SO53228

IN THE
Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

ANDRE STEPHEN ALEXANDER

Defendant and Appellant.

APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE CHARLES E. HORAN, JUDGE PRESIDING

LOS ANGELES SUPERIOR COURT NO. BA065313

APPELLANT'S OPENING BRIEF
[Volume 5 of 5; Pages 282-363]

THOMAS KALLAY, BAR NO. 34279

1317 N. San Fernando Boulevard, #906
Burbank, California 91504-4272
(818) 972-9762

Attorney for Appellant
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XII

THE TRIAL COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF JACQUELINE SHEROW THAT INCULPATED CHARLES BROCK IN THE MURDER OF JULIE CROSS

The defense sought to present the testimony of Jacqueline Sherow that related a statement Charles Brock made to Sherow. The gist of Charles Brock's statement was that "I had something to do with the killing of Julie Cross" or that "I'm involved in the murder." (RT 6632.) The trial court excluded Sherow's testimony on the grounds that it did not subject Brock to "...civil or criminal liability or create a risk of making him an object of ridicule, hatred or social disgrace in the community so that a reasonable man in his position would not have made the statement unless he believed it to be true." (RT 6642.)

Brock's hearsay statement was admissible under Evidence Code section 1230 ("section 1230") as a declaration against interest.[121] The trial court erred when it found that Brock's statement was not against his interests.[122] Brock's statement to Sherow were inculpatory and subjected him to criminal liability.

Sherow testified at a hearing held outside the presence of the jury. (RT 6630.) Approximately one year after the murder of Julie Cross (RT

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[121] Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

6625:18), Sherow and Brock were in the latter's car when Brock told her that: "I had something to do with the killing of Julie Cross" or "I'm involved in the murder." (RT 6632: 3-7.) There appears to be no dispute that this is what Brock said. The prosecutor cited the same phrases in his argument without indicating that there was any doubt that this is what Brock actually said. (RT 6626:5-11.) Brock went on to add: "I have to get away from here." (RT 6632:8-10; 6626: 10-11.) Based on what Charles Brock said, Sherow thought that he may have been involved in the Cross murder. (RT 6636.)

Sherow had known Charles Brock for about ten years; they were friends. (RT 6638.) Brock's mother was Sherow's best friend. (RT 6631.) In the car, Sherow and Brock were talking about her children. (RT 6633.) Sherow had just gotten out of jail, and Charles had taken care of her children while she was in jail. (RT 6633.) (Sherow was in jail for eight days on a charge of attempted murder of someone who was going to kill her children; the charge of attempted murder against Sherow was dismissed. [RT 6634].)

Whether or not a statement is self-inculpatory can be determined only by viewing the statement in context. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.) "The test imposed is an objective one – would the statement subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true." (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678.)

In *People v. Jackson, supra,* 235 Cal.App.3d 1677-1678, there had been a shooting at a dance and the defendant met afterwards with three individuals, one of whom was named Tolbert. Defendant told Tolbert "Greg, you shot that guy [the victim]," to which Tolbert replied, "No, I

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[122] Charles Brock was unavailable at trial since he died in 1982. (RT 6625, 6642.)

don't think I hit him." The defendant then said, "No, I think you shot the guy. He was a big brother," to which Tolbert responded, "Well, I don't care. He was a bully." The Court of Appeal concluded that Tolbert's statements were inculpatory and admissible under section 1230. (235 Cal.App.3d at 1678.)

Brock's statements that "I had something to do with the killing of Julie Cross" or "I'm involved in the murder" and "I have to get away from here" (RT 6632) are more inculpatory than Tolbert's responses in *Jackson.* They squarely acknowledge Brock's culpability, while Tolbert's responses were evasive.

In *People v. Garner* (1989) 207 Cal.App.2d 935, 937, the defendant was convicted of second degree murder in a shooting of the victim. The defense was that the car involved in the shooting had been in the possession of Johnson at the time of the shooting. Johnson's statement that he had been in the vehicle at, or near, the scene at the time of the homicide was held to be inculpatory. (207 Cal.App.2d 943.)

Brock's statements were more direct than Johnson's admission in *Garner, supra,* that he had been in the car at or near the scene of the shooting. Brock directly acknowledged his responsibility for Julie Cross' murder.

On appeal, the trial court's decision whether the statement was inculpatory is reviewed for abuse of discretion. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1250-1251.)

The context of the conversation between Brock and Sherow was that of a conversation between two friends – old friends. Brock had no reason not to tell the truth. Given the statement itself and its context (*People v. Lawley, supra*, 27 Cal.4th 102, 153), it is reasonable to conclude that Charles Brock would not have said it unless it was true. (*People v. Jackson, supra*, 235 Cal.App.3d 1670, 1678.)

The trial court's ruling that Brock's statement was not inculpatory was an abuse of discretion. All the evidence pointed in one way and one way only, i.e., that Charles Brock was acknowledging that he had a part, and a guilty part ("I have to get away from here" [RT 6632]), in the murder of Julie Cross. The *sole possible import* of Charles Brock's statements was that he was at least in part responsible for the murder – there simply could not have been any other meaning to them.

When, as in the case at bar, there is only one interpretation that can be given to the evidence, it is surely an abuse of discretion to opt for another interpretation for which there is no evidentiary support. It is surely arbitrary, and thus an abuse of discretion (*Grossman v. Grossman* (1942) 52 Cal.App.2d 184, 195 [discretion means, among other things, the absence of arbitrary determination, capricious disposition and whimsical thinking]), to disregard the evidence. One and only one interpretation could be given to Brock's statements to Sherow, and that is that Brock was at least partially responsible for the murder of Julie Cross. The trial court abused its discretion in arbitrarily disregarding that interpretation. (*Bailey v. Taaffe* (1866) 29 Cal. 422, 424 [discretion is not a capricious or arbitrary discretion, but an impartial discretion].)

The Fourteenth Amendment guarantees appellant the right to present his own witnesses to establish a defense. (*Washington v. Texas* (1967) 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 [defendant's right to present witnesses is "a fundamental element of due process of law"]; *Rock v. Arkansas* (1987) 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 [defendant's right to call witnesses is guaranteed in State criminal courts by the Fourteenth Amendment].) There was no principled, lawful reason to exclude Sherow's testimony. On the contrary, her testimony, as shown above, would have been admissible under California law. Sherow's

exclusion, as a witness, violated appellant's right under the Fourteenth Amendment to call her as a defense witness.

XIII

IT WAS ERROR TO INSTRUCT THE JURY IN THE TERMS OF CALJIC 2.04 [EFFORTS BY DEFENDANT TO FABRICATE EVIDENCE] AND CALJIC 2.05 [EFFORT BY SOMEONE OTHER THAN DEFENDANT TO FABRICATE EVIDENCE]

Over the objections of the defense, the court instructed the jury in terms of CALJIC 2.04[123] and 2.05.[124]

The People supported the giving of CALJIC 2.04 by two arguments. First, the People contended that appellant's father, Mr. Clifton Alexander, spoke with appellant "... about talking about a witness being straight with their program." (RT 7223:5-6.) Second, the People argued that appellant had contacted Jessica Brock on September 4 and 13, 1995, prior to her statement of September 14, 1995, in which she denied seeing appellant on the night Julie Cross was murdered "... and claims at the urging of defense counsel that it happened two years earlier." (RT 7223:7-13.)

The record does not support the People's factual claims that were advanced in support of CALJIC 2.04.

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[123] CALJIC 2.04 as given provided: "If you find that the defendant attempted to or did persuade a witness to testify falsely such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are matters for your determination." (CT 8924.)

[124] CALJIC 2.05 as given provided: "If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized such effort. If you find defendant authorized that effort, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration." (CT 3925.)

First, it was not appellant but his father who spoke about witnesses being "straight with their program." Mr. Clifton Alexander testified several times that it was he who made this statement. (RT 6708:6-8, 6735:24-26, 6736:18-19.) Thus, this statement cannot be ascribed to appellant. In any event, as Judge Horan himself explained in another context (RT 792:16-19), going along with the program means following the rules.

There is nothing wrong about a witness "being straight with their program." To begin with, there is nothing wrong about witnesses being "straight" – in fact, witnesses should be "straight." Taken at face value, the phrase means that the witnesses would testify "straight," meaning truthfully. It is also true that the "program" being referred to is not appellant's "program" but "their," i.e., the witnesses', program. There is nothing wrong in a witness sticking with his or her own "program."

It may also be said that it is ambiguous what Mr. Alexander meant by witnesses being "straight with their program." Although the prosecutor had ample opportunity to clear up what was meant by "being straight with their program," he never did so, leaving it a matter of speculation and innuendo what this phrase really means.

CALJIC 2.04 refers to appellant's efforts to persuade others to testify falsely. There is no connection between a witness 'being straight with the program' and appellant's alleged efforts to persuade anyone to testify falsely.

The People's second reason to give CALJIC 2.04 also fails to pass muster. Notably, in supporting the giving of CALJIC 2.04, the prosecutor stated that Jessica Brock stated at the urging of *defense counsel* that appellant came to her house two years before the Cross murder. (RT 7723.) This refers to what has been referred to in this brief as the Defense Interview of 1995. (See *supra*, pp. 131-133.)

The statements of defense counsel in conducting this interview cannot be ascribed to appellant. Moreover, the statement that appellant came to Jessica Brock's house two years before the Cross murder was Jessica Brock's statement, and not the statement of defense counsel. In any event, there is no evidence at all that appellant at any time told Jessica Brock to state that he came over to her house two years before the Cross murder.

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, *evidence must appear in the record* which, if believed by the jury, will support the suggested inference." (Italics added) (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) There is no evidence in the record to support either of the two factual claims that People made in support of the giving of CALJIC 2.04.

The same is true of CALJIC 2.05. The prosecutor contended that this instruction was warranted by the letter that Darcel Taylor wrote Terry Brock. (RT 7225:1-7.)

Taylor's testimony regarding this letter has been summarized at pp. 118-119, *supra*. Not one word of her testimony supports the giving of CALJIC 2.05.

First, when Taylor wrote this letter in February 1991, she did not know that appellant was a suspect in the Cross murder. (RT 5886.) Therefore, she could hardly be suggesting that Terry Brock testify one way or the other in the Cross murder case. Second, Taylor testified that appellant did not ask her to write the letter. (RT 5879, 5885.) Third, there is nothing in the letter that comes even close to suggesting that appellant wanted Terry Brock to fabricate evidence. There is simply no mention in the letter of appellant's desires, wishes or objectives. Fourth, the letter inquired what, if anything, had passed between Terry Brock and the police. This is not a suggestion, coming from appellant, to fabricate evidence.

Fifth, there is nothing in the letter that even vaguely suggests what it was that *appellant* allegedly wanted Brock to say or testify to. This is not surprising since there was no mention of appellant in the letter.

Giving CALJIC 2.04 and 2.05 without any evidence to support either instruction was an invitation to the jury to speculate that appellant may have indeed engaged in efforts to fabricate evidence and to cause others to do the same. Speculation of this sort could not help but prejudice appellant. Proof of guilt beyond a reasonable doubt is among the essentials of due process. (*In re Winship* (1970) 397 U.S. 358, 359, 90 S.Ct. 1069, 25 L.Ed.2d 368.) CALJIC 2.04 and 2.05 invited the jury to convict appellant in the absence of evidence of appellant's guilt. This violated appellant's rights to due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315-316, 99 S.Ct. 2781, 61 L.Ed.2d 560.)

There was no evidence to support CALJIC 2.05 and it was therefore error to give it. (*People v. Hannon, supra,* 19 Cal.3d 588, 597.) Taken in conjunction with other errors (Argument XX [Cumulative Error]), the error was reversible.

XIV

THE INSTRUCTIONS GIVEN ON AIDING AND ABETTING WERE PREJUDICIALLY MISLEADING AND CONFUSING, AND WERE NOT SUPPORTED BY THE EVIDENCE OR THE ISSUES RAISED IN THIS CASE

A. Introduction

The trial court instructed on aiding and abetting three times. The first instruction on aiding and abetting was given prior to deliberations on the guilt phase. The second and the third instructions on aiding and abetting were given prior to deliberations on the special circumstances phase of the trial. None of the instructions on aiding and abetting were relevant to the

issues raised by the evidence. It was therefore error to give these instructions.

In discussing the aiding and abetting instructions prior to the deliberations on the special circumstances, court and counsel referred to the earlier hearing on these instructions held during the guilt phase. For this reason, appellant summarizes the hearings and instructions given on aiding and abetting in chronological order, beginning with the hearing and the instructions in the guilt phase. Appellant then states the law that governs situations where, as here, the instructions given are not relevant to the issues raised by the evidence. Appellant concludes by pointing out why it was error to give each of the aiding and abetting instructions and why appellant was prejudiced by these instructions.

B. The Instructions Given and the Hearings Thereon

1. The Guilt Phase

In the guilt phase, the trial court gave the general instructions on the definition of a principal, CALJIC 3.00,[125] and on the meaning of aiding and abetting, CALJIC 3.01.[126] (CT 3951, 3952.) Immediately after these general

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[125] CALJIC 3.00 as given provided: "The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include: 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or 2. Those who aid and abet the commission or attempted commission of the crime." (CT 3951.)

