SUPREME COURT No. S073205

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	
v.	Riverside County Superior Ct. No. CR49662
JACK EMMIT WILLIAMS,	
Defendant and Appellant.	

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE TIMOTHY HEASLETT, JUDGE

REPLY BRIEF FOR APPELLANT JACK E. WILLIAMS

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ARGUMENTS

GUILT PHASE ISSUES

I.

BY IMPROPERLY DISMISSING JUROR #12 FOR PURPORTED MISCONDUCT, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RELATED RIGHTS UNDER THE CALIFORNIA CONSTITUTION

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant noted that it is a Sixth Amendment violation

to dismiss a juror without good cause. Here, juror #2 reported to the court that juror #12 made a remark to the effect that the truth about the robbery of Mr. Brodbeck at the Taco Bell lay in the parking lot and that everyone else was just lying. Juror #12 denied making the remark, no other juror heard it and juror #2 admitted it was ambiguous. Nevertheless, the trial judge found juror #2 to be more credible than juror #12, decided (with very little investigation) that the comment attributed to juror #12 was *not* ambiguous, and dismissed juror #12 for misconduct.

Even conceding that the remark was made (which the defense does not), the purported remark does not constitute misconduct. It was not an improper reference to the evidence or the merits of the case. It was, instead, merely a passing commentary on the general state of the conflicting evidence of the sort this court has declined to characterize as misconduct. Under these circumstances, the trial court abused its discretion by improperly dismissing a sitting juror.

More importantly, it appears that race played some role in the dismissal decision . Juror #12 was one of only two black jurors on the panel.[1] Earlier in the trial, Juror #12 outspokenly complained that only black witnesses were shackled in the courtroom. The white witnesses were not. Despite this obvious disparity of treatment in plain view of all the participants, the trial judge was apparently unaware of it until juror #12 raised the issue. Moreover, when the court finally made its official inquiry into the matter (30 R.T. 4062-4099,4140-4149, 4205-4212), the focus was on the way Juror #12 raised the issue rather than on the actions of the sheriff's deputies whose virtually unfettered discretion in shackling

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[1] Both black jurors were removed before the verdict.

witnesses actually caused the problem.

In context, it appears that the misconduct ruling was merely a vehicle for dismissing an obstreperous juror rather than an appropriate sanction for an actual transgression. The result was to deprive appellant of half of the African Americans on the jury. The other half would be removed later. (*See* Issue II *infra.*)

The trial court's error in improperly dismissing a sitting juror for misconduct compels reversal of all of appellant's convictions. (Appellant's opening brief at pp. 127-151.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that there was no error because the juror failed to follow the court's direction not to form or express an opinion about the case until all the evidence had been presented and deliberations had begun. Respondent contends that the juror's comment about the parking lot was in fact a commentary on the merits of the case and thus violated the judge's admonition not to discuss the case.

Further, respondent asserts juror #12's behavior and demeanor provided sufficient evidence for the trial court to excuse her despite her assertion that she could remain fair and impartial. Finally, since the defense objection to her discharge at trial was based on Penal Code section 1089, any federal Constitutional claims are waived for appeal. (Respondent's brief at pp. 102-135.)

ERRORS IN RESPONDENT'S ARGUMENTS

Standard of Review

Recently, this court reaffirmed that dismissing a sitting juror because of an asserted inability to perform the juror function properly is **not** reviewed under an abuse of discretion standard. Rather, the dismissal for inability to properly perform the juror function must meet the higher standard of a demonstrable reality. (*People*

v. Wilson (2008) 44 Cal.4th 758, 821.) Indeed, in *People v. Barnwell* (2007) 41 Cal.4th 1038 this court explained that standard stating, "To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Id.*, at p. 1052.)

While respondent acknowledges this standard of review (respondent's brief at p. 103-104), a critical review of respondent's arguments reveals that they are premised primarily on the lesser discretionary standard concerning whether or not there was evidence to support the trial court's determinations.

No commentary on the merits of the case

As this Court explained in *People v. Majors* (1998) 18 Cal.4th 385, 420-425, mere conversation among jurors outside the jury room, even if it involves some aspect of the case does not necessarily prove misconduct. Indeed, more than century ago this Court observed, "'[t]he law does not demand that the jury sit with the muteness of the Sph[i]nx, and when jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but in order to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case.' (*People v. Kramer* (1897) 117 Cal. 647, 649.)" (*Id.,* at p. 425.) Thus, comment on matters of general knowledge even though the comments may highlight an aspect of the case is not misconduct. (*See People v. Cox* (1991) 53 Cal.3d 618, 693, 696.)

Juror #12's allegedly improper comment was to the effect that "the only truth lied in the parking lot and that everyone else was just lying." (31 R.T. 4574.) In

his opening brief, appellant pointed out that even if juror #12 made that exact comment - a matter not at all clear from the evidence - the remark does not constitute misconduct. The comment does not appear to favor the witnesses from either side. More importantly, however, the observation does not appear to be anything more than a general comment on an evidentiary situation apparent to all the jurors. That is, because of the discrepancies in prosecution witness testimony about what happened, not all the prosecution witnesses could be correct.

As appellant explained in his opening brief, Mr. Brodbeck testified that he was told to get out of the car and then frisked. Several items were taken from him. (34 R.T. 4472, 4481.) Then, as he ran towards the Taco Bell, he slipped, heard a **single** shot and heard something like a bullet whistle by him. (34 R.T. 4472-4473, 4483-4484.)

Prosecution witness Lyons testified that although he was at the scene, he did not watch what happened. (19 R.T. 2689.) He saw Williams walk towards a car, then he heard a **couple** of shots and everyone, including Lyons and Gonzales, started running. (19 R.T. 2692-2693.)

Prosecution witness Weatherspoon testified that he was not aware that Mr. Brodbeck was frisked or searched and did not remember if James Handy approached Mr. Brodbeck at all. He did not see Handy touching the man or take anything from him. Further, although Weatherspoon ended up with Brodbeck's keys and opened the trunk of the vehicle, he did not remember if he did that on his own or if someone directed him to do so. (31 R.T. 4171.) Most importantly, although he heard a single shot, he did not see how the shot was fired.

Prosecution witness James Handy testified that he frisked Mr. Brodbeck and took some items from him. He walked away, however, and did not see the

shooting. (29 R.T. 3945.)

Deputy Aguirre said he found a single shell casing in the parking lot near where Mr. Brodbeck's car had been. (33 R.T. 4436-4437.)

Given the discrepancies in testimony about how many shots were fired and what took place during the incident, it is abundantly clear that not all the prosecution witnesses could be factually correct.

Even if that were not so, as juror #2 recognized, the statement attributed to juror #12 is at best ambiguous. (39 R.T. 4689-4691.) At worst, it was mere "speculation" on the weight of the conflicting evidence at that point in trial; a type of speculation that this court has declined to categorize as misconduct. (*People v. Majors, supra,* 18 Cal.4th at pp. 424-425.)

Respondent attempts to sidestep the problem of general juror commentary by parsing juror #12's statement. Respondent urges that while the portion of the phrase "[t]he truth lies in the parking lot" may have been somewhat ambiguous, the rest of the phrase "everyone else was just lying" is not. The latter shows that juror #12 made up her mind about the credibility of witnesses prior to jury deliberations. (Respondent's brief at p. 134.)

It should be noted, however, that the tape of appellant's statements to the police were played **before** juror #12 was challenged. (*Compare,* 35 R.T. 4521-4521 [tape played] with 37 R.T. 4573 et seq. [juror #12 challenged because of her comment on the incident in the parking lot].) Thus juror #12's comments would apply to appellant's own statements as well. That is, juror #12's comment was not inherently biased against the prosecution witnesses nor against defendant.

Moreover, as appellant pointed out above, because the testimony concerning what actually happened in the parking lot was so conflicting, not only juror #12,

but **all** of the jurors would have to conclude that some of the prosecution witnesses were lying, or at the very least, grossly mistaken. Therefore, far from being an opinion on the merits or the credibility of particular witnesses, juror #12's comment was merely a general observation on the conflicting evidence in the prosecution's case.

More importantly, nothing in the record suggests that juror #12's remark should be parsed in its phraseology as urged by respondent. The remark was NOT a comment favoring one side's witnesses over the other side's witnesses, nor was it a comment showing that juror #12 made up her mind concerning the credibility of any particular witness vis-a-vis any other witness. Indeed, when queried by the judge, juror #12 told the court she could remain impartial even though she had been singled out twice for examination. (48 R.T. 4625.)

Therefore, contrary to respondent's arguments, the comment does not show that juror #12 formed an opinion concerning which witnesses were telling the truth. Taken in its entirety, Juror #12's statement was that the truth concerning what actually took place in the parking lot is impossible to discern from the conflicting welter of all the various witnesses' testimony because all of the witnesses could not possibly be telling the truth.

This court's decision in *People v. Holloway* (2004) 33 Cal.4th 96, is instructive on this issue because it deals with a similar factual scenario and highlights the errors in respondent's arguments. In *Holloway*, juror #3 sent two notes to the court asking to see pictures of the two decedents while they were alive. During an interview between the court and juror #3 after the second request, the juror explained that he wanted to see the pictures because he was having dreams about the decedents. The judge ultimately denied the request, and told juror #3 that

the court assumed that the juror had not discussed this matter with other jurors. Juror #3 replied that he had not. Thereafter, the judge did not specifically direct the juror not to discuss the request with other jurors, although as the prosecutor pointed out, that admonition could certainly be implied from the judge's question.

Subsequent to the interview, an alternate juror reported that juror #3 spoke to her about the interview noting that he thought he had made a reasonable request of the court. No other jurors were present.

When interviewed again, juror #3 denied initiating contact with other jurors stating instead that other jurors asked him what the interview with the court was about and he told them. He thought there were three or perhaps four other jurors present. Nevertheless, juror #3 said he could be impartial and that nothing that happened in the interviews would affect him in his deliberations. The juror was retained on the jury. (*Id.,* at pp. 123,124.)

On appeal, the defense argued that juror #3 should have been dismissed and that his retention on the jury violated the defendant's Sixth Amendment rights. In support of its argument, the defense claimed that juror #3 exhibited two forms of misconduct: "First, in discussing the case with [the alternate juror], he violated his oath and the admonition not to so do. ... Second[], [Juror # 3] attempted to conceal his misconduct by asserting, completely contrary to [the alternate's] representation, that he did not approach anyone about this, but was asked himself." (*Id.*, at p. 124.) These are virtually the same arguments that respondent makes in support of its claim that juror #12 was properly dismissed in this case. (See Respondent's brief at pp. 130-134 .)

In *Holloway*, however, this court found no Sixth Amendment violation in keeping Juror #3 on the jury. The Court noted that while the version of events

provided by the alternate and juror #3 were superficially inconsistent, it may well have been that juror #3 made the specific remark only to the alternate but he discussed the matter with other jurors who were present soon after. Thus, the two versions could be reconciled. Although this Court did not point to any specific portion of the record to support that conclusion, it found the explanation reasonable under the circumstances. Further, since juror #3 claimed that he could remain impartial there was no demonstrable reality that would support a dismissal. (*Id.*, at pp. 125-126.)

Since the facts of this case parallel the facts of *Holloway*, the same result should obtain. There was no demonstrable reality of inability to perform as a juror that required the dismissal of Juror #12.

Race

Aside from the foregoing, however, there was an additional factor at work here; the factor of race. As appellant pointed out in his opening brief, juror #12 was singled out twice for interrogation. The first time she was questioned for being outspoken in her denunciation of official conduct by the state in shackling only black witnesses. Indeed, the state's conduct was so improper that not only did the trial judge concede the error, he took at least some remedial action to correct it by instructing the jury. (30 R.T. 4097-4100.)

The trial judge simply didn't recognize the racially disparate treatment of witnesses when it occurred. (30 R.T. 4073, 4075.) It had to be pointed out to him by a black juror. (30 R.T. 4075.) Once he recognized it, however, the judge apologized to juror #12 for failing to have noticed the problem and admitted that he had been insensitive to the witness issue. (30 R.T. 4074.)

Nevertheless, although this concededly improper conduct was initiated by

sheriffs' deputies, there was no censure of state employees, or at least none that was conveyed to the jury. The trial court's official inquiry into misconduct was conducted of the jurors - not the deputies - and in particular the black juror who raised the issue.

Further, juror #12 was the only juror singled out for examination concerning her conduct (30 RT 4072) and she was specifically admonished not to let the incident affect her ability to be impartial. (30 R.T. 4074-4075.) By comparison, although jurors #5, #6, #7, and perhaps #10, were at lunch together and apparently discussed the incident where strong words were exchanged between defendant Dearaujo and witness James Handy in the courtroom, their shared reactions and expressions of discomfort (30 R.T. 4080) did not merit an examination by the court, an admonition not to discuss the case or an admonition to remain impartial. Under these circumstances, the unmistakable message from the court was that it was not the errors of court officials or white jurors that caused concern, but rather the fact of the complaint from a black juror.

Juror #12's second transgression was for making an ambiguous comment about the state of the case, a comment that she denied even making. Her outspokenness obviously made an impression on the court. She was one of only two empaneled black jurors in this case.[2] Dismissal for the innocuous comment made here was not only improper, but served as a signal that criticism from a black juror was not favored, or , as juror #12 herself phrased it under questioning by the trial judge, "an opinionated person [] sometimes [] rubs people the wrong way." (38 R.T. 4625.) Moreover, since no juror other than juror #2 even professed to hear

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[2] The dismissal of juror #10, the only other black juror is discussed at length in Issue II, *infra*.

the purported remark, certainly it did not taint the entire jury.

It is noteworthy that when the black witnesses were shackled in court and the white ones were not, that concededly improper courtroom misconduct drew only a mild cautionary instruction to the jury from the judge concerning the impact of shackling. The discussion among white jurors about their collective fear and discomfort over strong words in the courtroom drew no judicial examination and no admonition at all. However, the trial court's sanction for a mere passing comment on the state of the conflicting evidence - and an ambiguous comment at that - was dismissal. Thus, in context, it appears that the misconduct allegation against juror #12 was more of a vehicle to get rid of an obstreperous black juror rather than an appropriate sanction for any wrongdoing.

That the judge may not have been consciously aware of the bias in his courtroom until it was pointed out to him does not make the bias any less real. Indeed, as appellant will explain in more detail in Issue II, the dismissal of all the black jurors reduced the diversity of the jury panel at guilt phase. This deprived the jurors as a whole of the benefit of life experiences similar to that of the defendant and fatally compromised the penalty trial where the prosecution invited the jury to make life-worth comparisons between the decedent, a highly accomplished, attractive, white female and the defendant, a very young black man of modest accomplishment.

Respondent does not confront the race problem directly, urging instead that race was not the basis for the defense objection to juror #12's dismissal. Thus, appellant waived the matter on appeal. (Respondent's brief at p. 130.)

Respondent ignores, however, that the first time the question of dismissing Juror #12 came up, the **prosecution** moved to exclude juror #12 on the ground that

she could not be fair because she complained about the shackling of African American witnesses. Further, the **prosecution** expressed concerned that juror #12 was prejudiced against it because there were only two black witnesses and both appeared in restraints. (31 R.T. 4140-4143, see also 31 RT 4209.)

Defense counsel Wright objected, noting that Juror #12 never expressed any bias against the prosecution. To the contrary, she stated that she could be fair. It was juror #7 who instigated the whole issue and even juror #7 admitted that juror #12 was merely responding to his inquiry. (31 RT 4146-4147; see also appellant's opening brief at p. 140.)

Additionally, when the incident involving juror #12's comment on the Taco Bell parking lot evidence was reported to the court, the prosecutor suggested that it was not necessary to make an inquiry of juror #12, but if an inquiry was to be made, then it should be limited to whether she made the statements attributed to her by juror #2. The prosecution recommended there not be an inquiry as to whether juror #12 was able to be fair and impartial. (38 R.T. 4617.) The prosecutor then urged that juror #12's comments amounted to misconduct and that her "previous comments concerning the custodial status of witnesses and alleging that that was due to the fact that the jurors [sic - witnesses] were black" showed bias against the prosecution. (38 R.T. 4622.)

Therefore, contrary to respondent's contentions, race was one of the primary bases for the prosecution's request that juror #12 be dismissed; the prosecutor equated juror #12's displeasure with the unequal treatment of black prosecution witnesses with bias against the prosecution. Thus, these facts demonstrate that the issue of race was squarely before the trial court at the time the court made its ruling dismissing juror #12.

Constitutional Prohibitions Were Violated

Respondent finally asserts that there is no Constitutional violation at issue here. The defense objected to juror #12's dismissal on the grounds that it violated California Penal Code section 1089. That the penal code section does not violate any Constitutional principles and since the statute itself was not violated, there could not be any federal Constitutional violation. (Respondent's brief at pp. 134-135.)

Nevertheless, respondent implicitly concedes that if there was a violation of Penal Code section 1089, that error implicates appellant's federal Constitutional rights as well. Even if that was not the case, the facts are not in dispute and the federal Constitutional legal principles are essentially the same as the trial court was asked to apply regarding Penal Code section 1089. Therefore, appellant's Constitutional claims are preserved even if presented for the first time on appeal. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1288, fn. 15.)

Moreover, excusing an empaneled juror without good cause deprives a criminal defendant of his right to a fair trial under the Fifth and Fourteenth Amendment Due Process clauses as well as the Sixth Amendment right to trial by jury. (Cf. *Crist v. Bretz* (1978) 437 U.S. 28, 35-36 [98 S.Ct. 2156, 2160-2161, 57 L.Ed.2d 24]; *Downum* v. *United States* (1963) 372 U.S. 734, 736 [83 S.Ct. 1033, 1034, 10 L.Ed.2d 100].) Indeed, the right to a trial by jury in criminal cases is such a fundamental feature of the justice system that it is protected against state action by the Due Process clause of the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158 [88 S.Ct. 1444, 1451, 20 L.Ed.2d 491].) It also violates the Eighth and Fourteenth Amendment requirements for reliability in the guilt and

sentencing phases of a capital trial. (Cf. *Beck v. Alabama* (1980) 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382].) More to the point, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." (*Batson v. Kentucky* (1986) 476 U.S. 79, 86.)

Thus, for the reasons set forth above and in appellant's opening brief, the trial court's error in dismissing juror #12 violated not only the proscription of Penal Code section 1089, but appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights as well. Appellant's convictions and sentence must be reversed.

II.

BY IMPROPERLY DISMISSING THE HOLDOUT (AND ONLY REMAINING) BLACK JUROR, JUROR #10, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RELATED RIGHTS UNDER THE CALIFORNIA CONSTITUTION

SUMMARY OF APPELLANT'S ARGUMENT

As appellant noted in his opening brief, excusing an empaneled juror without good cause deprives a criminal defendant of his right to a fair trial under the Fifth and Fourteenth Amendment Due Process clauses as well as the Sixth Amendment right to trial by jury. This is so because every criminal defendant is entitled to a verdict by the jury originally empaneled. (*Cf. Crist v. Bretz* (1978) 437 U.S. 28, 35-36 [98 S.Ct. 2156, 2160-2161, 57 L.Ed.2d 24]; *Downum* v. *United States* (1963) 372 U.S. 734, 736 [83 S.Ct. 1033, 1034, 10 L.Ed.2d 100].) Indeed, the right to a trial by jury in criminal cases is such a fundamental feature of the justice system that it is protected against state action by the Due Process clause of the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158 [88 S.Ct. 1444, 1451, 20 L.Ed.2d 491].) The error in wrongfully excusing an empaneled juror also violates the Eighth and Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (*Cf. Beck v. Alabama* (1980) 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382].)

Moreover, special caution is required when the juror is dismissed during deliberations. (*Cf. People v. Cleveland* (2001) 25 Cal.4th 466.) Even greater

appellate scrutiny is required when the dismissed juror is not only a holdout juror but the only remaining minority juror in a cross racial prosecution. (*Cf. United States v. Hernandez* (2 Cir. 1988) 862 F.2d 17, 23.)

Here, all of those conditions existed. Nevertheless, the causes for dismissal of juror #10 cited by the trial judge were either unsupported by the evidence or dismissal was vastly out of proportion to the juror's purported activities during deliberation. Further, the investigation undertaken by the trial judge was deficient in a critical respect: he failed to make any inquiry of the offending juror before dismissing her and failed to take any action (or even investigate) her allegations of misconduct by other jurors during deliberations. The trial judge simply presumed the worst based on the allegations other jurors made about juror #10 and acceded to their demands that she be dismissed. Under these circumstances, the error compels reversal of all of appellant's convictions.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that the trial court properly excused juror #10 because she was sleeping during deliberations and because she refused to properly deliberate with the other jurors. Further, the trial court's determination was made after a full inquiry of the other jurors. (Respondent's brief at pp. 135-168.)

ERRORS IN RESPONDENT'S ARGUMENTS

As appellant explained in his opening brief, because the right to a trial with the originally empaneled jury is of Constitutional dimension, the discretion of the trial judge to dismiss a sitting juror is severely limited. (*People v. Roberts* (1992) 2 Cal.4th 271, 324 - 325.) The court must make a determination whether good cause exists to discharge the juror and the reasons for discharge must appear in the record. (*Ibid.*) In this regard, the inability to perform the juror's functions must appear as a

"demonstrable reality." (*People v. Collins* (1976) 17 Cal.3d 687, 696.) In *People v. Cleveland, supra,* 25 Cal.4th 466, Justice Werdegar explained that because of the need for additional protection of an accused's constitutional right to a jury trial, "we more accurately have explained that, to affirm a trial court's decision to discharge a sitting juror, "[the] juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.' " [Citations.] **This language indicates a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror.** Therefore, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a *demonstrable reality* that the juror failed or was unable to deliberate. (*People v. Cleveland, supra*, 25 Cal.4th at pp. 487-489 (conc. opn. of Werdegar, J., [Emphasis added] see also *People v. Wilson, supra,* 44 Cal.4th 758, 820.)

Accordingly, the purported good cause must be such that it "actually renders [the juror] 'unable to perform his duty.'" (*People v. Compton* (1971) 6 Cal.3d 55, 59.) Perhaps most significantly, however, in making this judgment "[t]he court must not presume the worst." (*People v. Franklin* (1976) 56 Cal.App.3d 18, 26.)

No "Demonstrable Reality" That Inattentiveness Affected Jury Deliberations

Respondent claims that juror #10 slept during deliberations and that sleeping was an appropriate factor upon which the judge could base his decision to dismiss her.

There are two problems with respondent's argument. First, the evidence of inattentiveness is, at best, marginal. Second, in context, even conceding inattentiveness, there is absolutely no showing concerning how any inattentiveness might have affected jury deliberations.

Turning to the first problem, there is precious little evidence to support the trial court's conclusion that juror #10 actually slept during deliberations. Juror #2 stated that juror #10 was asleep because she closed her eyes, curled up in her chair and pulled a cap down over the top of her face. (See, e.g., 45 R.T. 5379.) Other jurors stated that juror #10 appeared to have her eyes closed at times (see e.g. 45 R.T. 5416-5417 [Juror #11 said that juror #10 had her eyes closed and could have been sleeping].) Nevertheless, as appellant pointed out in his opening brief (at pp. 166-169), even though all of the jurors sat around the same table, when queried directly by the trial judge about whether juror #10 was actually sleeping, NO juror other than #2 would state unequivocally that he or she saw juror #10 asleep. [3]

As to the second problem, no juror said that this inattentiveness occurred on more than one occasion, and no juror explained what transpired during this period of inattentiveness. Indeed, Juror #1 was the most expansive on the subject and he noted merely that this period lasted for only 10 to15 minutes (during which time only two jurors spoke) and he only observed it on one day. (45 RT 5376.)

Appellant notes that in this case, the jurors had been deliberating - anew after the dismissal of another juror for illness - for approximately a day and a half before the issue was presented to the trial judge. (45 RT 5376.) Moreover, prior to that evolution, the original jurors [including juror #10] had been deliberating the case for approximately seven days. (18 C.T. 5055, 5064.) Thus, there is NO evidence showing that Juror #10 was asleep for any substantial amount of time or that she missed any significant portion of jury deliberations. This absence of evidence showing that juror #10 missed any significant deliberations is absolutely fatal to

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[3] Interestingly, it was juror #2 who instigated the complaints against both juror #10 and juror #12.

respondent's argument.

A similar situation occurred in *People v. Bowers* (2001) 87 Cal.App.4th 722. In that case, the court observed:

> "Here, only one juror said anything about Juror No. 4 sleeping during deliberations. The trial court did not ask the other jurors about it during its investigation. In a period of several days, Juror No. 4 appears to have slept only a very brief time. There was no evidence concerning what was happening in the jury room when he slept. Even deferring to the trial court's factual finding Juror No. 4 slept, the bare fact of sleeping at an unknown time for an unknown duration and without evidence of what, if anything, was occurring in the jury room at the time is insufficient to support a finding of misconduct or to conclude the juror was unable to perform his duty. (See *People v. Daniels, supra,* 52 Cal.3d at p. 864 [misconduct must be serious and willful].)" (*Bowers* at p. 731.)

Respondent attempts to overcome this evidentiary hurdle by arguing that the trial court properly dismissed juror #10 for purportedly nodding off during trial on occasion and particularly during the playing of the tape of the defendant's statement to the police. (Respondent's brief at pp. 158-163.)

It is noteworthy that respondent chooses to focus its argument on the defendant's statement to the authorities. Not only is that statement one of the centerpieces of the prosecution's case, but as explained below, the manner in which it was considered demonstrates why the unjustified dismissal of juror #10 denied appellant a fair trial.

In addition to the tape of the defendant's statement to the authorities played at trial, there was a written transcript of the tape. (Prosecution Exhibit 68.) That transcript was specifically provided to all jurors. (45 R.T. 5423.) More importantly,

juror #2 told the court that **during deliberations**, juror #10 was holding the transcript of the police interview and told the other jurors "my lawyer could put holes through this." (45 R.T. 5384.) Thus, contrary to the inference respondent wishes this court to draw from Juror #10's purported dozing, juror #2's observation shows beyond cavil that juror #10 was fully aware of the content of the defendant's statement.

The truly interesting portion of juror #2's observation, however, is juror #10's claim that her lawyer could poke "holes" in the statement, an assertion corroborated by Juror #4. (45 R.T. 5398.) Juror #10's assertion about the statement demonstrates that she had very serious reservations about the credibility of defendant's statement despite its admissibility. A review of the interrogation (Prosecution Exhibit 68), shows that many of the defendant's seemingly inculpatory answers were in response to police questions that used legal or value laden terms the consequence of which the defendant probably did not understand. For example, during the interrogation, District Attorney Pacheco pressed Williams about the meaning of the word "carjack", and Williams conceded that he meant robbing. (People Exh. 68 at p. 53.) Steve McNair testified however, that when he, Holland, Weatherspoon and appellant went out specifically to "carjack" a vehicle, he thought they were simply going to hot-wire the car and take it. (31 RT 4275.) While hot-wiring a vehicle outside the presence of the owner would encompass an unlawful taking, it would not encompass the elements of "robbery" within its legal definition of a taking of property by force or fear from the presence of the owner. (See Penal Code section 211.) Absent legal training, it is highly doubtful that a person like the defendant, who had limited education, would have an appreciation for the legal distinction between the "force and fear" requirement for robbery and the

requirements for a mere taking of property belonging to another. More importantly for an evaluation of the credibility of the defendant's statement, nowhere in the interrogation did the District Attorney ever clarify that distinction.

Moreover, by any measure, the authorities conducted the interrogation in a hostile and abusive manner.[4] More importantly, juror #10 clearly realized the primary purpose of the interrogation was to get an incriminating statement and only incidentally to get an accurate picture of what took place. Juror #10 was obviously

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[4] Throughout the interrogation, the authorities kept telling the defendant he was lying. For example, one officer told the defendant " I've been here since nine o'clock yesterday morning and I don't want any bullshit. "p. 8; I'm not going to sit here and play games" p 8; "Go ahead and dig yourself a hole partner, go ahead. Go ahead and lie to me." p. 10; "Naw that ain't the way it happened. Who'd you give the gun to? [I] wannna see how much you're gonna lie to me." p. 10; "Jack, you're not being truthful partner." p. 11; " We know where the gun the gun went, we know you had it. You fired at that guy when he took off running at the taco stand. He's gonna eyeball you and you're goin down. Now we want the gun. Don't sit there an lie to us anymore" p. 12; "Hah. If you're gonna keep lyin, you're gonna keep diggin yourself a hole partner and then when the times to come and you go to court, this dude's lyin, that's all this dude does is lie. [para] He don't wanna come clean about nothin. Even when the facts are presented to him, when I tell you what happened, you don't wanna tell me the truth. [para] If you lie to us now, when you go to court, they just ask us what you said and we can say you said this, he said this, he said this, but we proved it all a lie. Anything you say in court, they gonna think that you're lying there too. [para] Even when you are tellin the truth they're gonna figure you're lyin so now is the time to tell the truth right now see...." p. 20.; "Stand up man" p. 29 ; "See why don't you just come out with it, why don't you just tell us, what, what do you gotta play these games for?" p. 31; "I'll tell you what Jack, I hope we don't find out no more lies." p. 32; "Here's my, here's my pen, here's my pad and I'm gonna write Jack lied again and I'm gonna give it to the judge." p. 32;

The foregoing is a sampling of the police harassment and hostility contained in just the first one-third of the interrogation.

disgusted at the police tactics used to intimidate an 18 year old boy who never finished high school. Moreover, as a member of a racial minority that has historically suffered from police intimidation, perhaps juror #10 appreciated how this type of intimidation would result in a statement that was not entirely accurate and reflected the police view of what happened rather than the reality of the situation. Indeed, her confident assertion that her lawyer could poke "holes" in the interrogation suggests precisely this view. (45 R.T. 5398.) In that regard, the admonition not to bring race into deliberations and the refusal to entertain any discussion of what it was like to grow up a black person in Moreno Valley deprived the jury of a dissident but knowledgeable voice concerning the true meaning of the purported organizational meeting at Natalie Dannov's house as well as the credibility of appellant's statement.

Additionally, juror #10 was apparently not shy about asking for testimony to be reread when she did not recall it or her recollection differed from that of the other jurors. (45 RT 5412-5413.) Thus, it does not appear that juror#10 missed any evidence of significance.

Moreover, if the occasional "nodding off" during trial was so serious that it justified the removal of a deliberating juror, it is a mystery why the trial judge did not discuss the issue with counsel on the record or remove juror #10 for inattentiveness when it occurred. Instead, the trial court's most aggressive attempt to deal with the problem at trial was a request to the bailiff to offer juror #10 a glass of water and to remind not only juror #10, **but jurors #11 and #12 as well**, that they needed to sit up and pay attention during the playing of the tape. (35 R.T. 4526; 45 R.T. 5359-5360.) Respondent does not even discuss, let alone challenge the verdict based on the possibility that these other jurors also slept during the

playing the tape. In any event, under these circumstances, it appears that any instances of inattentiveness were relatively minor and entirely consistent with the normal human frailties experienced in any lengthy and complex trial.

For these reasons and those set forth in appellant's opening brief, the trial court's factual determination that juror #10 slept is insufficient to show as a "demonstrable reality" that juror #10 was unable to perform her duties. (*People v. Wilson, supra*, 44 Cal.4th at p. 820.)

No "Demonstrable Reality" That Juror #10 refused to Deliberate

The real crux of respondent's argument is that juror #10 refused to deliberate. Respondent's argument is based on the claim that juror #10 expressed a fixed conclusion during deliberations and refused to consider other points of view; that she refused to speak to other jurors, and finally that she attempted to separate herself physically from the other jurors. (Respondent's brief at pp. 164-167.)

Before examining the facts, however, it is important to examine the whole notion of what it means to deliberate.

"[F]ormal discussion is not necessarily required to reach a decision or conclusion by deliberation. In a given case to "deliberate" means "to ponder or think about with measured careful consideration and often [but not necessarily] with formal discussion before reaching a decision or conclusion.' (Webster's 3rd New Internat. Dict. (1986) p. 596.)" (*People v. Bowers, supra* , 87 Cal.App.4th at p. 733.) Moreover, as the *Bowers'* opinion pointed out, "[i]t is not uncommon for a juror (or jurors) in a trial to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors. The record suggests that, after listening to all the evidence in court and observing the witnesses, Juror No. 4

determined they lacked credibility and were lying." (*Id.*, at p. 735.)

Indeed, Code of Civil Procedure section 613 states in pertinent part: "When the case is finally submitted to the jury, they may decide in Court or retire for deliberation . . . ." Clearly, this statute does not require group deliberations. Instead, each juror may conduct deliberations individually. (See *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910-911.) Similar to Code of Civil Procedure section 613, Penal Code section 1128 permits a jury to decide a case in the courtroom without retiring[5] and thus without formal group deliberations. (*People v. Bowers, supra* , 87 Cal.App.4th at p. 735.) Moreover, because "[i]ndividuals acquire different methods of processing information and decision making based on their background and experiences, it is unrealistic to expect each person or each jury to deliberate and come to a conclusion in the same fashion." (*Id.*, at p. 735.)

Given this legal background, the facts of this case simply will not support a determination that Juror #10 refused to deliberate. As appellant pointed out in his opening brief, the evidence shows that even before the jury foreman complained about juror #10's behavior, juror #10 **specifically asked** the court what it meant to deliberate. Juror #10 wanted to know what happened if she did not have any further comments - would that situation constitute a failure to deliberate? (45 RT 5311.) The court responded that there should be some give and take. (45 RT 5311.) Juror #10 then asked what happened if there was an impasse (or as she phrased it a "lockdown") between her and the other jurors and she simply had nothing more to

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[5] California Penal Code section 1128 provides in pertinent part: "After hearing the charge, the jury may either decide in court or may retire for deliberation."

say. (45 RT 5311.) The judge responded that if she told the jurors that "I've made up my mind and I'm not going to change it," that situation still constituted deliberation. (45 R.T. 5311-5312.) Even though the judge later told juror #10 that he might have misled her, he never took any action to answer her question or further explain what it meant to deliberate.

The initial complaint by the jury foreman epitomized the clash in the jury room . When the jury foreman actually reported juror #10's behavior to the court, he complained that juror #10 would announce that she had nothing to say. (45 RT 5364.) The foreman admitted, however, that after certain votes were taken, juror #10 would engage the rest of the jurors by changing her mind and asking technical questions. (45 RT 5365.) On those occasions when she disagreed with the majority, the foreman would ask her to write out what she thought so that they could discuss the reasoning behind her stand on an issue. She refused to do that. (45 RT 5365.) She "just clam[ed] up". (45 RT 5366.) "She just says my opinion is this and that's it." (45 RT 5369.)

Under examination by the prosecutor, the foreman reiterated that juror #10 made statements but would not discuss the reasoning behind them. She just said "that is what she believes." (45 R.T. 5370.) **In his opinion, juror #10 refused to accept the views of other jurors and was therefore failing to deliberate**. His exact words were "she does not accept our views at all." (45 R.T. 5371.)

Perhaps most significantly, however, the foreman admitted that there was "a little blowup " in the jury room during deliberations. Although the foreman apologized and thought most people accepted his apology, he did not know for sure. (45 RT 5373.) Additionally, the issue of race came up during deliberations. As foreman, he tried to put a stop to the talk but he was not sure he was entirely

successful. (45 RT 5373.) In any event, he admitted that juror #10 might have taken it personally. (45 RT 5373.)

If indeed there had been any doubt about the matter, when juror #10 appeared before the court the morning following the jury foreman's complaint, she told the trial court that during deliberations she had been attacked verbally, screamed at and cut off during deliberations. (45 R.T. 5434-5435.) In that regard, juror #2 explained that juror #10 realized she was the only African American in the room, so she wanted to double check everything. Further, she felt "picked on" because of her race and her insistence on getting things right. Indeed, the rest of the jurors told her not to bring race into it. (45 R.T. 5386, 5389.)

Other jurors corroborated juror #10's version of the events. Most significantly, jurors #4 and #11confirmed that there was a heated exchange among the majority and juror #10 during the prior week of deliberations and people were very irritated. (45 R.T. 5399, 5421-5422.)

Certainly that kind of outburst by other jurors would - at the very least - tend to inhibit a minority juror's participation in deliberations for fear of provoking new instances of recrimination. Moreover, as juror #1 admitted, Juror #10 expressed her opinions. She simply refused to discuss the basis for them. (45 R.T. 5377-5378.) Juror #2 also admitted that juror #10 was arguing with other jurors at the beginning of deliberations. It was not until later, after the other jurors strongly challenged her to prove her arguments that she would say, "When I have something to say, I'll say it, and I don't want to say anything right now so I'm not saying it. You guys talk about what you want, but I'm not gonna say anything," (45 R.T. 5382; see also juror #11's similar comments at p. 5419.) Juror #6, explained that the pattern that emerged during deliberations was that when juror #10 disagreed with the majority,

she would say so. Nevertheless, she would not explain why in any great detail. (45 R.T. 5415.) When juror #10 agreed with the majority, however, she opened up and discussed her reasoning more. (45 R.T. 5415.)

Juror #2 also observed that sometimes juror #10 wanted to reopen votes that were already settled. (45 R.T. 5395.)

Juror #5 agreed that, occasionally, juror #10 would respond inappropriately to questions on a topic. (45 R.T. 5406.) Nevertheless, he too, admitted that he was struggling with the legal issues. (45 R.T. 5406.) Additionally, jurors #5, # 6 and #11 complained that sometimes juror #10 would take one position in the morning and then argue or shift to another in the afternoon. (45 R.T. 5408, 5413, 5418-5419.) Juror #5 also agreed that juror #10 often would not share her reasoning. (45 R.T. 5407) That is, sometimes she would take a position but refuse to explain how she got there. (45 R.T. 5407.)

Significantly, however, juror #4 told the court that juror #10 would argue that the other jurors did not have evidence to support their views. When the other jurors came up with specifics, juror #10 would say **"I don't believe it."** (45 R.T. 5396.)

Finally, juror #4 and juror #2 admitted that juror #10 spent a lot of time flipping through the booklet of jury instructions and writing notes. (45 R.T. 5394, 5399, 5389.)

Situations where a juror disagrees with the majority concerning what the evidence shows or how deliberations should be conducted do not constitute a refusal to deliberate and are not grounds for discharge. Additionally, a juror who participates in deliberations for a reasonable period of time may not be discharged for refusing to deliberate further simply because the juror believes that additional discussion will not change his or her conclusions. (*People v. Cleveland, supra*, at p.

485.)

Here, the jurors admitted that juror #10 fully participated in deliberations for at least a day. Moreover, even though the majority complained that she did not deliberate towards the end, as noted above, they also complained that towards the end of deliberations she flipped through the jury instruction booklet, she tried to engage in technical discussions and changed her vote. Moreover, contrary to the view of several jurors, closely analyzing jury instructions, engaging in technical discussions and changing votes certainly shows continuing participation in the deliberative process.

The primary complaint from the jury foreman, however, was that once juror #10 made up her mind, "She just says my opinion is this and that's it." (45 RT 5368.) This is precisely the problem the majority jurors had with the holdout in *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080 (cited with approval by this court *in Cleveland*). In *Symington*, the holdout juror simply refused to debate her views stating that she did not "'have to explain herself to anybody.'" *(Symington, supra*, at p. 1084, quoted in *Cleveland, supra* at p. 484.) In *Cleveland* this court found that similar conduct was perfectly appropriate and necessary to maintain the integrity of the jury trial process. (*Id.*, at pp. 485-486.)

Most importantly, however, the facts demonstrate that juror #10 was simply unpersuaded by the state's case. As juror #6 explained, when other jurors would try to contradict juror #10's views by pointing to specific testimony or evidence, juror #10 often said "I don't believe it." (45 R.T. 5395.) There could hardly be a more clear statement of juror #10's rejection of the state's evidence. It is this failure to be persuaded by the prosecution evidence that is fundamentally fatal to the trial judge's dismissal of juror #10. (*Cleveland* at pp. 483-484.) Indeed, if there was any doubt

about the matter, the jury foreman erased it when he told the trial judge that juror #10 was failing to deliberate **because she refused to accept the views of other jurors**. (45 R.T. 5371.)

Rather than a refusal to deliberate, the facts here demonstrate a holdout juror doggedly refusing to cave in under pressure from the majority. Juror #10 did not believe the prosecution's witnesses and did not believe that the state carried its burden of proof. When she initially tried to debate the issues and explain the racial divide, she was verbally attacked. Recognizing that further debate was useless in the sense that she could not persuade the majority and the majority could not persuade her, she remained silent except in those rare instances when the majority saw the issues the same way she did. Under these circumstances and for the additional reasons set forth in appellant's opening brief, there is inadequate factual support for a finding that as a "demonstrable reality," juror #10 failed to properly deliberate.

Inadequate Inquiry into Credible Assertions of Juror Misconduct

Finally, as appellant explained in his opening brief, the trial court failed to conduct an adequate inquiry into the abuse suffered by juror #10 at the hands of the other jurors or to investigate allegations of misconduct by these other jurors in disregarding the trial court's instructions to start deliberations anew (a matter discussed at greater length in issue III *infra*.).

Respondent urges that because the trial judge has considerable discretion in conducting an investigation and because the trial judge actually interrogated numerous jurors- getting similar answers from most of those jurors concerning the course of deliberations - the trial court's inquiry was sufficient. (Respondent's brief at pp. 167-168.) It was not.

Conspicuously omitted from respondent's argument is any discussion of the jury misconduct here. That is, the trial judge's investigation confined itself to whether juror #10 was deliberating properly. By contrast, the evidence the court gathered during that investigation showed intimidation based on race, exclusion of the cultural context of the primary prosecution evidence and outright violations of the judge's instructions to start deliberations anew. NONE of this misconduct was investigated by the trial judge.

Here, during deliberations juror #10 attempted to explain what it was like for a young black girl to grow up in Moreno Valley where these events occurred. (45 R.T. 5282.) In doing so, she was obviously trying to convey the cultural context of life as a young black person in the area, a perfectly valid consideration. (*See, People v. Wilson, supra*, 44 Cal.4th at p. 831["[Jurors] can draw on their personal and family experiences within their own minority communities."]

More important, as appellant pointed out in his opening brief (at p. 198, fn. 63), in the context of this case, juror #10 might well have been trying to explain to the other jurors that the " organizational meeting" at Natalie Dannov's house was little more than a group of teenagers boasting to one another and talking big. It was certainly not the well orchestrated beginning of a smoothly functioning criminal undertaking that the prosecution contended was the centerpiece of an ongoing criminal enterprise. Had she not been unfairly maligned and marginalized, juror #10 could have encouraged other jurors to seriously consider whether the Pimp Style Hustlers was ever intended to be a viable criminal enterprise. Instead, it may have been an engine for achieving social status [or as Natalie Dannov phrased it, becoming " legitimate businessmen" (see, e.g., 24 RT 4329)] in a low status environment.

Indeed, the prosecution's primary witness, Christopher Lyons, testified that he thought the purpose of the crimes was simply to get money to have fun. (19 R.T. 2706.) Mondre Weatherspoon testified to essentially the same thing. (29 R.T. 4034.) Moreover, the evidence shows that most of the subsequent carjackings were complete failures. Even then, there was little evidence of recrimination by appellant. Thus, as a viable criminal enterprise, the Pimp Style Hustlers was mostly a bust. Had the jurors concluded that in context there was no viable ongoing criminal enterprise, appellant's vicarious liability, particularly for the Los homicide, would have been even more suspect than it was presented by the prosecution.

That view of the very foundation of the prosecution's case against appellant, however, was obviously antithetical to the prosecution's presentation and apparently out of favor with the remaining (white) jurors. From the record available, it appears that the rest of the jurors attempted to preclude any discussion of what they considered the racial aspects of the case. As juror #2 explained, juror #10 realized she was the only African American in the room, so she wanted to double check everything. Further, she felt "picked on" because of her race and her insistence on getting things right. Indeed, the rest of the jurors told her not to bring race into it. (45 R.T. 5386, 5389.) According to juror #2, juror #10 acquiesced in the majority's demand. (45 R.T. 5389.)

Perhaps contrasting the view of the majority of the jurors in this situation and later in the penalty phase better illustrates the fundamental problem of race in these deliberations. As noted above, during guilt phase deliberations, the majority white jurors considered juror #10's attempt to explain the cultural context of a young black person growing up in Moreno Valley to be nothing more than an unwarranted attempt to bring race into deliberations. (45 R.T. 5386,5389.) Yet, in the penalty

phase, when the prosecution introduced testimony, pictures and a video of the cultural context of Ms. Los' life, especially her young life growing up in a small Minnesota town and how it shaped her behavior as an adult, the majority apparently saw this evidence as a valid consideration supporting the imposition of the death penalty. (See issue XVI *infra.*) These are virtually identical considerations except that Ms. Los was white and juror #10 was black. Under these circumstances, it is hard to reconcile excluding this jury consideration when the basic theory of conviction was called into question, yet permit it when deciding which of the two ultimate alternative penalties was more appropriate.

Moreover, despite these allegations of misconduct in the jury room, the trial judge never investigated. In fact, when juror #4 specifically asked the court if it was aware of the "blow up" in the jury room, the judge quickly silenced the juror by saying that he did NOT want to know about that incident. (45 R.T. 5399.)

Even if the foregoing was not sufficient to prompt an investigation by the trial judge, juror #10's remarks the day after she was dismissed were more than sufficient. At the hearing held on the morning after her dismissal, juror #10 told the trial judge what happened when the two alternate jurors were previously seated:

> "But when the alternates came, your instruction was that we were supposed to start our deliberations from -- like we never deliberated before and forget what we talked about before and start anew, because we had two new alternates and the defendant was entitled to verdicts from everybody from -- fresh, and during the deliberations, if I would have been here yesterday I would have told it, but it wasn't redeliberated.
>
> It was like, "You tell us what you think and we'll tell you what we decided," and it wasn't right to me, because to me, you supposed to act like you never talked

about what you talked about before, and it was kind of like, okay, well, if that's the way you guys did it, okay, then we're ready to vote. And we spent a week and a half in there before we could even vote on issues, and then you come in and you just say how you felt about certain charges, and then we listened and we said that's how we felt, and then we voted, and I don't think it was fair and unbiased, because to me it seemed it was a preconceived thing already in their mind how they was gonna do it, because they had no discussion about anything, and I thought that your instructions meant we are supposed to start again, like we started when we first started, without giving what -- the things we talked about, the questions that came up.

We had to ask for certain testimony again, and none of that was done, and in one day mostly 11 verdicts, 11 charges was voted on in one day by basis of, to me, how we felt before the two other people came in there, and it bothered me because that didn't -- to me didn't seem like your instructions to us, and I really don't feel that that's fair." (45 R.T. 5433-5434.)

Moreover, as explained below, the jury notes are entirely consistent with juror #10's explanation of what took place during the two days of deliberations after the two alternates were seated and before juror#10 was replaced. That is, the newly seated jurors were simply asked what they thought and the remaining jurors explained what they had previously decided and votes were taken.

Before examining the juror notes, however, it is important to consider them in the context of the ever changing composition of the jury. A time line will assist the Court in understanding that context.

March 23, 1998 Jury begins guilt phase deliberations. (18 C.T. 5055.)

March 26, 1998 Judge makes inquiry of Juror #10. (18 C.T. 5058.)

Jury note asking for readback of testimony and an explanation of the meaning of a "major participant" as set forth in CALJIC 8.80.1 (19 CT 5154.)

March 30, 1998 2 jurors replaced with alternates at approximately noon. (18 CT 5064.)

Jury returns from lunch and deliberations resume at 1:45 pm. (18 CT 5064.)

Jury note asking to "fill...in" new jurors on previous questions and answers. (19 CT 5163.)[6]

Jury note asking whether jurors should return verdicts as decided. (19 CT 5161)

Jury note asking for two copies of printed instructions. (19 CT 5162.)

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[6] The jury note reads:

[Jury question] "When deliberating anew, can we use our same questions and answers during the new deliberations or do we resubmitt (sic) some questions if we want to fill the new jurors in on certain questions that came up before along with their answers."

[signed] march 30, 1998 Juror #3 [foreman]

[Judge response] "You may not have the same questions as before, but to the extent that you do, you may use the same answers" (19 C.T. 5163.)

March 31, 1998	Jury note asking if every crime is a new conspiracy or does the conspiracy start at the first crime? (19 CT 5165.)
	Jury note requesting readback of testimony. (19 CT 5167.)
April 1, 1998	Jury foreman note complaining about juror #10, in juror #10's absence. (19 CT 5168-5159.)
	Juror 10 excused without being contacted first. (18 CT 5067.)
April 2, 1998	Former Juror #10 examined by the court. (18 CT 5068.)
	Alternate juror #4 empaneled as new juror and jury directed to start deliberations anew at 10:30 am. (18 CT 5068.)
	More readbacks of testimony. (18 CT 5068; 19 CT 5170-5171.)
	Verdicts on 9 of the 11 counts reached. (18 CT 5075-5092.)
	Jury recessed until 9:30 am April 6, 1998. (18 CT 5068.)
April 6, 1998	At 2 pm, jury requests clarification of the phrase "to wit" in the sentence enhancements on two counts. (19 CT 5172.)
	At 2:15 pm. verdicts on the remaining 2 counts reached. (18 CT 5070-5074.)

The evidence shows that on March 30, 1998 (two days **before** the jury foreman complained about juror #10) two jurors were excused for various reasons

and two alternates were seated. (See 18 C.T. 5064- 5065.) The latter of the two alternates was seated at approximately noon and the jurors were instructed to begin deliberations anew. (18 C.T. 5064.) That same afternoon, after the reconstituted jury returned from lunch at 1:45 pm, the jury foreman sent the judge a note asking if the original jurors could simply "fill... in" new jurors on questions that had been previously discussed. (18 C.T. 5065; 19 CT 5163.) The court responded that such a procedure was permissible assuming that the jury's concerns were the same. (19 C.T. 5163.) Again that same afternoon, the jury foreman sent another note to the judge asking if the verdicts should be given to the court as they were decided. (See 18 C.T. 5065; 19 C.T. 5161.) It should be noted as well that on that same afternoon, the jury requested two additional copies of the jury instructions. (19 C.T. 5162.)

Significantly, the majority jurors themselves corroborated both the jury notes and juror #10's explanation of what took place during those two days of deliberations. In his original note to the court complaining about juror #10's failure to properly deliberate, the jury foreman observed that the jury previously voted on counts 1-11. Nevertheless, when juror #10 returned from lunch, she changed her mind about the way she voted. (19 C.T. 5168; see also 45 R.T. 5368.) Although the note does not state which day the jurors actually voted, since the note was sent only a day and half after the reconstituted jury convened (and thus the jury could have gone to lunch only twice), the time sequence means the reconstituted jury originally voted on 11 separate counts on either the afternoon when the alternates were seated or the following morning.

More corroboration was provided by Juror #4 who complained that juror #10 sometimes wanted to reopen votes that were already settled. (45 R.T. 5395.) Juror #6 said the same thing. (45 R.T. 5414.) Critically, juror #6 also said that sometimes

after lunch juror #10 would come back and totally reverse her opinion on a subject they voted on right before lunch. (45 R.T. 5413.) Juror #6 also said that the jury had to go through readbacks simply to benefit juror #10. (45 R.T. 5414.)

In context, therefore, it appears that the reconstituted jury voted before juror #10 asked for a readback of testimony. That is, the verdicts would have been returned on the same afternoon as the alternates were seated but for juror #10's refusal to go along with the majority. Moreover, juror #6's comments make it clear that it was NOT the new jurors or even the majority jurors who wanted the readbacks it was juror #10. These facts show that juror #10 *was* deliberating, although her method probably frustrated the other jurors. Nevertheless, her method of deliberation was not cause for dismissal.

Despite these allegations of juror misconduct - allegations that appear to be corroborated both by the jurors themselves and the independent juror notes - the trial judge failed to conduct an investigation into ANY of these matters. His concern focused solely on the majority jurors' complaints about juror #10's ability to deliberate. Moreover, as appellant pointed out in his opening brief, the decision in *People v. Castorena* (1996) 47 Cal.App.4th 1051 compels reversal under the circumstances presented here. (See appellant's opening brief at pp. 198-199.)

In *Castorena*, the trial court initially interviewed seven of twelve jurors concerning whether a holdout juror was refusing to deliberate. Based solely on interviews with those seven jurors and without interviewing the holdout juror, the trial court determined to dismiss the holdout juror.

Subsequently, the holdout juror submitted a 15 page note to the trial court which contradicted the allegations made against her by the other jurors and raised new allegations of misconduct against one of her accusers. (*Id.* at p. 1066.)

Additionally, there was evidence from at least one other juror that in fact the holdout juror was deliberating in good faith. (*Id.* at p. 1066.) Despite those matters, the trial court dismissed the holdout juror. (*Ibid.*)

The appellate court **reversed** concluding that the trial court erred significantly in failing to conduct a proper inquiry. (*Ibid.*) Based on the 15 page note, the court possessed information which, if true, would preclude 'good cause' for removing the holdout juror, and constitute 'good cause' to justify removal of one or more of the other jurors from the case. (*See, e.g., People v. Ray* (1996) 13 Cal.4th 313, 343.) Absent an inquiry into the facts raised in the juror's 15 page note, however, "the court did not have the requisite facts upon which to decide whether [the holdout juror herself] in fact failed to carry out her duty as a juror..." (*Id.*, at p. 1066.) Although a sufficient inquiry might have refuted the holdout juror's claims in the note, nevertheless, "we cannot speculate about what facts might have been adduced if the [proper] inquiry had been conducted." (*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066.)

As appellant explained above and in his opening brief, the facts of this case closely mirror those of *Castorena*. While the judge interviewed several jurors, he never bothered to interview juror #10, the holdout juror. Additionally, despite evidence that the majority jurors had a significant verbal altercation with juror #10, the trial judge said he did not want to know about it. Even conceding that the judge may not have been aware of the severity of the verbal altercation merely by listening to the majority jurors, had he interviewed juror #10 as the defense requested, he would have become aware of the magnitude of the problem. Moreover, he certainly knew about it the following day when juror #10 told him that she had been verbally attacked, screamed at and cut off during deliberations. Still, he did nothing.

Finally even after juror #10 informed the court that the majority jurors had essentially ignored his instructions to begin deliberations anew - an allegation largely corroborated by the juror note asking about recording the verdicts and the testimony of the majority jurors themselves- the trial court still failed to investigate. Thus, like the circumstances of *Castorena*, the trial court failed to conduct an appropriate factual inquiry into the circumstances involving juror misconduct. Moreover, like *Castorena,* the error affected appellant's substantial federal Constitutional rights.

Prejudice

In his opening brief, appellant argued that the prejudice in unfairly dismissing the holdout juror during deliberations denied appellant his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution as well as similar provisions of the California Constitution. The prejudice compels reversal.

Respondent does not argue prejudice and thus necessarily concedes that if the juror was improperly dismissed, the error compels reversal.. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession]; Indeed, "[a]s the Attorney General 'does not expand on the issue with ... citation to relevant authority,'" the Court should deem the issue conceded.) *(People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1070 n.4 [quoting *People v. Hardy* (1992) 2 Cal.4th 86, 150]; see also *People v. Williams* (1997) 16 Cal.4th 153, 206 ["Points perfunctorily asserted without argument in support are not properly raised."].)

For the reasons set forth above and in appellant's opening brief, the trial

court's error in excusing the holdout juror during deliberations requires reversal.

III.

SUBSTITUTION OF AN ALTERNATE JUROR FOR ORIGINAL JUROR #10 COERCED A VERDICT

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that although the judge instructed jurors to begin deliberation anew on the substitution of a juror, he did nothing to ensure that past misconduct in this area - as revealed by juror #10 - did not continue. Further, the dates on the verdict forms and the speed at which the jurors arrived at verdicts despite the vast quality of evidence on multiple counts demonstrates that there was no meaningful deliberation after alternate juror #4 was substituted for juror #10. Instead, as with past juror misconduct substitutions, the existing jurors simply coerced the new juror into accepting their view of the evidence. (Appellant's opening brief at pp. 203-214.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that because the jurors requested a readback of testimony after the substitution of the previous jurors (but before the dismissal of juror #10), that readback alone shows that the jurors were deliberating properly. More important, it shows that the jury followed the judge's instructions to begin deliberations anew. Additionally, because the jurors were clearly deliberating properly before the dismissal of juror #10, and there is no indication on the record that they did anything differently after juror 10 was replaced by alternate juror #4, this court can safely presume that the jurors continued to follow the judge's instructions. For that reason, appellant's claim is necessarily based upon pure speculation. (Respondent's brief at pp. 169- 176.)

ERRORS IN RESPONDENT'S ARGUMENTS

Respondent's argument is essentially an appeal to the presumption of regularity. That is, if the jury deliberated properly before juror#10 was dismissed, then in the absence of evidence to the contrary, it should be presumed to have deliberated properly after the dismissal.

The primary flaw in respondent's argument is the failure to deal with the evidence of record. As appellant explained in the prior issue, there was plenty of evidence in the record to warrant an investigation into juror #10's claim that the jury did NOT deliberate properly before juror #10 was dismissed. Appellant incorporates his prior arguments set forth in Issue II on this matter as though they were set forth here in full.

As to the deliberations after juror #10 was relieved, verdicts on 9 of the 11 counts were reached **on the same date that juror #10 was relieved** and the verdicts on the remaining two counts were reached after only four or five hours **the next working day**. Thus, the evidence of the jury's past misconduct as set forth in Issue II and the speed with which deliberations concluded after juror #10 was replaced rebut any presumption of regularity.

Respondent attempts to sidestep this evidence by merely alluding to the ongoing jury deliberations, both before and after juror #10 was replaced. The obvious problem with respondent's argument on this point, however, is that the outward appearance of regularity does not preclude coercion. Moreover, if there was coercion by other jurors, it is certainly the result of the interplay between the judge and jury concerning the dismissal of the only two black jurors on the panel and the judge's concession that the original jurors could "fill... in" the new jurors.

Nevertheless, appellant will deal with the two events of juror substitution

extolled by respondent to explain in depth why respondent's appeal to the presumption of regularity in jury deliberations will not withstand scrutiny.

Deliberations Prior to Dismissal of Holdout Juror #10.

Respondent's answer to appellant's claim of juror misconduct on March 30, 1998 is that after the substitution of two jurors (two days before juror #10 was dismissed), the reconstituted jury requested a readback of testimony. Obviously there would be no reason to ask for a readback of testimony if the substituted jurors had already decided the case in accordance with the wishes of the majority of previously deliberating jurors

Respondent is in error. The sequence of these events is important to an understanding of exactly what transpired.

As appellant explained in the prior issue, on March 30, 1998, the second of the two alternates was seated at approximately noon and the reconstituted jury was instructed to begin deliberations anew. (18 C.T. 5064.) That same afternoon the jury foreman sent the judge notes asking if the original jurors could simply "fill... in" new jurors on questions that had been previously discussed (18 C.T. 5065 ; 19 CT 5163)[7] and whether the verdicts should be given to the court as they were decided. (See 18 C.T. 5065; 19 C.T. 5161.) That same afternoon as well, the jury requested additional copies of the jury instructions. (19 C.T. 5162.)

It is certainly true, as respondent asserts, that the jury also requested readbacks of certain testimony. That request, however, came **a day after the alternates were seated**. (19 C.T.5167.)

This one-day delay is crucially important in the context of what actually took

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[7] As noted previously, the court responded that such a procedure was permissible assuming that the jury's concerns were the same. (19 C.T. 5163.)

place during deliberations. As explained in the prior issue, it appears that the reconstituted jury voted on almost all of the counts on the same afternoon the alternates were seated.

Additionally, Juror #4 told the trial court that juror #10 spent a lot of time flipping through the instruction booklet and writing little notes. (45 R.T. 5394.) Juror #6 told the court that the jury had to go through readbacks **to benefit juror #10.** (45 R.T. 5414.)

In context, therefore, it was clearly juror #10 who wanted the copies of the jury instructions NOT the other jurors and just as clearly, it was NOT the new jurors or even the majority jurors who wanted the readbacks, it was juror #10. Thus, contrary to respondent's claim, the facts show that the request for readbacks of testimony was not so much because the reconstituted jury deliberated in good faith as much it was that the holdout juror refused to cave-in under the intense and improper pressure of the other jurors to find appellant guilty. All the verdicts would have been returned on the same afternoon the alternates were seated **but for** juror #10's refusal to go along with the majority.