[126] CALJIC 3.01 as given provided: "A person aid and abets the commission or attempted commission of a crime when he or she, (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime. A person who aids and abets the commission of the crime need not be personally present at the scene of the crime. Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (CT 3952.)

instructions on aiding and abetting, the jury was given the instructions on murder, i.e., CALJIC 8.10 [Murder – Defined], 8.11 [Malice Aforethought – Defined], 8.20 [Deliberate and Premeditated Murder], 8.30 [Unpremeditated Murder of the Second Degree] and 8.21 [First Degree Felony-Murder]. (CT 3954-3959.)

After the murder instructions, the trial court went on to instruct the jury in the terms of CALJIC 8.27 [First Degree Felony-Murder – Aider and Abettor].[127] (CT 3960.) The underlying felony in CALJIC 8.27, as given to the jury, was robbery. Under CALJIC 8.27, as given to the jury, appellant could be found by the jury to have aided and abetted the robbery, and thus could be found guilty of first degree murder under a felony-murder theory.

The defense objected to the giving of CALJIC 8.27 as not being "the theory of the case." (RT 7166:27-28.) The defense's objection was predicated on the argument that the People's theory of the case was that it was appellant who shot Julie Cross. The defense contended that the People did not proceed on the theory that appellant aided and abetted the shooting of Julie Cross:

> "THE COURT: "...[CALJIC] 8.27, however, I think that may apply. The blank should be robbery or attempted robbery. No, it would be robbery written in. [Para.] MR. KLEIN [defense counsel]: The only theory that has been presented is that Mr. Alexander murdered Julie Cross – [Para.] THE COURT: Well – [Para.] MR. KLEIN: Himself. The issue of whether Mr. Alexander is an aider and abetter [sic] is not an issue. [Para.] THE COURT: Could the jury not find the following? Could

[127] CALJIC 8.27 as given provides: "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental." (CT 3960.)

> the jury not conclude beyond a reasonable doubt that Mr. Alexander was one of two persons at the scene but had reasonable doubt as to which person actually fired the shotgun? You don't see that as a possibility? [Para.] MR. KLEIN: That is not the theory of the case." (RT 7166.)

The trial court agreed that the theory of the case was that appellant shot Julie Cross, and not that appellant aided and abetted the shooting. Immediately after the foregoing exchange, the trial court stated: "I know it is not the theory of the case, but that does not mean they [the jury] have to follow the theory of the case." (RT 7167:1-3.) The trial court then stated that the jury could conclude that the evidence was weak or equivocal as to which of the two people present on the scene did the shooting, and that the jury could conclude that appellant was on the scene but was not the one who had done the shooting. (RT 7167:4-17.)

The trial court ignored the record made by the People. The prosecutor's argument to the jury made it unmistakably clear that the People contended that it was appellant who shot Julie Cross. (RT 7261-7276.) This was the People's theory of the case. It was *not* the People's theory that appellant aided and abetted the murder of Julie Cross.

Of course, the People wanted the best of all possible worlds. In the argument on giving CALJIC 8.27, the prosecutor said: "But to say that the theory is that we believe he is the shooter is not to say that they [the jury] could find him not to be the shooter." (RT 7169:5-7.) A little earlier, the prosecutor had stated that Nina Miller had testified that Terry Brock was the shooter, and that the jury could find that appellant was present at the time of the shooting. (RT 7167:22-25.)

The answer to the prosecutor's statements is the record as the People made that record. The People did not argue that Terry Brock was the shooter and that appellant was simply present at the time of the shooting.

And, of course, it was possible that the jury would not find appellant to be shooter – that was the defense's theory of the case.

In any event, as shown in subsection D below, CALJIC 8.27, given in the guilt phase, enabled the jury to find that appellant had aided and abetted the robbery, and not the shooting. Thus, the colloquy between court and counsel on the subject of aiding and abetting *the shooting* was beside the point, as far as CALJIC 8.27 and the guilt phase instructions were concerned. However, that colloquy became relevant for the purposes of the instructions for the special circumstances phase, as appears in the next subsection.

2. The Special Circumstances Phase

In the special circumstances phase of the trial, the trial court first instructed the jury in terms of CALJIC 8.80 that if the jury found beyond a reasonable doubt that "... the defendant was either the actual killer or an aider or abetter [sic], but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill aided and abetted an actor in the commission of murder in the first degree..." (RT 7742-7743.) The court then instructed the jury in terms of CALJIC 8.81.17 [Special Circumstances – Murder in the Commission of a Robbery]. (RT 7745-7746.)

A little later, the court instructed the jury that if the "...defendant is not the actual killer, but rather an aider and abetter [sic] to a robbery or attempted robbery, or if you are unable to decide whether the defendant was the actual killer as opposed to an aider and abetter [sic], then you must also find beyond a reasonable doubt that the defendant had the intent to kill in order to find this special circumstance true." (RT 7746-7747.)

Prior to the giving of these instructions, the defense again objected to the aiding and abetting instructions.[128] In response, the trial court stated that it was possible *but not likely* that the jury would conclude that appellant was one of the two people on the scene but that he was not the person with the shotgun. (RT 7738:8-11.) Thus, the earlier exchange between the court and defense counsel on the subject of aiding and abetting the shooting (RT 7166) was resuscitated. However, the trial court was wrong in concluding that instructions can be given that do not apply to the facts and issues that are raised by the evidence. As set forth in the next section, the law is to the contrary.

C. The Governing Law

The law is clear.

> "The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' (People v. Satchell (1971) 6 Cal.3d 28, 33, fn. 10 [].) 'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference (People v. Carmen (1951) 36 Cal.3d 768, 773 []).' (People v. Hannon (1977) 19 Cal.3d 588, 597 [].)" (*People v. Saddler* (1979) 24 Cal.2d 671, 681.)

If the trial court is right and the jury 'does not have to follow the theory of the case' (RT 7167), then the jury may be instructed, contrary to the principles appearing in *Saddler, supra*, on questions of law that are ***not*** relevant to the issues raised by the evidence. In other words, the jury, if the

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[128] Defense counsel objected to the "aiding and abetting aspects of [CALJIC] 8.80." (RT 7737:21-22.) "MR. KLEIN: I made the argument when the court suggested giving the aiding and abetting instruction relative to first degree murder. So it is the same argument." (RT 7737-7738.)

trial court is right, may be instructed on any issue, whether relevant or not relevant to the issues actually raised by the evidence.

The confusion on the part of the jury that such a 'rule' would engender is at once apparent. The jury could be given instructions on principles of law that are totally abstract and irrelevant to the case the jury was asked to decide. And the relevant instructions would be lost in the welter of irrelevant instructions. The giving of an instruction that states a correct abstract principle of law but has no application to the facts or issues raised by the evidence is error (*People v. Moore* (1954) 43 Cal.2d 517, 530) because it confuses and misleads the jury by injecting into the case matters that are not involved (*People v. Jackson* (1954) 42 Cal.2d 540, 546-547), and because it may not be assumed that jurors undertake to decide for themselves that principles of law stated by the court have nothing to do with the case. (*People v. Hatchett* (1944) 63 Cal.App.2d 144, 161.)

Thus, under settled principles of law it was error to instruct the jury that appellant had aided and abetted the shooting *or* the robbery. As shown in subsections D and E below, instructions on aiding and abetting simply had no application to the facts or issues raised by the evidence in this case

D. Since there was No Evidence that Appellant Aided and Abetted the Commission of the Robbery, the Instruction on Aiding and Abetting Should Not Have Been Given in the Guilt Phase

As noted, CALJIC 8.27 as given was predicated on the assumption that appellant aided and abetted the commission of the robbery.

There was absolutely no evidence to support the theory that appellant aided and abetted the commission of the robbery.

Assuming that the robbery in question was the taking of the ignition keys and the Secret Service shotgun (see Argument IX), the only evidence of the 'robbery,' presented by way of Bulman's testimony, was that the man on the passenger side of the car, i.e., appellant, reached in and took the

keys and then took the shotgun. (Text, *supra*, p. 70.) There was no other evidence.

While the discussion between court and counsel on the subject whether appellant had *aided and abetted the shooting* was off the mark and irrelevant because CALJIC 8.27, as given, was predicated on the theory that appellant *aided and abetted the robbery*, the jury may well have been left with the impression that they could find appellant guilty of murder if he had aided and abetted the shooting. After all, the jury had been given CALJIC 3.00 and 3.01 in close proximity to the murder instructions. Since CALJIC 8.27 was patently inapplicable because there were no facts to support it, the jury may well have concluded that the general instructions on aiding and abetting (CALJIC 3.00 and 3.01) applied to the murder instructions and that they could conclude that appellant had aided and abetted the shooting, i.e., the murder of Julie Cross.

It appears that the trial court, as well as counsel, were under the impression that this is exactly what CALJIC 8.27 provided for, i.e., that giving this instruction enabled the jury to find appellant guilty of murdering Julie Cross on the theory that he aided and abetted the shooting even though he did not do the shooting himself. (RT 7166.)

The confusion caused by CALJIC 8.27 – it was patently inapplicable since there was no evidence that appellant had aided and abetted the robbery – and the giving of CALJIC 3.00 and 3.01 in close proximity to the murder instructions is evident. The most obvious, if misguided, way out of this confusion was for the jury to conclude that it could find appellant guilty of murder on the theory that he aided and abetted the shooting. Yet this flew in the face of the evidence, the People's theory of the case and the law, since there was no evidence to support this theory.

E. Since the People's Theory Was that Appellant Shot Julie Cross, it was Error to Instruct the Jury In the Special Circumstances Phase That Appellant Could be Found to Have Aided And Abetted the Shooting

The first aiding and abetting instructions given in the special circumstances phase enabled the jury to find that appellant had either committed the shooting, i.e., the murder himself, or that he had aided and abetted the shooting. (RT 7742:23-26 [the jury could find that appellant was either the actual killer or an aider or abettor].)

As pointed out in subsections C and D above, this instruction was not supported by the facts and theories propounded by the parties, and it was therefore error to give this instruction. But the problems with this instruction in the special circumstances phase do not stop here.

Shortly after giving this instruction, the court instructed the jury that it could find that appellant had aided and abetted the robbery. (RT 7746.) As noted in subsection D, there was nothing to support this instruction, either. But now the jury was presented with the possibility of finding that appellant had aided and abetted not only the shooting, but also the robbery. Or was the jury to chose between the two? No one could, or can, say.

It is also true that the trial court, in giving the special circumstances instructions, did not repeat CALJIC 3.00 and 3.01 when it instructed the jury prior to the special circumstance deliberations. Apparently, the jury was supposed to keep the substance of these instructions in mind between February 28, when it was instructed on the guilt phase, and March 6, the day it was instructed on special circumstances. This is quite a feat, especially after five days of deliberations on the question of guilt. The jury could not be expected to remember the definition of aiding and abetting after five days of deliberations on the question of guilt. This left the jury

not only confused but essentially rudderless on the aiding and abetting issue.

By the time the court instructed the jury for the third time on aiding and abetting, the jury must have been thoroughly confused. (RT 7746:23-27.) This time, the jury was instructed that it could find that appellant had aided and abetted the robbery. (*Id.*) Considered as a whole, the two instructions on aiding and abetting given in the special circumstances phase enabled the jury to find that appellant had aided and abetted the shooting as well as the robbery.

This scenario was completely at odds with the evidence. Nothing in the People's case assigned such a passive, subordinate role to appellant. The People's case was that appellant had reached into the car, gotten the ignition keys and the shotgun, and shot Julie Cross. There was nothing in the People's case about aiding and abetting. The latter simply was not a theory under the facts as presented by the People, nor was it the case as argued by the People to the jury.

F. The Errors Were Prejudicial

The damage that these confused instructions on aiding and abetting inflicted on appellant's case is readily apparent. It gave doubters on the jury a convenient escape hatch that allowed them to find appellant guilty even though they rejected the People's theory that appellant shot Julie Cross.

In the argument on CALJIC 8.27, the trial court stated that "[w]ere I a juror, I would have less than total confidence in that blood evidence given the circumstances" (RT 7168:26-28) – referring to evidence that Cross' blood had 'blown back' on appellant. Thus, the trial court acknowledged that the People's evidence that appellant shot Cross may well have been considered weak by the jury – the court did so three times when discussing the aiding and abetting instruction (RT 7167:4-17; RT 7168:22-25; RT

7738:8-9) – and then gave those jurors who also thought that the evidence was weak a convenient escape hatch.

The confusion that attended the aiding and abetting instruction made it likely that this escape hatch was utilized by the jury. The instructions were not supported by the evidence, which is and of itself a confusing circumstance. (*People v. Jackson, supra,* 42 Cal.2d 540, 546-547; *People v. Hatchett, supra,* 63 Cal.App.2d 144, 161.) It was not clear whether the jury could find that appellant aided and abetted the shooting or the robbery or only one of the two. And the definition of aiding and abetting was not repeated for the special circumstances deliberations, which left the jury to its own devices when it came to making a decision that was literally the difference between life and death.