Under these circumstances, there is no presumption of regularity for respondent to rely upon. Moreover, as appellant pointed out in the previous issue, since the trial judge did not conduct a proper investigation into these allegations of juror misconduct, an appellate court "cannot speculate about what facts might have been adduced if the [proper] inquiry had been conducted." (*People v. Castorena*, *supra*, 47 Cal.App.4th at p. 1066.)

Deliberations After Dismissal of Holdout Juror #10.

Respondent's reliance on the claim that nothing in the record indicates misconduct in the swift deliberations after juror #10 was replaced is contrary to the

facts of record and a legally insufficient basis upon which to conclude that the verdicts were not coerced.

As appellant explained in his opening brief, the trial court's failure to inquire into the juror misconduct in this case eliminates any basis for this court's deferential reliance on the trial court's factual findings because the trial court did not have an adequate basis upon which to make any factual findings. (Cf. *People v. Nessler* (1977) 16 Cal.4th 561, 581.) Indeed, no juror contradicted juror #10's account of the process by which the majority circumvented the mandate of the trial court's instructions to deliberate anew. (*People v. Castorena*, *supra*, 47 Cal.App.4th at p. 1066.) In fact, as appellant pointed out above, the jury notes of March 30, 1998 and the juror testimony during the judge's inquiry **bolster** juror #10 claims. (19 C.T. 5161,5163; *supra.* pp. 31-33,)

More important, nothing in respondent's argument addresses the problem of substituting jurors after the majority has already reached conclusion regarding guilt. As appellant pointed out in his opening brief (at pp. 209-210), even though a jury has been instructed to start its deliberations anew, there are some circumstances where following such an instruction is simply unrealistic because it is impossible to incorporate into those deliberations the perception, memory and viewpoints of the new juror. This is especially true where (as here) the jury has already reached agreement for verdicts on related counts. (See, e.g., *People v. Aikens* (1988) 207 Cal.App.3d 209, 219 (conc. & dis. opn. of Johnson, J.) [where jury reached a verdict on a related count prior to the substitution of a new juror, a verdict by a reconstituted jury cannot meet the requirement of unanimity]; *State v. Corsaro*

(1987) 107 N.J. 339 [526 A.2d 1046][8] [once jurors have reached any verdicts, the panel cannot be reconstituted to deliberate and reach the remaining verdicts].)

As appellant explained in his opening brief as well, there is a substantial "inherent coercive effect upon an alternate juror who joins a jury that has ... already agreed that the accused is guilty...." (*United States v. Lamb* (9th Cir. 1973) 529 F.2d 1153, 1156.) The coercive effect is particularly strong where the sole dissenter is removed by the court, which can only telegraph to the majority that its guilty position was approved by the court. (Cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231,239-241 [108 S.Ct. 546, 98 L.Ed.2d 568] [recognizing court's conduct more likely to be interpreted as coercive where jury is aware that the court knows the numerical breakdown of the division among the jurors.])

Here, the alternate juror who replaced juror #10 was under inordinate psychological pressure to go along with the group, whose one recalcitrant member the court had removed from its body after lengthy deliberations. (See, e.g., *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981 [trial court coerced a verdict by its actions that "sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity"].)

This court has emphasized that the propriety of substitution of a juror during deliberations rests on the presumption that the new juror will participate fully in the jury's deliberation. (*People v. Collins*, *supra*, 17 Cal.3d at p. 693.) The deliberations here, however, were irretrievably skewed when the court effectively

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[8] As Justice Johnson explained in *Aikens*, the New Jersey statute governing substitution of jurors is similar to and interpreted in a manner similar to California's Penal Code section 1089. (*People v. Aikens, supra,* 207 Cal.App.3d at p. 218.)

gave its imprimatur to the majority by discharging the one juror who took issue with the majority's view during those deliberations. The verdicts on counts 3-12 are dated April 2, 1998 (18 C.T. 5074- 5095), the first day of deliberations after the last alternate was substituted in. (18 CT 5068.) All verdicts were reached on April 6, 1998, after approximately four more hours of discussion on only the second day of deliberations by the reconstituted jury.[9] (18 C.T. 5069.)

The length of deliberations are a critical factor in determining whether the judgment was rendered in undue haste. Indeed, in *People v. Thomas* (1990) 218 Cal.App.3d 1477, a case upon which respondent relies, the court specifically noted, "...this is not a case where the jury rushed to judgment after the alternate jurors were seated. In point of fact, the newly constituted jury deliberated for **almost three weeks** before reaching a verdict on some but not all of the remaining counts. The length of deliberations and the discriminating verdicts reached by the jury establish beyond doubt that defendant suffered no prejudice because of the court's action." (*Id.*, at p. 1488 (emphasis added).) Obviously, the same cannot be said for the deliberations here.

This was a months long trial and the total length of deliberations from the final reconstituted jury lasted barely a day and half. (18 CT 5068, 5070-5073.) The extraordinarily short - one day - time frame in which the final reconstituted jury reached verdicts on 9 of the 11 counts (18 C.T. 5074- 5095) plus the remaining four or five hours of deliberation to reach a verdict on the remaining two counts (18 C.T. 5069) constituted nothing less than a rush to judgment. By comparison, the jury deliberated a total of six days before juror #10 was removed. (18 CT 5055-5068.)

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[9] The jury was in recess from the afternoon of April 2, 1998 to the morning of April 6, 1998. (18 CT 5068.)

Under the totality of the circumstances presented in this case, particularly the coercive conduct of the majority jurors and their successful campaign to replace the lone holdout, "[a] replacement juror, no matter how novel or persuasive her argument for [] acquittal may have been, would have been hard pressed to overcome the trial court's implied admonition to the original jurors to hold their ground and convict." (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429 (dis. opn. of Nelson, J.).)

For these reasons, the verdicts here were improper. There is simply no evidence that will support respondent's invocation of the presumption of regularity. Instead the opposite is true. What evidence there is demonstrates that the jury verdicts here were coerced.

Accordingly, the trial court deprived appellant of his state and federal constitutional rights to a fair trial by an impartial jury, requiring reversal. Moreover, because the coercion of the guilt verdicts rendered them unreliable, it also deprived appellant of his right to due process under the Fifth Amendment, his right to a jury trial under the Sixth Amendment, and his right to a reliable death judgment under the Eighth and Fourteenth Amendments to the United States Constitution. For all these reasons and those set forth in his opening brief, the judgment must be reversed.

IV.

THE TRIAL COURT ERRED IN INSTRUCTING ONLY ON FIRST DEGREE FELONY MURDER WITHOUT ANY LESSER INCLUDED OFFENSE INSTRUCTION, AND IN GIVING SPECIAL CIRCUMSTANCE INSTRUCTIONS WHICH ALLOWED THE SPECIAL CIRCUMSTANCE TO BE IMPUTED TO APPELLANT

SUMMARY OF APPELLANT'S ARGUMENT

The trial court has a *sua sponte* duty to instruct on all lesser included offenses supported by the evidence. These instructions ensure that the jury is not left with an "all or nothing" situation in which it either has to convict a defendant of a more serious offense about which the jury has its doubts, or acquit the defendant despite evidence showing clear criminal culpability. Here, despite the jury's evident difficulty with the reach of the theories of vicarious liability, no instructions on lesser included offenses related to the Los homicide were given. Nevertheless, there was evidence supporting an instruction on the lesser included offense of second degree felony murder based on the target offense of discharging a firearm at the vehicle in a grossly negligent manner. (See *People v. Robertson* (2004) 34 Cal.4th 156, 165-167.) Moreover, the jury even asked the court if appellant had to be convicted of the same offense as the actual shooter. Because no instruction on the lesser offense was given, the homicide conviction must be reversed. (Appellant's opening brief at pp. 215- 230.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that there was no *sua sponte* duty to instruct on any lesser offense because there was substantial evidence that appellant was guilty of the first

degree felony murder of Ms. Los. (Respondent's brief at pp. 176-183.)

ERRORS IN RESPONDENT'S ARGUMENTS

In his opening brief, appellant conceded that there was some evidence that, if admissible, would support a conviction for first degree felony murder. That is **NOT** the issue however. The issue is whether there was sufficient evidence to support an instruction on a lesser offense. Significantly, under California law, the fact that the perpetrator of the crime is guilty of one crime does not mean that the person who aids and abets the perpetrator or conspires with the perpetrator is necessarily guilty of that same degree of the crime. (*People* v. *Woods* (1992) 8 Cal.App.4th 1570, 1590-1591; see also *People v. Prettyman* (1996) 14 Cal.4th 248, 275-276 [assuming but not deciding that *Woods* was correctly decided].) Thus the failure to instruct the jury that the aider and abetter could be guilty of a lesser offense than the actual perpetrator is an error of Constitutional magnitude.

Respondent's argument is flawed because it focuses almost exclusively on the evidence supporting the first degree felony murder instructions, but fails to come to grips with the evidence supporting the lesser included offenses. Respondent concedes, as it must, that second degree felony murder is a lesser included offense of felony murder. (Respondent's brief at pp. 179-180.) Nevertheless, respondent recites a litany of facts supporting a first degree felony murder conviction. As presented by respondent, these include: appellant provided the weapon to Dearaujo; appellant previously told the group at Dannov's house that persons who resisted should be shot; appellant directed Dearaujo and Lyons to hijack a light colored car and be prepared to put the victim in the trunk; and finally, appellant told them to meet him near Gordy's market so they could drive to

Anaheim. (Respondent's brief at p. 182.)[10] Thus, respondent argues the jury would necessarily find that appellant committed first degree felony murder (robbery). (Respondent's brief at pp. 182-183.)

Significantly; omitted from respondent's argument is any discussion of the testimony of the prosecution's primary witness and the only eyewitness to the shooting, Christopher Lyons. Lyons testified that he told police that he and Mr. Dearaujo **volunteered** to get a car. (20 R.T. 2832.) If there was any doubt about the matter, during the discussion on jury instructions, the trial court found **as a matter of law** that **the evidence was insufficient to show that appellant commanded or ordered the two to commit the carjacking.** (38 RT 4658-4660.) Indeed, during penalty phase closing argument before the Dearaujo jury, the prosecutor specifically argued that, "They went to commit the carjacking of Yvonne because they wanted to go with Jack. **It was his [Dearaujo's] idea**. They wanted to do it, he and Chris." (9 Supp. R.T. at p. 7089. (emphasis added) .) A few moments later Ms. Nelson reiterated to the jury "He's [Dearaujo] doing this all on his own. [¶] There's no one there giving him step by step instructions on how to commit a carjacking.." (9 Supp. R.T. at p. 7094.) Since presumably the prosecution did not argue inconsistent theories between the defendants' two juries and is not now changing its theory on this appeal, it is hard to argue successfully that appellant was the prime mover in this transaction, in view of the prosecutor's closing argument.

Lyons further testified that he did not know what his intent was when he and Dearaujo went looking for a vehicle. He just knew he wanted to get a car to drive to

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[10] Appellant does NOT concede that these facts were ever established beyond a reasonable doubt.

a party in Anaheim. (21 R.T. 2904.) If Lyons did not know exactly what his intent was, logically, appellant could not knowingly share it.

Finally, Lyons testified that he and Dearaujo yelled at Ms. Los to open the door of her car. Instead of complying, Ms. Los started her car and began to back up. (19 R.T. 2639.) It appeared to Lyons that Dearaujo then panicked and shot Ms. Los. (19 R.T. 2639, 2643; 21 R.T. 2909, see also 2840.) Lyons testified that he was very surprised when he heard Dearaujo actually fire the gun. He then panicked when he saw Dearaujo had panicked. (21 R.T. 2909, see also 2840.)

Thus, considered in context, the evidence here shows that the Los homicide was "a rash impulse hastily executed." (Cf. *People v. Munoz* (1984) 157 Cal.App.3d 999, 1010.) It was a reflexive act and the bullet accidentally hit a vital spot. (Cf. *Jackson v. State* (1991) 575 So. 2d 181 at pp. 192-193; see also *People v. Dillon* (1983) 34 Cal.3d 441, 487-489.) More to the point, it was a reflexive act by someone other than appellant, who was nowhere near at the time of the shooting.

As appellant explained in his opening brief, under these circumstances, there is no mandatory inference that appellant either knew Lyons and Dearaujo were going to use the weapon to commit a robbery or that he shared that purpose when he loaned them the weapon. Indeed, the jury could have found that the robbery itself was an independent act conjured up by Dearaujo and Lyons, or that the shooting of Ms. Los was an independent act done by a panicky teenager after the robbery attempt had been abandoned. Therefore, whether the killing of Ms. Los was in fact a natural and probable consequence of appellant's activities was a key factual question which only could have been resolved by the jury if it was properly instructed to apply an objective test for second degree felony murder. (Cf. *People v. Fauber* (1992) 2 Cal.4th 792 at p. 834.)

PREJUDICE

Notwithstanding the foregoing, respondent argues in essence that the evidence of appellant's participation in the homicide was so overwhelming that even if instruction on the lesser included offense of second degree felony murder had been given, the jury necessarily would have found appellant guilty of first degree felony murder. (Respondent's brief at pp. 182-183.)

Significantly omitted from respondent's argument, however, is any discussion of the jury note **specifically asking** if the jury had to find appellant guilty of the same offense as the actual perpetrator. The note read, "I want to know if a person is a principal if the non principal commits a crime is the principal just as guilty of the crime also." (19 CT 5149.) Over defense objection, the prosecution proposed a response using the language from CALJIC 3.00 that an aider an abetter is equally guilty with the perpetrator. (44 R.T. 5229.) After argument, the judge determined that the appropriate response was "You are referred to instruction 3.00." [Principal is equally guilty][11] (44 R.T. 5231) and provided that answer in writing to the jury. (19 CT 5149.) The note and response are both dated March 25, 1998. (19 CT 5149.)

The note clearly suggests that the jury, or at least some of its members were

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[11] CALJIC 3.00 as it was read to the jury provides:

"Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty.

Principals include, one, those who directly and actively commit or attempt to commit the act constituting the crime, or, two, those who aid and abet the commission or attempted commission of the crime." (43 R.T. 5131.)

seeking a legal way to find appellant less culpable than Dearaujo. Moreover, since appellant wasn't at the scene, did not know for sure that Dearaujo and Lyons would even attempt a robbery, much less a shooting, and did not find out about the incident until later, it would certainly be reasonable of a juror to seek a lesser penalty than death for appellant. (Cf. *People v. Fauber, supra,* 2 Cal.4th 792, 834 [no accomplice liability as a matter of law after codefendant said "either do it" or "blow it off."].) Given that the jury specifically asked whether it was required to find appellant guilty of the greater offense, and was told that it had to so find, it is implausible that the jury would NOT have found appellant guilty of a lesser offense had it been so instructed.

The situation here is a classic example of the all-or-nothing choice between conviction and acquittal; a dichotomy that subverts the fact finding process and undermines the reliability of the verdict. (*People v. Geiger* (1984) 35 Cal.3d 510 at p. 519, citing *Beck v. Alabama* (1980) 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382]; see also *People v. Barton* (1995) 12 Cal.4th 186 at p. 196.) Moreover, the right to have the jury consider every material issue presented by the evidence and the need to discover the truth requires that the jury be instructed on all applicable theories of a lesser included offense. (See *People v. Doolittle* (1972) 23 Cal.App.3d 14, 19, fn. 3: "A charge of murder includes all subdivisions of murder, the lesser degrees thereof, and manslaughter.")

Finally, failing to instruct on noncapital lesser included offenses that are supported by the evidence violates due process under the Fourteenth Amendment as well as violating the Eighth Amendment. (*Cordova* v. *Lynaugh* (5th Cir. 1988) 838 F.2d 764, 767; *Vickers* v. *Ricketts* (9th Cir. 1986) 798 F.2d 369, 371-373 [per Justice Kennedy, verdict overturned despite "abundant, clear, persuasive" evidence

of guilt of first degree murder].) Verdicts following a failure to give lesser included offense instructions are more suspect in capital than non-capital cases. (*Beck* v. *Alabama*, *supra,* 447 U.S. at pp. 642-643.)

Therefore, for the reasons set forth above and in appellant's opening brief, the failure to instruct on a viable lesser included offense supported by the evidence in a situation where the jury was plainly looking for a lesser alternative compels reversal.

V.

THE TRIAL COURT'S ANSWER TO THE JURY'S QUESTION REGARDING AIDER AND ABETTER LIABILITY WAS NEITHER RESPONSIVE NOR IMPARTIAL. THUS, IT VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS, HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE GUILT DETERMINATION IN A CAPITAL CASE

SUMMARY OF APPELLANT'S ARGUMENT

As noted in the previous issue, the jury sent the court a note requesting clarification of aider and abetter liability for felony murder.[12] That is, the jury wondered whether the defendant could be found guilty of a lesser offense than his codefendant who was the actual killer. Over defense objection, the trial court simply directed the jury to reread CALJIC 3.00 (all principals are equally guilty).

Significantly, however, the trial court failed to alert the jury to CALJIC 8.27, the instruction which explains the causal and temporal requirements for aider and abetter liability in felony murder and would have permitted the jury to find appellant guilty of a lesser offense. Therefore, the court's reply failed to properly explain the legal issue confronting the jury. That error alone requires reversal. Additionally, by referring the jury to CALJIC 3.00 and not CALJIC 8.27, the judge implicitly endorsed the prosecution's theory of the case and failed to give the jury an impartial view of the evidence.

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[12] The note read: "I want to know if a person is a principal if the non principal commits a crime is the principal just as guilty of the crime also." (19 CT 5149.)

Appellant was severely prejudiced by this combination of errors. Vicarious liability was the fundamental factual issue for the jury in the case. The jury's note clearly indicated that it was not fully convinced that the prosecution proved its claim that appellant was an aider and abetter to felony murder. That is, had the aider and abetter instructions been clear, and had the jury been convinced by the evidence, the note would have been unnecessary. Under the circumstances presented here, a reviewing court cannot say beyond a reasonable doubt that the error referring the jury to an instruction favoring the prosecution's theory did not contribute to the verdict. Reversal is compelled.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that the issue is waived since appellant failed to properly object at the time the supplementary instructions were given. Moreover, because the trial court has great leeway in answering jurors' questions and the CALJIC 3.00 instruction that was given here was itself appropriate, appellant's issue lacks merit. Finally, even if the trial court erred, appellant was not prejudiced. The discussions concerning the note were concluded before juror #10 was excused. The reconstituted jury did not ask a similar question. Thus, there is no evidence that the jury that actually convicted appellant was troubled by the issue of aider and abetter liability. (Respondent's brief at pp. 183-189.)

ERRORS IN RESPONDENT'S ARGUMENT

Respondent's arguments both lack support in the record and misplace the responsibility for properly instructing the jury. Additionally, even if CALJIC 3.00 was a correct statement of the law, that claim alone does not relieve the trial judge

from giving instructions that are fair and impartial.[13] In context, CALJIC 3.00 emphasized only the prosecution's view of the evidence. The instructions could not have been impartial without reference to CALJIC 8.27. More to the point, since the trial judge previously referred the jury to CALJIC 3.00 the note clearly implied that CALJIC 3.00 did not resolve the jury's question about aider and abetter liability - an issue the prosecutor herself conceded. Under these circumstances, CALJIC 8.27 was the more appropriate response. Finally, since 11 members of the reconstituted jury that convicted appellant were the same jurors affirmatively misled by the trial court's instructional error, and since those 11 jurors were able to simply "fill...in" the new juror concerning previous questions and answers, it cannot be said that the error was harmless.

No Waiver

Respondent's waiver claim is based on the fact that trial defense counsel uttered the word's "yes, well...." in a midsentence response to the prosecutor's assertion that CALJIC 3.00 answered the jury's question. (Respondent's brief at p. 185-187.) Further, trial defense counsel never specifically asked that the judge read CALJIC 8.27 as well. (Respondent's brief at pp. 187.)

The facts, however, do not support a waiver claim. The entire colloquy over

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[13] Moreover, to the extent that respondent argues that a trial court need not elaborate on an instruction (see respondent's brief at pp. 187-188), the argument is misplaced. The defense did not ask for elaboration. The defense objected to CALJIC 3.00. Additionally, as explained below, having given CALJIC 3.00 over defense objection, the trial judge then had a *sua sponte* duty to be sure that the instructions were impartial. By giving CALJIC 3.00 without giving CALJIC 8.27 as well, the trial court merely reinforced the prosecution's theory of the case. No case law supports the proposition that a trial defense counsel has to request additional instructions such as CALJIC 8.27 to ensure the judge's charge to the jury is impartial.

the jury note is as follows:

> THE COURT: People versus Williams, CR-49662. We are convened in chambers. Both counsel are present.
>
> MS. NELSON: The answer to their question [concerning the jury note] is 3.00, just plain as day. That's the answer.
>
> THE COURT: Well, my response, refer to 3.00.
>
> MS. NELSON: I would say the whole set, which starts at 3.00, and the language is right there, the very first thing you read, apparently, **but we already told them to refer to the whole set [of aider and abetter instructions] and that apparently did not do it**, and the specific answer to their specific question is exactly 3.00.
>
> MR. WRIGHT: But there are --
>
> MS. NELSON: That one instruction answers that question –
>
> MR. WRIGHT: Yes, well --
>
> MS. NELSON: -- which is to what level are principals responsible. Each principal, regardless of the extent or manner of participation, is equally guilty, principals included, and it's defined.
>
> MR. WRIGHT: **I'm not waiving my objection to 3.00 or any of that group, but that language is in 3.00.**
>
> THE COURT: Okay. **Your objection is noted** and the answer is refer to instruction 3.00. (44 R.T. 5234 (Emphasis added).)

After reviewing the foregoing, the defense objection to the reading of CALJIC 3.00 in response to the jury note could not be more clear. The defense did

NOT agree that reading CALJIC 3.00 was a proper response to the jury note. In fact, the exact opposite is true: defense counsel disagreed vehemently. Moreover, if there was any doubt about the matter, the trial judge specifically noted the defense objection when he overruled it. Thus, respondent's claim that the defense failed to properly object to the trial court's decision to refer the jury to CALJIC 3.00 is simply without foundation in the record.

As for respondent's claim of waiver because the defense did not specifically request CALJIC 8.27 (respondent's brief at p. 187), that argument is not well taken either. Respondent implicitly characterizes the matter as the defense failure to request elaborating instructions. (Respondent's brief at p. 187.) That is not the situation here. CALJIC 8.27 is not an instruction that merely elaborates on aider and abetter liability. Because it explains the causal and temporal relationship necessary for felony murder, the instruction is critically important to the jury's determination of whether appellant had any criminal liability at all for the homicide offenses. Indeed, CALJIC 8.27 was originally given as an integral part of the general instructions on aider and abetter liability. (44 R.T. 5275.)[14]

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[14] Respondent also discusses the prior jury note expressing confusion over aider and abetter liability for the robbery of the Los Angeles Times office instead of the Classy B liquor store (counts eight and nine). (Respondent's brief at p. 184.) Respondent apparently urges that taken together, the two notes express continuing confusion over the aider and abetter liability issue, but that the confusion is confined only to counts eight and nine rather than the homicide offense. (Respondent's brief at p. 188.)

That argument is in error. The judge responded to the note concerning aider and abetter liability for the robbery of the Los Angeles Times office. (19 CT 5147.) Thus, the jury's second note expressing confusion about the extent of aider and abetter liability generally (19 CT 5149) was obviously directed at the homicide offense.

Even if that were not so, the trial court's failure to properly instruct is fully reviewable on appeal. This is so both because of the trial court's *sua sponte* duty to properly instruct the jury on the general principles of law relevant to the issues raised by the evidence (*People v. St. Martin* (1970) 1 Cal.3d 524, 531), and because the substantial rights of the defendant were affected by the improper instruction given. (Penal Code section 1259; see *People v. Harris* (1981) 28 Cal.3d 935, 956.) Indeed, a defendant does not have to request that an instruction be modified in order to have the issue reviewed on appeal where the error (as here) consists of a breach of the court's fundamental duty to properly instruct. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207 fn 20.)

More important, respondent's argument misplaces the responsibility for properly instructing the jury once it has indicated that it does not fully understand the legal matters at issue. The jury note indicated that the jurors simply did not understand the aider and abetter instructions previously given to them. The prosecutor even admitted as much.[15]

Under these circumstances, the court had a ***sua sponte*** obligation under Penal Code section 1368 to "clear up any instructional confusion expressed by the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 96-97.) Once a trial court is alerted to the need for an instruction, the court has an obligation "to give a correctly phrased instruction." (*People v. Forte* (1988) 204 Cal.App.3d 1317, 1323; disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027.) That is, "[A] court may give only such instructions as are correct statements of the law. [Citation]."

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[15] As the prosecutor admitted: "but we already told them to refer to the whole set [of aider and abetter instructions] and that apparently did not do it..." (44 R.T. 5234.)

(*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the parties was incorrect. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Malone* (1988) 47 Cal.3d 1, 49.) The court must ensure that instructions adequately state the law and adequately assist the jury in resolving the issues the instructions address. (*People v. Key* (1984) 153 Cal.App.3d 888, 898.)

Since, as the prosecutor admitted, the jury had previously been referred to CALJIC 3.00, as well as the entire series of aiding and abetting instructions and still did not understand the vicarious liability concept, simply referring the jury to CALJIC 3.00 again was not an appropriate response to the jury's question. "The responsibility for adequate instruction becomes particularly acute when the jury asks for specific guidance." (*Trejo v. Maciel,* (1966) 239 Cal.App.2d 487, 498; see also *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833; accord, *Bartosh v. Banning* (1967) 251 Cal.App.2d 378.)

Further, "[w]here ... the need for more [instruction] appears, it is the duty of the judge ... to provide the jury with light and guidance in the performance of its task." (*Wright v. United States* (D.C. Cir. 1957) 250 F.2d 4, 11.) "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States* (1946) 326 US 607, 612-613 [90 L.Ed 350]; accord, *Powell v. United States* (9th Cir. 1965) 347 F.2d 156, 157-58; *United States v. Harris* (7th Cir. 1967) 388 F.2d 373, 377.)

The reason for the requirement of clarity is simple: "To perform their job properly and fairly, jurors must understand the legal principle they are charged with

applying ... A jury's request for ... clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.)

Instead of clearing away the jury's confusion with "concrete accuracy," here, the trial judge merely referred the jury to an instruction that the prosecutor conceded that the jury did not understand. It was certainly of no help to the jurors to be referred to instructions which their note clearly told the court they did not comprehend. (*United States v. Gordon* (9th Cir. 1988) 844 F.2d 1397, 1401-1402 [error to rely on original instruction where jury note expressed confusion regarding conspiracy counts]; *United States v. Walker* (9th Cir. 1978) 575 F.2d 209, 213 [trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion].) Moreover, a "perfunctory rereading" of the general instructions which were previously given is insufficient as well. (*United States v. Bolden* (D.C. Cir. 1975) 514 F.2d 1301, 1308-09.)

Thus, simply referring the jury to CALJIC 3.00 again did not adequately respond to the jury's question about aider and abetter liability. Indeed, as one California court observed, "there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (*People v. Thompkins, supra*, 195 Cal.App.3d 244, 252-253.) Indeed in *Thompkins*, the defendant's first and second degree murder convictions were reversed because of the trial court's failure to properly instruct in response to the jury's questions. (*Id.*, at p. 252.)

CALJIC 3.00 Is Misleading in the Context of this Case

The real thrust of respondent's argument, however, is that because CALJIC 3.00 is an accurate statement of the law, and because the trial judge has discretion in determining how best to answer juror questions, reference to CALJIC 3.00 alone avoids any issue involving misleading the jury. (Respondent's brief at pp. 187-188.) Such an argument will not withstand scrutiny. "Even an accurate statement of the law may be erroneous as an instruction if it is likely to mislead or misdirect a jury upon an issue vital to the defense..." (*People v. Cole* (1988) 202 Cal.App.3d 1439, 1446; disapproved on other grounds in *People v. Mastia* (2001) 25 Cal.4th 1180, 1191.) Moreover, although the precise nature of any amplification, clarification or rereading of instructions is a matter of judicial discretion (*United States v. Bolden, supra*, 514 F2d at p 1308; see also *People v. Beardslee, supra,* 53 Cal.3d at p. 97), nevertheless, "there are necessarily limits on that discretion." (*United States v. Bolden, supra*, 514 F.2d at p. 1308.) When the jury's question indicates that it has focused on the controlling legal principle in the case, the court's instructions must clear up the jury's confusion. (*People v. Thompkins, supra*, 195 Cal.App.3d 252-253.)

As appellant explained in the opening brief, the court's supplemental instructions were inadequate to clear up the jury confusion. The instructions given were inadequate because they told the jurors that appellant was equally guilty with the actual perpetrator when it was clear that the jury was not convinced that appellant's culpability was equal to that of Dearaujo. The instructions left the jury with no way of expressing this view in its verdict.

The prosecution's only theory of criminal culpability was felony murder. (8 R.T. 813.) CALJIC 8.27 guides the jury in its determination of whether the

requisite causal and temporal relationship actually exists in a felony murder prosecution. In that regard, the jury may well have been convinced that appellant had no criminal culpability for the homicide at all. As appellant pointed out extensively in issue IV in his opening brief (and that explanation is incorporated fully herein by reference), appellant wasn't at the crime scene, did not know for sure that Dearaujo and Lyons would attempt a robbery, much less a shooting, and did not find out about the incident until Ms. Los was already dead. Additionally, the trial judge found that as a matter of law the evidence was insufficient to show that appellant commanded or ordered the carjacking (38 RT 4658-4660) and the prosecutor herself told the Dearaujo jury that the evidence showed that the carjacking was Dearaujo's idea. (9 Supp. R.T. at p. 7089, 7094.) On these facts, a jury could reasonably conclude that the prosecution did not establish the required temporal and causal nexus.

CALJIC 3.00 Is a Fatally Unbalanced Instruction in the Context of this Case

In his opening brief (at pp. 240-244), appellant noted that even aside from the problem that the trial court's response did not fully explain the requisite causal and temporal nexus, the supplemental instruction was fatally unbalanced. It favored the prosecution's theory of the case and essentially directed a verdict for first degree felony murder.

That is, when the jury specifically asked if appellant's criminal liability as an aider and abetter was the same as that of Mr. Dearaujo, by referring the jury solely to CALJIC 3.00 and NOT to CALJIC 8.27, the judge clearly implied that it was. (19 C.T. 5163.) Moreover, absent a thorough explanation of the principles of causation and temporal relationships, such as those contained in CALJIC 8.27, (as well as the absence of instructions on a lesser included offense, see Issue IV), the

jury obviously believed it had no legal theory by which it could acquit appellant of first degree murder.

Both state and federal decisions have long recognized that instructions "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence are impermissible," because such an instruction is argumentative. (*People v. Gordon*, *supra*, 50 Cal.3d 1223, 1276, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1138.) A judge is prohibited from giving the jury argumentative instructions or comments favoring a certain party. (Cf. *Quercia v. United States* (1933) 289 U. S. 466, 469-470.) Federal and state due process notions under the Fifth and Fourteenth Amendments as well as Cal. Const., art. I, §§ 7 and 15 demand that when the jury has expressed difficulty in resolving an issue at trial, the court's response must be balanced and not unequally favoring either side.

Nowhere in respondent's argument is this concern even addressed, let alone resolved. Having failed to address the issue at all, respondent necessarily concedes that referring the jury only to CALJIC 3.00 and not CALJIC 8.27 resulted in fatally unbalanced instructions and improperly favored the prosecution's theory of the case. (See *People v. Bouzas*, *supra,* 53 Cal.3d at p. 480 [respondent's failure to engage arguments operates as concession]; Indeed, "[a]s the Attorney General 'does not expand on the issue with ... citation to relevant authority,'" the Court should deem the issue conceded. *(People v. Solorzano* , *supra*, 126 Cal.App.4th 1063, 1070 n.4 [quoting *People v. Hardy* (1992) 2 Cal.4th 86, 150].)

PREJUDICE

Respondent asserts that even if the trial court erred in failing to refer the jury to CALJIC 8.27, appellant was not prejudiced. The jury note asking about aider and

abetter liability is dated March 30, 1998, two days **before** juror #10 was dismissed and the final reconstituted jury began deliberations anew. Thus, respondent urges, there is no evidence that the reconstituted jury that actually decided appellant's guilt was in any way concerned about the temporal or causal relationship between appellant and the underlying felony. (Respondent's brief at p. 189.)

Respondent's argument borders on the specious. The trial court's error affected eleven of the jurors who eventually sat on the reconstituted jury. That is, even if the new juror on the reconstituted jury did not have any concerns about the temporal and causal connection between appellant and the underlying felony, the other eleven jurors previously did have such a concern. Moreover, that concern was sufficiently pressing that they expressed it to the trial judge in their note. The trial judge improperly resolved that concern. Nowhere does respondent explain how the trial court's erroneous instruction that mislead 11 of 12 jurors could not have affected the final verdict in this case. Indeed, it is only necessary for one juror to have voted differently in order to obtain a more favorable verdict. (See *People v. Flood* (1998) 18 Cal.4th 470 [question is whether any "rational juror, properly instructed, could have found [in favor of the defendant.]"; see also *Duest v. Singletary* (11th Cir. 1993) 997 F.2d 1336, 1339.)

Moreover, if the twelfth juror had similar concerns, the eleven who had received the erroneous instruction would have cited the trial court's previous directive to staunch any further consideration. The likelihood that just this occurred is evident in the reconstituted jury's note **specifically asking** how to deal with concerns voiced by the new juror similar to those that affected the other eleven jurors during prior deliberations. That is, the foreman of the reconstituted jury sent the judge a note asking if the original jurors could simply "fill... in" new juror on

answers to questions that had been previously asked of and answered by the court. (18 C.T. 5065.) The trial court responded that such a procedure was permissible assuming that the reconstituted jury's concerns were the same. (19 C.T. 5163.)[16] Thus, if the substitute juror had a similar concern, the jurors who had already submitted a question to the trial court and received a response that improperly limited the jury's scope of consideration would have so informed the substitute juror.

For the reasons set forth above and in appellant's opening brief, the trial court's failure to even refer the jury to CALJIC 8.27, and instead direct its focus to CALJIC 3.00, when the jury note clearly showed that the jury was struggling with one of the most central vicarious liability issues in the case, amounts to a deprivation of federal and state due process under the Fifth and Fourteenth Amendments. Moreover, because the court failed to clarify or fully explain the matters at issue for the jury, the error also violated the defendant's Sixth Amendment right to a jury trial and his Eighth Amendment right to a reliable guilt

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[16] The jury note reads:

[Jury question] "When deliberating anew, can we use our same questions and answers during the new deliberations or do we resubmitt (sic) some questions if we want to fill the new jurors in on certain questions that came up before along with their answers."

[signed] March 30, 1998 Juror #3 [foreman]

[Judge response] "You may not have the same questions as before, but to the extent that you do, you may use the same answers" (19 C.T. 5163.)

phase verdict in a capital case.

VI.

CALJIC 3.02 WAS MISLEADING AND APPLIED AN IMPROPER STANDARD FOR A NONKILLER WHO AIDED AND ABETTED IN A FELONY MURDER CASE

SUMMARY OF APPELLANT'S ARGUMENT

As appellant explained in the prior issue, aider and abetter liability for a nonkiller in a felony murder case requires both a causal and temporal relationship between the underlying felony and the homicide. CALJIC 3.02, however substitutes a negligence standard for those requirements. That is, CALJIC 3.02 requires that the nonkiller merely commit an act the natural and probable consequences of which are a homicide. This standard is entirely different, and lowered the prosecution's burden of proof in a felony murder case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

SUMMARY OF RESPONDENT'S ARGUMENTS

Respondent urges that appellant's arguments were rejected in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-107. Further, appellant did not make the federal constitutional objection to the instruction that is now urged on appeal, so the issue is waived. In any event, respondent argues that the issue lacks merit since the jurors were also instructed on CALJIC 3.01, CALJIC 8.80.1, and CALJIC 8.81.17, which fully advised them of the legal principles to be applied. (Respondent's brief at pp. 189-194.)

ERRORS IN RESPONDENT'S ARGUMENTS

In brief, *Coffman and Marlow* is distinguishable because the versions of the instructions relied upon in that case are not the same in critical particulars as the instructions in this case. Further, the defense specifically objected to the instruction

at issue and appellant was not required to further object to the legal consequences of a denial of his objection. Finally, none of the instructions relied upon by respondent deal with the specific Constitutional issue raised here.

Coffman and Marlow Is Distinguishable

This court's decision in *Coffman and Marlow* is clearly distinguishable from the facts of this case. Certainly it is true that in *Coffman and Marlow* this court rejected the defense argument that CALJIC 3.02 unconstitutionally relied on a negligence standard. (*Id.* at p. 108.) In that case, however, this court relied on the additional instructions CALJIC 3.01, and particularly the special circumstance instruction CALJIC 8.81.17, to arrive at that result. The latter instruction specifically informed the jury that the defendant had to have the specific intent to kill. (*Id.*, at pp. 106-107.) Moreover, because the jury returned a true finding on the special circumstance, any difficulties in CALJIC 3.02 were essentially moot. (*Id.*, at p. 108.)

Here, however, the version of CALJIC 8.81.17 that was read to the jurors told them only that the special circumstance was "not established if the attempted robbery was merely incidental to the commission of the murder." (19 C.T. 5199; 43 R.T. 5145-5146.) **The instruction given to appellant's jury did NOT require the jury to find that appellant had the specific intent to kill.**

Certainly it is true that CALJIC 3.01 told the jury that an aider and abettor must act with the intent of committing, encouraging or facilitating the commission of the target crime. Without requiring a specific intent to kill, however (as the different version of CALJIC 8.81.17 required in *Coffman and Marlow*), CALJIC 3.01 does not, by itself, surmount the negligence standard set forth in CALJIC 3.02. For this reason *Coffman and Marlow* is not controlling.

No Waiver

Without citation to authority, respondent urges that the defense did not object to the instruction on the constitutional grounds asserted on appeal so the issue is waived. (Respondent's brief at p. 191.)

Respondent is in error. Respondent concedes, as it must, that the **defense objected to all of the aider and abetter instructions as well as the special circumstance instruction** on the grounds that the evidence would not support the instructions. (Respondent's brief at p. 190-191.) As long as trial counsel has identified the reason or basis for a trial objection or requested specific federal constitutional abridgements flowing from denial of the objection the request should be cognizable on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 436.)

Even if that was not the case, however, the trial court's failure to properly instruct in this case is fully reviewable on appeal. In criminal actions, a claim of constitutional error in instructing a jury can almost always be raised initially on appeal. (*People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn 1; criticized on another ground in *People v. Williams* (1975) 51 Cal.App.3d 65, 67; see also Penal Code section 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if substantial rights of the defendant were affected thereby."].) Moreover, an appellate court is generally not prohibited from reaching questions that have not been preserved for review by a party. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; see also *People v. Smith* (2003) 31 Cal.4th 1207, 1215; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

For these reasons, the federal Constitutional error is not waived and this court is not precluded from reviewing appellant's claim.

The Errors Were Not Cured by Other Instructions

Respondent urges that in combination, CALJIC 3.01, 8.80.1 and 8.81.17 correctly instruct the jury on the applicable principles of aider and abetter liability. (Respondent's brief at pp. 192-194.)

Respondent does not - and cannot - argue that even the foregoing combination of instructions informed the jury that appellant must harbor the specific intent to kill. Indeed, as explained above, it was that "specific intent to kill" language contained in the other version of CALJIC 8.81.17 that blunted a similar defense argument in *Coffman and Marlow*. No such language appears in the version of CALJIC 8.81.17 read to appellant's jury.

More important, nothing in the instructions cited by respondent or given by the court requires the jury to find appellant guilty of murder based on anything greater than a negligence standard. As appellant explained in his opening brief, the problem with the natural and probable consequence portion of CALJIC 3.02 is that it implies that an aider and abettor who intentionally aids the first crime (such as the unlawful attempted taking of a vehicle) is, by operation of law, automatically guilty of any other unintended crime just so long as such crime is the natural and probable consequence of the first crime. Such a result is not consistent with fundamental principles of our criminal law because it allows liability to be imposed based upon negligence even when the crime involved requires a different state of mind. (LaFave and Scott, *Substantive Criminal Law* (1986) § 6.8, p. 158.)

Further, the natural and probable consequence doctrine is based on what a reasonable person would foresee as probable and natural consequences and then uses that standard to conclusively impute a higher degree of criminal culpability to a person who may not, in fact, have foreseen, let alone intended or deliberated, such

consequences. (*LaFave* and *Scott*, *supra.*) In a prosecution for murder, the doctrine operates as an irrebuttable presumption that a non-killer (i.e., an aider and abettor to some contemplated offense) has malice and/or some alternative mens rea sufficient to establish guilt of murder, even though such a state of mind could not be presumed and would have to be proven in order to convict the actual killer. (*Ibid.*)

Therefore, the probability that the jury in this case may have understood CALJIC 3.02 to permit it to convict appellant of felony murder and special circumstance murder without a need to decide if he had the otherwise requisite intent renders his convictions for those crimes invalid. (*Cf. Stromberg v. California* (1931) 283 U. S. 359, 368.) Thus, the special circumstances findings, and appellant's sentence of death must be reversed.

VII.

ALTERNATIVELY, IF THE JURY WAS PROPERLY INSTRUCTED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, THE TRIAL COURT ERRED IN FAILING TO MODIFY THE INSTRUCTION SUA SPONTE TO TELL THE JURY THAT THE TEST WAS OBJECTIVE RATHER THAN SUBJECTIVE

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that the trial court erred by not modifying CALJIC No. 3.02 *sua sponte* to inform the jury that the determination of whether a particular crime was a natural and probable consequence of a criminal act requires the application of an objective rather than subjective test. (*People v. Woods, supra*, 8 Cal.App.4th at p. 1587; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) The question of whether the ultimate crime was the natural and probable consequence of the target offense is not an issue of law. **It is an issue of fact** for the jury that must be resolved in light of all the circumstances. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn.5.) "The issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*People v. Woods, supra*, at p. 1587; *People v. Nguyen, supra*, at p. 531.)

Whether the shooting of Ms. Los was a natural and probable consequence of the underlying felony was a critical factual question for the jury to decide. The jury

note clearly shows that the jury was having difficulty deciding where appellant's culpability (if any) lay.[17] Under the facts of this case, there is no mandatory inference that appellant either knew Lyons and Dearaujo were going to use the weapon to commit a robbery or that he shared that purpose when he loaned them the weapon. Indeed, the jury could have found that the robbery itself was an independent act conjured up by Dearaujo and Lyons[18], or that the shooting of Ms. Los was an independent act done by a panicky teenager after the robbery attempt had been abandoned.[19] Therefore, whether the killing of Ms. Los was in fact a natural and probable consequence of appellant's activities was a key factual

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[17] As appellant pointed out previously, the jury note read: "I want to know if a person is a principal if the non principal commits a crime is the principal just as guilty of the crime also." (19 CT 5149.) The jury also requested clarification concerning appellant's culpability, if any, for the robbery at the Los Angeles Times office. That jury note read: "If A-B-C were involved in planning and talking about a robbery in one place - and B & C started out to do the crime. They did not do the planned crime but did another crime in the same area. What would A's status be under the law? Dated March 24, 1998." (19 C.T. 5146.)

[18] As appellant noted previously, that was precisely the argument that the prosecutor made to codefendant Dearaujo's jury during penalty phase summation. She told the jury: "They went to commit the carjacking of Yvonne because they wanted to go with Jack. **It was his [Dearaujo's] idea**. They wanted to do it, he and Chris." ([Emphasis added] 9 Supp. R.T. at p. 7089.) A few moments later, the evidence was insufficient to show that appellant commanded or ordered the carjacking. (38 RT 4658-4660.)

[19] As appellant also pointed out previously, Lyons testified that he and Dearaujo yelled at Ms. Los to open the door of her car. Instead of complying, Ms. Los started her car and began to back up. (19 R.T. 2639.) It appeared to Lyons that Dearaujo then panicked and shot Ms. Los. (19 R.T. 2639, 2643; 21 R.T. 2909, see also 2840.) Lyons testified that he was very surprised when he heard Dearaujo actually fire the gun. He then panicked when he saw Dearaujo was panicked. (21 R.T. 2909, see also 2840.)

question which only could have been resolved by the jury if they were properly instructed to apply an objective test. (Cf. *People v. Fauber*, *supra*, 2 Cal.4th at p. 834.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent first urges that appellant could be found liable for first degree murder either as an aider and abettor or as a co-conspirator. Since the natural and probable consequences doctrine applies to both theories, it would support appellant's conviction for first degree murder. (Respondent's brief at pp. 194-195.) Further, there is no *sua sponte* duty to instruct that the natural and probable consequences test is an objective one. Any such modification of the instruction must be requested and no such request was made here. (Respondent's brief at pp, 195-197.)

ERRORS IN RESPONDENT'S ARGUMENTS

Insufficient Evidence That Natural and Probable Consequences Doctrine Applies

As appellant argued in his Penal Code section 1118.11 motion, the evidence showed that he was not a major participant in the homicide or the attempted robbery of Ms. Los. He was not present during the offense and any "counseling" or "encouragement" to shoot people (if in fact appellant counseled or encouraged) took place several days before the incident. Additionally, codefendant Dearaujo and Christopher Lyons proceeded to the parking lot of the family fitness center and committed the crime on their own.[20] Appellant provided no planning, direction or control of their activities. As noted previously, this is exactly what the prosecutor

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[20] Indeed, the trial judge found that as a matter of law the evidence was insufficient to show that appellant commanded or ordered the carjacking. (38 RT 4658-4660.)

told Dearaujo's jury. (9 Supp. R.T. at p. 7094.) At most, appellant provided a weapon that was subsequently used to commit the homicide. (18 CT 5034-5035.)

Because appellant's involvement in the Los homicide was so minimal, the case here is easily distinguishable from the leading cases where the homicide was found to be a natural and probable consequence of the defendant's actions. For example in *People v. Hammond* (1986) 181 Cal.App. 3d 463, the defendant was considered an aider and abetter to a homicide based on the natural and probable consequences doctrine where four factors were present. At the time the offense took place, the defendant was present across the street from the crime scene. He watched while the robbery of a jewelry store took place and the owner was shot. He then drove the getaway car and later possessed some of the stolen property. (*Id.*, at pp. 466-467.)

Here by contrast, none of those factors are in play. Mr. Williams was not present when the offense took place. Thus he certainly did not see the offense take place. Moreover, because he was not present and did not even know that an offense would take place, he was not in a position to prevent the offense or render assistance to Ms. Los before she died. Indeed, Mr. Williams did even know that Ms. Los had been shot until well after the incident took place.

In *People v, Prettyman, supra,* 14 Cal.4th 248, 273, this court determined that defendant Bray was an aider and abetter based on the natural and probable consequences doctrine under the following circumstances: Bray and Prettyman were homeless persons sleeping in a church courtyard along with "Vance" Van Camp. Bray repeatedly said to Prettyman: "We are going to get that fucker Vance. He has no idea who he is messing with. He ain't getting away with this shit." Prettyman nodded his head and said, "Yep. Okay." (*Id.*, at p. 256.) Shortly thereafter,

Prettyman bludgeoned Van Camp to death. (*Id.*, at p. 256.)

Mr. Williams' case does not parallel the circumstances in *Prettyman.* Here, appellant was not present in the area where the homicide occurred. Moreover, appellant's purported exhortation to "cap em" was not directed at a specific person. It was a hypothetical response to a hypothetical question presented days before the homicide. (2 C.T. 374-388.) More importantly, the only eyewitness to the shooting, Christopher Lyons did NOT testify that Ms. Los was shot because of appellant's purported exhortation. He testified that she was shot because Dearaujo panicked. (19 R.T. 2639, 2643; 21 R.T. 2909, see also 2840.) Thus the shooting was an independent act and not the result of anything the defendant did or failed to do.

In *People v. Solis* (1993) 20 Cal.App.4th 264 (disapproved on a different point in *People v. Prettyman, supra* 14 Cal. 4th 258), the defendant was found to be an aider and abetter under the following circumstances: the defendant and his confederates had an ongoing dispute with a rival group of young people. One night after a series of confrontations between the groups, the defendant picked up another confederate whom the defendant knew to be armed. The defendant drove his armed confederate to a park where the rival group congregated. As they approached the rival group, the defendant complied with his confederate's direction to turn out the car headlights. As the defendant drove closer, the armed confederate shot and killed one of the members of the rival group. Immediately after the shooting, the defendant drove the shooter to a place of safety.

In this case, however, although Mr. Williams knew that Dearaujo was armed, Mr. Williams was not present when the incident took place: he did not transport Dearaujo and Lyons to the shopping center: he did not direct them to shoot at anyone and did not facilitate their escape from the scene. Additionally, the evidence

was insufficient to show that Mr. Williams commanded or ordered a carjacking. (38 RT 4658-4660.) Moreover, the prosecutor told the Dearaujo jury that the carjacking was Dearaujo's idea and that no one gave him step by step instructions on how to do it. (9 Supp. R.T. at p. 7094.)

Comparing the circumstances of Mr. Williams' case to those set forth above (and in appellant's opening brief), the natural and probable consequences doctrine simply did not apply. Under any objective test, the homicide here was too attenuated and too remote from anything that appellant did or failed to do to qualify as a natural or probable consequence of his actions. Thus, the trial court erred in giving the instructions and the prosecution erred in seeking a first degree murder conviction.

Sua sponte duty to define terms with a technical meaning.

Even if an instruction on the natural and probable consequences doctrine was appropriate on the facts of this case, the failure to instruct the jury that the test was an objective one compels reversal. This is so because the type of test to be applied has a technical meaning within the instruction.

It has long been the law that a trial court has a *sua sponte* duty to define terms which have a "technical meaning peculiar to the law." (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403; see also *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52; *People v. Hill* (1983) 141 Cal.App.3d 661, 668.) More important, the failure to define a technical term which is an essential element of the charge may be reviewed as reversible federal constitutional error because it precludes the jury from determining every material issue presented by the evidence. (See *People v. Reynolds* (1988) 205 Cal.App.3d 776; see also *People v. Black* (1994) 23 Cal.App.4th 667, 670-72.)

In that regard, "The rules governing a trial court's obligation to give jury instructions without request by either party are well established. 'Even in the absence of a request, a trial court must instruct on general principles of law that are ... necessary to the jury's understanding of the case.' [Citations.] That obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' [citation], or has a technical meaning peculiar to the law or an area of law [citation]." (*People v. Roberge* (2003) 29 Cal.4th 979, 988; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1012.)

While it is certainly true that commonly understood terms need not be defined for the jury, if the jury expresses a lack of such "common understanding", the court's underlying obligation is to assure that the jury understands its duties. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1025, Mosk, concurring.) Nevertheless, the jury note here shows beyond cavil that there was no sense of "common understanding" among jury members concerning the extent of appellant's criminal culpability.

Moreover, even when a trial court has no *sua sponte* duty to instruct initially, if instructions are given, the court has a duty to instruct correctly. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1337; see also *People v. Castillo* (1997) 16 Cal.4th 1009 , 1015 [even when a trial court instructs on a matter on which it has no sua sponte duty to instruct, it must do so correctly].)

As appellant explained in his opening brief, since the 1996 decision in *People v. Prettyman, supra,* 14 Cal.4th 248, the form version of CALJIC 3.02 has been modified specifically to include an objective test.[21] In *Prettyman* this court noted

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[21] The instruction now includes the following language:

that informing the jury of the target crime was a legal requirement for conviction under the natural and probable consequences doctrine. Thus, even though the then existing CALJIC 3.02 instruction did not contain such a requirement, this court imposed a *sua sponte* duty on trial courts to modify the instruction to include all the legal requirements. (*Id.*, at pp. 265-266.) Similar to *Prettyman*, therefore, since a legal requirement for applying the natural and probable consequences doctrine to an aiding and abetting case is the objective test (*People v. Woods, supra*, 8 Cal.App.4th at p. 1587; *People v. Nguyen, supra,* 21 Cal.App.4th at p. 531), the trial court here had a *sua sponte* duty to modify CALJIC 2.03 to include the objective test.

Respondent counters that in *People v. Cox, supra,* 53 Cal.3d 618, 699 this court specifically stated that any modification of CALJIC 3.00 to include the "natural and probable consequences" doctrine had to be requested. There was no *sua sponte* duty on the trial court to modify the instruction to include it. (Respondent's brief at pp. 196-197.)

The most obvious problem with applying the *Cox* language to this case is that *Cox* dealt with CALJIC 3.00, **not** CALJIC 3.02, the instruction at issue in this case.

> "In determining whether a consequence is natural and probable, you must apply an objective test based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. **A natural consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened.'Probable' means likely to happen.**" [Emphasis added.]

Additionally, however, *Cox* predates *Prettyman* by five years and as noted above, *Prettyman* mandated that the natural and probable consequences language in CALJIC 3.02 had to be augmented *sua sponte* to include an explanation of the target crime aided and abetted. Thus, the matter at issue in *Cox* has not only been effectively overruled by *Prettyman*, it has been extended by *Prettyman*. Most important, however, *Cox* **does not say anything at all** about whether an objective or subjective test is to be applied. Thus *Cox* is entirely inapposite to the issue here.

For these reasons, and those set forth in appellant's opening brief, the trial court's failure to specifically tell the jury to apply an objective test to the natural and probable consequences doctrine compels reversal.

VIII.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURORS TO DETERMINE WHETHER THERE WAS A SINGLE OR MULTIPLE CONSPIRACIES VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY IMPROPERLY LOWERING THE PROSECUTION'S BURDEN OF PROOF ON A MATERIAL ISSUE OF FACT

SUMMARY OF APPELLANT'S ARGUMENT

The prosecutor's alternative theory of vicarious liability was conspiracy. After a jury note asking whether there was one conspiracy or perhaps multiple conspiracies, the trial court simply responded that the jury had to decide whether there was a conspiracy. The question of whether there are multiple conspiracies, however, is a critical factual issue for the jury that requires specific instructions that were not given here.

In the federal courts and in the California courts until 1989, the question of whether there was a single or multiple conspiracies was deemed to be a jury question. This is so because the essence of the crime of conspiracy is the nature of the agreement. The question for the jury to decide is what did the conspirators agree to do? Was there one agreement encompassing multiple acts, or multiple agreements encompassing separate acts? A trial judge who made that determination would invade the province of the jury.

With the decision in *People v. Davis* (1989) 211 Cal.App.3d 317, however, the Court of Appeal for the First Appellate District determined that the question was one of law and therefore no instructions were required. Relying on the holding of

People v. Ramos (1982) 30 Cal.3d 553, 589, [rev'd. on another ground in *California v. Ramos* (1983) 463 U.S. 992 [77 L.Ed.2d 1171, 103 S.Ct. 3446], the *Davis* court ruled that if there were multiple victims, there were multiple crimes (in that case, multiple solicitations). Therefore, since reasonable people would not normally disagree on the number of victims, the jury need not be instructed to determine whether there was a single or multiple crimes.

Other state appellate courts have simply applied the *Davis* holding to conspiracy cases with no further analysis. The *Davis* holding, however, will not withstand analysis. *Ramos* was concerned with the statutory construction to be applied to robbery offenses. It did not even purport to examine conspiracy cases. Moreover, even in later conspiracy cases which have rejected the "number of victims" test, the state appellate courts have refused to address issues of Constitutional double jeopardy, Due Process right to a fair trial and Sixth Amendment right to a jury trial involved in whether the judge or the jury is required to make the final determination on the nature of the agreement. Nonetheless, because factual determinations are the province of the jury, there is a *sua sponte* duty to properly instruct the fact finder to determine whether the evidence shows one, or more than one conspiracy. The failure to so instruct improperly lowered the prosecution's burden of proof by removing a material factual issue from the jury's consideration. Therefore, the error is reversible per se. Moreover, even if not reversible per se, the error undermined the reliability of the guilt and penalty phase verdicts in violation of the Eighth and Fourteenth Amendments so reversal is required.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that since conspiracy was not charged as a separate crime

but was only as a theory of conviction, it does not matter whether there was but a single or multiple conspiracies. (Respondent's brief at p. 197-201.) Further, trial defense counsel never asked for a specific instruction on the point and the pattern instructions given to the jury, CALJIC 6.10.5 and CALJIC 6.16 are correct statements of the law concerning conspiracy. (Respondent's brief at pp. 201-203.) Additionally, the Los shooting was not outside the conspiracy because the evidence showed that the conspiracy was very broadly based. (Respondent's brief at pp. 203-204.) Finally, appellant was not prejudiced because the jury note expressing concern over the number of conspiracies was dated before juror #10 was replaced and the jury began deliberations anew. Thus, there is no showing that the jury that actually adjudicated appellant's guilt was at all concerned about the reach of the conspiracy theory in this case. (Respondent's brief at pp. 204-205.)

ERRORS IN RESPONDENT'S ARGUMENTS

Inappropriate Response to Jury Note Inquiring about Single vs. Multiple Conspiracies

The primary flaw in respondent's argument is that it does not cite even a single case that stands for the proposition that when conspiracy is used as a theory of conviction instead of a charged crime, the number of conspiracies makes no difference. Indeed, such an assertion makes no logical sense.

The very essence of any conspiracy is that there must be an agreement. That is, what was it that the conspirators agreed to do? (*Braverman v. United States* (1942) 317 U.S. 49, 53 [87 L. Ed. 23, 63 S. Ct. 99].) The juror note essentially asked the trial court to clarify the nature of the agreement. That is, was there one agreement encompassing multiple acts, or multiple agreements encompassing

separate acts?[22] The fact that conspiracy was used as a theory of conviction rather than a charged crime does not alter this most basic issue. More important, it was this most basic issue concerning the nature of the agreement that the trial court failed to properly resolve for the jury. If there was a single conspiracy, as the trial court's instruction implies (if not directs), the nature of the conspiracy would have to be very broad. If the jury had been permitted to determine for itself whether there was but one conspiracy or a number of conspiracies, the jury may well have decided the individual conspiracies were narrow in scope - a result likely in appellant's favor.

The jury note makes plain that the jury simply did not understand the law of conspiracy as explained in the instructions given by the trial judge. Indeed, if the jury understood that there was only one conspiracy, there was certainly no need to ask if each offense constituted a new conspiracy.

Despite the inquiry about multiple conspiracies, the trial court's written response told the jury that if it found a conspiracy, there was only one. ("You are to determine from the evidence whether **a** conspiracy was formed." (Emphasis added).) (19 C.T. 5166.)[23] As the defense counsel correctly noted, however, the

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[22] The jury note read: "When you deal with conspiracies, is every individual crime the start of a new conspiracy or does the conspiracy start at the first crime and every crime after that is just a continuance of the original conspiracy? Dated March 31, 1998." (19 C.T. 5165.)

[23] The judge instructed the jury:

> "You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and if so, whether the crime alleged in **Counts I through XI** was perpetrated by a co-conspirator in furtherance of that conspiracy and was a natural and probable

existence of one or more conspiracies is a fact question for the jury, not a legal question for the trial judge. (45 R.T. 5343.)

The trial court's response deprived the jury of the opportunity to determine whether there were different agreements for different counts, or whether there were no conspiratorial agreements at all on some counts where the defendant was not even present. The jury should have been instructed to agree unanimously whether there was a single or multiple conspiracies. (*See United States v. Echeverry* (9th Cir.1983) 698 F.2d 375, *modified,* 719 F.2d 974, 975.) Thus, the trial court failed in its primary responsibility to properly resolve the jurors' confusion concerning their fact finding role in a major issue in the case, the extent of appellant's vicarious liability. The failure to properly instruct the jury on its fact finding responsibilities on such a crucial issue is reversible per se because, "in the absence of such instructions, a court cannot 'presume in support of the judgment the existence of every fact the trier could reasonably have deduced from the evidence.' [citation]" (*People v. Morocco* (1987) 191 Cal.App.3d 1449 at p. 1353, fn 4.)