It is wholly within the realm of reason that one or more jurors opted for the aiding and abetting "theory" of the case. It may well have provided the basis for verdicts of guilty and the special circumstance of one or more jurors who agreed with the trial court and who found the evidence that appellant had shot Julie Cross to be unpersuasive. Here was a ready-made "theory" that allowed the jury to vote for guilt and the special circumstance while still believing that it had not been shown that appellant shot Julie Cross. Absent this error, it is reasonably probable that the jury would not have been able to reach a unanimous verdict of guilty on the charge that appellant murdered Julie Cross or on the finding that the murder had been committed in the course of a robbery. (*People v. Watson, supra*, 46 Cal.2d 818, 837.)

Proof of guilt beyond a reasonable doubt is among the "essentials of due process." (*In re Winship* (1970) 397 U.S. 358, 359, 90 S.Ct. 1069, 25 L.Ed.2d 368.) In this case, there was no evidence upon which the jury could base the conclusion that appellant had aided and abetted the robbery or the shooting. However, the instructions on aiding and abetting afforded the jury

the opportunity to find appellant guilty on the theory that he aided and abetted the robbery and/or the shooting. Thus, appellant could be found guilty, even though it was impossible to prove his guilt beyond a reasonable doubt. This is a clear violation of the Due Process clause of the Fourteenth Amendment.

Jackson v. Virginia (1979) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, points to the same conclusion. Under *Jackson v. Virginia*, the critical inquiry is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. (99 S.Ct. 2789, 61 L.Ed.2d 573.) Since there was *no evidence* that appellant was an aider and abettor, the record does not support a finding of guilt beyond a reasonable doubt.

In making it possible for the jury to convict appellant on a theory that was not supported by any evidence, the instructions on aiding and abetting deprived appellant of his right to Due Process guaranteed by the Fourteenth Amendment.

XV

THE TRIAL COURT ERRED WHEN IT PERMITTED THE PROSECUTION TO ELICIT TESTIMONY FROM JESSICA BROCK THAT APPELLANT HAD COMMITTED A CRIMINAL OFFENSE IN 1978

Jessica Brock gave conflicting testimony on when appellant, who seemed upset, came over to her house with a bag containing something in it that he asked her to help rinse off. She testified variously that this happened in 1978 when she lived in Santa Monica and that it happened in 1980 when she lived on Montclair. (Text, *supra*, pp. 129-135.)

While Jessica Brock was on the stand, the People requested, out of the hearing of the jury, leave to examine Jessica about the triple murder, in order to show that the occasion that appellant and Terry Brock visited her in Santa Monica was in October 1978, right after the triple murder

occurred.[129] The prosecutor argued that it could be shown that Jessica Brock was familiar with the triple murder and that this would fix 1978 as the date of appellant's visit to Jessica Brock that took place under the described circumstances. (RT 6232-6233.)

The defense objected to the admission of evidence of another crime. (RT 6233.)

After a hearing outside the presence of the jury during which Jessica Brock testified about her familiarity with the facts of the triple murder (RT 6215-6220), the trial court ruled that the People could elicit from Jessica testimony to the effect that she was aware in 1978 that her brother Terry and appellant had committed a crime that led to a "serious charge" that was ultimately tried and that, due to the nature of that offense, it made an impression on her and that she therefore was not confusing that visit with the one in 1980. However, the court ruled that it would not permit the People to elicit the information that this charge "was a 187," that she knew the victims of that homicide, or that appellant was convicted of that offense. (RT 6271-6272.)

Ultimately,[130] Jessica Brock testified that sometime after appellant's and Terry Brock's visit to her house in Santa Monica, she became aware of an offense that was committed by appellant and Terry Brock. She testified that, due to the nature of the offense, the visit by appellant and Terry Brock made an impression on her. (RT 6352-6353.) Thus, testimony that appellant had committed another offense – notably, one that was memorable, according to Jessica – was admitted into evidence.

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[129] The triple murder took place on October 31, 1978. (RT 6264:23.)

[130] As set forth in Argument XVI, when she was first asked about the matter of the other offense, Jessica Brock blurted out: "What are you referring to? The triple murder?" (RT 6288.) This led to a motion for mistrial that is the subject of Argument XVI.

Under Evidence Code section 1101(b), evidence that a person committed a crime is not admissible unless it is introduced to prove a relevant fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented.[131]

"The fact that the defendant in a criminal prosecution has committed other crimes may be evidence of his bad character and his propensity or disposition to commit the crime charged. But bad character of a defendant cannot be shown for this purpose [], and if this is the only purpose the evidence is excluded." (1 Witkin, *California Evidence* (4th ed.) *Circumstantial Evidence,* section 74, p. 409 [citing authorities].) Evidence Code section 1101(a) is declarative of this fundamental principle. (*Law Revision Commission Comment* to Evidence Code section 1101 ["Section 1101 states the general rule recognized under existing law;" "Section 1101 states the general rule that evidence of character to prove conduct is inadmissible in a criminal case."].)[132]

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[131] Evidence Code section 1101 provides: "(a) Except as provided in this section and Sections 1102, 1103, 1108 and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [Para.] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." Evidence Code sections 1102, 1103, 1108 and 1109 on their face do not apply to this case.

[132] The purpose of the rule is to prevent the conviction of an innocent man or woman. The object of this rule "is to prevent a person not guilty of the present charge from being improperly found guilty of it." (1A Wigmore,

Section 1101 has been the rule in California even before the enactment of the current Evidence Code. (E.g., *People v. Coan* (1927) 85 Cal.App. 580, 586; *People v. Asavis* (1937) 22 Cal.App.2d 492, 494; *People v. Baylor* (1941) 47 Cal.App.2d 34, 39; *People v Albertson* (1944) 23 Cal.2d 550, 576.) It is certainly the rule now. (*People v. Moten* (1991) 229 Cal.App.3d 1318, 1325 [evidence of prenatal drug use was inflammatory in prosecution for murder and felony child endangerment arising from death by malnutrition and dehydration of defendant's 8-week-old infant]; *People v. Bruce* (1989) 208 Cal.App.3d 1099, 1105 [evidence of prior rape conviction involving different victim in subsequent prosecution for rape had no tendency to prove or disprove issue whether victim in subsequent prosecution for rape had consented to intercourse]; *People v. Valentine* (1988) 207 Cal.App.3d 697, 702, 704 [prosecution made no offer of proof to show motive, opportunity intent, preparation, plan, knowledge, identity, or absence of mistake or accident]; *People v. Brown* (1993) 17 Cal.App.4th 1387, 1394.)

The trial court made it clear that evidence of the other offense was admissible because Jessica Brock's credibility was all-important to the case

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Evidence, section 58.2, p. 1216 (Tillers rev. 1983).) Evidence of specific bad acts to show conduct is excluded "...not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited and either allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." (*People v. Baskett* (1965) 237 Cal.App.2d 712, 715, 716, citing the predecessor of 1A Wigmore, Evidence, section 58.2, p. 1212 (Tillers rev. 1983).) The danger that spawned this rule is that evidence of specific bad acts will overwhelm the critical faculties of the trier of fact who will conclude, in the absence of actually probative evidence, that the charged offense was committed simply because the defendant "is a likely person to do such acts." (1A Wigmore, Evidence, section 58.2, p. 1215 (Tiller rev. 1983).)

and it was important to test that credibility. According to the trial court, Jessica was a "crucial witness" (RT 6253:15) because if her statement was believed that appellant came to her house on the night of the Cross murder, a conviction was very likely, but if they believed her statement that appellant came to her house in 1978, there was "...very little evidence of the defendant's guilt." (RT 6261-6262:4-5.) Thus, according to the trial court, her credibility was important. (RT 6262:15.)

In the Defense Interview (the "Defense Interview" of 1995, text, *supra*, p. 131 et seq.), Jessica Brock stated that the night that appellant came over with a bag was a different night from the night that Julie Cross was murdered and that at the time appellant came over, she, Jessica Brock, lived in Santa Monica. (Text, *supra*, p. 131.) Thus, according to the trial court, it was "absolutely imperative" that the jury be made aware of the "...incident that she associates with that Santa Monica visit [the 1978 triple murder] and triggers her memory to that Santa Monica visit." (RT 6267:21-24.) The trial court stated that the reason that the defense did not want mention of the triple murder was that the defense did not want to jury to be given information that would cast "grave doubts" on the statement Jessica Brock had made in the Defense Interview. (RT 6267:14-16.)

The trial court admitted evidence of an uncharged, prior criminal act on the theory that it impeached the credibility of Jessica Brock, i.e., her statement that the night appellant came over with a bag was on a night different from the Cross murder. However, there is nothing in Evidence Code section 1101 that authorizes the admission of evidence of the *defendant's* prior misconduct to bolster or attack a *witness's* credibility. In fact, there is law to the contrary.

People v. Thompson (1979) 98 Cal.App.3d 467, 470, was a prosecution for, among other things, furnishing marijuana to a minor on

May 8, 1977. The minor in question was allowed to testify that the defendant had given him marijuana on occasions other than May 8, 1977, as well. This evidence was admitted on the theory that evidence of these other occasions was admissible to support the minor *witness's* credibility. (98 Cal.App.3d at 472.)

The court in *Thompson, supra,* per Justice Bernard Jefferson, held that evidence of specific acts of uncharged misconduct on the part of the defendant was not admissible to support the minor witness's credibility. (98 Cal.App.3d at 476-477.) Writing for the court, Justice Jefferson explained that the admission of such evidence 'emasculated' the statutory prohibition by Evidence Code section 1101 of the admission of evidence that the defendant committed similar offenses. (98 Cal.App.3d at 481.)

The error in admitting evidence of a prior criminal act was no small matter in this case. The trial court's own analysis of the evidence, while considering this very issue, shows that the case was closely balanced. (RT 6261-6262.) According to the trial court, Jessica Brock's testimony was critical in tipping the case one way or the other. (RT 6261- 6262.) Thus, when she testified that the (uncharged) offense had made a strong impression on her (RT 6353), her testimony regarding this offense must have made a strong impression on the jury, as well. Of course, as discussed in Argument XVI, there was no mystery what this other offense was. It was the triple murder. (RT 6288:14-15.) In a trial for murder, where the evidence is closely balanced, the statement that the defendant had committed a triple murder must have had the effect of a bombshell.

The primary danger in the admission of evidence of another crime is that the trier of fact will give excessive weight to this evidence irrespective of guilt of the present charge, and thus result in the conviction of a person who is not guilty of the charged offense. (Fn. 120, p. 307, *supra.*) There can be no more serious prejudice to the defendant, if not to the criminal justice

system, than the conviction of an innocent person for a crime he did not commit. In a prosecution for murder, it is simply an insuperable task for the defense to deal with the fact that the defendant has previously committed a triple murder. Thus, the danger of a wrongful conviction was materially increased by the gravity of the previous, uncharged offense.

The admission of evidence that appellant had committed another offense in order to attack the credibility a Jessica Brock, a witness, was a clear violation of the law. There is nothing in Evidence Code section 1101 that justifies the admission of this evidence. In fact, it has been held error to admit evidence of an uncharged offense perpetrated by the *defendant* in order to attack the credibility of a *witness*. (*People v. Thompson, supra,* 98 Cal.App.3d 467, 470.) As has been held in a great number of cases, where the evidence is closely balanced, as in this case,[133] a lesser showing of error will justify a reversal than where the evidence strongly preponderates against the defendant. (6 Witkin and Epstein, *California Criminal Law* (3d ed.), *Reversible Error,* section 45, pp. 506-507 [citing authorities].) In this case, the error is clear, and its effect was manifestly substantial. Thus, it is reasonably probable that, absent this error, the jury would have reached a result favorable to appellant. (*People v. Watson, supra*, 46 Cal.2d 818, 834.)

California law that prohibits the admission of evidence of an uncharged offense is very clear. (Evidence Code section 1101.) It is also very clear on the specific point that evidence of specific acts of uncharged misconduct on the part of the defendant to support or attack the credibility of a witness is *inadmissible*. (*People v. Thompson, supra*, 98 Cal.App.3d 467, 470.) There simply was no colorable basis for the admission of testimony that appellant had committed an uncharged offense that was very

[133] See Argument XX which is incorporated here by reference.

'memorable.' Since there was no legal basis for the admission of this testimony, the trial court's ruling admitting this testimony was arbitrary.

The arbitrary denial of the crucial state-law-mandated safeguard of Evidence Code section 1101 violated appellant's rights under the Due Process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 227, 100 L.Ed.2d 175 [due process clause is violated when defendant is arbitrarily denied safeguard mandated by state law]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522.) Thus, in addition to constituting reversible error under California law (*People v. Watson, supra*, 46 Cal.2d 818, 834), the admission of this testimony also violated appellant's right to Due Process under the Fourteenth Amendment.

XVI

THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED WHEN JESSICA BROCK REFERRED IN HER TESTIMONY TO THE 1978 HOMICIDE

As shown in Argument XV, it was prejudicial error to allow Jessica Brock to testify that she was aware of the fact that appellant and Terry Brock had committed an offense in 1978 and that, due to the nature of the offense, this had made an impression on her. (RT 6352-6353.)

This error was compounded when, under questioning by the prosecutor, Jessica Brock made explicit reference to the "triple murder." (RT 6288.)