No Waiver

Respondent urges that the issue is essentially waived for appeal because trial defense counsel did not specifically ask for an instruction that told the jury to determine whether a single or multiple conspiracies existed and further, the pattern instructions to which defense counsel acquiesced are accurate statements of the law. (Respondent's brief at pp. 201-203.)

The facts do not support respondent's argument. During the discussions on the jury note, trial defense counsel reminded the court that he initially objected to

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consequence of the agreed upon criminal objective of that conspiracy." (43 R.T.5137 (Emphasis added).)

any conspiracy instructions. (45 R.T. 5343.) He also objected to the court's proposed language that essentially reiterated the CALJIC pattern instructions because the language of the pattern instructions was too broad and did not tell the jury when the conspiracy began and ended. (*Ibid.*) Further, the number of conspiracies was a fact question for the jury. (*Ibid.*)

After additional discussion and assurances by the trial court that the defense objections were **not** waived, trial defense counsel acquiesced in the answer given by the judge because it merely highlighted the pattern CALJIC instructions. (45 R.T. 5344.) Certainly, making the best of a bad situation that trial defense counsel did not create does not amount to a waiver. (Cf. *People v. Coleman* (1988) 46 Cal.3d 749, 781, fn 26; *People v. Calio* (1986) 42 Cal.3d 639, 643.)

Moreover, even if the facts were as respondent urges, respondent misperceives the problem. The responsibility for properly instructing the jury rests with the trial judge, not counsel. As appellant explained in previous issues, "The responsibility for adequate instruction becomes particularly acute when the jury asks for specific guidance." (*Trejo v. Maciel, supra,* 239 Cal.App.2d at p. 498 ; see also *McDowell v. Calderon*, *supra*, 130 F3d 833; accord, *Bartosh v. Banning, supra,* 251 Cal.App.2d at p. 387.)

Further, "[w]here ... the need for more [instruction] appears, it is the duty of the judge ... to provide the jury with light and guidance in the performance of its task." (*Wright v. United States*, *supra,* 250 F2d at p. 11.) "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States*, *supra,* 326 US at pp. 612-613 [90 L.Ed 350]; accord, *Powell v. United States*, *supra,* 347 F2d at pp. 157-58; *United States v. Harris*, *supra*, 388 F.2d at p. 377.)

The reason for the requirement of clarity is simple: "To perform their job properly and fairly, jurors must understand the legal principle they are charged with applying ... A jury's request for ... clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration." (*People v. Thompkins*, *supra*, 195 Cal.App.3d at p. 250.) Additionally, Penal Code section 1138 "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (*People v. Beardslee, supra,* 53 Cal.3d at pp. 96-97.)

It is certainly true that the precise nature of any amplification, clarification or rereading of instructions is a matter of judicial discretion. (*United States v. Bolden, supra,* 514 F.2d at p. 1308; see also *People v. Beardslee, supra,* 53 Cal.3d at p. 97.) Nevertheless, "there are necessarily limits on that discretion." (*United States v. Bolden, supra.* 514 F.2d at p. 1308.)

The jury note here specifically told the court that the jury was confused over the nature and extent of any conspiracy. Instead of clarifying the jury's understanding of the consequences of its decision, however, the court essentially paraphrased the instructions previously given. Any reinstruction or amplification, however, should be fully sufficient to eliminate the confusion. (See, *United States v. Bolden, supra,* 514 F2d at 1308-1309.) It was certainly of no help to the jurors to be given an instruction that essentially reiterated instructions which their note clearly told the court they did not understand. (*United States v. Gordon, supra*, 844 F.2d 1397, 1401-1402 [error to rely on original instruction where jury note expressed confusion regarding conspiracy counts]; *United States v. Walker, supra*, 575 F.2d at p. 213 [trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion].)

More important, when evaluating a claim of instructional error, the reviewing court must assume the jury could have believed the evidence of the party claiming error. (See, e.g., *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-674.) Moreover, the failure to properly instruct on a material factual issue is reversible unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*People v. Harris* (1994) 9 Cal.4th 407, 424.) As noted above, a defendant has a constitutional right to have the jury determine every material issue presented by the evidence. Therefore, the error cannot be cured by an appellate court weighing the evidence and determining that it was more probable than not that a correctly instructed jury would still have found the defendant guilty. Reversal is thus compelled.

Nature of the Conspiracy

The real crux of respondent's argument, however, is that the conspiracy is so broadly based, that any act performed by any of the conspirators during the commission of any of the charged offenses was within the ambit of a single conspiracy. In support of its argument, respondent cites the testimony of various prosecution witnesses who claimed various objectives for the group, including such things as "having fun", "seeking adventure" and "terrorizing the neighborhood." (Respondent's brief at pp. 203-204.) In respondent's view, this evidence showed that the object of the conspiracy was " 'having fun',' seeking adventure' and 'terrorizing the neighborhood' by committing violent crimes." (Respondent's brief at p. 204.)

The jury note, however, highlights the real problem with respondent's argument: there was no overall agreement among the so-called co-conspirators that encompassed all of the charged offenses. For example, conspicuously omitted from

respondent's argument is any discussion of the robbery of the Circle K. As appellant explained in the opening brief, the jury asked whether any single conspiracy began with the "first" charged offense. The first charged offense, however, was the robbery of the Circle K convenience store. That robbery could NOT be part of a single conspiracy since it occurred the night BEFORE the purported organizational meeting at Natalie Dannov's home.[24] The law is clear that a defendant cannot be held liable vicariously for acts committed by others before the conspiracy even began. (See, e.g., *People v. Marks* (1988) 45 Cal.3d 1335, 1345; *People v. Weiss* (1958) 50 Cal.2d 535, 566; *People v. Brown* (1991) 226 Cal.App.3d 1361, 1372.) Moreover, CALJIC 6.19 [Joining a Conspiracy After its Formation] was NOT given, in this case, so the jury had no guidance whatsoever on the applicability of any conspiracy theory to the Circle K robbery.

A trial court has a *sua sponte* duty to instruct on the general principles relevant to the issues raised by the evidence. (*People* v. *Wilson* (1967) 66 Cal.2d 749, 759.) Therefore, even though the jury note made plain the jury's confusion about the applicability to conspiracy to the counts alleged, since the trial court never instructed the jury that a conviction for the Circle K robbery could not be based on a conspiracy theory, appellant's conviction for this count certainly must be reversed. (See *People v. Marks, supra,* 45 Cal.3d at p. 1345.)[25]

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[24] The robbery of the Circle K occurred in the early morning hours of May , 14, 1993. (27 R.T. 3729-3731, 3737.) The meeting at Dannov's did not take place until the following evening around 8 pm. (22 R.T. 3033.)

[25] It might be argued that the conviction for this offense could be upheld on an the alternate aider and abetter theory. Even if the aider and abetter theory was appropriate under the facts of this case (which it is not), if the reviewing court cannot determine whether the jury used a correct or an incorrect theory, the conviction must be reversed. *(People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

Additionally, if, as the prosecutor argued the object of the conspiracy was to earn "G" stripes and obtain money, it is hard to see how the death of Ms. Los fit into this overarching conspiracy. When Ms. Los was shot, Lyons and Dearaujo were simply trying to obtain a vehicle to serve as transportation to a party. Party transportation was obviously not an attempt to earn "G" stripes or get money. Indeed, appellant told the police that everyone who committed a crime to get "G" stripes had to have a witness. (People's Exh. 68, at p. 52.) There were no independent witnesses from the Pimp Style Hustlers assigned to the Los incident to verify any claims that Lyons and Dearaujo might make concerning their activities. Additionally, there was certainly no evidence of any plan to rob Ms. Los of her valuables to make money or to take and strip her vehicle for parts that could be converted to cash and put in an account to benefit the group members.

Moreover, the fact that appellant provided the weapon and suspected that Dearaujo and Lyons were "gonna do dirt" does not necessarily bring appellant within the ambit of any conspiracy. (See, e.g., *Piaskowski v.Bett* (7th Cir. 2001) 256 F.3d 687, 693-694 [petitioner's presence at the scene of the crime and his reference to "shit going down" was constitutionally insufficient to sustain a murder conviction based on a conspiracy theory].) Thus, if there was only one conspiracy, certainly the Los homicide and the Circle K robbery fell outside the ambit of that conspiracy. Nothing in the judge's instruction required the jury to make that determination. In fact the opposite is true. The judge specifically instructed the jury that if it found a

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Nothing in the jury findings indicate which theory the jury used to arrive at its decision. Moreover, here, since the jury note specifically mentioned the "first" crime in connection with its conspiracy inquiry, it is more likely than not that the jury used the invalid conspiracy theory rather than an aider and abetter theory as the reason for the guilty finding on the Circle K robbery count.

conspiracy, the conspiracy would apply to ALL the offenses charged. (43 R.T. 5137.)

Finally, even if there was but one conspiracy, the failure to properly instruct the jury to determine if all the charged offenses fit within it impermissibly lightened the prosecution's burden of proof and undermined appellant's right to due process and a trial by jury as well as reliable capital guilt and sentencing determinations, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

PREJUDICE

Respondent urges that since the jury note inquiring about the number of conspiracies was dated before the substitution of juror #10, there is no showing that the jury that actually decided appellant's guilt harbored the same concerns. (Respondent's brief at pp. 204-205.)

As with the previous issue, however, respondent's prejudice argument borders on the specious. The trial court's error affected eleven of the jurors who eventually sat on the reconstituted jury. That is, even if the new jurors on the reconstituted jury did not have any concerns about the number of conspiracies and their various objects, the other eleven jurors previously did have such a concern. Moreover, that concern was sufficiently pressing that they expressed it to the trial judge in their note. The trial judge improperly resolved that concern. If the substituted jurors raised concerns about the number of conspiracies, the remaining jurors would have pointed to the trial judge's prior improper response to put their concerns to rest.

Nowhere does respondent explain how the trial court's erroneous instruction that affirmatively misled eleven of twelve jurors did not affect the final verdict in this case. Indeed, it is only necessary for one juror to have voted differently in order

to obtain a more favorable verdict . (See *People v. Flood, supra,* 18 Cal.4th 470 [question is whether any "rational juror, properly instructed, could have found [in favor of the defendant.]"]; see also *Duest v. Singletary* (11th Cir. 1993) 997 F.2d 1336, 1339.)

Even if that were not so, respondent fails to address the reconstituted jury's note **specifically asking** how to deal with concerns voiced by the new jurors similar to those that affected the other nine jurors during prior deliberations. That is, the foreman of the reconstituted jury sent the judge a note asking if the original jurors could simply "fill... in" new jurors on answers to questions that had been previously asked of and answered by the court. (18 C.T. 5065.) The trial court responded that such a procedure was permissible assuming that the reconstituted jury's concerns were the same. (19 C.T. 5163.)[26]

Thus, respondent's assertion that there is no indication that the reconstituted jury had any concerns similar to the ones expressed by the prior jury is contradicted by the record. A fair reading of the juror note shows that the reconstituted jury had precisely the same concerns as the prior jury and that concern was resolved in

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[26] The jury note reads:

[Jury question] "When deliberating anew, can we use our same questions and answers during the new deliberations or do we resubmitt (sic) some questions if we want to fill the new jurors in on certain questions that came up before along with their answers."

[signed] March 30, 1998 Juror #3 [foreman]

[Judge's response] "You may not have the same questions as before, but to the extent that you do, you may use the same answers" (19 C.T. 5163.)

exactly the same erroneous way.

For these reasons and those set forth in appellant's opening brief, appellant's convictions and his death sentence must beset aside.

IX.

THE TRIAL COURT ERRED IN FAILING TO REQUIRE THAT THE JURY AGREE UNANIMOUSLY THAT THERE WAS ONE OR MORE CONSPIRACIES AND THAT THE DEFENDANT WAS PART OF EACH SUCH CONSPIRACY

SUMMARY OF APPELLANT'S ARGUMENT

Aside from, but related to the previous issue, there was a more pernicious problem with the conspiracy instructions in this case. Nowhere in the instructions was the jury required to agree unanimously on the nature of the conspiracy (or conspiracies) nor were jurors required to agree unanimously that appellant was a member of any such conspiracy (or conspiracies).

Even though conspiracy was merely a theory of conviction rather than a charged offense in this case, the requirement for unanimity is not thereby suspended. Moreover, since the jury was instructed that the conspiracy theory applied to all of the offenses in this case, the error in failing to ensure unanimity requires reversal of all of appellant's convictions. (Appellant's opening brief at pp. 276-288.)

SUMMARY OF RESPONDENT'S ARGUMENTS

Respondent urges that there is no *sua sponte* duty to instruct that the jury must agree unanimously on the conspiracy and that it must be found beyond a reasonable doubt. Unanimity is only required on the actual crime committed, not the theory under which the crime was committed. (Respondent's brief at pp. 206-208.)

ERRORS IN RESPONDENT'S ARGUMENT

Respondent's argument simply misses the point. While it is certainly true that the jurors need not agree unanimously on which **theory** of guilt they employ to reach a conviction for the target offense (*Schad v. Arizona* (1991) 501 U.S. 624, 630-646), nevertheless, if conspiracy is used as a theory of conviction, jurors must agree at least on what the actual conspiratorial agreement was. (*Cf. Braverman v. United States*, *supra*, 317 U.S. 49, 53 [87 L. Ed. 23, 63 S. Ct. 99].) Nothing in the conspiracy instructions given here tells them that. The danger is that some jurors might think appellant was involved in one conspiracy, others might think he was involved in a different one and some might think he was not involved in any conspiracy at all. (*Cf. People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Indeed, this was exactly the problem expressed by the jurors in one of their prior notes to the judge. That is, if appellant was involved in a conspiracy to rob the Classy B liquor store, but independently Lyons and Dearaujo decided to rob the LA Times office instead, what was appellant's criminal liability?[27]

Significantly, at trial the prosecutor argued that the purpose of the conspiracy was to get "G" stripes and money. (43 R.T. 5189-5190.) On appeal, however, respondent urges that the purpose of the conspiracy was " 'having fun',' seeking adventure' and 'terrorizing the neighborhood' by committing violent crimes." (Respondent's brief at p. 204.) If the People cannot agree on the nature of the conspiracy, it is hard to imagine that the jury could. In fact, the jury note asking about vicarious liability for the robbery of the LA Times office plainly demonstrates

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[27] The note read: "If A-B-C were involved in planning and talking about a robbery in one place - and B & C started out to do the crime. They did not do the planned crime but did another crime in the same area. What would A's status be under the law? Dated March 24, 1998." (19 C.T. 5146.)

that the jury was confused about the nature of any actual conspiracy agreement.

More important, as explained in the prior issue, since the robbery of the Circle K and the Los homicide were outside the purview of any conspiracy theory, the failure of the trial court to require unanimity on the agreement that constituted the conspiracy theory compels reversal. As this court observed in an analogous context: "a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified 'nefarious' conduct." *(People v. Prettyman, supra,* 14 Cal.4th at pp. 267-268.) Without a unanimity instruction, the jury was simply left to speculate about whatever unspecified nefarious conduct might constitute the illegal conspiratorial agreement in this case. Thus the lack of a unanimity instruction is fatal to any conviction based on conspiracy theory.

Finally, as appellant also explained in the previous issue, although it might be argued that the conviction for these offenses could be upheld on the alternate aider and abetter theory, even if the aider and abetter theory was appropriate under the facts of this case (which it is not), if the reviewing court cannot determine whether the jury used a correct or an incorrect theory, the conviction must be reversed. *(People v. Guiton, supra,* 4 Cal.4th at p. 1130.) Nothing in the jury findings indicate which theory the jury used to arrive at its decision. Moreover, here, since the jury note specifically mentioned the "first" crime in connection with its conspiracy inquiry, it is more likely than not that the jury used the invalid conspiracy theory rather than an aider and abetter theory as the reason for the guilty findings.

For these reasons and the reasons set forth in appellant's opening brief, appellant's convictions must be reversed and his sentence to death set aside.

X.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

SUMMARY OF APPELLANT'S ARGUMENT

The consciousness of guilt instructions given at appellant's trial were constitutionally infirm for two reasons. First, they created permissive inferences that were overbroad. That is, they allowed the inference of a guilty mental state from conduct unrelated to the mental state; they permitted an inference of guilt of many offenses from a single untoward act or statement, and the jury could draw adverse inferences about a defendant's guilt based solely on untoward conduct or statements by the codefendant.

Second, the instructions are impermissibly argumentative. They highlight particular evidence for the specific purpose of inferring consciousness of guilt. Effectively, they focused the attention of the jury on evidence favorable to the prosecution, thus lightening the prosecution's burden of proof. Compounding the problem, they placed the trial judge's imprimatur on the prosecution's evidence. Given the jury's difficulties in resolving the whole question of appellant's vicarious liability, the instructions given here were highly prejudicial.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent first urges that consciousness of guilt instructions have been repeatedly upheld by this court because they benefit the defense by cautioning the jury to carefully weigh evidence which might otherwise appear incriminating. Citing numerous cases, the prosecution argues that because of this favorable benefit,

the consciousness of guilt instructions do not favor the prosecution's theory of the case nor do they lessen its burden of proof. (Respondent's brief at p. 210-211.)

Respondent also urges that CALJIC 2.03 was appropriate under the circumstances of this case because appellant attempted to mislead detectives in the statement he gave them. That is, he tried to minimize his role in the offenses. Further, even if his equivocations concerned collateral matters, the instruction is proper because the instruction is not limited to specific charges but merely tells the jury how to evaluate particular evidence should the jury find that such evidence exists. (Respondent's brief at p. 212.)

Regarding CALJIC 2.06, respondent asserts that the instruction was appropriate because the prosecution does not have to prove conclusively that appellant attempted to suppress the weapon, it is sufficient that the jury could make that inference. (Respondent's brief at pp. 212-213.)

Finally, respondent urges that any error is harmless. The jury was free to disregard the instructions if no evidence supported them and the evidence against appellant was overwhelming. (Respondent's brief at p. 213.)

ERRORS IN RESPONDENT'S ARGUMENTS

Consciousness of guilt instructions are not beneficial to the defense.

Respondent's first argument that the instructions are beneficial to the defense is not well taken. The first part of CALJIC 2.03 reads "If you find that before this trial a defendant made a willfully false, or deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove the consciousness of guilt." (43 R.T. 5124.) The first part of CALJIC 2.06 reads: " If you find that a defendant attempted to suppress evidence against himself in any manner, such as by

destroying the evidence, or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt." (43 R.T. 5124.)

Unlike CALJIC Nos. 1.00 and 2.90 which tell the jury to consider all of the evidence, this language specifically highlights evidence that is favorable to the prosecution and unfavorable to the defense. As such, they appear to be argumentative. As appellant pointed out in his opening brief, argumentative instructions tend to unfairly single out facts favorable to one party while also suggesting to the jury that special consideration should be given to those facts. (*Estate of Martin* (1950) 170 Cal. 657, 672.) CALJIC 2.03 and 2.06 clearly highlight evidence favorable to the prosecution and suggest that it be treated with special consideration.

That said, the last part of CALJIC 2.03 reads; " However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination." (43 R.T. 5124.) The last part of CALJIC 2.06 reads: "However, such conduct is not sufficient by itself to prove that a killing was deliberated and premeditated, and its weight and significance, if any, are matters for your consideration." (43 R.T. 5124.) In *People* v. *Kelly* (1992) 1 Cal.4th 495, 532, this court explained that consciousness of guilt instructions are permissible because:

> "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence."

Nevertheless, because CALJIC Nos. 1.00 and 2.90 already tell the jury that it must consider and weigh all the evidence, it does not appear that the latter part of either instruction (CALJIC 2.03 or 2.06) tells the jury anything about this type of evidence that the jury is not already required to consider.

Moreover, if this language confers a benefit on the defense as this court

suggests in *Kelly*, then the defense ought to be able to waive that benefit and preclude the instruction from being given at all. (Cf. *Cowan v. Superior* Court (1996) 14 Cal.4th 367, 371 ["Permitting waiver.... is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights. [Citation]"].) Obviously, however, that is not the case with these two instructions.

Significantly, other than simply noting that this court has approved of these consciousness of guilt instructions, nothing in respondent's argument addresses these matters.

CALJIC 2.03 is inapplicable to the facts of this case.

The record shows that the prosecution requested CALJIC 2.03 because at the beginning of his interview the defendant denied any involvement in the offenses. (37 RT 4585.) As appellant explained in his opening brief, however, he was entirely truthful in his statement to the police about the persons who committed the shooting and he told the police their names. Moreover, although the authorities accused him of being at the scene, he explained that he was not there but waiting for a ride to go to a party. (Prosecution Exhibit 68, p. 7.) With the possible exception of two minor collateral matters, - appellant noted Dearaujo and Lyons might or might not have been involved in other carjacking incidents (Prosecution Exhibit 68, p. 7), and a claim he did not know where the gun was after the Los homicide (Prosecution Exhibit 68, p. 12) - appellant truthfully answered the questions put to him.

On appeal respondent does not take issue with the truthfulness of appellant's statements to the authorities, nor does it dispute that any untruths were likely related to collateral matters. Instead, respondent claims that appellant attempted to

minimize his responsibility. That alone was a sufficient basis for the instruction. (Respondent's brief at p. 211-212.)

Omitted from respondent's argument, however, is any acknowledgment that "minimization of involvement" was not the basis for giving the instruction. The basis for the instruction was that the defendant purportedly made a false statement. As appellant explained above and in his opening brief, that basis is not supported by the record.

Additionally, even if the instruction properly could be given on a basis not urged by the prosecution, respondent has not identified any particular misleading statement or statements that minimize appellant's involvement. Instead, respondent simply points to the entirety of appellant's statements to the police and characterizes them generally as inconsistent and misleading. (Respondent's brief at p. 211.) This generalized reference is hardly fair to the defendant to refute or this court to address. Moreover,

> "The reviewing court is not required to make an independent, unassisted study of the record in search of . . . grounds to support the judgment. It is entitled to the assistance of counsel. The appellate court may reject an issue, even if it is raised, if a party failed to support it with adequate argument." (*People v. Hardy* (1992) 2 Cal.4th 86, 150.)

Respondent's final argument on this instruction is the assertion that the instruction does not assume the existence of any evidence relating to a charge, but merely instructs the jury on how to evaluate such evidence if it finds it. (Respondent's brief at p. 212.) The problem with such a claim is that an instruction should not be given if there is insufficient evidence to support it. The jury could not make a rational inference of consciousness of guilt to the charged homicide if appellant's statement about the homicide was basically truthful.

Moreover, as appellant also explained in his opening brief, if the alleged false or misleading statements did not relate to the charged crimes or provide any basis for inferring the requisite *mens rea*, the instruction was inappropriate. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 435-436 [The defendant's false statement about where he got a stolen credit card was irrelevant to the charged crime of using a stolen card. Indeed, the defendant never denied knowing that the card was stolen].) Here, the only possible inconsistencies between the facts set forth at trial and what appellant told police, were inconsistencies related to appellant's knowledge of the disposal of the weapon and his knowledge of any other crimes Lyons and Dearaujo may have involved with. Neither of these inconsistencies was relevant to proving appellant's *mens rea* as it related to his vicarious liability for the Los homicide.

CALJIC 2.06 was improper under the facts of this case.

The prosecutor told the court that her request for CALJIC 2.06 was based on the fact that the murder weapon was ultimately given to Anthony Post and disassembled in an attempt to hide it. (37 R.T. 4596.) The evidence, however, shows that Lyons gave Post the gun and some shell casings. He told Post to hold onto them because appellant would come by later to pick them up. Before the police came by to pick up the gun, however, Post disassembled it, cleaned his fingerprints off of it and hid it. (25 RT 3455-3457.) Post also testified that early on the day the police arrested everyone involved, he offered to give the gun to appellant. (25 R.T. 3456.) Appellant told him to hang onto it, he would get it later. (25 R.T. 3456.) Thus, nothing in Tony Post's testimony suggests that appellant ordered (or even knew) that the gun was to be disassembled to keep it from the police.

Accordingly, these "facts" did not provide the basis for a logical and rational

inference that appellant intended to rob Ms. Los. Thus, because the alleged false statements did not relate to the charged crimes or provide any basis for inferring the requisite *mens rea*, the instruction was inappropriate. (*People v. Rankin*, *supra*, 9 Cal.App.4th at pp. 435-436.)

Respondent simply claims that the facts supporting the inference need not be conclusively established before the instruction is given. (Respondent's brief at p. 212.) Even assuming respondent's assertion was true, at least as a general proposition, respondent does not demonstrate how the facts here provide any rational basis for the requisite inference. Absent such a showing, respondent cannot prevail.

PREJUDICE

Respondent asserts that even if the instructions should not have been given, any error was harmless. The instructions simply told the jurors how to weigh the evidence if they found it. Moreover since the jury was instructed under CALJIC 17.31 to disregard any instructions that were inapplicable to the facts, the jury would not apply the consciousness of guilt instructions if no facts supported them. Further, since the evidence of appellant's guilt was overwhelming anyway, any instructional error was harmless under any standard. (Respondent's brief at p. 213.)

On the matter of evidence of guilt, there is no dispute that appellant's culpability, if any, for the Los homicide is solely a vicarious one. Contrary to respondent's claim, the several jury notes expressing concern over the reach of the vicarious liability concepts such as aider and abetter liability and conspiracy liability show that conviction was a very long way from a sure thing. In support of this argument, appellant invites the court's attention to issues V, VIII, IX and XI, where the fallacies of these vicarious liability matters are discussed. Appellant

incorporates those arguments here by reference just as if they were set forth here in full.

As to respondent's argument that the jury was free to disregard these instructions if they were not factually supported, respondent misses the point. As appellant explained above, the facts upon which respondent relies to support these instructions do not permit a rational inference of the requisite *mens rea*. If respondent could draw an impermissible inference from these facts, the jury most certainly could. The danger of course is that in a close case such as this one, the jury would draw an impermissible inference against the defendant thereby unfairly tipping the balance in favor of the prosecution.

For these reasons, and those set forth in appellant's opening brief, the trial court erred in giving the consciousness of guilt instructions in this case and the error prejudiced appellant by tipping the balance in favor of the prosecution.

XI.

THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING AS TO APPELLANT, WHO WAS CONVICTED AS AN AIDER AND ABETTOR OR CO-CONSPIRATOR

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that in order to prove appellant's aider and abettor or coconspirator liability under the felony murder special circumstance here, the evidence must show that he was a major participant in the offense and that he exhibited a reckless indifference to human life. (*Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed. 2d 127, 107 S.C. 1676].) Reckless indifference requires a subjective appreciation that particular conduct creates a grave risk of death. Here, although there was evidence that appellant was involved a series of carjackings, there is no evidence that he had any significant participation in the carjacking that led to Ms. Los' death. In fact, he was not even present and did not know for sure that a carjacking would even take place. Further, because his participation was largely limited to making the weapon available to the perpetrators if they decided to actually commit a crime, he had no subjective awareness that his acts would likely result in death. Thus the crime charged here was not proportional to the defendant's involvement.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent disputes appellant's claim of insufficient evidence. Respondent first notes that the trial court found appellant to be a major participant. The trial

judge concluded that appellant was either the primary or the co-moving force in the group. Moreover, the Los incident was not isolated, but part of a larger pattern of crimes. Thus, the prosecution argued that in some respects appellant was "almost a 20th century equivalent of Fagen (sic) from Oliver Twist...." (36 R.T. 4535.) Further, the admonition to shoot persons who resisted and furnishing a weapon to his "youthful recruits" was the equivalent of reckless indifference to human life. Appellant had to be aware that by furnishing a loaded gun to the people who were going to be doing a carjacking, the risk of resistance carried an extreme likelihood of death. (36 R.T. 4536.) (See Respondent's brief at p. 221.)

Second, respondent argued that carjacking is a serious felony deserving of serious punishment and appellant directed or participated in several carjackings. (Respondent's brief at p. 222-223.) Moreover, more than just providing the pistol used in the Los homicide, appellant instructed Dearaujo and Lyons on what sort of car to take and where to meet him after the carjacking occurred. (Respondent's brief at p. 224.) On this evidence the jury could find that appellant was a major participant and acted with reckless indifference. (Respondent's brief at p. 225.)

ERRORS IN RESPONDENT'S ARGUMENTS

Insufficient Evidence of Reckless Indifference

Although cast as a *Tison* analysis, a close reading of respondent's argument shows that it is nothing more than a "foreseeability" argument. Given the circumstances listed by respondent; i.e. participating in multiple robberies that were inherently dangerous felonies, by providing a weapon and by providing instruction on what sort of vehicle to obtain, it was certainly foreseeable that a death might occur. Foreseeability however, is NOT the same as reckless indifference and these

circumstances do not show a subjective awareness that such actions created a grave risk of death. More significantly, as explained below, the prosecutor made virtually that same argument to the Dearaujo jury that appellant makes now on appeal.

In *Enmund v Florida* (1982) 458 U.S. 782, the Supreme Court recognized that robbery is a serious crime deserving serious punishment, but is not so grievous an affront to humanity that the only adequate response would be the death penalty. Since life for the victim of a robbery is not over and normally is not beyond repair, the court concluded that death is an excessive penalty for the robber who, as such, does not take human life. It would be very different, the Supreme Court noted, if the likelihood of killing in the course of a particular robbery were so substantial that one should share in the blame for the killing if he or she somehow participated in the felony, but the court found no factual basis for such a conclusion in Enmund's case, despite his knowledge that his confederates were armed. *Enmund* thus points to the defendant's appreciation of risk from his subjective standpoint.

More to the point, as the Court explained in *Tison* "the possibility of bloodshed is inherent in the commission of **any** violent felony and this possibility is generally foreseeable and foreseen." ([Emphasis added] *Id.*, 481 U.S. at 151.) Foreseeability, therefore, is simply too low a standard for imposition of the death penalty. (*Ibid.*) The "reckless indifference" standard cannot equal foreseeability because then "every felony murder accomplice [would be] arguably recklessly indifferent." (Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death* (1990) 31 B.C. L. Rev. 1103, 1163-1167.) That is, the amorphous nature of "reckless indifference" would allow courts to impose the death penalty on any felony-murderer simply by fitting the facts of the case into a risk-oriented analysis.

(See Note: *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 Am. Crim. L. Rev. 463, 489-490.)

The "reckless indifference" standard of *Tison v. Arizona* is meant to describe a mental state short of intent to kill, yet beyond foreseeability. Its purpose is to "genuinely narrow the class of persons eligible for the death penalty" *(Zant v. Stephens* (1983) 462 U.S. 862, 877, [103 S.C..2733, 77 L.Ed.2d 235]) so that felony-murder liability alone does not permit execution.

Moreover, because *Tison* specifically rejected foreseeability, it is not sufficient that a defendant should have anticipated violence. As appellant explained in his opening brief, the "subjective awareness" standard of *Tison* requires that a defendant *expected homicidal* violence. Thus, it is NOT sufficient that there be simply a **risk** of violence, there must be a **probability of death** based on facts known to the defendant. (*See, e.g., Abram v. State* (S.C.. Miss. 1992) 606 So. 2d 1015, at 1042.)

Contrary to respondent's argument, the evidence here does not fulfill that requirement. The events that led to the death of Ms. Los occurred suddenly and without any preexisting plan. Unquestionably, appellant admitted suppling a weapon and admitted knowing that Dearaujo and Lyons were "gonna do dirt" (Prosecution exhibit 68 at p.32.) In his statement to the police, however, appellant explained that "dirt" simply meant a crime of some sort, not necessarily even a robbery or a "jack." (Prosecution exhibit 68 at p. 42.) Appellant went on noting that he would provide the gun to Lyons or Dearaujo for whatever purpose they intended, criminal or not. His exact words were that he would give them the gun anytime "they needed it - any time somebody have fun with somebody - whatever - you

know, it don't matter." (Prosecution exhibit 68 at p. 32.) Indeed, there was testimony that he provided the gun to Mondre Weatherspoon who simply went out in Natalie's back yard and squeezed off a few rounds into the air (19 R.T. 2694) and later shot a round into the air in front of Chuey's apartment. (31 R.T. 4164.)

After obtaining the weapon, Dearaujo and Lyons walked around the parking lot to see if a relatively easy victim would randomly appear. When Ms. Los suddenly appeared in her vehicle, the carjacking attempt began. (19 R.T. 2632-2633.) Not only did Dearaujo deliver the fatal shot, but appellant had no meaningful opportunity to counsel his companions against rash action or to intervene on behalf of Ms. Los.

Moreover, even though appellant supplied the weapon for a possible carjacking, the jury could not have inferred a subjective awareness of a grave risk of death from that fact alone. There was no evidence in this case that Dearaujo had displayed violent propensities in the past, or that appellant was aware of his propensities. While Dearaujo had been involved in the prior Circle K robbery, he did not hurt anyone. Indeed, the weapon had not been fired in **any** of the purported crimes prior to the Los homicide.

As appellant pointed out in the opening brief, *State v. Branam* (Tenn. 1993) 855 S.W. 2d 563, 570 is particularly close to the facts of this case. There, a robbery went sour when the victim began honking the horn of her car and the triggerman shot her. (Id., 855 S.W. 2d at 570.) Although the defendant was physically present, he was held **not** to have manifested reckless indifference. Like appellant herein, he was never in possession of a weapon and never personally confined the victim. There was no evidence of a preconceived plan to kill by the triggerman. The probable

awareness that the triggerman was armed was NOT enough, in itself, to manifest reckless indifference. (*Id.*, 855 S.W. 2d at 571.)

The facts of this case are even weaker than *Branham* because not only was appellant NOT present at the scene, there is no evidence that appellant was aware that a carjacking would take place. Instead, the evidence shows that appellant had a ride to a party in Anaheim but that there wasn't enough room for Dearaujo and Lyons in the car. Thus, if they wanted to go to the party, they would have to obtain their own vehicle. (People's Exh. 68, at pp 9, 39.) For all appellant knew, Dearaujo and Lyons would abandon the enterprise and decide that the risk of getting caught outweighed the desire to go to the party. Certainly on the two prior occasions when appellant's associates attempted to carjack vehicles (De George and (Nolin) Meza), they abandoned the enterprise and ran away when the victims refused to cooperate. (25 R.T. 3503; 27 R.T. 3795.) Indeed, the trial court ruled that as a matter of law the evidence was insufficient to show that appellant commanded or ordered the carjacking. (38 RT 4658-4660.)

If there was still any lingering doubt about the matter, the prosecution's primary witness, Christopher Lyons dispelled it. Lyons told the police that appellant did NOT order them to get a car; instead, he and Dearaujo actually **volunteered** to get a car. (20 R.T. 2833.)

Respondent's claim that the evidence showing that appellant urged group members to "cap em" if victims offered resistance (36 R.T. 4535-4536) was a sufficient showing that appellant acted with reckless indifference is similarly flawed. Not only was appellant's comment offered in response to a hypothetical question but appellant provided what was essentially a hypothetical answer to a hypothetical

situation. (2 C.T. 374-388.)

More important, contrary to respondent's argument on appeal, Lyons never ascribed the cause of the shooting to appellant's direction to "cap em." In fact, the opposite is true. Lyons testified that the shooting took place because Dearaujo panicked. (19 R.T. 2639, 2643; 21 R.T. 2909, see also 2840.) Lyons said that he was very surprised when he heard Dearaujo actually fire the gun. Lyons then panicked when he saw Dearaujo was panicked. (21 R.T. 2909, see also 2840.) Lyons also testified that the purpose of carrying the gun was to "Demand [a car] from the owner, try to scare them out of their car" (18 R.T. 2622), if necessary, by threatening them with a gun or knife. (18 R.T. 2622.)

Additionally, every prior attempted robbery or carjacking (except the Circle K robbery) was preceded by the same purported admonition to kill resisters. Significantly, NONE of those other robberies resulted in injury or even a discharge of the weapon, let alone death. Thus, appellant's theatrical rhetoric to "cap 'em" adds nothing to his subjective awareness that death was likely to ensue from an attempted carjacking.

This is not a situation where the defendant directed a specific attack on a specific individual and told the assailants to kill. Instead, this was mere braggadocio by inexperienced (and likely intoxicated) teenagers fantasizing about lurid possibilities. Moreover, as appellant explained previously, despite this tough rhetoric, on the two occasions when victims actually offered resistance prior to the Los incident (DeGeorge and (Nolin) Meza), the perpetrators ran away. (25 R.T. 3503; 27 R.T. 3795.)

Additionally, as appellant pointed out in his opening brief, even the most

inexperienced "wannabe" robber would recognize that shooting a gun in a parking lot where there are people around, is not a particularly good way to steal a car. Indeed, if the plan is to steal a car but the weapon has to be fired, the noise draws so much attention that the vehicle theft is fatally compromised. The weapon is actually useful only if the threat to use it overcomes the victim's will to resist. Moreover, the defense notes that after codefendant Dearaujo shot Ms. Los, he did NOT subsequently steal the vehicle. He ran away. (19 R.T. 2644.) Thus, the actual use of the weapon completely compromised the plan to steal the car rather than being an integral part of it.

Significantly, even the prosecutor's argument to the Dearaujo jury at trial undermines its argument on appeal. At trial, the prosecutor told the Dearaujo jury that appellant was NOT the prime mover in this transaction nor were his prior instructions on how to commit a carjacking a significant factor in the shooting of Ms Los. The carjacking and the method for committing the offense were Dearaujo's idea. Indeed, the prosecutor specifically argued "They went to commit the carjacking of Yvonne because they wanted to go with [appellant to a party in Anaheim]. **It was his [Dearaujo's] idea**. They wanted to do it, he and Chris." (9 Supp. R.T. at p. 7089 (Emphasis added).) A few moments later, Ms. Nelson reiterated to the jury **"He's [Dearaujo] doing this all on his own. [para.] There's no one there giving him step by step instructions on how to commit a carjacking.**." (9 Supp. R.T. at p. 7094.)

Given these circumstances, Lyons' testimony fatally undermines the trial court's conclusion that appellant was a prime mover in this tragedy or that appellant was subjectively aware that his conduct carried a grave risk of homicidal violence.

Moreover, as appellant previously explained, since Mr. Dearaujo had organic brain damage and was borderline mentally retarded (Supplemental R.T. Vol. 7 at p. 6681), it is doubtful that Dearaujo even had the capability to meaningfully reflect on a decision to pull the trigger. Thus, the Los shooting was "a rash impulse hastily executed." (Cf. *People v. Munoz, supra,* 157 Cal.App.3d at p. 1009.) It was a reflexive act by a panicky and borderline mentally retarded teenager. Unfortunately, the bullet accidentally hit a vital spot. (Cf. *Jackson v. State, supra,* 575 So. 2d 181 at pp. 192-193; see also *People v. Dillon, supra,* 34 Cal.3d 441, 487-489.)

Significantly, the evidence shows that nothing the defendant did or failed to do was absolutely essential to the commission of this homicide. Moreover, the prosecutor's argument before the Dearaujo jury leaves no doubt that the People's position was that the actual carjacking of the Los vehicle was Dearaujo's idea and the shooting was Dearaujo's responsibility. In short, appellant was not responsible for inciting, directing or carrying out this homicide. At most, appellant was aware that a robbery might take place and that by supplying the weapon, it was foreseable that there would be violence. As appellant noted previously, however, foreseeability is **NOT** the standard and is not sufficient to support the felony murder special circumstance. (*Tison v. Arizona, supra,* 481 U.S. at p.151.)

For the reasons set forth herein and in appellant's opening brief, the evidence is insufficient to establish the elements of "major participation" and "reckless indifference" that are necessary to sustain the special circumstance finding. Thus, the true finding on the felony murder special circumstance must be set aside and appellant's death sentence reversed.

XII.

THE TRIAL COURT ERRED IN REQUIRING APPELLANT WILLIAMS TO WEAR LEG RESTRAINTS DURING THE TRIAL

SUMMARY OF APPELLANT'S ARGUMENT

A defendant may not be shackled in the courtroom except on a showing of manifest need and as a last resort in an extraordinary case. Here, despite proper behavior in the courtroom, the trial judge allowed the bailiffs to impose rigid leg restraints **based solely on the deputy's assessment** that a few instances of jail misconduct over a five year period awaiting trial warranted shackling in the courtroom. The improper imposition of these restraints violated federal and state due process under the Fifth and Fourteenth Amendments, his Sixth Amendment rights to counsel and to present a defense, and to reliable guilt and penalty phase determinations under the Eighth Amendment. (Appellant's opening brief at pp.327-343.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent first urges the claim was waived because there was not a proper objection at trial. Second, respondent urges that the claim has no merit because in the proper exercise of the court's discretion, it relied on appellant's prior jail incidents as the reason to impose the restraints. Finally, respondent urges that any error is harmless because there is no showing that the jury was aware of the restraints. (Respondent's brief at pp. 225-229.)

ERRORS IN RESPONDENT'S ARGUMENTS

No waiver

Respondent's waiver argument is not well taken. Essentially, respondent's waiver argument is based on the notion that acquiescence in a shackling decision already made constitutes waiver. It does not.

As appellant explained in his opening brief, right after the judge gave the jurors preliminary instructions and dismissed them for the evening, he told counsel that the court security people were asking that appellant be shackled. The court security people expressed some concern to the judge and apparently told him that there had been some prior incidents in the jail involving appellant. The trial judge noted that he assumed that trial defense counsel was not prepared to deal with the issue.

Trial defense counsel responded that he was prepared to address the matter and that he had warned his client to expect shackling. Defense counsel then said that the defendant had not been a problem for anyone in jail transportation and that the jail incidents the court referred to were pretty old. Nevertheless, he had informed the defendant to expect to be shackled after another incident in another courtroom that took place the week prior. (16 R.T. 2182-2183.) At the first opportunity after the restraints were imposed, appellant complained that they were "very, very uncomfortable." (16 R.T. 2211.)

From the foregoing, it is apparent that all parties understood that the decision had already been made that the defendant was going to be shackled. The trial judge was merely reciting his reasons for the record. Certainly there was no reason for counsel to anticipate that the defendant would be shacked or to inform the defendant

that he likely would be shackled unless it was already clear to all concerned that the shackling decision had already been made.

Moreover, although defense counsel did not specifically state that he objected to shackling, the clear purpose of his comments that the defendant had not been a problem for the transportation personnel and that the jail incidents were pretty old was to inform the judge that shackling was not warranted here. If, as respondent suggests, the defense had no objection to the shackling, counsel's comments would have been both irrelevant and unnecessary.

By acquiescing in a trial court decision that had obviously already been made, defense counsel was simply making the best of a bad situation that he did not create. Those circumstances do not amount to a waiver. (Cf. *People v. Coleman, supra,* 46 Cal.3d at p.781, fn 26; *People v. Calio, supra,* 42 Cal.3d at p. 643.)

Shackling Was Improper

Respondent argues that because of the prior jail incidents involving the appellant, the decision to use the restraints in court was a perfectly appropriate exercise of the trial court's discretion. (Respondent's brief at p. 228.) Respondent is in error.

While it is certainly true that a trial judge has some discretion to impose physical restraints (*People v. Sheldon* (1989) 48 Cal.3d 935, 945), that discretion is not unbounded. In *People v. Duran* (1976) 16 Cal.3d 282, 290-291, this court stated the general rule applicable to physical restraints and "reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints."

The court further explained the discretionary standard for the imposition of restraints, noting:

> "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. (*Id.*, at pp. 291-292.)

Significantly, under the standard set forth in *Duran*, **the trial court's discretion is relatively narrow**. (*Id.*, at pp. 292-293; *People v. Cox, supra,* 53 Cal.3d 618, 651.) Thus, the "manifest need" required for the imposition of physical restraints "arises only upon a showing of unruliness, an announced attention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' Moreover, '[t]he showing of nonconforming behavior . . . **must appear as a matter of record** . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'" (*People v. Cox, supra*, 53 Cal.3d at p. 651(internal cites omitted, emphasis added).) The federal standard is even higher -- shackling a defendant is only justified "as a last resort, in cases of extreme need, or in cases urgently demanding that action." (*Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1485; see also *Illinois v. Allen* (1970) 397 U.S. 337, 344.)

Respondent's brief does not explain how the prior jail incidents meet the "manifest need" standard for shackling a defendant. As appellant pointed out in his

opening brief, not only did the trial court simply take the bailiff's word for it that shackling might be necessary, but the judge failed to develop a record supporting the shackling determination. Most importantly, however, the trial judge failed to grasp his essential constitutional responsibilities in making the shackling decision.

As the facts of this case amply demonstrate, the trial judge held only a perfunctory hearing prior to deciding to maintain the restraints on appellant. At the time, the apparent rationale for the restraints was the sheriff's request based on defendant's purported jail incidents. (16 R.T. 2182.)[28] Moreover, as explained previously, in context it appears that the decision to shackle the defendant already had been made.

Significantly, prior to the introduction of the leg brace, the defendant had been present for a number of hearings over a five year period. Nothing in the conduct of the defendant in court suggested a need for these restraints. Indeed, nothing in the record suggested that the defendant had been in any way disruptive in court during those five years.

More to the point, the sum total of the trial court's recitation of facts supporting the shackling decision was that jail deputies would be requesting restraints and that the judge had been told that there were some jail incidents over the years that would support the request. (16 R.T. 2182.)

Even assuming arguendo that in some "off the record" briefing, the sheriff's

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[28] Although the court and the parties only mentioned in passing that there was another incident involving another defendant in another courtroom, to the extent that any shackling decision was premised on an incident having nothing to do with appellant, the trial judge unquestionably abused his discretion.

department somehow described the jail incidents in similar factual detail as the prosecution's penalty phase presentation, those facts still would not justify leg restraints. All of the purported jail incidents took place in various tanks where the defendant and his alleged accomplice Deloney were attempting to establish dominance or positions of influence within the prisoner community. (See ,e.g., 49 R.T. 5845-5846, 6139.) There was no showing that **any** of these incidents were related to any attempt to escape or that they posed any real challenge to the authority of correctional staff. Additionally, as the facts set forth in appellant's opening brief demonstrate, the most severe violence involving appellant in jail revolved around fisticuffs (see e.g. 49 R.T. 5839-5840, 5848, 5861-5862), certainly no match for the modern weaponry of correctional staff or even the courtroom bailiff.

Significantly, nothing in the record demonstrates that the sheriff's department told the trial court about the chronological relationship between the observation of these incidents and the imposition of leg restraints. That is, there is no showing that the incidents were observed shortly before the restraints were imposed. What the **later** trial record shows is that the last jail incident involving appellant fighting with another inmate took place on December 29, 1995 (48 R.T. 5583) **three years before** the trial court was asked to impose physical restraints. (18 CT 4995.) As trial defense counsel pointed out, by the time the court ordered restraints, the jail incidents were already quite old and not indicative of appellant's behavior in court. (16 R.T. 2182.) Moreover, it appears that appellant had been in court at least 14 times after that incident (2 CT 452 - 483, 495, 3 C.T. 708, 728) and as trial defense counsel noted, appellant had no problems.

Related to the foregoing, nowhere in respondent's brief does it address the

lack of support in the record for the decision to shackle the defendant. (*See People v. Mar* (2002) 28 Cal.4th 1201, 1222.) What the trial record reveals is that the trial court simply acquiesced in the sheriff's department request for restraints.

Blanket acceptance of the bailiff's recommendation, is not the standard for imposing physical restraints. In order for the court to impose physical restraints, there must be a showing of need based "on facts, not rumor and innuendo...". (*People* v. *Cox*, *supra,* at p. 652.) Nothing in the record shows that the evidence presented by the court security personnel to the trial court even remotely approached that standard. (*People v. Duran*, *supra*, 16 Cal.3d. at p. 291.)

From the record available, it is apparent that the trial judge simply acceded to the desire of the Sheriff's Department for absolute security based on little more than a precaution. That is, nowhere in the record does the trial court indicate what incidents the sheriff's department relied upon or what the defendant's role was in any of these incidents. These circumstances show unequivocally that the trial judge failed to make an independent factual determination of the necessity for the restraints. (*People v. Duran, supra* 16 Cal.3d 282, 291 [trial court, not security personnel, must make the determination that there is evident necessity for the restraints used to preserve courtroom security]; (see also *People v. Jacla* (1978) 77 Cal.App.3d 878, 885: "[T]he determination to impose restraints and the nature of the restraints to be imposed are judicial functions to be discharged by the court, not delegated to a bailiff"; and *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825: "The trial court here abused its discretion in abdicating its responsibility for courtroom security to the bailiff and/or sheriff's personnel.")

Finally, nothing in the trial court's comments indicates it was aware of the

procedural and substantive requirements established in *Duran* that should have governed its determination of defendants' objection to the leg restraints. (*People v. Mar, supra*, 28 Cal. 4th at p. 1222.)

Under these circumstances the reasons cited by the court fail to demonstrate the "manifest need" for shackles, and thus the trial judge abused his discretion as a matter of law. (Cf. *Deck v. Missouri* (2005) 544 U.S. 622 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953] [death penalty reversed because trial judge failed to make clear why shackles were necessary at this time with this defendant, thus abusing his discretion]; *People v. Cox, supra*, 53 Cal.3d at pp 650-651.)

PREJUDICE

Respondent urges that since there is nothing on the record showing that jurors saw the shackles, appellant cannot demonstrate prejudice. (Respondent's brief at p. 228.) Respondent is again in error.

As appellant explained in his opening brief, if the defendant was improperly shackled in the courtroom, the error is of constitutional magnitude. (See *Deck v. Missouri, supra,* 544 U.S. 624 [125 S.Ct. 2007, 2009; 61 L.Ed.2d 953] *Estelle v. Williams* (1976) 425 U.S. 501, 504-505; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712 .) Thus, there is no burden on the defense to prove the error was prejudicial, prejudice is presumed. (*Deck v. Missouri, supra,* 544 U.S. 635 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953]. The burden is on the respondent to prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California* 1967) 386 U.S. 18, 24; see generally *Yates v. Evatt* (1991) 500 U.S. 391, 402-405 [114 L.Ed.2d 432, 111 S.Ct. 1184] (overruled on a different ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72).)

In this instance, there is nothing on the record showing one way or the other whether the jury could see appellant's leg restraints.[29] Nevertheless, as appellant explained in his opening brief, in view of the controversy that erupted after a sharp-eyed juror perceived that black witnesses were handcuffed while white witnesses were not (see Issue I *infra.*), the trial judge should have taken it upon himself to determine if any jurors were similarly aware of whether the defendant was restrained. Indeed, as the bailiff noted, in another courtroom, the trial judge almost always had the defendants shackled with leg restraints, but placed a wooden screen at counsel table so the jurors would not see. (30 R.T. 4092.)

There is nothing in this record indicating that there was a skirt or other device at counsel table to prevent the jurors from seeing the defendant's leg restraints. More importantly, this court has **no factual basis** upon which to make a determination that the jurors could NOT see the leg restraints. (See *Deck v. Missouri, supra,* 544 U.S. 634 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953] [Death sentence reversed even though record ambiguous about whether the jury saw the restraints or the effect the restraints had on the jury].)

Whether or not the jury can see the shackles is only one part of the prejudice analysis. (Cf. *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) There are other areas of

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[29] The trial judge noted that although he had never seen the locking leg restraints that he proposed to place on the defendant, he had been told that they could not be seen. (16 R.T. 2182.) Later the prosecution suggested real leg shackles and chains in place of the locking leg restraint. Discussing the leg shackles and chains, the defense noted that such devices might not be seen if the defendant did not stand up. (17 R.T 2211.) Nowhere in the record, however, does the court or counsel say whether the leg restraints actually worn could be seen.

prejudice resulting from the use of physical restraints. Nowhere in respondent's brief does it deal with these other issues. For example, in the opening brief appellant pointed out that a shackled defendant may feel confused, frustrated, or embarrassed, thus impairing his mental faculties. Indeed, here, the trial court was aware that the brace was "very, very uncomfortable" and was "cutting" the defendant. (16 R.T. 2211.)

Another problem is that communication between the defendant and his lawyer may be impaired by any physical restraints. While this circumstance does not appear directly from the record in this case, given the defendant's obvious discomfort and distaste for the physical restraints, there is little question that he was distracted by the leg braces.

Yet another factor to consider is that the dignity and decorum of the judicial proceedings may suffer. Significantly, the United States Supreme Court has stated that trial courts **must** consider this factor before ordering restraints. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 344.) In this situation, the dignity and decorum of judicial proceedings was destroyed by the totally uncalled for and unnecessary shackling. Shackling of any defendant without proper due process constraints insults the system as a whole. Certainly nothing in the record suggests that the trial court even considered this factor.

Finally, the restraints may be painful to the defendant. Here, for example, not only did appellant complain about how uncomfortable the restraints were, but modern shackles inflict enough pain to call into question the propriety of their use. (*United States v. Whitehorn* (D.D.C. 1989) 710 F.Supp. 803, 840, rev'd on unrelated grounds sub nom. in *United States v. Rosenberg* (D.C.Cir. 1989) 888 F.2d 1406.)

Similar to the circumstances presented here, all of these considerations came into play in *People v. Mar, supra,* 28 Cal.4th 1201. In *Mar*, the issue was whether the trial court's unjustified use of a "stun belt" restraint was prejudicial. The belt was never activated and the facts demonstrate that the jury probably could not see it. More importantly, there was nothing in the record to show what effect the belt had on the defendant while testifying or on his demeanor. (*Id.*, at p. 1213.)

Nonetheless, finding that the use of such a physical restraint was prejudicial, this court concluded that "Even when the jury is not aware that the defendant has been compelled to wear a [restraint], the presence of the [restraint] may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury...." (*People v. Mar, supra,* 28 Cal.4th at p. 1219.)

That was precisely the situation here. The defense urged that the restraints were unnecessary and informed the court that the leg braces were "very, very uncomfortable." As appellant pointed out in his opening brief, it is difficult to imagine that despite the perception that he had done nothing to warrant these special restraints and the obvious discomfort they inflicted, the restraints nonetheless left the appellant's ability to concentrate on the proceedings or participate in his defense completely unimpaired.

More important, as appellant explained previously, because prejudice is presumed when a defendant is impermissibly shackled (*Deck v. Missouri, supra,* 544 U.S. 635), the burden is on respondent to demonstrate beyond a reasonable doubt that the shackling did not affect the outcome of this case. Respondent's only answer to the concerns set forth in *Mar* is the bald assertion that the jury probably did not

see the shackles. Not only is that assertion not corroborated, as explained above, it is a woefully inadequate substitute.

Under the circumstances of this case, therefore, the objection to the shackling decision was not waived; the decision to impose physical restraints was a clear abuse of discretion unsupported by the facts of record and appellant was prejudiced by having to wear the painful restraints whether or not the jury was able to see them. Virtually none of these matters were even addressed in respondent's brief, let alone adequately addressed. For the reasons set forth herein and in appellant's opening brief, the shackling error compels reversal.

PENALTY PHASE ISSUES

XIII.

APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

SUMMARY OF APPELLANT'S ARGUMENT

The essence of appellant's argument is that felony murder, while a serious crime, should not be not among that narrow class of cases that are so grievous that the only appropriate penalty is death. As explained in issue XI, the Eighth Amendment prohibition against cruel and unusual punishment embodies a proportionality principle. In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the United States Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders.

It is undisputed that the prosecution's only theory of criminal culpability in this case was felony murder. (8 R.T. 813.) Thus, appellant became eligible for a death sentence – and a death sentence was imposed – based solely on the commission of an unintentional killing, with no other fact about him or the crime making it aggravated. Moreover, because the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability, persons who commit felony murder, especially an accidental or unintentional homicide do not fall

into this category. The recent *Roper* and *Atkins* decisions from the United States Supreme Court recognize that lesser mental states of mentally retarded people and children also lessen the *mens rea* of the offender. Similarly, therefore, persons who commit unaggravated, unplanned murders - such as unintentional homicides resulting from felony murder - also have lesser *mens rea* and are thus not deserving of the ultimate penalty either.

Significantly, the vast majority of states recognize that an offender whose crime was found by the trial court to be unintentional and unaggravated by any fact other than the robbery underlying his felony murder conviction, lacks the requisite *mens rea* to be deserving of society's harshest punishment.[30] Under the "evolving standards of decency" standard that the Supreme Court uses when analyzing the "cruel and unusual" clause of the Eighth Amendment, these numbers demonstrate a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence – the robbery.

Additionally, international norms are persuasive authority in interpreting the Eighth Amendment's ban on cruel and unusual punishment. The United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" (Roth and Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 447-48 (1985). England, where

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[30] See appellant's opening brief at pp. 355-356 for a discussion of state laws on the matter.

the doctrine originated, abolished the felony-murder rule in 1957, and the rule apparently never existed in France or Germany. Additionally, Article 6 (2) of the *International Covenant on Civil and Political Rights* ("ICCPR"), to which the United States is a party, also provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.)

For these reasons, the imposition of the death penalty on a person who has killed negligently or accidentally fails the first part of the proportionality test. It is simply contrary to evolving standards of decency and does not comport with contemporary values.

Imposition of the death penalty for felony murder simpliciter fails the second part of the proportionality test as well. That is, the death penalty for felony murder simpliciter does not serve either of the penological purposes required by the Supreme Court – retribution and deterrence. Retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. An unintentional homicide involves a very much a less culpable mental state that an intentional killing. Further, deterrence is not served because, the death penalty simply cannot deter a person from causing a result he never intended and never foresaw.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that contrary to appellant's argument, California law requires a showing of moral culpability before the death penalty may be imposed on a felony murderer. Here, the jury was instructed in accordance with CALJIC 8.80.1

that appellant must have acted with reckless indifference and as a major participant before the robbery felony murder special circumstance could be found to be true. Respondent argues reckless indifference and major participation in the underlying felony provide the requisite moral culpability for imposition of the death penalty on a felony murderer, regardless of whether the actual homicide was negligent or accidental. (See *Tison v. Arizona, supra*, 481 U.S. at p. 158.)

Further, since international law does not prohibit the imposition of the death penalty so long as American standards of decency are met, there is no violation of international law. (Respondent's brief at pp. 229-231.)

ERRORS IN RESPONDENT'S ARGUMENTS

To the extent respondent's argument is simply that the *Tison* factors of "reckless indifference" and "major participation" provide the requisite moral culpability for the unintentional homicide in this case, respondent is in error. In this case, the evidence is insufficient to support either factor.

As explained in Issue XI *supra*, there is no evidence that appellant had any significant participation in the carjacking that led to Ms. Los' death. In fact, he was not present and did not know for sure that a carjacking would even take place. Further, his participation was limited to making the weapon available to the perpetrators should they actually decide to commit a crime.

Given these circumstances, appellant lacked the subjective awareness that his acts would pose a great risk of physical harm, let alone death. Moreover, if a further showing was required, the defense notes that appellant previously loaned the pistol to other teenagers who attempted to commit crimes with it and no violence ever occurred. In fact, in prior instances, when the targets of the carjackings refused to

comply, the perpetrators simply ran away. The weapon was never fired at all. Even the prosecution's primary witness, Christopher Lyons testified that the purpose of the weapon was simply to scare people into giving up their property. (18 R.T. 2622.) Nothing in this evidence shows that appellant subjectively anticipated bloodshed, let alone homicidal violence.

As additional reasons why the evidence does not support a true finding that appellant acted with reckless disregard or as a major participant in the Los homicide, appellant hereby incorporates all of his arguments from issue XI in both his opening brief and the reply brief on this matter as though they were set forth here in full.

Tison is No Longer Good Law

Aside from the foregoing, there is a deeper issue to be resolved. Should a non killer who was not present at the scene and who had no specific intent to kill be death eligible?

Appellant is not death eligible under the facts of this case because death is a disproportionate punishment for vicarious criminal liability, particularly where the defendant obviously did not kill and had no specific intent to kill. That is, given the evolving standards of decency encompassed by the Eighth Amendment, vicarious liability for felony murder precludes not only execution but death eligibility as well. To the extent that *Tison* substitutes reckless indifference and major participation for direct involvement and a specific intent to kill, *Tison* and its companion cases *Cabana v. Bullock* (1986) 474 U.S. 376 [88 L. Ed. 2d 704, 106 S. Ct. 689] and *Hopkins v. Reeves* (1998) 524 U.S. 88 are not only aberrations in the law, they have been effectively superseded by the later cases of *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S. Ct. 2242, 153 L. Ed. 2d 335]; *Roper v. Simmons* (2005) 543 U.S. 551

[125 S. Ct. 1183, 161 L. Ed. 2d 1] and more recently, *Kennedy v. Louisiana* (2008) ___ U.S. ___ [171 L. Ed. 2d 525, 128 S. Ct. 2641].)