Prior to taking the stand that day, Jessica Brock was warned by the trial court that she would be asked about the "other case" but that she was not to refer to that case as the "murder case" (RT 6279:21-24, RT 6280:13-18, RT 6282:3-4.)

The prosecutor commenced to question Jessica Brock about the incident when appellant and Terry Brock came over to her house in Santa

Monica. (RT 6286-6287.) The prosecutor then asked Jessica: "And did you connect that particular incident in Santa Monica with an offense that had been committed by both your brother Terry Brock and Andre Alexander in 1978?" (RT 6288:10-13.) Jessica's replied: "What are you referring to? The triple murder?" (RT 6288:14-15.)

The defense moved for a mistrial. (RT 6289.) The motion was denied. (RT 6290.) Following the hearing on the motion, which was held in the jury's absence, the trial court instructed the jury to disregard the last question and answer and ordered the question and answer to be stricken. (RT 6296.)

Later, the trial court questioned the jurors and alternate jurors individually about Jessica Brock's answer to the prosecutor's question. (RT 6435-6476.) Each of the jurors and alternates was asked whether they remembered the answer Jessica had given. Two jurors, Nos. 192 and 68, responded that they had heard the answer. (RT 6442 [No. 192], 6456 [No. 68].) All of the other jurors and alternates responded that they had not heard the answer. All of the jurors and alternates were instructed to disregard the question and answer and to follow the court's instruction in that regard. They all indicated that they would follow the court's instructions.

It is not possible that the jury were insulated from Jessica Brock's reference to the triple murder.

The recollections of juror No. 192 and 68 recollections were clear. No. 192 heard Jessica refer to "[s]omething about some other murder case, a triple murder or something" (RT 6442), and No. 68 heard Jessica refer to a "triple murder." (RT 6456.) No. 68 said in response to the court's questions: "I remember two words. She said 'triple murder.' Those were the only two words that I remember." (RT 6456:10-12.) If two jurors were so specific and clear in their recollection of what Jessica Brock said, it is very hard to believe that Brock's reference to the "triple murder" was lost

on all the remaining ten jurors, as well as the alternates. It is far more likely that the remaining jurors knew what was expected of them, i.e., they claimed they heard nothing, and that Nos. 192 and 68 either did not know or care, or simply chose to tell the truth.

It is also true that the extraordinary lengths to which the trial court went in trying to control the damage were in and of themselves counterproductive. It was hardly lost on the members of the jury that something truly important must have happened for them to be questioned individually by the trial court. Thus, repeated admonitions to disregard Brock's statements served, in the end, to highlight Brock's testimony.

The prejudicial effect of Brock's reference to the triple murder was exacerbated by the unfortunate circumstance that the prosecution had managed to convey to the jury during the testimony of April Watson that appellant was being investigated for more than one murder.[134] Thus, when Brock referred to the triple murder, a piece of the puzzle fell into place for the jury. The prior exchange between the prosecutor and Watson alerted the jury to the fact that appellant was being investigated for more than one murder. When Brock told the jury what that other murder was – a triple murder – the jury was primed and ready for the "information."

To ask a jury hearing a murder case to disregard testimony that the defendant had been convicted of a triple murder is to ask the jury to overlook the elephant in the living room. It simply cannot be done.

The prejudicial nature of a reference in this case to a prior, uncharged crime has been set forth in Argument XV. That discussion is

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[134] "Q And you [A. Watson] remember going to Wilshire Division of L.A.P.D. and speaking to Detective Henry and Kwoch who were investigating the murder of Julie Cross. Is that correct? A. The murder of who? Q Julie Cross. A murder case. THE COURT: Secret Service Agent. THE WITNESS: I don't know if that is what they were working on at the

incorporated here by reference. If reference to a conviction of a crime was prejudicial, it is patent that making it clear that the crime was a triple murder was exponentially more prejudicial.

The damage that reference to a "triple" murder did to appellant's case may be described by assuming that the reference was not to a triple murder but only to another murder. Given that appellant was on trial for murder, it can be safely assumed that evidence that he had committed another murder would be very damaging. It certainly would be excluded under Evidence Code section 1101, unless it fell within one of the exceptions of subsection (b) of that provision. In any event, evidence that he had committed another murder, and thus had the disposition to commit such crimes, would be highly prejudicial.

If evidence of a single murder would have been damaging and prejudicial, reference to a "triple" murder could not be anything other than devastating. The jury could not possibly have viewed appellant in the same light after mention of a triple murder than it viewed him before.

After Jessica Brock's testimony regarding the triple murder, appellant's conviction was, in all reasonable probability, a foregone conclusion. The error was without a doubt prejudicial. (*People v. Watson, supra*, 46 Cal.2d 818, 837.)

Jessica Brock's reference to the triple murder was a clear and unambiguous violation of Evidence Code section 1101. The purpose of the rule of Evidence Code section 1101 is to prevent the conviction of an innocent person. (See fn. 130, p. 300.) Thus, the clear violation of the state-law mandated safeguard of Evidence Code section 1101 violated appellant's right to Due Process under the Fourteenth Amendment because it deprived appellant of a reliable determination of guilt. The conceded

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time. BY MR. KURIYAMA: Q They didn't tell you what murder case it was? A I don't remember that." (RT 5854.)

error of Brock's reference to the triple murder exposed appellant to the danger of a conviction based on testimony about the uncharged crime of a *triple murder.* Under the Eighth and Fourteenth Amendments to the United States Constitution, appellant is entitled to a *reliable* determination of guilt. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 100 S.Ct. 2382, 65 L.Ed.2d 391.) Appellant was deprived of such a reliable determination and this violated his rights under the Eighth and Fourteenth Amendments.

XVII

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT THAT THE CROSS MURDER WAS COMMITTED IN THE COURSE OF A ROBBERY. AT MOST, THE EVIDENCE SHOWS THAT THERE WAS AN ATTEMPT TO COMMIT A ROBBERY IN THE COURSE OF THE MURDER[135]

Reversal is required when the evidence of guilt is so insubstantial that the judgment may be regarded as having been based mainly on speculation, conjecture, unwarranted inferences or mere suspicion. (6 Witkin and Epstein, *California Criminal Law* (3d ed.), *Criminal Appeal*, section 152, p. 400, citing *People v. Alkow* (1950) 97 Cal.App.2d 797, 802.) In this case, the verdict finding that appellant committed the murder in the course of a robbery (CT 3859-3861)[136] rests on speculation and conjecture. Thus, since this verdict is not supported by the evidence, it must be reversed.

Robbery is the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and

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[135] This contention was raised unsuccessfully in appellant's Penal Code section 995 motion. (CT 994-995; 1059-1069.)

[136] As set forth in the statute, the jury found the murder to have been committed during the "the commission, or the attempted commission of" a robbery. (Penal Code section 190.2(a)(17)(A).)

against his or her will, accomplished by force or fear. (Penal Code section 211.)

The only items of personal property taken were the ignition key and the Secret Service shotgun. This happened when the man on the passenger side of the Secret Service car reached inside the car and pulled the ignition key out. This man evidently noticed the shotgun as he reached in for the keys, got a hold of the shotgun, and pulled it out of the car. (RT 4800.)

This happened well after the altercation was under way between Bulman and Cross, on the one hand, and the two men who had approached the car, on the other. Before the ignition key and the shotgun were taken out of the car, the man on Bulman's side of the car had held a pistol to Bulman's head, told Bulman to get his hands up, and exchanged words about Bulman being a police officer. (Text, *supra*, p. 69.) The man had instructed Bulman to tell Cross to drop her weapon and Bulman had told Cross not to comply. (Text, *supra*, pp. 69.) In the meantime, Cross had gotten out of the Secret service car with her weapon drawn. (Text, *supra*, p. 67.) Bulman heard Cross instruct the man on her side of the car to get his hands back up on the car. (Text, *supra*, p. 69.) In short, the physical struggle between these four people was well under way by the time the man on the passenger side reached in and took the keys and the shotgun.

There is absolutely no evidence that either of the two men attempted to gain possession of any personal property of either Bulman or Cross, or property of the Secret Service, other than the ignition key and the shotgun. As far as these two items are concerned, the only reasonable inference is that the man on the passenger side reached in for the ignition key for the purpose of disabling the car. And obviously the man on the passenger side of the car got a hold of the shotgun to arm himself vis-a-vis Cross and Bulman. Thus, the object of the two men as they approached the Secret Service car and engaged in the confrontation with Bulman and Cross was

clearly not the ignition key nor the shotgun. These objectives developed as the confrontation unfolded and as part of the physical struggle between these four people.

There is no evidence at all, much less substantial evidence, to support the conclusion that the intent of the two men was to rob Bulman and Cross. The fact that the two men walked up to the car and set off the confrontation with Bulman and Cross is not evidence that they intended to rob them. "Any" evidence is not substantial evidence. (*Estate of Teed, supra,* 112 Cal.App.2d 638, 644.) Substantial evidence must be "reasonable, credible, of solid value and reasonably inspire confidence in the judgment." (*People v. Green* (1980) 27 Cal.3d 1, 55 disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and overruled on other grounds in *People v. Morris* (1988) 46 Cal.3d 1, 17, fn. 6.) The speculation that the two men intended to commit a robbery as they walked up to the Secret Service car is simply that – speculation – and is not credible nor of "solid value."

For this reason, it was error to instruct the jury in terms of CALJIC 8.81.17 [Special Circumstances – Murder in the Commission of a Robbery]. (RT 7745:20-7746:18.) [137] The defense objected to this instruction on the appropriate grounds that there was no evidence of a robbery. (RT 7175-7176; 7740:13-15.) It is error to instruct on an abstract principle of law that has no application to the facts or the issues raised by the evidence in the case. (*People v. Moore* (1954) 43 Cal.2d 517, 530.)

The robbery was only incidental to the murder. "[W]here the defendant's intent is to kill, and the related offense is only incidental to the murder, the murder cannot be said to have been committed in the commission of the related offense." (*People v. Williams* (1988) 44 Cal.3d

[137] This instruction was given at the conclusion of the special circumstances phase of the trial.

883, 927, citing the rule of *People v. Green, supra,* 27 Cal.3d 1, 61 [special circumstance not satisfied if the felony is committed for the purpose of facilitating the murder].) The sole reason that the man on the passenger side of the car took possession of the shotgun was to arm himself against Cross and to shoot her. Taking the ignition key was to prevent Bulman's and Cross's escape. Thus, the only items of personal property taken – the key and the shotgun – were taken as incidental to the murder itself. Robbery-murder as a special circumstance applies only to "...a murder in the commission of a robbery, *not to a robbery committed in the course of a murder.*" (Italics added) (*People v. Marshall* (1997) 15 Cal.4th 1, 41.)

The case at bar strongly resembles other cases where the robbery was held to be incidental to the murder.

In *People v. Green, supra*, 27 Cal.3d 62, the taking of property from the murder victim was to leave the corpse "bereft of anything whatsoever by which she could be identified." The special circumstance finding of robbery was set aside as incidental to the murder. In this case, taking the shotgun with which Cross was shot was also plainly incidental to the murder. In *People v. Thompson* (1980) 27 Cal.3d 303, 324, taking the car keys was held incidental to the murder because the car was used to effect a getaway. In this case, taking the keys prevented the victims' escape and, of course, taking the shotgun gave the murderer the means with which to commit the crime – a matter 'incidental' to the murder.

In *People v. Marshall, supra,* 15 Cal.4th 1, 12, 41, a letter written by the victim requesting a check-cashing card from a grocery store was found on the defendant. The prosecution theorized that the defendant took the letter as a "token" of the rape and murder. Although the defendant had obviously taken the letter from the victim's person, according to this Court this was not enough to make the murder in *Marshall* 'a murder in the commission of a robbery.' In the case at bar, taking the keys and the

shotgun facilitated the murder itself. Thus, in this case the robbery is far more "incidental" to the murder than in *Marshall,* and the same conclusion should be reached.

In light of the foregoing, the special circumstances finding that appellant committed the murder during the course of a robbery should be struck.

Appellant's conviction of the special circumstance that the murder was committed during the commission of a robbery also violates the Due process clause of the Fourteenth Amendment. Under the Due Process clause, the critical inquiry is to determine whether the "record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573.) The reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, "... any rational finding of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Ibid.*) A conviction that does not meet this test violates the Due Process clause of the Fourteenth Amendment. (*Id.* at 433 U.S. 314.)

There was simply no evidence that taking the ignition key and the shotgun was done in the course of a robbery. All the evidence points unequivocally to the conclusion that key and the gun were taken in the commission of the homicide. A rational finder of fact could conclude nothing else. Accordingly, appellant's conviction of the special circumstance of robbery violates the Due Process clause of the Fourteenth Amendment.

XVIII

THE TRIAL COURT LACKED THE POWER TO MAKE A MOTION FOR NEW TRIAL ON APPELLANT'S BEHALF AND IT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO CONTINUE THE MOTION FOR A NEW TRIAL, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO MAKE A MOTION FOR A NEW TRIAL

A. The Procedural Background

The jury returned its verdict of death on March 18, 1996. (CT 3879, 3985.) On March 22, 1996, the defense filed a motion for access to personal juror information pursuant to Code of Civil Procedure section 237 [providing, *inter alia*, that any person may petition the court for access to records of personal juror information]. This motion was denied on April 11, 1996. (CT 4006.)