As appellant pointed out in his opening brief, although the Eighth Amendment does not specifically prohibit disproportionate sentences nor does it contain an express mandate for individualized punishment, the Supreme Court has held that the cruel and unusual punishment clause of that Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. (*See, e.g., Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637].) Additionally, in *Woodson v. North Carolina* (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] (followed in *Lockett v. Ohio* (1978) 438 U.S. 586, 603- 04, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973]), the Court set forth the requirements of individualized sentencing:

> "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

(*Woodson,* 428 U.S. at 304, 96 S.Ct. at 2991.)

In her dissenting opinion in *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140], Justice O'Connor explained the proportionality concept this way: "In sum, in considering the petitioner's challenge, the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's

involvement in the crime, as well as whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in Lockett." (*Enmund*, 458 U.S. at 816, 102 S.Ct. at 3386-87 (O'Connor, J., dissenting).)

In the recent case of *Kennedy v. Louisiana*, *supra,* the Court reiterated the principles that guide its decision making when determining the sorts of offenses that make a defendant death eligible. In *Kennedy*, the Court observed that the Cruel and Unusual Punishment Clause of the Eighth Amendment springs from the evolving standards of decency that mark the progress of a maturing society. That is, the standard for extreme cruelty "'itself remains the same, but its applicability must change as the basic mores of society change.' (*Citation.)*" (*Kennedy, supra,* at ____ U.S. ____; 128 S.Ct. at p. 2660.) Since punishment must be graduated and proportional to the crime, while informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Citation*) (*Kennedy, supra,* at ____ U.S. ____; 128 S.Ct. at p. 2660.)

Applying these decades old principles to the universe of death eligible crimes and defendants, in *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on a defendant who did not take life, attempt to take life, or intend to take life. (*Enmund, supra*, 458 U.S. at pp. 789-793.) The Court reiterated the fundamental, moral distinction between a "murderer" and a "robber," noting that while "robbery is a serious crime deserving serious punishment," it is not like death in its "severity and irrevocability." (*Enmund, supra* , at 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (internal quotation marks omitted)." Thus, the crime of

vicarious felony murder would be disproportionate to the offense and the death penalty could not be imposed.

Nevertheless, several years later, in *Tison v. Arizona*, *supra,* the Court revisited the scope of the death penalty and addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Writing for the majority, Justice O'Connor said that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison, supra*, 481 U.S. at pp. 158.)[31] Justice O'Connor explained that some unintentional murders may be among the most inhumane and dangerous. Further, the "reckless indifference" to human life by a "major participant" may evince as much moral culpability as a specific intent to kill. (*Id.* at pp. 157-158.)

That said, in choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*Tison v. Arizona, supra,* 481 U.S. at pp. 168-179 [dis. opn. of Brennan, J.].)

Even in *Tison,* however, the Court specifically held that mere liability for

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[31] *Cabana v. Bullock* (1986) 474 U.S. 376 [88 L. Ed. 2d 704, 106 S. Ct. 689] and *Hopkins v. Reeves* (1998) 524 U.S. 88 do not require this finding to be made by a jury, but nevertheless require this form of mens rea to be established at some point in the case, even on appeal.

felony-murder alone is **not** sufficient to warrant either the imposition of the death penalty or a true finding on a special circumstance. (*Tison v. Arizona, supra,* 481 U.S. 137, 151, [95 L.Ed. 2d 127, 107 S.C. 1676].) The "reckless indifference" standard of *Tison* is meant to describe a mental state short of intent to kill, yet beyond foreseeability. Its purpose is to "genuinely narrow the class of persons eligible for the death penalty" *(Zant v. Stephens, supra,* 462 U.S. at p. 877, [103 S.C..2733, 77 L.Ed.2d 235]) so that felony-murder liability alone does not permit execution.

Subsequently, the Supreme Court held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime. (*Kennedy v. Louisiana, supra,* at ____ U.S. ____; 128 S.Ct. at p. 2650.) These latter cases again hold that the Eighth Amendment narrows the class of persons eligible for the death penalty to those who participate in the most serious crimes and who bear extreme responsibility for those crimes. Thus, death is not an appropriate punishment in situations where the defendant has a diminished personal responsibility, such as juveniles and mentally retarded persons.

In *Kennedy*, the court continued on that same theme concluding that under the "evolving standards of decency" as evidenced by legislatures and jury verdicts, the **death penalty is not appropriate for crimes where the defendant did not kill.** Thus, even a heinous crime like the rape of a child is not a crime for which the death penalty could be imposed. *(Kennedy v. Louisiana, supra,* ____ U.S. ____ ; [128 S.Ct. at p. 2660.].)

Although *Tison* has never been formally overruled, *Tison* and its companion

cases of *Cabana v. Bullock, supra,* and *Hopkins v. Reeves, supra,* are at best on the fringe of Constitutional acceptability. Felony murder absent an intent to kill expands the death penalty beyond the most culpable offenders. Although claiming to narrow the class of offender for whom the death penalty was appropriate (see *Zant v. Stephens, supra,* 462 U.S. at p. 877), *Tison* actually went beyond the most culpable. The Court unilaterally expanded the class of death eligible defendants to those who did NOT kill or have a specific intent to kill but who nevertheless possessed the other characteristics of reckless indifference and major participation.

The recent case of *Kennedy v. Louisiana, supra,* has put the *Tison* holding squarely in jeopardy. Examining the larger question of death eligibility in the context of the rape of a child, the Court recognized that there was a certain amount of inconsistency in its own case law on the ultimate reach of the death penalty. The Court admitted that it was still "in search of a unifying principle...." (*Kennedy, supra,* at ____ U.S. ____; 128 S.Ct. at p. 2659.) Nevertheless, the Court reaffirmed that whatever the circumstances, it would closely adhere to the principle that instances in which the death penalty may be imposed must be very narrow. (*Ibid.)*

In *Kennedy,* the Court specifically rejected the notion that the death penalty could be imposed on a defendant who did not kill. Perhaps it restates the obvious, but the defendant here was accused as an accomplice to an unintentional killing; he did not kill Ms. Los.

As appellant pointed out in his opening brief, imposition of the death penalty on non-killer accomplices or conspirators has always been problematic. "The non-triggerman convicted of felony murder is three times removed from the locus of blame: the killing is murder by reason of the felony-murder rule, the defendant is

responsible for the killing under accomplice liability principles, **and he faces the executioner because of the manner in which another person killed.** Such a person may be at the outer reaches of personal culpability, yet still face death." (Garnett, R., *Depravity Thrice Removed: Using the 'Heinous, Cruel or Depraved' Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases* (1994) 103 Yale L.J. 2471, 2473 (Emphasis added).)

The fault with the *Tison* criteria is seen in cases such at this one where the defendant was not present, did not have an intent to kill, obviously did not kill and did not even know that a crime necessarily would take place - let alone a homicide.[32] Moreover, as appellant also explained in his opening brief, under the Eighth Amendment proportionality principles, the critical inquiry is not whether the appropriate procedures were followed to impose the death penalty, but rather, whether the defendant's conduct under the circumstances was *individually blameworthy* enough that death is the appropriate punishment. (See *Coker v. Georgia* (1977) 433 U.S. 584 [97 S.Ct. 2861, 53 L.Ed.2d 982].) Imposing the death penalty solely based on the *Tison* factors present in this case, violates the Eighth Amendment proportionality principles.

Just as significantly, the death penalty for felony murder for a non killer who does not posses the specific intent to kill does not serve the purposes of either

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[32] As appellant has repeatedly noted throughout the briefing, he was not present and did not know that a homicide might take place. Moreover, the prosecution conceded that appellant did **NOT** entertain a specific intent to kill. It was for that reason that CALJIC 8.80.1 was specifically modified to exclude the "intent to kill" language (38 R.T. 4656-4662) and the *Tison* factors of "reckless indifference" and "major participation" were substituted. (43 R.T. 5144-5145.)

retribution or deterrence. Retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. Here, obviously, appellant did not harbor a specific intent to kill, thus his moral culpability was considerably less than that of an intentional killer. Indeed, any unintentional homicide involves a less culpable mental state that an intentional killing. (See *Enmund, supra*, 458 U.S., at 798 ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally'" (citation omitted).) Moreover, as *Enmund* also pointed out: "...putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." (*Id.*, at 801.)

More important, in his dissent in *Tison*, Justice Brennan addressed the notion that "reckless indifference" is somehow the moral equivalent of intentional action and thus may be punished equally severely. As Justice Brennan explained:

> "... a determination that the defendant acted with intent is qualitatively different from a determination that the defendant acted with reckless indifference to human life. The difference lies in the nature of the choice each has made. The reckless actor has not chosen to bring about the killing in the way the intentional actor has. The person who chooses to act recklessly and is indifferent to the possibility of fatal consequences often deserves serious punishment. But because that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill.
>
> The importance of distinguishing between these different choices is rooted in our belief in the "freedom of the human

> will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). To be faithful to this belief, which is "universal and persistent in mature systems of law," *ibid.*, the criminal law must ensure that the punishment an individual receives conforms to the choices that individual has made. [footnote omitted] Differential punishment of reckless and intentional actions is therefore essential if we are to retain "the relation between criminal liability and moral culpability" on which criminal justice depends. *People v. Washington*, 62 Cal. 2d 777, 783, 402 P. 2d 130, 134 (1965) (opinion of Traynor, C. J.). The State's ultimate sanction -- if it is ever to be used -- must be reserved for those whose culpability is greatest. Cf. *Enmund,* 458 U.S., at 798." (*Tison v. Arizona, supra* 481 U.S. at pp.170-171.) [dis. opn. of Brennan, J.].)

As for satisfying the social purpose of deterrence, it is axiomatic that the death penalty cannot deter an unintentional homicide. (See Appellant's opening brief at pp. 361-362.)

For these reasons, the more recent cases of *Roper, Simmons* and particularly *Kennedy* have effectively superseded the *Tison* factors of "reckless indifference" and "major participation" for a non killer accomplice. Therefore, because appellant did not kill, did not have an intent to kill and was sentenced to death based solely on the *Tison* factors, his punishment violated the Eighth Amendment proportionality principles and must be reversed.

XIV.

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO CORRECT AN OBVIOUS CONFLICT SITUATION

SUMMARY OF APPELLANT'S ARGUMENT

Reversal is automatic when a trial court requires conflicted representation over a timely objection. During the prosecution's penalty phase presentation, the Public Defender himself declared a conflict with a primary prosecution witness previously represented by the public defender's office. The Public Defender revealed that there was confidential information in the office files on that witness; information that would be advantageous to appellant on cross examination. Upon discovering that defense counsel was not personally aware of the information, the judge ordered trial defense counsel not to seek the advantageous information from any office source and ordered the office not to reveal it to defense counsel. The trial judge then refused to allow defense counsel to withdraw.

The trial court's refusal to allow the public defender to withdraw violated appellant's Sixth Amendment right to conflict free counsel, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment right to due process.

The order placed trial defense counsel in the untenable position of favoring one client over another. That is, either defense counsel harmed the prior client by discovering the confidential information and using it for the benefit of appellant; or conversely counsel failed to aggressively seek the confidential information thus benefitting the prior client to the detriment of appellant. Either way, appellant's

representation at the penalty phase was fatally compromised and reversal is automatic.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that because appellant's counsel did not personally represent the prosecution witness on a prior occasion, and because appellant's counsel did not actually have any confidential information on the prosecution witness, and because appellant's counsel was permitted to seek impeachment information from other sources outside the Riverside County Public Defender's Office, there was no actual conflict of interest. (Respondent's brief at pp. 231-249.)

ERRORS IN RESPONDENT'S ARGUMENTS

The primary flaw in respondent's argument is the assertion that because the defense counsel was not personally aware of any confidential information concerning prosecution witness Deloney and did not have access to Deloney's confidential information in the Public Defender's files, there was no actual conflict of interest. To the contrary, a conflict of interest exists "where an attorney, or a member of the attorney's firm or office, represents a criminal defendant after having previously represented a prosecution witness." *(People v. Pennington* (1991) 228 Cal.App.3d 959, 965.) Formal Opinion No. 1981-59 of the State Bar asserts that if the public defender represents two defendants charged in separate unrelated criminal cases, and one defendant seeks to become a witness against the other, the public defender should not continue to represent either of them. (See the opinion located at: http://calbar.ca.gov/calbar/html_unclassified/ca81-59.html.) Numerous cases have recognized that the violation of any of these rules of professional conduct establishes an actual conflict of interest. (See, e.g., *United States v. Iorizzo* (2nd Cir, 1986) 786

F.2d 52, 57, citing *United States v. McKeon* (2d Cir. 1984) 738 F.2d 26, 34-35; *United States v. Dolan* (3rd Cir. 1978) 570 F.2d 1177, 1184.)

Even if that were not so, when the Public Defender declares a conflict of interest, as Mr. Zagorsky repeatedly did in this case, **the declaration of counsel by itself is sufficient to establish an actual conflict without disclosure of the underlying facts**. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 486;[33] *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 535.) In *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, the court of appeal found that it was sufficient to establish a conflict when there was an affirmative representation either by personal

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[33] In response to the claim that allowing a public defender to unilaterally declare a conflict of interest, the trial court would be ceding authority to unscrupulous defense counsel who simply wanted to manipulate the trial process, the Court in *Holloway* explained that the trial court had other ways to deal with unscrupulous attorneys. (*Id* at p. 486 fn.10.) Moreover, the Court explained the rationale for allowing the unilateral declaration of defense counsel to establish a conflict, noting:

> "In so holding, the courts have acknowledged and given effect to several interrelated considerations. An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists and will probably develop in the course of a trial.' ... Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.... Finally, attorneys are officers of the court and ' " when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." ' ... We find these considerations persuasive." *Id.* at pp. 485-486, citations omitted.)

appearance or by declaration that the chain of command at the county public defender's office reviewed the facts, and concurred with trial defense counsel that there was a conflict. (*Id.* at p. 594, fn. 8.) In the view of the Court of Appeal, the county public defender did not declare conflicts lightly and thus there was little danger of multiple frivolous conflict declarations. (*Id.*, at p. 594.) It should be noted that in this case, while Mr. Zagorsky declared conflicts with several prosecution witnesses, he did NOT make such a declaration regarding other prosecution witnesses that the public defender previously represented. (See, e.g., sealed transcripts, 51 R.T. 5974-5975.) Thus it would be hard to argue plausibly that Mr. Zagorsky was simply making frivolous declarations of a conflict.

That the trial court offered the alternative of allowing trial defense counsel to discover other evidence to impeach Deloney, aside from confidential information contained in the Pubic Defender's files, is no solution to the conflict. Suppose for example, the information that Mr. Zagorsky discovered in the Deloney file was that Deloney admitted to his counsel that he - not appellant- was the instigator of these jailhouse incidents and that appellant assisted him only under extreme duress.

Even if public defender Wright discovered this information from an independent source, it would still be confidential information and Mr. Wright would **NOT** be entitled to use it to impeach Deloney. An attorney's duty of confidentiality is broader than just client communications and **extends to all confidential information, privileged or unprivileged, and whether learned directly from the client or from another source.** (*Perillo v. Johnson* (5th Cir. 2000) 205 F.3d 775, 779 (emphasis added).) Thus the solution imposed by the trial judge was no solution at all. It merely conferred a patina of legitimacy on a process that actually prevented

trial defense counsel from using information helpful to the defendant.

To counter appellant's arguments, respondent relies on *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 for the proposition that a possible conflict within a Public Defender's office does not require automatic disqualification. *(Id.,* at p. 1569) *Rhaburn*, however, is easily distinguishable.

In *Rhaburn*, the defense argued simply that because the Public Defender previously represented some prosecution witnesses, disqualification was automatic. The Court of Appeal concluded, however that disqualification was not automatic and the case had to be returned to the trial court to determine whether there was an actual conflict. Significantly, however, in *Rhaburn* the Public Defender **did not declare a conflict**, thus the case had to be returned to the trial court to determine if there was a conflict. Indeed, the court in *Rhaburn* specifically noted that in formulating a more flexible rule than automatic disqualification, it was relying on cases where counsel averred that there was no actual or potential conflict of interest. (*Id.,* at p. 1578.) Here, by contrast, the Pubic Defender **DID** declare a conflict, thus an actual conflict of interest existed in this case. (*Holloway v. Arkansas , supra*, 435 U.S. at p. 486; *Uhl v. Municipal Court, supra,* 37 Cal.App.3d at p. 535; *Aceves v. Superior Court, supra,* 51 Cal.App.4th at p. 594, fn. 8..)

In that regard, to the extent that the trial court relied on Mr. Wright's assertion that he did not previously represent any of the state's witnesses and that he was not aware of any materials contained in the public defender's files as justification for finding no conflict, the finding is unsupported by the record. Mr. Wright clearly did not know what was in the files and thus **could not know** whether there was a conflict. By contrast, Mr. Zagosky read the files and actually knew there was a

conflict.

In dicta, *Rhaburn* went further, however, and acknowledged that in developing a more flexible approach to conflict situations in criminal cases, it was departing from the rigid rule of automatic disqualification that applied in civil cases. (*Id.*, at pp. 1578-1579.) As justification for such a departure, the court noted that the financial incentive to favor one client over another certainly did not apply in criminal cases handled by the public defender's office. Moreover because the public defender's office usually handled a high volume of cases, the financial consequences of automatic disqualification fell heavily on the taxpayers. (*Id.*, at pp. 1579-1580.)

While these financial considerations are certainly seductive, they are nonetheless, improper. (*People v. Barboza* (1981) 29 Cal.3d. 375, 380-381 [expense is an improper consideration in determining where counsel's fiduciary responsibilities lie]; see also *Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.) "[T]he pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial."].)

More important, nowhere in the *Rhaburn* opinion is there even a mention of the Sixth Amendment right to conflict free counsel discussed in *Mickens v. Taylor* (2002) 535 U.S. 162. In *Mickens,* the United States Supreme Court flatly rejected any distinction between private law firms and state appointed counsel when evaluating conflict situations in a Sixth Amendment context. Thus, if a conflict exists, it does not somehow become less important or less of a conflict because the entity representing a criminal defendant is the public defender rather than a

privately retained law firm. *(Mickens v. Taylor, supra,* 535 U.S. at p. 169, fn2.)[34] Nothing in the Sixth Amendment allows the state to impose counsel on a defendant based upon financial considerations to the public at large when counsel has an actual conflict of interest. In an analogous context, the fact that the taxpayers would have to bear the enormous financial burden of funding the entire defense of indigent persons charged with crimes was no impediment to requiring compliance with the Sixth Amendment right to counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) Moreover, included within the Sixth Amendment right to counsel is the right to conflict free counsel. (*Wheat v. United States* (1988) 486 U.S. 153, 160. *see also Wood v. Georgia* (1981) 450 U.S. 261, 271 [Conflicted counsel are also a due process Fourteenth Amendment violation.]). Thus, public financial considerations are not a suitable basis for avoiding the mandate of the Sixth Amendment right to conflict free counsel.

Finally, left completely unaddressed by respondent's argument is the solution to this dilemma proposed by Mr. Zagorsky. In accordance with the procedure outlined in *People v. Alcocer* (1988) 206 Cal.App.3d. 951, 961-962, Mr. Zagorsky proposed that the court simply appoint an independent counsel to advise Mr.

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[34] Footnote 2 in *Mickens* states:

> "In order to circumvent *Sullivan's* [*Cuyler v. Sullivan*] clear language, Justice STEVENS suggests that a trial court must scrutinize representation by appointed counsel more closely than representation by retained counsel. *Post*, at 1250 (dissenting opinion). **But we have already rejected the notion that the Sixth Amendment draws such a distinction.** " [emphasis added]

Deloney on whether he would be willing to waive any conflict. (Sealed transcripts 51 R.T.5989.) In that regard, the prosecutor even advised the court that Mr. Deloney intimated that probably he would be willing to waive any conflict. (51 R.T. 5962.) Had the trial judge read *Alcocer* a little more closely and erred on the side of caution, he could have easily avoided the conflict situation presented here. Moreover, if cost was a legitimate concern in the Sixth Amendment context, appointing independent counsel would not be nearly as costly or time consuming as retrying the penalty phase at this late date.[35]

For these reasons, and those set forth in appellant's opening brief, the trial court's refusal to properly resolve the clear conflict situation in this case compels reversal of the penalty phase trial.

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[35] Since there were numerous other penalty phase witnesses who had not yet testified at the time this conflict problem arose, those witnesses could have been testifying while the disputed witnesses were being advised by independent counsel. Thus, there is a good chance that there would have been no material delay and the jury might not have been inconvenienced at all.

XV.

THE TRIAL COURT ERRED IN FAILING TO CORRECT THE JURY'S MISUNDERSTANDING CONCERNING THE MEANING OF A SENTENCE OF LIFE WITHOUT PAROLE AND IN FAILING TO AMELIORATE ITS FEAR THAT THE SENTENCE IT IMPOSED WOULD NOT BE CARRIED OUT

SUMMARY OF APPELLANT'S ARGUMENT

The prosecution presented extensive evidence of, and argument on, appellant's future dangerousness. During deliberations, however, the jury sent the court a note requesting an explanation of the meaning of a sentence of life without parole and whether a death sentence would actually be carried out. That is, would the sentencing decision have the practical effect of allowing the defendant to gain his freedom at some point?

Instead of answering the jury's question, the trial court simply referred the jury to the prior sentencing instructions which the note plainly showed the jury did not understand. The trial court's failure to ensure that the jury understood its sentencing responsibilities deprived appellant of his Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment right to due process.

SUMMARY OF RESPONDENT'S ARGUMENT

Relying on this courts prior decisions, particularly *People v. Abilez* (2007) 41 Cal.4th 472, respondent argues that CALJIC 8.84 and 8.88 adequately instruct the jury on the meaning of life without parole as an alternative to the death penalty.

Further, relying on *People v. Silva* (1989) 45 Cal.3d 604, even though the jury specifically asked whether a sentence of life without parole might eventually allow the defendant to go free, respondent contends that referring the jury to the standard instructions provided the jury with an adequate response to its concerns. (Respondent's brief at pp. 249-256.)

ERRORS IN RESPONDENT'S ARGUMENTS

The holding in *Abilez* and similar cases is that the standard instruction, CALJIC 8.84 is sufficient to convey the appropriate sentencing responsibilities to the jury. That is, a sentence of life without parole means that the defendant will spend the rest of his life in prison and that a sentence of death means the defendant will be executed. Nevertheless, this court has never rejected the equally appropriate formulation set forth in *People v. Fierro* (1991)1 Cal.4th 173, 250, that the jury "must assume" that the sentence it adjudicates will be carried out. The defense proposed instruction here contained virtually identical language to that approved by this court in *Fierro*.[36] (4 C.T. 1074.)

The more fundamental problem is, as appellant explained in his opening brief, that although CALJIC 8.84 says that a defendant will be confined for "life without

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[36] The defense proposed instruction read:

> "You must assume that if you sentence the defendant to death, he will be executed in the gas chamber or by lethal injection. If you choose the sentence of life in prison without the possibility of parole, you must assume that he will not be paroled." (19 C.T. 5282.)

parole", the language of the South Carolina instruction [imprisonment until death] that the United States Supreme Court found defective in *Simmons v. South Carolina* (1994) 512 U.S. 154, 169, permits exactly the same conclusion.

Neither the South Carolina nor the California instruction fully addresses the problem that this jury believed that through some formula, even a capital defendant might become eligible for parole. Thus, the jury here expressed great skepticism that any "life" sentence absolutely precluded parole. It is for that reason that *Simmons* and later *Shafer v. South Carolina* (2001) 532 U.S. 36 [121 S. Ct. 1263, 149 L. Ed. 2d 178] require that a jury be instructed that a sentence of life without parole means that there is, in fact, no possibility of parole. CALJIC 8.84 does not resolve that fundamental problem.

There is nothing inaccurate about telling the jury what it should presume in choosing between its sentencing options. The jury is not supposed to speculate about possible escapes or commutations. A rational and reliable determination of the appropriate sentence is best achieved if the jury refrains from such speculation and presumes that the sentences will actually be carried out. That is the choice the proposed instruction would have given the jury in this case. More importantly, that is why the defense proposed instruction is far superior to the standard CALJIC 8.84 instruction.

Additionally, CALJIC 8.84 as it was given here suffered from the same flaws in its description of the imposition of a sentence of execution as it did with the sentence of life without parole discussed above. As appellant pointed out in his opening brief, since at the time of appellant's penalty trial there had been very few executions, the jurors, or at least some of them, clearly had doubts that a death

sentence would be carried out. The proposed instruction remedied that flaw by telling jurors that they were to presume that a sentence of execution would be carried out. Thus, the proposed instruction corrected the federal due process problem that *Simmons* and *Schafer* addressed with respect to jurors perceptions of the efficacy of their sentencing decisions and conformed to this court's direction in *Fierro* concerning the appropriate language necessary to counter these perceptions.

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

XVI.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL "VICTIM IMPACT EVIDENCE"

SUMMARY OF APPELLANT'S ARGUMENT

The victim impact evidence in this case consumed almost one fifth of the prosecution's entire penalty phase case in chief. The sheer volume of emotional evidence overwhelmed any realistic notion of an impartial assessment of the propriety of a death verdict. Moreover, the quality of the evidence and the type of argument crossed the line between an appropriate request for a death verdict based on the impact of the killing and the improper request for a death verdict based significantly on an invidious comparison between the societal worth of the deceased and the societal worth of the defendant. That is, Ms. Los was not only someone special to her family but an extraordinary person who contributed to society. By contrast, the prosecution asserted that appellant had little social worth. He renounced hard work and study. Instead he preyed on others and chose violence and manipulation as a way of satisfying his desires. Underlying this overt presentation was yet another message, a not-so-subtle appeal to race. The prosecution's penalty phase theme was basic: an extraordinary valuable Caucasian life was snuffed out by a black defendant of little social value. Indeed, that theme permeated the entire penalty phase presentation. For these reasons the death verdict must be set aside.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent first urges that appellant's claim is waived by the failure to properly object. Second, the evidence presented here was entirely appropriate and well within this court's guidelines for victim impact evidence. The testimony and the videotapes did not invite an irrational emotional response from the jury but rather explained the effects of Ms. Los' death on her loved ones and the community. Thus, the evidence was proper under California Penal Code section 190.2, subdivsion a, circumstances of the crime. (Respondent's brief a t pp. 256-265.)

ERRORS IN RESPONDENT'S ARGUMENTS

The fatal flaw in respondent's argument is the failure to acknowledge that the victim impact evidence in this case went wildly beyond anything contemplated by the United States Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 827, [111 S.Ct. 2597, 115 L.Ed.2d 720]. In *Payne* the high court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se bar*." ([Emphasis Added]. *Ibid.)*

Nevertheless, to be consistent with the facts and holding of *Payne,* the admission of victim impact evidence, if such evidence is admitted at all, must be attended by appropriate safeguards to minimize its prejudicial effect and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. The *Payne* court specifically warned there are limits to victim impact evidence, and observed that it would violate the federal constitutional guarantee to due process of law to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair. . . ." (*Payne, supra,*

501 U.S. at p. 825.)

As made clear by Justice O'Connor in a concurring opinion joined by Justices Kennedy and White, the absence of any due process violation in *Payne* was established by the distinctly limited quantity of otherwise irrelevant victim impact evidence presented in that case:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merelythat if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." Ante, at 827. In a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 831-832.)

Justice Souter's concurrence, joined by Justice Kennedy, added the following warning to that written by Justice O'Connor:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. [Citations.] With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." [Citation.] (*Payne v. Tennessee, supra*, 501 U.S. at pp. 836-837.)

As Justice Moreno pointed out in his concurring opinion in *People v.*

Robinson (2005) 37 Cal.4th 592, the *Payne* decision left intact the Constitutional restrictions announced in *Booth v. Maryland* (1987) 482 U.S. 49 [96 L.Ed.2d 440, 107 S.Ct. 2529], that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Id.*, at p. 656.) There is a definite line between proper victim impact testimony and improper characterization and opinion by the victim's family. (*Ibid.*)

Overwhelming Emotional Impact

In *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, this Court suggested a limitation on victim impact evidence, emphasizing that "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*, *supra*, ... " This Court further warned that:

> Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d [841] at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] (*Id.* at p. 836, n.11.)

As appellant explained in his opening brief, a significant portion of the prosecution's penalty phase evidentiary presentation was devoted solely to victim impact evidence. Ten witnesses testified (mostly non family members) and the prosecution presented two videotapes, numerous photographs, and certificates and awards attesting to Ms. Los' accomplishments. The sheer volume of the evidence alone created an unacceptable risk that the jury's attention would be focused on

improper considerations. As The Supreme Court of New Jersey pointed out:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness. (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.)

Moreover, the evidence about the decedent's character far exceeded the "quick glimpse" of the decedent's life approved in *Payne v. Tennessee, supra*, 501 U.S. at pp. 822-823. Here, Ms. Los' virtues were explored at length, and the evidence also included an exhaustive account of her complete life history, from birth to death and beyond, including detailed descriptions of her activities; her work as a candy striper when she was a youth, her volunteer activities including the care of a disabled, bedridden child, her heart rending certificate citation from a "mother of the year" contest, her activities in setting up a presurgical clinic at a base hospital, a video montage of her life and finally a video of the Air Force dedication of a building in her honor. The testimony about these activities was buttressed by awards complete with photos, documents and certificates. (See, e.g., the 19 photographs contained in prosecution exhibits 71and 72, plus the videos contained in prosecution Exhibits 82 and 83.) The total presentation here resembled a memorial service or celebrity tribute more than a capital penalty trial.[37]

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[37] "[T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a

More important, a review of the evidence and argument in this case reveals that here the evidence of the victim's character was most likely offered to provoke the type of emotional reaction found impermissible in *Booth*. It worked; not only was the decedent's fiancee Mr. Petrosky overwhelmed and unable to finish his presentation (52 R.T. 6093), but as counsel for codefendant Dearaujo pointed out to the trial judge, during the presentation of the victim impact evidence there were times when jurors as well as court staff were in tears. (Supplemental R.T. volume 9 at p. 7063.)

Because of its massive scale and overwhelming emotional impact, this evidence was "so unduly prejudicial that it renders the trial fundamentally unfair[.]" Thus, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. [Citation.]" *(Payne v. Tennessee, supra*, 501 U.S. at p. 825.) The death sentence must be reversed.

Invidious Appeals to Race

Respondent urges that comparisons between the decedent and the defendant are not invidious appeals to race.

As appellant pointed out in his opening brief, however, a death sentence is unconstitutional "if it discriminates against [the defendant] by reason of his race,.., *or if it is imposed under a procedure that gives room for the play of such prejudices*." (*Furman v. Georgia* (1972) 408 U.S. 238, 242 [33 L.Ed.2d 346, 92

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criminal trial." *Salazar v. State* (2002, Tex Crim App.) 90 S.W.3d 330, 335-336.) The Texas Court of Criminal Appeals found a seventeen-minute video montage of 140 photos of the deceased, including the decedent as an infant and toddler, inadmissible.

S.Ct. 2726] [conc. opn. of Douglas, J.] (emphasis added).) Therefore, while it may be impossible to eliminate the pernicious effect of race from capital sentencing altogether (*McCleskey v. Kemp* (1987) 481 U.S. 279 at pp. 308-314), the courts should engage "in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system" (*id.* at p. 309) and disapprove any procedures which create an unnecessary risk that racial prejudice will come into play. (*Batson v. Kentucky* (1986) 476 U.S. 79, 99 [90 L.Ed.2d 69, 106 S.Ct. 1712].)

The presentation of extensive evidence concerning the outstanding character of the homicide victim creates the risk that arbitrary and irrelevant comparisons will influence the sentencing decision. (*Booth v. Maryland*, *supra*, 496 U.S. at p. 506 and fn. 8; *State v. Carter* (Utah 1995) 888 P.2d 629, 652; *Alvarado v. State* (Tex.Crim.App. 1995) 912 S.W.2d 199, 222 [conc. opn. of Baird, J.].) It is wrong to allow "such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." (*Booth*, *supra*, at p. 506.)

Whether the comparison is phrased as a comparison between victims or a comparison between the defendant and the victim, the effect is exactly the same, and the result is a death sentence that is not only arbitrary and unfair (*Booth*, *supra*, at p. 506), but also a violation of the equal protection of the laws. (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 [145 L.Ed.2d 1060, 120 S.Ct. 1073].) (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 15 and 17.)

The most obvious discrimination is unique to the capital punishment context; the danger that defendants whose victims are perceived as assets to society will be more likely to receive the death penalty than equally culpable defendants whose

victims are perceived as less worthy. (*Booth*, *supra*, at p. 506.) However, a more familiar form of discrimination is lurking as well - discrimination based on race. "[I]n many cases, expansive [victim impact evidence] will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death decision." (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280 [hereafter cited as Blume].)

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray* (1986) 476 U.S. 28, 35 [90 L.Ed.2d 27, 106 S.Ct. 1683].) That danger is particularly acute in cross-racial crimes like this one, where the victim and her surviving relatives are white and the defendant is black. Neither the race of the victim nor the race of the defendant is a constitutionally permissible factor in capital sentencing. (*McCleskey v. Kemp, supra,* 481 U.S. 279 [95 L.Ed.2d 262, 107 S.Ct. 1756] [race of victim]; *Zant v. Stephens*, *supra*, 462 U.S. at p. 885 [race of defendant].)

Evidence which glorifies the homicide victim and emphasizes her virtues exacerbates this disparity. In *Moore v. Kemp* (11th Cir. 1987) 809 F.2d 702, the victim character evidence was much less extensive than it was in this case, and the prosecutor's comparison argument was much less explicit. Neither mentioned race expressly. (*Id.* at pp. 747-748 and fn. 12.) Even so, Judge Johnson readily concluded that "it could not but help inflame the prejudices and emotions of the jury to be confronted with a father's testimony of the virtuous life of his white daughter violated and then mercilessly snuffed out by this black defendant." (*Id.* at p. 749, emphasis in original [conc. and dis. opn. of Johnson, J.].)

Overt prejudice is not the only danger. There are many subtle ways in which conscious or unconscious racism can color the jurors' perception of the defendant, their evaluation of his defenses, and their assessment of the seriousness of his crime. (*Turner v. Murray, supra*, 476 U.S. at p. 35.) Evidence which focuses the jury's attention on the character of the victim gives these improper influences free rein, causing majority jurors to view the crime as especially serious because they empathize and identify with the white victim. (See Berger, *Payne and Suffering - A Personal Reflection and a Victim- Centered Critique* (1992) 20 Fla. St. U. L.Rev. 21, 25, 48.)

Here, the prosecutor's request to compare the value of lives was explicit. She told the jury to "[l]ook at all the lives he has touched and compare that with all the lives that Ms. Los touched in such a positive manner." (55 R.T. 6575.) The prosecutor then raised the image of Ms. Los caring for a disabled bedridden child, and contrasted it to the image of appellant and his friends shoving "guns in women's and men's faces and tak[ing] their cars." (55 R.T. 6575.)

If that was not enough, only a few transcript pages later, the prosecutor raised the race issue directly. Although phrased in politically correct terms, the racial overtones were obvious. First, the prosecutor said that this incident was not related to racial stereotypes such as violence erupting from a notorious black gang like the Crips. ["This group of kids was a multi-racial group of kids. This wasn't some minority thing or some gang like Crips..." (55 R.T. 6580.)] Then she told the jury that despite all the advantages that appellant had during his upbringing, nevertheless, he resorted to "the violent way out, the sociopath way out." (55 R.T. 6580.) Since there was no evidence whatsoever about sociopathic tendencies, the clear implication

was that appellant reverted to stereotypical black gang behavior and got what he wanted by using violence.

If the prosecutor was simply trying to tell jurors that appellant had an unfettered choice to do good or evil and he chose evil, why paint images of black gangs and sociopathic violence, unless it was to implant the frightening idea of the Crips in their minds? This rhetoric was nothing more than an inflammatory emotional appeal to the jury's fear of racial violence.

As appellant also explained in his opening brief, however, there is more to the issue: here, the trial court excused the only two black jurors for their purported misconduct based on their belief that blacks were treated differently. The questioning of jurors and particularly the jury foreman revealed almost complete insensitivity to racial differences. The frustration between juror #10 and the other jurors reached a boiling point and there was a heated exchange in the jury room where race became an issue. (45 RT 5373.) As explained in Issue I, however, it was a little more than a mere heated exchange. As juror #10 herself explained to the trial judge, she was attacked verbally, screamed at and cut off during deliberations. (45 R.T. 5434-5435.) Further, Juror #2 explained that juror #10 realized she was the only African American in the room and felt "picked on because of her race." Indeed, when juror #10 tried to explain the black culture that may have influenced how the events unfolded in this case, the rest of the jurors specifically told her not to bring race into it. (45 R.T. 5386, 5389.) Thus, there is little doubt that the jury was particularly sensitive to racially divisive issues and probably to racial stereotypes.

The contrast between the problem of race as it existed in the guilt phase and the issue as it appears here is particularly revealing. While it is certainly true that

jury considerations in guilt phase are different than those in penalty phase, the different way race was treated in those two phases amounts to a significant Fourteenth Amendment Due Process violation. In the guilt phase' the jury refused to consider race in the context of juror #10's attempt to explain what it was like to grow up as a black person in MorenoValley at the time when the defendant lived there. In doing so, she was obviously trying to convey the cultural context of life as a young black person in the area - a perfectly valid consideration. (*See, People v. Wilson, supra*, 44 Cal.4th at p. 831["[Jurors] can draw on their personal and family experiences within their own minority communities."] More important, as appellant explained in issue I, had the jury heard this commentary, it may well have entertained a reasonable doubt concerning whether the meeting at Natalie Dannov's house was truly an organizational meeting that would support a conspiracy theory or an aider and abetter theory [as the prosecution contended] , or whether it was merely a group of young people getting together to brag and boast, a session fueled primarily by alcohol [as the defense contended]. The trial court's failure to make any inquiry into this clear instance of jury misconduct deprived appellant of a fair trial.

At penalty phase, however, the decedent's race was prominently featured in the victim impact evidence and the prosecutor repeatedly contrasted the decedent's race to that of the defendant. While the terms the prosecutor used were ostensibly race neutral, the allusions to Crip gang violence [a black gang] and stereotypical sociopathic violence [a comment for which there was absolutely no evidentiary support] a jury already sensitized to racial divisiveness in the guilt phase could not possibly have missed the racial connection. Moreover, by emphasizing the decedent's race, and allowing the jury to consider large amounts of victim impact

evidence these improper influences caused majority jurors to view the crime as especially serious because they could empathize and identify with the white victim. In short, by allowing the jury to exclude racial and cultural considerations in the guilt phase, the trial court improperly lowered the prosecution's burden of proof on its vicarious liability theories. By contrast, allowing invidious racial considerations in the penalty phase, the trial court improperly increased the likelihood of a death verdict.

It is of no consequence to argue that guilt phase considerations and penalty phase determinations are different, thus the matters the jury can consider are different. Not only were the matters excluded at guilt phase and admitted at penalty phase improper, but even if that was not the case, state evidentiary rules must give way to federal Constitutional mandates. (Cf. *Davis v. Alaska* (1974) 415 U.S. 308, 320 [39 L.Ed.2d 347, 356, 94 S.CT. 1105][state procedural restriction on cross examination not permitted to defeat Sixth Amendment right to confront]; *Chipman v. Mercer* (9th Cir. 1980) 628 F.2d 528, 530-532 [California Evidence Code section 352 restriction on impeachment evidence cannot defeat the Sixth Amendment right to cross examine]; *People v. Reeder* (1978) 82 Cal.App.3d 543. [Judge's statutory discretion under Penal Code section 352 may not override the defendant's substantive due process rights].) For these reasons, excluding racial and cultural considerations where it hurt the defense and allowing them where it helped the prosecution unfairly deprived appellant of due process and a fair trial.

No Waiver

Respondent argues that the issue was waived because the objection was not proper. (Respondent's brief at p. 260-261.) Respondent is in error.

As appellant explained in his opening brief, at an Evidence Code section 402 hearing conducted at the beginning of the penalty phase, defense counsel specifically objected to the testimony of Christopher Reusch, Captain Margaret Foltz, Paul Petrosky and the two videotapes. Defense counsel urged that the evidence on these tapes and from these witnesses was not proper victim impact evidence. (52 R.T. 6069-6070.) The trial court overruled the defense objections with the exception of the music on one of the videotapes, which the court did not allow. (52 R.T. 6076.)

As appellant also explained in footnote 116 of his opening brief, counsel did not specifically object to the testimony of Mr. Los' parents, her children or her siblings. Nevertheless, since the judge allowed the most egregious forms of victim impact evidence into evidence, any further objection to the testimony of these people clearly would have been a fruitless gesture. (See footnote 116 at pp. 439-440 of appellant's opening brief.) Futile objections are not required simply to preserve an issue for appeal. (*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Moreover, even if that were not the case, the facts are not in dispute and the federal Constitutional legal principles are essentially the same as the trial court was asked to apply. The improper use of victim impact testimony in this case violated the Eighth and Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (Cf. *Beck v. Alabama* (1980) 447 U.S. 625, at p. 643 [65 L.Ed.2d at p. 403, 406, 100 S.Ct. 2382].) Therefore, appellant's Constitutional claims are preserved even if presented for the first time on appeal.

(*People v. Boyer, supra,* 38 Cal.4th 412 at p. 441, fn. 17; see also *People v. Carasi, supra*, 44 Cal.4th 1263 at p. 1288, fn 15.) Finally, an appellate court is generally not prohibited from reaching questions that have not been preserved for review by a party. (*People v. Williams, supra,* 17 Cal.4th at pp. 161-162, fn. 6; see also *People v. Smith, supra*, 31 Cal.4th at p. 1215; *People v. Yeoman , supra* 31 Cal.4th at p. 117.)

For these reasons, the federal Constitutional error is not waived and this court is not precluded from reviewing appellant's claim as to the entire range of improper victim impact evidence presented in this case.

CONCLUSION

Individually and collectively, these improper appeals to the jury's emotion deprived appellant of any semblance of a reliable penalty phase determination. The errors complained of herein violated appellant's Fifth, Sixth, Eighth and Fourteenth amendment right and were so highly prejudicial that reversal is compelled under any standard.

XVII.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE

SUMMARY OF APPELLANT'S ARGUMENT

Given the extensive amount and highly emotional nature of the victim impact evidence in this case, the court had a *sua sponte* duty to properly instruct the jury on its appropriate consideration.

Here, although the trial court instructed in accordance with CALJIC 8.84.1 nothing else was said to guide the jury in its consideration of this emotionally volatile evidence. CALJIC 8.84.1 is deficient because it does not caution the jury against an improper or irrational use of the victim impact evidence and does not warn the jury against invidious comparisons between the victim and the defendant. The error deprived appellant of his Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment rights to due process.

SUMMARY OF RESPONDENT'S ARGUMENT

Citing *People v. Morgan* (2007) 42 Cal.4th 593, 624; *People v. Carey* (2007) 41 Cal.4th 109, 134 and similar cases, respondent urges that there is no *sua sponte* duty to instruct on victim impact evidence beyond CALJIC 8.81.4. (Respondent's brief at pp. 265-266.)

ERRORS IN RESPONDENT'S ARGUMENT

While this court has rejected arguments similar to those appellant made here,

nevertheless, this court has never rejected the principles set forth in the instruction proposed by appellant.

In his opening brief, appellant explained in detail why the argument is appropriate here. Other than a perfunctory assertion that CALJIC 8.84.1 addresses all of appellant's contentions, respondent has chosen not to address the merits of appellant's arguments. That being so, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XVIII.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT ON LINGERING DOUBT IN VIOLATION OF STATE LAW AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

SUMMARY OF APPELLANT'S ARGUMENT

The defense proposed a penalty phase instruction on lingering doubt. The trial court refused noting that although the instruction was correct on the law, lingering doubt was solely a matter for argument. In view of the jury's repeated notes expressing concern about the limits of appellant's vicarious liability as well as its concern for whether the death penalty was appropriate, the trial court's resolution of this close question was of monumental importance in determining whether to execute appellant or spare his life. Therefore, the failure to give this instruction deprived appellant of his Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment rights to a reliable penalty determination, and his Fifth and Fourteenth Amendment rights to due process.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent notes that similar arguments have been rejected many times. (Respondent's brief at p. 268.) Further, because the jury could have considered lingering doubt under factor (k) there was no necessity for a separate instruction. (Respondent's brief at p. 268.)[38] Thus there was no error. (Respondent's brief at pp.

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[38] Respondent also asserts -without citation to appellant's briefing- that appellant conceded that there was no doubt at to his guilt. (Respondent's brief at

268-269.)

ERRORS IN RESPONDENT'S ARGUMENT

Essentially, respondent's argument is nothing more than a recitation of some of the reasoning set forth in this court's prior decisions on this issue. In his opening brief, however, appellant explained at length why that reasoning does not apply to appellant's case and why appellant was prejudiced by the failure to properly instruct on lingering doubt.

Since respondent has chosen not to address the substance of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

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p. 268-269.) Appellant categorically asserts that he never conceded his guilt to the charged crimes. The jury clearly found him guilty of the charged offenses, but just as clearly the jury notes show that the jury was uncomfortable with the reach of the prosecution's theories of vicarious liability. Had the jury been properly instructed on those theories, it might well have acquitted him on some or all of the charges. (See, e.g. Issues V-IX.)

XIX.

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

SUMMARY OF APPELLANT'S ARGUMENT

CALJIC 8.85 was given in this case. The instruction is Constitutionally flawed because it fails to tell the jury which factors are mitigating and which are aggravating. This failure to designate allows jurors to make disparate judgments on similar factors and introduces an unacceptable level of arbitrariness in the capital sentencing process.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent cites several cases where arguments similar to the ones appellant makes here have been rejected by this court. On that basis, respondent asserts that appellant's claim has no merit. (Respondent's brief at pp. 269-270.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant conceded that this court has ruled adversely on claims somewhat similar to the one appellant presents here. Nevertheless, also in his opening brief, appellant explained at length why that reasoning does not apply to appellant's case and why appellant was prejudiced by the standard CALJIC 8.85 instruction given in this case.

Since respondent has chosen not to address the substance of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XX.

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT''S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

SUMMARY OF APPELLANT'S ARGUMENT

CALJIC 8.88 is an improper instruction because it fails to describe accurately the weighing process the jury must apply in capital cases. Moreover, by so failing, it deprives a defendant of the individualized consideration that the Eighth Amendment requires. Further, the instruction is improperly weighted toward death and contradicts the requirements of Penal Code section 190.3 by allowing a death judgment if the aggravating circumstances are merely "substantial" instead of requiring the jury to make the proper determination that if the mitigating circumstances outweigh the aggravating circumstances, it must return a verdict of life without parole.

Finally, the critical "so substantial;" language in the instruction that describes the effect of the aggravating factors is unconstitutionally broad. That language would allow a death judgment if the jury found death was authorized under the statutes instead of whether it was appropriate under the circumstances. All of these problems effectively lower the prosecution's burden of proof below that is required by the Constitution.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that all of appellant's arguments have at one time or another

been rejected by this court. On that basis, respondent asserts that appellant's claim has no merit. (Respondent's brief at pp. 270-273.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant conceded that this court has ruled adversely on claims somewhat similar to the one appellant presents here. Nevertheless, in his opening brief, appellant explained at length why that reasoning does not apply to appellant's case and why appellant was prejudiced by the standard CALJIC 8.88 instruction given in this case.

Since respondent has chosen not to address the substance of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XXI.

THE DEATH PENALTY IS DISPROPORTIONATE TO APPELLANT'S INDIVIDUAL CULPABILITY AND ITS IMPOSITION WOULD THEREFORE VIOLATE THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that the death penalty is disproportionate to his personal culpability and that its imposition in this case would violate the state and federal constitutions. In particular, appellant urged that his culpability in this case is even less than that of the defendant in *People v. Dillon* (1983) 34 Cal.3d 441, yet defendant Dillon got a reduction from a first degree murder conviction to second degree while the appellant here was sentenced to death.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that appellant was more culpable than Dillon. Here, appellant knew that Lyons and Dearaujo were going to do a carjacking when he provided them with the pistol. Further, on prior occasions, appellant told members of the Pimp Style Hustlers to "pop" or "cap" persons who resisted. (Respondent's brief at pp. 274-275.)

ERRORS IN RESPONDENT'S ARGUMENTS

As appellant pointed out in his opening brief, Dillon was part of a well planned six person invasion of a marijuana plantation they intended to rob. The defendant fired nine rifle shots into the decedent who was merely attempting to

protect his property. Nevertheless, this court reduced Dillon's conviction to second degree murder, primarily because of his individual background. The court focused primarily upon the defendant's youth, the fact that he lacked the intellectual and emotional maturity of an average 17-year-old, his lack of a prior record, and the petty chastisements given to the other six youths involved in the incident. (*Id.*, at pp. 483-488.)

Here appellant was barely eighteen and had no prior record. (43 R.T. 6267-6268.) More important, appellant was NOT the perpetrator of the homicide. Moreover, contrary to respondent's assertion, not only did appellant not know that a homicide was going to take place, he was not even certain that a crime would take place. Several prior carjacking attempts by appellant's associates had been complete failures and no homicide had ever taken place. The trial judge ruled that as a matter of law, the evidence was insufficient to show that appellant ordered the car jacking or commanded the perpetrators to commit a crime. (38 RT 4658-4660.)

Additionally, Lyons admitted that the car jacking idea originated with him and Mr. Dearaujo. (20 R.T. 2832.) Further, Dearaujo, the actual shooter, was a slow witted teenager who panicked when Ms. Los tried to leave the scene. (See Supplemental R.T. Vol. 9 at p. 6998.) The argument that the prosecutor made to codefendant Dearaujo's jury during penalty phase summation was that the carjacking was conceived and carried out by Dearaujo and Lyons, not appellant. As she told the jury: "They went to commit the carjacking of Yvonne because they wanted to go with Jack. It was his [Dearaujo's] idea. They wanted to do it, he and Chris." (9 Supp. R.T. at p. 7089 (emphasis added).) A few moments later, Ms. Nelson reiterated to the jury "He's [Dearaujo] doing this all on his own. [¶] There's no one

there giving him step by step instructions on how to commit a carjacking.." (9 Supp. R.T. at p. 7094.) This was an argument clearly supported by the evidence.

Finally, appellant was **not** the actual shooter; the only theory of criminal culpability for appellant was as an aider and abetter or conspirator to felony murder. (8 R.T. 813.) Felony murder is a particularly harsh legal doctrine; to extend it even further to reach a peripheral participant and impose a sentence of death is to impose the harshest sentence on one whose personal culpability is minimal.

Thus, like *Dillon,* these circumstances show that appellant is hardly the "worst of the worst" for whom the death penalty is reserved. For these reasons and those set forth in appellant's opening brief, the death penalty is disproportionate to appellant's legal and moral culpability. This court should set the penalty aside.

XXII.

THE VIOLATIONS OF MR. WILLIAMS' RIGHTS ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT MR. WILLIAMS' CONVICTIONS AND PENALTY BE SET ASIDE

SUMMARY OF APPELLANT'S ARGUMENT

Mr. Williams was deprived of a fair trial and a reliable penalty determination in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards. The acts most violative of these standards are the illegal arrest of Mr. Williams and the process of picking the jurors who would sit in judgment on his life. More general charges include a contention that the United States and the State of California have effectively institutionalized racism in the process of choosing who will be subject to

the death penalty, and how they will be processed.

SUMMARY OF RESPONDENT'S ARGUMENT

In a one page argument, respondent notes that this court has consistently rejected challenges to the death penalty based on international law. Further, since the death penalty imposed in this case does not violate either state or federal law, there is no violation of international law either. (Respondent's brief at p. 276.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant explained at length why his trial violated international law. Since respondent has chosen not to address the substance of appellant's arguments on any aspect of international law, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XXIII.

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

SUMMARY OF APPELLANT'S ARGUMENT

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

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

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was

young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few defendants for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that all of appellant's arguments have previously been rejected by this court and appellant does not present any compelling reasons for a new review of those issues. Respondent then addresses appellant's arguments by generally setting forth this court's position on the thrust of appellant's argument.

(Respondent's brief at pp. 277-280.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant acknowledged that this court has approved these statutes generally but explained in detail why the application of these statutes was not appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XXIV.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT APPELLANT'S CONVICTIONS AND DEATH SENTENCE BE REVERSED

SUMMARY OF APPELLANT'S ARGUMENT

Even if the errors in appellant's case standing alone do not warrant reversal, the court should assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

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

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that there were no errors in this case, thus there could be no cumulative error or prejudice flowing therefrom. (Respondent's brief at p.281.)

ERROR IN RESPONDENT'S ARGUMENT

Respondent does not address the situation where this court might disagree and find one or more errors in the guilt or penalty phases of appellant's trial. Implicitly, therefore, respondent appears to concede that such errors may be cumulatively prejudicial.

Regardless of any such concession, however, there is a more fundamental problem with respondent's argument. Heightened reliability is required in capital litigation. Reliability, however, is not the primary focus of respondent's answer. Nowhere in respondent's answer does it explain how the challenged procedures in this case contributed to the overall reliability of the penalty phase fact finding process. Instead, respondent's insistence on waiver and harmless error provide little assistance to this court in its duty to ensure fundamental fairness.

The errors in this case are overwhelmingly prejudicial, both individually and cumulatively. More important, individually and cumulatively, these errors undermined the reliability of the death verdict. Our system of justice relies on process. If the trial process is just and fair, then the result will be reliable. (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) If the process is fundamentally flawed, however, it cannot be redeemed by resort to waiver or harmless error analysis. As appellant explained in both his opening and reply briefs, the death penalty process in California is fatally flawed in statute and it was flawed in its application to this case. Therefore, appellant's conviction and his death

judgment must be set aside.

XXV.

THE $10,000 RESTITUTION FINE WAS INCORRECTLY IMPOSED IN DISREGARD OF THE DEFENDANT'S ABILITY TO PA Y

SUMMARY OF APPELLANT'S ARGUMENT

At the conclusion of the penalty phase, the trial court ordered the defendant, Jack Williams to pay a $10,000 restitution fine pursuant to Penal Code section 1202.4 (19 C.T. 5374.) This fine was imposed in error because appellant is subject to a death sentence. Prisoners on death row are not permitted to work. Moreover, appellant is indigent and was assigned court appointed counsel, both at trial and on appeal. Therefore, appellant has no reasonably discernable means of paying a fine of this magnitude. Moreover, even though trial defense counsel failed to object, the error was not waived because the fine exceeded the court's jurisdiction.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that the issue was waived because the version of Penal Code section 1202.4 in effect at appellant's sentencing required the trial court to take into account the defendant's ability to pay. Thus, the failure to object constitutes waiver. Further, the issue lacks merit. Since the statute required the judge to consider the defendant's ability to pay, it should be conclusively presumed that the trial court actually considered the defendant's ability to pay, despite the fact that the trial court never stated the factual basis upon which it could have found that the defendant had the ability to pay such a large fine.

ERRORS IN RESPONDENT'S ARGUMENT

The very recent decision in *People v. Avila* (2009) 46 Cal.4th 680 adopts respondent's argument and rejects appellant's argument. The thrust of the *Avila* decision is that under the version of Penal Code section 12022.4 in existence in 1998 when the defendant was sentenced, a fine in any amount greater than the minimum of $200 up to the maximum of $ 10,000, was subject to the court's discretion. (§ 1202.4, subds. (b)(1), (d).) Significantly, however, under the statute in 1998 and the current statute, a defendant bears the burden of demonstrating his inability to pay, and express findings by the court as to the factors bearing on the amount of the fine are not required. (§ 1202.4, subd. (d); see *People v. Romero* (1996) 43 Cal.App.4th 440, 449 [the statute "impliedly presumes a defendant has the ability to pay," and leaves it to the defendant to adduce evidence otherwise].) Therefore, because the defendant did not come forward at sentencing to explain why he could not pay the fine, the issue is waived for appeal. (*Avila* at p. 729.)

Avila is wrongly decided and should be reconsidered. The key to the *Avila* decision is that the judge has discretion to impose a fine in any amount between $200 and $10,000. The primary flaw in *Avila* and in respondent's argument is the failure to articulate any rational basis upon which the trial court could have made even so much as an implied finding that the defendant had the ability to pay a $10,000 restitution fine. Here, the defendant is indigent and on that basis he qualified for court appointed counsel. (Cf. *Gideon v. Wainwright* (1963) 372 U.S. 335 [9 L. Ed. 2d 799, 83 S. Ct. 792]; *People v. Ortiz* (1990) 51 Cal.3d 975, 988-989.) Further, he cannot work while in prison on death row and thus cannot earn money to pay any fine at all, let alone a fine of $10,000. (See Penal Code section 2933.2(a)

[death row inmate is not entitled to earn work credits].) Thus, there was no evidence anywhere in the record to support an implied finding - much less an actual one - that appellant possessed the ability to pay a $10,000 restitution fine. (Cf. *People v. Saelee,* (1995) 35 Cal.App.4th 27, 31.) Significantly, "[a] trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

It is no answer to assert that the statute implies that all defendants are presumed capable of paying fine. The circumstances already known to the court demonstrate that the defendant was not capable of nor would he ever be capable of paying a $10,000 fine. Both of these conditions were known, or should have been known, to the trial judge. Given these circumstances, there is no factual basis to support the trial court's exercise of discretion to impose a $10,000 restitution fine.

Additionally, even if there was some requirement on the defense to affirmatively show that the defendant did not have the ability to pay the fine, what other evidence could the defense present besides indigence and the inability to earn money while on death row? These are factors already established on the record (or as a matter of law) and certainly were well known to the trial court. Simply reciting them again for the record is redundant. Clearly, "'[t]he law neither does nor requires idle acts.'"(*People v. Kitchens*, *supra*, 46 Cal.2d 260, 263; see also *Douglas v. Alabama, supra,* 380 U.S. 415, 422 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *People v. Anderson, supra,* 25 Cal.4th 543, 587.)

Under these circumstances, the $10,000 fine was an unauthorized sentence, thus exempting appellant from having to bring his claim to the trial court's attention. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) More to the point, as appellant

noted in his supplemental brief, restitution fines in excess of the defendant's ability to pay may well be an unconstitutional punishment under the Eighth Amendment. (See, e.g., *United States v. Bajakajian* (1998) 524 U.S. 321, 337-338 [141 L. Ed. 2d 314, 118 S. Ct. 2028].)

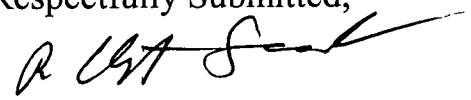
For these reasons, and those set forth in the opening brief, appellant's fine must be reduced to the statutory minimum and any amounts above the statutory minimum that have already been taken from him must be restored.

CONCLUSION

For the reasons set forth herein and in appellant's opening brief, the multiple guilt phase errors involving juror deliberations, the failure to properly respond to jurors' inquiries about the reach of vicarious liability, the multiple instructional errors defining vicarious liability, the failure of the evidence to support the felony murder (robbery) special circumstance and the improper shackling of the defendant all compel reversal of appellant's convictions.

The penalty phase errors, including the refusal to correct a conflict situation, the failure to ensure the jury understood the meaning of the sentencing alternatives, the voluminous, emotional and improper victim impact evidence, the erroneous penalty phase jury instructions and the constitutional infirmities of the death penalty statue itself combined to undermine confidence that the sentence of death was appropriate. Therefore, the sentence, as well as the convictions must be set aside.

Respectfully Submitted,



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CERTIFICATE OF WORD COUNT

I am the attorney for appellant Jack Emmit Williams. Based upon the word-count of the Word Perfect 8.0 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 50,708 words. (California Rules of Court, rule 8.630 (b)(1)(C).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: November 9, 2009

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STATE OF ARIZONA, COUNTY OF YAVAPAI

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Appellant Williams' Reply Brief

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