On April 12, 1996, appellant filed a motion, to be heard on April 23, 1996, to continue "...probation and sentencing and any hearing on a motion for a new trial and modification." (CT 4007-4008.) The trial court denied the motion on April 16, 1996. (CT 4014; RT 8435-8438.)

On April 23, 1996, on the same day that the commitment of a judgment of death was filed (CT 4078-4085), the trial court stated that the defense had not "seen fit" to file a motion for a new trial (RT 8552:25-26) and went on to state that the defense was "deemed" to have made a motion for new trial based upon: (1) each and every objection made during the trial by the defense, including the motion for a mistrial; (2) the instructions given to the jury; (3) the admission of testimony of witnesses who had been hypnotized, i.e., Bulman; (4) failure to admit certain declarations against interest; (5) the ruling that appellant could be impeached by his prior murder conviction, which prevented appellant from taking the stand during the guilt phase; (6) the ruling that the prior murder conviction was made known to the jury as a special circumstance even though appellant's representation in that case was ineffective; (7) the denial of the motion to

suppress evidence produced by the wiretaps; (8) the ruling denying appellant's motion for interference with his right to counsel; and (9) the court's bias as shown in appellant's motion and defense counsel's ineffectiveness in failing to seek review of the court's denial of that motion. (RT 8553-8556.)[138]

The trial court denied this "motion for a new trial." (RT 8554:17-18; 8556:27-28.)

There are three material errors in the court's rulings of April 16 and April 23, 1996.

First, the trial court abused its discretion on April 16, 1996 when it denied appellant's motion to continue the motion for a new trial. Second, a motion for new trial can only be made and entertained on the defendant's application and the trial court has no power to act on its own motion. Since appellant did not file a motion for a new trial, the trial court was without power to "deem" that such a motion had been filed. Third, as a result of the first and second errors, appellant was deprived of his right to make his own motion for a new trial.

B. The Trial Court Abused its Discretion When it Denied Appellant's Motion to Continue the Motion for a New Trial

1. The Denial of a Continuance May Be an Abuse of Discretion

A trial court's denial of a motion for a continuance is reviewed for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) The trial court's denial of appellant's motion for a continuance to prepare and file the motion for a new trial was, for three reasons, an abuse of discretion.

First, the trial court's order was an abuse of its discretion because the chronology of events shows that the defense had a good reason to await the court's decision on the motion to disclose confidential juror information

[138] This was the motion filed by appellant in pro per on January 29, 1996 (CT 3675-3680) that was stricken on February 8, 1996. (CT 3813.)

before preparing and filing the motion for a new trial. Second, defense counsel had legitimate conflicting commitments that prevented him from preparing and filing the motion for a new trial. Third, the trial court abused its discretion by virtue of the fact that it denied the first and only request for a continuance after only 29 days had elapsed from the death verdict, and only 5 days had elapsed from the denial of appellant's motion for juror information.

Before discussing each of these reasons why the trial court abused its discretion in denying the motion for a continuance, appellant sets forth the written and verbal showing made in support of the motion for a continuance.

2. The Showing in Support of the Motion to Continue

The motion to continue the motion for a new trial was supported by a declaration of defense counsel, Mr. Klein, in which he stated that he had not been able to complete work on the motion for new trial because he had been required to do a great amount of work on another case, *In re Hunt*, that was pending in another department of the Superior Court. (CT 4008.) The declaration also noted that the probation report had not as yet been completed. Finally, the declaration stated that the defense's motion to obtain names and addresses of jurors had been denied, that defense counsel intended to file a motion for reconsideration, and that counsel needed additional time to interview the jurors. (CT 4008.)

In the hearing held on April 16, 1996, Mr. Klein stated that he and his partner had been preparing for the evidentiary hearing in the *Hunt* case that was to commence on April 22, 1996, and that certain decisions of the judge in that case required review by the appellate court. (RT 7432.) Mr. Klein stated that, in the case at bar, he had had no time other than to prepare the motion to disclose personal juror information that the court had denied. (RT 8433.) In response to the trial court's question, Mr. Klein stated that he

had not been able to work on this case since March 29, 1996, except for meeting with appellant and the probation officer. Mr. Klein stated that he had intended to file a reply to the People's opposition to his motion to disclose personal juror information. (RT 8434.) Mr. Klein concluded by saying that the information obtained from the jurors would be used in the motion for a new trial. (RT 8435.)

The trial court responded by stating that it did not find good cause for a continuance. (RT 8435:25-26.) The court observed that this was a death penalty case, the jury had returned a verdict, and appellant had been in custody for a long time. (RT 8435-8436.) In its opinion, five weeks was enough to prepare all necessary motions, but Mr. Klein had "decided" to work on another case instead. (RT 8436:19-24.)[139] The trial court went on to state that it and Mr. Klein had had a conversation about the *Hunt* case some months ago, and that the court had been assured that the *Hunt* case would not interfere with the case at bar. (RT 8436-8437.) The court stated that in the case at bar appellant awaited sentencing in a capital case and that such a case had priority over "...a habeas matter where a defendant has been sitting in custody for ten years." (RT 8437:9-14.)

At this point in the hearing, appellant spoke up and requested additional time to prepare his pro per motion for a new trial based on ineffective assistance by counsel. (RT 8438-8441.) Appellant stated that he had been "going on nine years" but that he needed another thirty days and did not think that the court would have any problems in giving him the extra time. (RT 8440-8441.) This statement confirmed Mr. Klein's previous representation that appellant was willing to waive time on the motion for new trial. (RT 8535:14-22.)

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[139] As noted in subsection B.4, *infra*, the trial court appeared to assume that Mr. Klein should not be working on more than one case at a time. This is a most unrealistic assumption. (See subsection B.4, *infra*.)

The trial court responded by saying that the matter would be heard and finished on the next hearing date (April 23, 1996) and that this case would not be dragged out forever. (RT 8442.) Mr. Klein stated that the judge in the *Hunt* matter thought that case would take two weeks. (RT 8442:24-25.) Mr. Klein went on to state that he had been ordered to be ready in the *Hunt* case on April 22, and that he had a conflict since two judges were giving him conflicting orders. (RT 8443.)

The trial court concluded by stating that the motion to continue was without good cause and the conflicts in Mr. Klein's calendar were "legally insufficient as good cause." (RT 8444.) The court stated that the defense could have started to prepare its motions "the day the jury began with the guilt phase because if you are going to make a motion for a new trial, it will be made no matter what happens at penalty." (RT 8444.)

As noted in subsection A, *supra*, on April 23, 1996 the trial court stated that it "deemed" that a new trial motion had been made on several grounds (RT 8552-8556) and that the motion, as "deemed" to have been made, was denied. (RT 8556:27-18.) Mr. Klein stated that he had not seen another case where the trial court refused to continue a motion for a new trial to allow the attorney to prepare that motion when the client was willing to waive time. (RT 8557.) The trial court observed that [Penal Code section] 1050 applied to death penalty cases as well. (RT 8557:8-9.)

3. There Was a Legitimate Reason to Move for the Disclosure Of Juror Information Motion Before Moving for a New Trial

It appears that Mr. Klein intended to raise certain matters pertaining to the jury in the motion for new trial. (RT 8435.) He needed information from the members for the jury for this argument, and he therefore filed the motion for juror information on March 22, 1996 (CT 3990), four days after the verdict of death had been returned. Obviously, Mr. Klein was not

dragging his heels. He was attempting to lay the factual predicate for an argument to be raised in the motion for new trial.

The defense motion for juror information was denied on April 11, 1996. (CT 4006.) *The very next day*, and while he was obviously very busy in the *Hunt* case, Mr. Klein filed a motion to continue the motion for a new trial in the case at bar. (CT 4007.)

Mr. Klein's management of the *Hunt* matter and the case at bar in the first two weeks of April 1996 reflects a seasoned, experienced practitioner who was handling two high profile cases simultaneously. He was attending to *Hunt,* but he was also attempting to manage his commitments to the case at bar. If the denial of the motion for juror information surprised him, he did not ignore the problem but addressed it immediately in the motion to continue the motion for a new trial by informing the court that he would seek reconsideration of the juror information motion and that he intended to raise issues regarding the jury in the new trial motion. (CT 4008.) Since Mr. Klein obviously did not want to forego the argument relating to the jury that he intended to raise in the motion for new trial, he took action to protect his future ability to reverse or moderate the effect of the denial of his motion for juror information. A continuance during which he could assess the situation and possibly seek reconsideration was the best course of action and he took that course of action.

As it turned out, the potential issue(s) relating to the jury were completely lost to appellant. They cannot be raised in this direct appeal since there is no record that reflects these issues. There is no record because the trial court denied the defense the opportunity to prepare and file a motion for a new trial that would have provided the record on which these issues could have been raised. Thus, these issues have been consigned to the uncertain vagaries of collateral attack, made even more uncertain by the

passage of years since the trial took place and the verdict was handed down. From a practical point of view, the damage done to appellant's case with regard to the issues dealing with the jury is irremediable.

4. Defense Counsel's Scheduling Conflicts Should Have Been Taken into Consideration

While conflicting commitments of counsel do not necessarily constitute good cause for a continuance (*People v. Dowell* (1928) 204 Cal. 109, 113; 5 Witkin and Epstein, *California Criminal Law* (3d ed.), *Criminal Trial,* section 343 [continuance for conflicts in schedule usually denied]), an unavoidable or excusable conflict is a proper ground for a continuance. (*People v. Manchetti* (1946) 29 Cal. 452, 458 ["The trial court should exercise care not to handicap to his prejudice a defendant who is not responsible for the fact that his counsel is engaged in trial of another case"]; 5 Witkin and Epstein, *California Criminal Law* (3d ed.), *Criminal Trial,* section 343.) This is especially true when, as here, the defendant has no opportunity to retain alternate counsel. (*People v. Manchetti, supra,* 29 Cal. 452, 458.) It is obvious that at the conclusion of this lengthy and complicated trial, which ended in a verdict of death, it was absolutely out of the question to retain new counsel to prepare and argue the motion for a new trial. Thus, the trial court's ruling that Mr. Klein's scheduling conflict was "legally insufficient" cause for a continuance is wrong as a matter of law. An unavoidable or excusable conflict is a legally sufficient cause for a continuance. (*People v. Manchetti, supra*, 29 Cal. 452, 458.)

It appears that the conflict in this case was excusable. It is altogether unrealistic to suppose, as the trial court evidently did in this case, that a lawyer is obligated to limit himself to handling one case at a time. That simply does not square with reality. A practicing lawyer cannot choose to represent a single client in a single case and hope to make ends meet. While it may be an ideal for court and client that counsel devotes himself to one

case at a time, life and the practice of law have no room for such an ideal. It is absurd to suppose that a lawyer in private practice can afford the luxury of handling one case at a time.

As Mr. Klein made clear, he and his partner had been working on the *Hunt* case to prepare for an evidentiary hearing on April 22, 1996. Certain other matters were also pending in *Hunt* and would be resolved or clarified on April 22, 1996. (RT 8432-8433.) Thus, Mr. Klein was not asking for an open-ended continuance. When the motion for continuance was heard (April 16, 1996), he was clearly in the midst of a very busy period in *Hunt* that required his attention. It stood to reason that, as is normal in the practice of law, as soon as the "crisis" in *Hunt* was resolved Mr. Klein could return to the case at bar and to the preparation of the motion for new trial.

Mr. Klein also made clear that he had been intensively engaged in *Hunt* since March 29, 1996. (RT 8434.) Again, there is nothing unusual in this. Cases will 'heat up' and then return to a more inactive status, awaiting some further event or the passage of time. It was altogether reasonable, assuming that Mr. Klein carried more than one case at a time, that other cases would 'heat up' and demand his attention, just as the case at bar had absorbed Mr. Klein's time while it was in trial.

The trial court's claim that the case at bar had "priority" over *Hunt* (RT 8437) reflects the trial court's state of mind but not the law. There is no statute or rule of court that accords the case at bar priority over another criminal proceeding. In fact, since the defense in the case at bar had not requested any continuances prior to April 12, 1996 and there was a hearing date in *Hunt* (April 22, 1996), counsel's obligations in *Hunt* were entitled to at least to some consideration as far as scheduling motions in this case was concerned. The trial court's determination to rush this case to judgment did not give this case priority. There was simply no reason why a reasonable

accommodation could not have been reached between the demands of *Hunt* and the motion for a new trial in the case at bar.

5. Denial of the First and Only Request for a Continuance Was an Abuse of Discretion

Viewed from the vantage point of defense counsel on April 12, 1996, it appeared completely reasonable to suppose that the first request for a continuance, filed on the heels of the order denying the defense motion for juror information, would be granted by the trial court. For one, appellant was willing to waive time and it was uncontrovertibly true that Mr. Klein had been heavily engaged in the *Hunt* case since March 29, 1996. It was also true that Mr. Klein intended to pursue the juror issue in the motion for new trial and that he needed to develop the facts for that argument. Thus, it appeared to be reasonable to suppose on April 12, 1996 that the trial court would grant the requested continuance.

As we now know, however, nothing of the sort occurred. On the contrary, the trial court remained adamant about the April 23, 1996 hearing date. On that date, as the facts confirm, the trial court intended to, and did, dispose of the entire case.

No one, including the People of the State of California, nor the interests of justice, would have been adversely affected by an order that would have granted the defense a single continuance. Appellant was willing to suffer the further delay that the defense requested and no one can suggest a credible reason why a delay of twenty or thirty days in the entry of the judgment would have prejudiced the People.

Following a trial of this length and complexity, a single continuance granted to the defense in order to allow more time to prepare a motion for new trial would be considered well within reasonable limits and expectations by most lawyers and judges. This is all the more so because defense counsel had other pressing commitments, and because the defense,

apart from those commitments, needed to delay the new trial motion in order to gain the time necessary to investigate matters relating to the jury. In addition to these considerations, the defense obviously *needed time* to prepare the motion for new trial after a trial of this length and complexity. Denying the defense a single continuance was simply an abuse of discretion.

As is set forth more fully below in subsection D, the loss of the right to make a motion for a new trial is no trivial matter. It has been held to be reversible error. It should be held to be such an error in this case.

C. The Trial Court Did Not Have the Power to "Deem" That a Motion for New Trial Had Been Made by Appellant

The trial court was entirely without power to make a motion for new trial on its own motion or to "deem" that appellant had made such a motion when in fact no motion for a new trial was ever made by the defense in this case.

It is settled that the court has no power to make a motion for a new trial. (*People v. Rothruck* (1936) 8 Cal.2d 21, 24; *People v. Skoff* (1933) 131 Cal.App.235, 240; 6 Witkin and Epstein, *California Criminal Law* (3d ed.) *Criminal Judgment,* section 111, pp. 142-143 [the court has no power to act on its own motion].)[140] "A new trial may be granted to the defendant 'upon his application.' (P.C. 1181.)" (*California Criminal Law* (3d ed.)

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[140] "There was in fact no motion made for a new trial, the notice of motion is not the motion itself and is not sufficient to require the court to pass upon it. (See People v. Skoff, 131 Cal.App. 235, 239 [].) In this case the defendant not only made no motion but declined and refused to submit the motion. The last-cited case declares, and rightly so, that the court may not grant a new trial of its own motion. This is also clear from a reading of section 1181 of the Penal Code, which provides that the court may make such order upon the 'application' of the defendant. [citation]." (*People v. Rothruck, supra,* 8 Cal.2d 24.)

Criminal Judgment, section 111, p. 142.) No such "application" was ever made here.

Regrettably, the literal 'rush to judgment' that seems to have inspired the proceedings of April 16 and April 23, 1996 is at its most glaring in the trial court's decision to make a motion for new trial on behalf of appellant and, having made it, to deny it. Quite apart from being flatly contrary to the law, since the court lacked the power to move for a new trial on behalf of appellant, the trial court's actions set a highly undesirable precedent. The integrity of the judicial process is not served by the pretense of making a motion on behalf of a defendant who is just about to be sentenced to death, only to "deny" the "motion" that was just made by the court. One would not welcome such proceedings in a prosecution for petty theft. In a capital case, with the sentence of death about to be pronounced, proceedings of this nature are intolerable.

D. The Denial of Appellant's Right to Make A Motion for New Trial Is Reversible Error and Violates the Due Process Clause

> "Refusal to permit counsel for the defendant a reasonable opportunity to both prepare and present a motion for a new trial is, under the circumstances shown here, more than a mere error in procedure. It amounts to a deprival of a substantial statutory right and is not covered by the quoted constitutional provision [[141]]." (*People v. Sarazzawski* (1945) 27 Cal.2d 7, 18.)

In *People v. Sarazzawski, supra,* 27 Cal.2d at 11-12, an appeal from a judgment of death, the jury returned its verdict on October 3, 1944 and the trial court set sentencing for October 6, 1944. Defense counsel moved for a new trial but the trial court intervened and told counsel that the motion would have to be made on October 6 and would be put over for ten days for

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[141] Cal.Const., Art. VI, section 13 [judgment shall not be set aside unless the error complained of has resulted in a miscarriage of justice].

argument on the motion. Defense counsel stated that she was engaged on October 16 but the trial court stated that the matter would have to be heard on October 6 because a motion for new trial took precedence. When the matter was called on October 6, 1944, defense counsel requested a continuance of fifteen days. (27 Cal.2d 13.) Defense counsel stated that she was not ready to proceed and that she wanted to present additional affidavits in support of the motion. (27 Cal.2d 13-14.) The trial court denied the request for a continuance and went on to deny the motion for a new trial. (27 Cal.2d at 14-15.)

This Court held that while due process does not require the legislature to provide for a new trial, when it has been provided a defendant may not arbitrarily be deprived of the right to pursue it. (Id. at 17.) The Court held that, just as counsel has the right to an opportunity to prepare for trial, counsel has a right to a reasonable opportunity to prepare a motion for new trial. The Court held that the trial court's insistence that the motion be presented and argued on October 6 deprived the defendant's counsel of that opportunity. "In light of all the circumstances the right of the defendant to a reasonable opportunity to present his motion for a new trial and to have it judicially entertained and passed upon appears to have been do grievously impaired as to be tantamount to a refusal to hear it." (Id. at 17.) The Court concluded that this was reversible error. (Id. at 19.)

No one can question that the right to make a motion for a new trial is important in all cases, and that it is particularly important in a capital case. It is not solely the death sentence that lends the motion for a new trial special significance. The motion for a new trial gives the trial court the means to have a significant impact on the case. In the motion for a new trial, the defense has an opportunity to appeal to the trial judge to moderate, or lessen, or even set aside the jury's verdict. But the motion for a new trial is more than an appeal to the trial judge for relief. As in the instance of

juror misconduct, the motion for a new trial is the sole vehicle that allows the presentation of this issue in the direct appeal.

Ironically, the trial court's list of issues that it "deemed" included in its motion made on behalf of appellant illustrates the grievous harm that was done in this case by denying the defense the opportunity to present and argue its motion for new trial. Not only was the defense prevented from making a record on issues such as jury misconduct where the new trial motion is the only vehicle that can preserve the issue for the direct appeal, but important issues, such a identification by means of a single photo, were not revisited by the trial court simply because it did not "deem" them to be of any weight. Thus, the list of issues "deemed" considered by the trial court is woefully inadequate, as this brief demonstrates. One of the function of the motion for a new trial, however, is to accord the defense the opportunity to once again present an important point and a concomitant opportunity for the trial court to re-weigh that point with the benefit of the entire trial completed and in the calmer atmosphere of post-trial motions.

The trial court's unprecedented decision to make a motion for a new trial "on behalf of" appellant, only to deny it, also denied appellant the benefit of the trial judge's independent judgment in weighing the evidence. It is hornbook law that appellant was entitled to have the trial judge exercise *independent judgment* in weighing the evidence. (6 Witkin and Epstein, *California Criminal Law* (4th ed.), *Criminal Judgment*, section 102(2), p. 135.) It cannot be said that the trial judge was in a position to exercise his independent judgment when he was both the agent who made the motion for a new trial and the decision maker who denied that motion. The trial judge's *independent review* of the evidence on a motion for a new trial is a very important right that every defendant has – every defendant, that is, except the appellant in this case.

In short, as this Court observed in *People v. Sarazzawski, supra,* 27 Cal.2d at 17, a "motion for new trial is a legislatively established procedure which is the right of any convicted defendant to invoke." Appellant has been deprived of that right. As in *Sarazzawski*, this is reversible error.

The error should be deemed to be reversible per se. An error is reversible per se when the trial was fundamentally unfair. (*People v. Bostwick* (1965) 62 Cal.2d 820, 824; see generally 6 Witkin and Epstein, *California Criminal Law* (4th ed.), *Reversible Error*, section 21.) The trial court arbitrarily denied appellant the important right to make a motion for new trial. The court then proceeded to make a motion on appellant's behalf, which in and of itself nullified the judge's independence, as well as the substance and appearance of justice. A trial of this sort is fundamentally unfair. For this reason, the error should be held to be reversible error per se.

The denial of appellant's right to make a motion for a new trial was arbitrary and violated the clear and unambiguous requirements of California law. It was arbitrary because it flew in the face of common sense and even of a rudimentary awareness of the realities of post-trial litigation. But perhaps no more need to be said on this score than that the denial of the *first and only request for a continuance* in a case of this type is, standing alone, an arbitrary exercise of judicial power. And there is absolutely no question that California law flatly prohibits the trial judge to make a motion for a new trial on the defendant's behalf. The cavalier disregard of this simple but important rule when, in the same breath, the court denied the defense's first and only request for a continuance, presents an extraordinary scenario of the arbitrary exercise of judicial power. The arbitrary denial of the crucial state-law-mandated safeguard of a motion for a new trial *made by the defendant* violated appellant's rights under the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 227, 100 L.Ed.2d 175 [due process clause is violated when

defendant is arbitrarily denied safeguard mandated by state law]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522.) This is a further and additional reason to reverse the judgment.

XIX

IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY THAT MITIGATING CIRCUMSTANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT, AND THAT MITIGATING CIRCUMSTANCES MAY BE FOUND NO MATTER HOW WEAK THE EVIDENCE IS

The defense requested instructions for the penalty phase that would have instructed the jury that mitigating circumstances need not be proven beyond a reasonable doubt, and that mitigating circumstances may be found by the jury no matter how weak the evidence is. Two proposed instructions along these lines were submitted by the defense. (CT 3870, 3871.) The latter instruction was longer and also contained other points. The court refused to give either instruction. (CT 3871.)

This Court has held that a jury may consider mitigating circumstance no matter how strong or weak the evidence is, and that a mitigating circumstance need not be proven beyond a reasonable doubt. (*People v. Wharton* (1991) 53 Cal.3d 522, 601.) Instructions to this effect were approved in *People v. Wharton, supra,* 53 Cal.3d 522, 601, fn.23.)[142]

An instruction advising the jury that mitigating circumstances need not be proven beyond a reasonable doubt, and that mitigating circumstances may be found by the jury no matter how weak the evidence is, would have been particularly important when it came to the testimony of witnesses

[142] The instructions approved in *People v. Wharton* were in relevant part: "A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it."

regarding appellant's background, e.g., appellant's parents. The jury may have viewed this testimony with skepticism, since it was came from appellant's parents, family and friends, yet if the jury had been instructed that mitigating circumstances need not be proven beyond a reasonable doubt, and that mitigating circumstances may be found by the jury no matter how weak the evidence is, the jury might have given evidence coming from appellant's family more weight.

These instructions state correct propositions of law and clearly would have assisted appellant. There was no valid reason to refuse to give them, especially since specially tailored instructions to this effect have previously been approved by this Court in *People v. Wharton, supra,* 53 Cal.3d 522, 601.

Eleven penalty phase witnesses were either family members or had a personal connection to appellant. The requested instructions would have bolstered the testimony of these witnesses in making the jury understand that, while personal bias might cause the jury to view their testimony with some skepticism, this testimony was nevertheless entitled to be weighed and to be considered by the jury.

There was a reasonable probability that the jury down-played a considerable body of evidence – the testimony of eleven witnesses – on the theory that it should be discounted because of personal bias. If the requested instructions had been given, it is reasonable to expect that the jury would have given more weight to this body of testimony and that it would have reached a different result when it came to penalty. Thus, appellant was prejudiced by the court's failure to give these instructions. (*People v. Brown* (1988) 46 Cal.2d 432, 448 [reversal indicated if there is a reasonable possibility that the jury would have reached a different penalty verdict].)

The failure to give these instructions deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-38, 65 L.Ed.2d 392, 100 S.Ct. 2382; *Zant v. Stephens* (1983) 462 U.S. 862, 879, 77 L.Ed.2d 235, 103 S.Ct. 2733; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 49 L.Ed.2d 944, 96 S.Ct. 2978; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85, 100 L.Ed.2d 575, 108 S.Ct. 1981.) The requested instruction would have been very appropriate in this case since there was a considerable body of testimony from family members which the jury may well have discounted. The requested instructions would have informed the jury that testimony that they jury might otherwise be inclined to discount could be considered as mitigating evidence.

XX

IT WAS ERROR NOT TO INSTRUCT THE JURY THAT ANY ONE OF THE MITIGATING FACTORS COULD SUPPORT A DECISION THAT DEATH IS NOT THE APPROPRIATE PUNISHMENT, AND THAT THE JURY WAS NOT LIMITED TO THE SPECIFIC MITIGATING FACTORS LISTED BY THE COURT

The defense requested that the court instruct the jury that any one of the mitigating factors could support a decision that death was not the appropriate punishment, and that the jury was not limited to the specific mitigating factors listed by the court. The court refused to give this instruction. (CT 3871.)

In *People v. Wharton, supra,* 53 Cal.3d 522, 601, fn. 23, this Court approved instructions[143] that closely paralleled the instructions requested in this case.[144]

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[143] "The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this

It stands to reason that these instructions could have made a great deal of difference to the jury. The instruction that any one of the mitigating factors could support the conclusion that death was not the appropriate punishment provided an insight that is not apparent on the face of the instructions given. It simply is not to be found in CALJIC 8.85, nor anywhere else in the instructions given. However, this is a very important point. It gives the jury leeway and flexibility that it does not otherwise know it has.

Similarly, the instruction that the jury is not limited to the mitigating factors that are listed by the court gives the jury more leeway in the normative decision of determining penalty. Thus, an aspect of appellant's background that received little or no attention by counsel may nonetheless serve as a mitigating factor in the jury's opinion. The decision between a life sentence and the death penalty is so obviously difficult, and even

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case. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it. Any mitigating circumstance presented to you may outweigh all the aggravating factors. You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor."

[144] "The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors." (CT 3871.)

wrenching, that anything that legitimately informs the jury of its options should be welcomed and made part of the proceedings.

The failure to give these instructions deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-38, 65 L.Ed.2d 392, 100 S.Ct. 2382; *Zant v. Stephens* (1983) 462 U.S. 862, 879, 77 L.Ed.2d 235, 103 S.Ct. 2733; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 49 L.Ed.2d 944, 96 S.Ct. 2978; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85, 100 L.Ed.2d 575, 108 S.Ct. 1981.) If the jury had been informed that any single factor could support the choice of a life sentence and that it was not limited to the listed mitigating factors, it is reasonably possible that a life sentence might have been returned. There were factors in appellant's background and personal history that, taken alone, supported the choice of a life sentence. Yet the jury was not informed that this was enough to conclude that appellant should not be sentenced to death. This was very important information, which it could well have made the difference. Thus, a reversal of the penalty is indicated. (*People v. Brown* (1988) 46 Cal.2d 432, 448 [reversal indicated if there is a reasonable possibility that the jury would have reached a different penalty verdict].)

XXI

THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE DEPRIVED APPELLANT OF A FAIR TRIAL AND VIOLATED HIS RIGHT TO DUE PROCESS

"A ground for reversal in a close case is the occurrence of many errors which, if considered separately, might not be deemed seriously prejudicial. The cumulative effect, however, may be sufficient to warrant the conclusion of an unfair trial and hence a miscarriage of justice." (6 Witkin and Epstein, *California Criminal Law* (3d ed.), *Reversible Error,*

section 46, p. 508 [citing, *inter alia, People v. Hill* (1998) 17 Cal.4th 800, 844, 847.) The test for cumulative error is whether the defendant received due process and a fair trial. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

A review of the errors in this case should lead this Court to the conclusion that their cumulative effect deprived appellant of a fair trial. The errors are such as to shake one's confidence in the integrity of the fact-finding process. There are also serious errors of a procedural nature that deprived appellant of his right to a fair trial.

The fact-finding process was compromised by the impermissibly suggestive identification procedure employed by the People, which caused Bulman to "identify" appellant. (Argument I.) But this was not the only reason that Bulman's testimony should have been excluded. The clear violation of Evidence Code section 795 should have led to the same result. (Arguments V and VI.) Bulman's "identification" of appellant was simply inadmissible.

The fact-finding process was also marred by the loss of important evidence due to the inordinate delay in getting this case to trial. (Arguments III and IV.) By any measure, this was a blow to the defense. The People, however, were not similarly disadvantaged by the passage of time. They were allowed to present speculative evidence about alleged remnants of blood on a jacket recovered in a closet in the home of appellant's parents. This evidence should have been excluded. (Argument VII.)

Misleading instructions on aiding and abetting given in the guilt and the special circumstances phases allowed the jury to find appellant guilty on a theory for which there was no basis in the evidence. (Argument XIII.) This alone would surely shake one's confidence in the outcome of this case. Inflammatory and inadmissible evidence about the triple homicide seems to

have sealed appellant's fate. (Arguments XIV and XV.) This surely was a finding of guilt by innuendo, and not by valid proof of guilt.

Serious procedural errors also undermined appellant's right to a fair trial. He was deprived of the services of a lawyer to which he was entitled. (Argument II.) He was also deprived of the important right to make a motion for a new trial (Argument IX), and of a meaningful hearing on the issue of the modification of the sentence. (Argument XXI.) Appellant lost not only his lawyer, and but also valuable opportunities to which every defendant in a criminal trial is entitled.

This is not an exhaustive list of the errors in this case. Suffice it to say that, as shown in Argument XX, this was a close case. Absent the cumulative effect of these errors, it is reasonably probable that the jury would have reached a more favorable verdict. (*People v. Cuccia, supra*, 97 Cal.App.4th 785, 795; *People v. Watson, supra*, 46 Cal.2d 818, 837.)

In addition to the foregoing, the cumulative effect of the errors in this case deprived appellant of a fair trial and violated his right to due process. A trial infected with as many substantial errors as this trial cannot produce the reliable determination of guilt, or of the sentence of death, that is required by the Eighth and Fourteenth Amendments to the United States Constitution in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 100 S.Ct. 2382, 65 L.Ed.2d 391.) Thus, independently of the California's cumulative error doctrine, the judgment should be reversed for a violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

XXII

THE JUDGMENT IS NOT SUPPORTED BY SUBSTANTIAL OR CREDIBLE EVIDENCE AND SHOULD THEREFORE BE REVERSED

A. The Evidence Was Insufficient

The principles that determine the sufficiency of the evidence to support the judgment are familiar. The appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In reviewing the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to respondent and presumes in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lewis* (1990) 50 Cal.3d 262, 277; *Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573.) The "critical inquiry" is whether "the evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573.)

The conviction in this case rests upon a number of factors that, upon close scrutiny, do not survive the foregoing test, either because the factor in question is not reasonable, credible or of solid value, or because the evidence should not have been admitted.

Bulman's "identification" of appellant as the person shown in Exhibits 19 and 20 falls into the latter category. That evidence should have been excluded for the reasons set forth in Arguments I, V and VI.

It is also true that agent Bulman failed at least twice in identifying appellant prior to trial. He failed to pick appellant from a lineup on April

19, 1990 (*supra*, p. 96), and on August 20, 1980 he picked one Curtis James Jackson out of a photo display as "closely resembling" the person on the passenger side of the car. (RT 2671.) Bulman was anything but reliable in his "identification" of appellant.

Evidence that appellant's jacket showed traces of blood was speculative and conjectural and should have been excluded for the reasons set forth in Argument VII. Notably, it was stipulated that the presence of blood on the jacket could not be confirmed. (RT 7132-7133.) This evidence was so suspect that even the trial court remarked that if he was a juror, he would have less than total confidence in it, and that the jury might well not have any confidence in it at all, given the stipulation. (RT 7168:22-28.) The fact that the jacket was beyond appellant's control for a matter of years undermines this evidence so substantially that, once again, this weakness in the People's case did not escape the trial court's criticism. (RT 5642 [trial court stated that one does not know what happened to the jacket].)

Evidence relating to the glasses was perhaps the most glaring weakness in the People's case. Detective Henry testified that, at the time Detective Renzi's report was being written after the murder, there was no indication that either of the two suspects had gone to the area where the glasses, the glass case and the fragments of lens had been found. (RT 5941.) These glasses and fragments were never shown to be appellant's or even suitable for appellant. Nor is it true that appellant wore glasses in 1980. No fewer than four people testified that he did not. (Text, p. 136.) In any event, according to the People's theory of the case, appellant should be convicted of the murder of Julie Cross because he *might* have worn glasses – some kind of glasses, certainly not those that were found on the scene – in 1980. This "theory" borders on the absurd; it qualifies literally millions of people as suspects in the Cross murder. It is certainly not substantial evidence of guilt.

B. The Evidence Was Not Credible

Since no one ever identified appellant as one of the suspects – aside from Bulman's entirely impermissible "identification" of Exhibits 19 and 20 – and since there was no physical evidence at all in the form of fingerprints that linked appellant to the crime (RT 5933-5934), the only evidence that is left is Jessica Brock's testimony.

The trial court thought that Jessica Brock was the most important witness in the case. (RT 6160-6261.) According to the trial court, the jury was likely to convict if they believed her 1990 statement that on the night of the Cross murder appellant had come over to her house spattered with blood and with what appeared to be a weapon. (RT 6261.) On the other hand, if her statement to the defense in 1995 was believed, then, according to the trial court, the jury "...is left with very little evidence as to the defendant's guilt." (RT 6262:1-4.)

It is a fact that Jessica Brock told two versions of this tale – one in 1990 and the other in 1995. As the trial court pointed out, the two versions were diametrically opposed, one pointing to guilt, the other to innocence. The eerily fascinating aspect of Jessica's testimony during the trial is that she managed to deliver testimony of both versions of her tale. Thus, she recounted the 1995 version in great detail, down to the detail of telling the prosecution prior to trial that this was the "real" version. (Text, *supra,* p. 131.) She repudiated this when being questioned by the prosecution (*supra*, pp. 132-133), but returned to the 1995 version when questioned by the defense. (Text, p. 133.) This game hit its peak when she stated that there was one night that appellant came over with a bag and black object and washed it off, and that this happened in Santa Monica (RT 6368:16-18), only to state within minutes that it happened when she was living on Montclair. (RT 6370-6371.)

There must come a point when contradictions in a witness' testimony degrade that testimony to the point where it cannot be given any weight. "A witness may be so discredited by a showing of bias or interest, or self-contradiction, or other grounds of impeachment, or by the manner of testifying, or by inherent improbabilities in the testimony, as to render the witness unworthy of belief." (6 Witkin and Epstein, *California Criminal Law* (4th ed.), *Criminal Appeal*, section 161, p. 398, citing *People v. Carvalho* (1952) 112 Cal.App.2d 482, 489 [testimony inherently not credible[, *People v. Casillas* (1943) 60 Cal.App.2d 785, 792 [testimony not credible when witness gives three contradictory versions of crime].) A witness like Jessica Brock who ritually contradicted every statement she made on the witness stand regarding appellant's visit to her home simply cannot offer evidence that is "reasonable, credible, of solid value [so that it] reasonably inspires confidence in the judgment." (*People v. Green, supra*, 27 Cal.3d 1, 55.) Yet, that is the standard that evidence must meet. (*Id.*)

The trial court appreciated the pressures Jessica Brock was under (RT 6268-6269), and she made no secret of the conflicts she was experiencing. (Text, *supra*, pp. 121-122 ["Jessica Brock's State of Mind about Testifying"].) Thus, it is not necessary or even correct to view Jessica Brock as a congenital liar and perjurer. She was simply a person whose loyalties were and are so conflicted that no reasonable person can expect her to tell the truth.

But even if one clings to the entirely unrealistic presumption that Jessica Brock's testimony is substantial evidence that supports the judgment of conviction, it is patent that this is a very close case. As the trial court put it, it hinges on Jessica Brock's credibility. (RT 6261-6262.) A more slender reed cannot be imagined.

The fact that this is a very close case that hinges on the testimony of a witness who continually contradicted her own testimony should affect this

Court's assessment of the impact of the errors that have been raised in this brief. As Mr. Witkin writes, in a close case a lesser showing of error will justify a reversal than where the evidence strongly preponderates against the defendant. He goes on to state: "This approach gives great flexibility to appellate review, for closeness and balance are matters of degree, and the rule against reversal for mere insufficiency of evidence [citation] is readily overcome where error is found in the record. [Citation.]" (6 Witkin and Epstein, *California Criminal Law* (3d ed.), *Reversible Error*, section 45, pp. 506-507.) It is hoped that the Court will be guided by this principle in this case.

Any case, and particularly a capital case, that rests on evidence so insufficient and lacking in credibility as the case at bar, is not a case wherein the guilt of the defendant has been reliably shown. The most basic aspect of due process is that a judgment of conviction should rest on sufficient evidence. (*Jackson v. Virginia, supra,* 443 U.S. 307, 314, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560.) Proof of guilt beyond a reasonable doubt is among the essentials of due process. *(In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1069, 25 L.Ed.2d 368.) This is not a case where the evidence meets these constitutional tests and for this reason, in addition to all the others listed in this brief, the judgment should be reversed.

XXIII

THE CASE SHOULD BE REMANDED FOR A HEARING ON THE APPLICATION FOR A MODIFICATION OF THE VERDICT UNDER PENAL CODE SECTION 190.4(e)

In every case in which the trier of fact has returned a verdict imposing the death penalty, the defendant is deemed to have made an application for modification of the verdict under Penal Code section 190.4(e).

At the time the defense moved to continue the motion for a new trial, the defense also requested a continuance of the probation and sentencing hearing. (CT 4007:22-23.) The trial court denied this request when it proceeded to determine the automatic application for a modification of the verdict on April 23, 1996. (RT 8557 et seq.)

As this Court has made abundantly clear, the hearing on the automatic application for a modification of the verdict is not a rubber-stamp affair. The trial court must independently reweigh and consider the evidence (*People v. Bonillas* (1989) 48 Cal.3d 757, 801) and determine whether, in it's independent judgment, the weight of the evidence supports the jury's verdict. (*People v. Lang* (1989) 49 Cal.3d 991, 1045.)

Obviously, the hearing on the automatic application for the modification of the verdict is a crucial moment in any capital case. This is the last opportunity that the defense has to engage a court in *weighing* the evidence. This is also the occasion for the defense to directly engage the court on the question of penalty. Given the trial court's broad powers to affect the verdict, this hearing is of great importance to the defense.

This opportunity was lost in this case by the trial court's determination to rush this case to judgment. Obviously, the defense was not ready for this hearing on April 23, 1996, just as it was not ready to file a motion for a new trial.

Unfortunately, the trial court did not limit itself to holding the hearing on the modification of the sentence, in disregard of the defense's request to continue that hearing. The trial court also stated that it had read the probation report prior to proceeding with the modification hearing. (RT 8557:17-18.)

It is improper for the judge to read the probation report before hearing the automatic application for modification. (3 Witkin and Epstein, *California Criminal Law* (3d ed.), *Punishment*, section 499(3), p. 678.) This

Court has remanded a penalty determination for a new hearing in a case where the judge improperly considered prejudicial matter in the probation report that had not been presented to the jury. (*People v. Lewis* (1990) 50 Cal.3d 262, 286.)

This point of black letter law was brought to the trial court's attention by both defense counsel and the prosecution. (RT 8557-8558.) In fact, defense counsel stated that there were errors in the probation report that needed to be noted by the court. (RT 8559:5-10.) However, the trial court was not deterred by any of this,[145] and it proceeded to determine the automatic application for a modification of the sentence. (RT 8559 et seq.)

The court's denial of the defense request for a continuance of the hearing on the modification of the sentence was an abuse of discretion for the same reasons that it was an abuse of discretion not to continue the motion for a new trial. The argument on this score is incorporated here by reference. It is not appropriate to rush a capital case to judgment. Nothing would have been lost to the People if the defense had been given an opportunity to prepare for the modification hearing. This error was compounded by the trial court reading and considering the probation report.

The appropriate remedy in this case is to remand the case for a new hearing on the modification of the sentence.

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[145] The trial court flatly stated that it knew of no authority that the probation report was not to be considered. (RT 8558:15-17.) On the contrary, it is well settled under multiple decisions of this Court that the probation report is not to be considered. (3 Witkin and Epstein, *California Criminal Law* (3d ed.), *Punishment*, section 499(3), p. 678.)

XXIV

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

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Challenges to most of these features have been rejected by this Court, but they retain their constitutional validity since they have not been rejected by the United States Supreme Court. Appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional bases, rather than unduly lengthening this brief. 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 actually *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. The result is truly a "wanton and freakish" system that randomly chooses from among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that a random element in selecting who the state will kill is impermissibly dominant throughout the process of applying the penalty of death.

A. Appellant's Death Penalty Is Invalid Because § 190.2 Is Impermissibly Broad

Section 190.2 violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and in its application to appellant's case invalidates his death judgment because it is so all-inclusive that it does not meaningfully narrow the pool of murderers to those most deserving of consideration for the death penalty. As this Court has recognized:

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (conc. opn. of White, J.); accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed 2d 398 (plur. opn.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

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

> "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of

persons eligible for the death penalty." (*Zant v. Stephens, supra*, 462 U.S. 862, 878, 77 L.Ed.2d 235, 103 S.Ct. 2733.

Appellant was tried and convicted under the 1978 California Death Penalty Law. This initiative statute was enacted into law as Proposition 7 on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances.[146] This large number of special circumstances are so broad in definition as to encompass nearly every first-degree murder, which was, in fact, the drafter's declared intent.

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

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. By establishing twenty-six categories of special circumstance murder, the statute comes very close to achieving its goal of making every murderer eligible for death.[147] Section 190.2 does not genuinely narrow the class of persons eligible for the death penalty.

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

[147] The problem has been exacerbated by this Court's construction of the lying-in-wait special circumstance, which the Court has interpreted so broadly as to encompass virtually all intentional murders. (See *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.)

A recent law review article provides compelling confirmation of the 1978 statute's invalidity. The article, Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman*? (1997) 72 NYU L.Rev. 1283, presents empirical evidence demonstrating in two respects the statute's failure to perform the constitutionally mandated narrowing function. First, the data demonstrates as an empirical matter that 84% of convicted first degree murderers are statutorily death-eligible under the 1978 statute. (*Id.* at 1332.) Second, the data shows that only 11.4% of the statutorily death-eligible class of first degree murderers are in fact being sentenced to death. (*Ibid.*)

A statutory scheme under which 84% of first degree murderers are death-eligible does not "genuinely narrow" (see *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319 *cert. den.* 130 L.Ed.2d 802 (1995)). Further, since only 11.4% of those statutorily death-eligible are sentenced to death, California's death penalty scheme permits an even greater risk of arbitrariness than the schemes considered in *Furman v. Georgia, supra*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726,[148] and, like those schemes, is unconstitutional. Under the 1978 statute, as in pre-*Furman* Georgia, being sentenced to die is akin to being struck by lightening.

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[148] At the time of the decision in *Furman*, the evidence before the high court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at p. 386 n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . ." (402 U.S. at p. 309, n. 10) Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the

B. Appellant's Death Penalty Is Invalid Because § 190.3(a) as Applied Is Impermissibly Vague Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that features of murders exactly at odds with those of other death-eligible murders, have been found to be "aggravating" within the statute's meaning.

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[149] or because three weeks after the crime defendant sought to conceal evidence,[150] or threatened witnesses after his arrest,[151] or disposed of the victim's body in a manner that precluded its recovery.[152]

The purpose of § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 129 L.Ed.2d 750, 114

Eighth Amendment. See also, *The California Death Penalty Scheme, supra*, 72 NYU L.Rev. at 1288-1290.

[149] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09, *cert. den.*, 112 S. Ct. 3040 (1992).

[150] *People v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

[151] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

S.Ct. 2630), it has been used in ways so arbitrary and contradictory as to violate the federal guarantee of due process of law.

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

a. Because the defendant struck many blows and inflicted multiple wounds (see, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same) or because the defendant killed with a single execution-style wound. (See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).)

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification) (See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (witness-elimination); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoiding arrest); *People v. McLain*, No. S004370, RT 31 (revenge) or because the defendant killed the victim without any motive at all. (See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

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[152] *People v. Bittaker* 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35 (1989), *cert. den.* 496 U.S. 931 (1990).

c. Because the defendant killed the victim in cold blood (see, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood), or because the defendant killed the victim during a savage frenzy. (See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

d. Because the defendant engaged in a cover-up to conceal his crime (see, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim), or because the defendant did not engage in a cover-up and so must have been proud of it. (See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

e. Because the defendant made the victim endure the terror of anticipating a violent death (see, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623), or because the defendant killed instantly without any warning. (See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

f. Because the victim had children (see, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) [victim had children]), or because the victim had not yet had a chance to have children. (See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

g. Because the victim struggled prior to death (see, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same)) or because the victim did not struggle. (See, e.g., *People v. Fauber*, No.

S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

h. Because the defendant had a prior relationship with the victim (see, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same)), or because the victim was a complete stranger to the defendant. (See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

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

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. *The age of the victim*. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly. (See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in

a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").)

b. *The method of killing*. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire. (See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

c. *The motive of the killing*. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all. (See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown,* No. S004451, RT 3544 (avoiding arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

d. *The time of the killing*. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day. (See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).)

e. *The location of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location. (See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman,* No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).)

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

2. In practice, § 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 100 L.Ed.2d 675, 56 S.Ct. 1853.)

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Therefore Violates The Eighth And Fourteenth Amendments To The United States Constitution

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Every person, like appellant, convicted of felony-

murder is automatically eligible for death, and freighted with the requisite aggravating circumstance to be selected for death. Section 190.3(a) allows the prosecutor to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt either that aggravating circumstances are proved, or that they outweigh the mitigating circumstances and that death is the appropriate penalty. Not only is inter-case proportionality review not required; it is not permitted.

D. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Appellant's Constitutional Rights To Due Process And Equal Protection Of The Laws, And Constituted Cruel And Unusual Punishment

Appellant's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require either that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In Re Winship* (1970) 397 U.S. 358, 25 L.Ed2d 368, 90 S.Ct. 1068.)

Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[i] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[153] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance -- and even in that context, the required finding need not be unanimous.

Even if it were not constitutionally necessary to place a heightened burden of persuasion on the prosecution, some articulated burden of proof would be required to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied. "Capital punishment [must] be imposed fairly, *and with reasonable consistency*, or not at all." (Emphasis added) (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, 71 L.Ed2d 1, 102 S.Ct. 869.) The trial court's failure to instruct on any penalty phase burden of proof deprived appellant of his rights to due process, equal protection, and to freedom from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In cases in which the aggravating and mitigating evidence is balanced, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the ultimate burden of persuasion to the state while another assigns it to the defendant.

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[153] See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

E. California Law Violates The Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Unanimous, Written Findings Regarding Aggravating Factors

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

Of the twenty-two states like California that vest the responsibility for death penalty sentencing in the jury, however, fourteen require that the jury unanimously agree on the aggravating factors proven, and unanimously agree that death is the appropriate sentence.[154] California does not have such a requirement.

Thus, appellant's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Absent a requirement of unanimous jury agreement as to the existence of any factors, and written findings thereon, the propriety of the judgment herein can not be reviewed in a constitutional manner. (*California v. Brown* (1987) 479 U.S. 538, 543, 93 L.Ed.2d 934, 107 S.Ct. 837; *Gregg v. Georgia, supra*, 428 U.S. 153, 195, 49 L.Ed.2d 859, 96 S.Ct. 2909.) Moreover, because each juror

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[154] See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

could have relied on a factor which could potentially constitute proper aggravation, even though it was different from the factors relied on by the other jurors, there was no actual agreement on why appellant should be condemned.

F. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty

Thirty-one of the thirty-four states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman [v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia, supra,* 428 U.S. 153, 198, 49 L.Ed.2d 859, 96 S.Ct. 2909.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[iii]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it; the prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries is strictly the product of this Court.

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192, 49 L.Ed.2d 859, 96 S.Ct. 2909, citing *Furman v. Georgia, supra*, 408 U.S. at p. 313 (White, J., conc.).) This failure also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

G. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigating Factors Precluded A Fair, Reliable And Evenhanded Administration Of The Capital Sanction

Nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" -- factors (d), (e), (f), (g), (h), and (j) -- were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby undermining the reliability of the sentence. (*Woodson v. North Carolina, supra,* 428 U.S. 280,

304, 49 L.Ed.2d 944, 96 S.Ct. 2978; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-85, 100 L.Ed.2d 575, 108 S.Ct. 1981.)

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

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "bias or caprice in the sentencing decision," (*Tuilaepa v. California, supra*, 512 U.S. 967, 973, 129 L.Ed.2d 750, 114 S.Ct. 2630 citing *Gregg v. Georgia, supra*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. The constitution requires "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. 104, 112, 71 L.Ed2d 1, 102 S.Ct. 869.)

H. The Court Should Reexamine its Rejection of the Principle that a Verdict of Death Should be Based on Findings Beyond a Reasonable Doubt by a Unanimous Jury

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Ring v. Arizona* (2002) 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, the Supreme Court held that the finding necessary for the imposition of the death penalty must be made by a jury, unanimously and beyond a reasonable doubt. These two decisions were made in the instance of statutory schemes that allowed the judge, rather than the jury, to arrive at the factual determination upon which the imposition of the death penalty was predicated.

This Court has held that the principle declared in *Apprendi* and *Ring* do not apply to California's statutory scheme because the death sentence may be handed down in California once the jury has convicted the defendant of first degree murder and when one or more special circumstances have been found to be true by the jury beyond a reasonable doubt. (*People v. Anderson* (2001) 25 Cal.4th 543, 589; *People v. Snow* (2003) 30 Cal.4th 43; *People v. Prieto* (2003) 30 Cal.4th 226, 263.) The distinction made by this Court is between statutes where the defendant is – inappropriately – made death eligible by a judge's finding (*Apprendi* and *Ring*) and where the defendant is rendered death-eligible by a jury, as in California's jury determinations of first degree murder and one or more special circumstances.

It is respectfully submitted that the crucial element in a death sentence is not that the defendant is death-eligible but that the defendant has actually been sentenced to death. This is true from any point of view with which one cares to approach the question.

From a legal perspective, a special circumstances finding is simply a condition precedent to a death sentence. If there is no death sentence, the

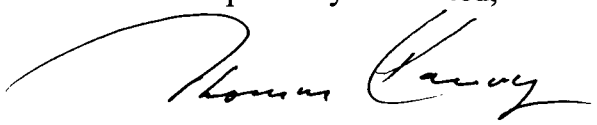
special circumstances finding passes into oblivion. From a policy, if not a moral, viewpoint, one would think that society would wish to assure itself of the unanimous verdict of the community when it comes to the death sentence itself, and not merely when it comes to a condition that is precedent to the death sentence. And, of course, from the condemned defendant's point of view, it is the jury's determination of death that counts, and not the preliminary determination that the defendant is eligible for the death penalty.

Wrapping the death verdict in the mantle of an "inherently moral and normative" decision (*People v. Prieto, supra,* 30 Cal.4th 226, 263) does not render the death sentence any less lethal. However one chooses to classify the death sentence – as factual, or normative, or inherently moral – the fact is that it ***is*** a death sentence. No jury is ever asked to make a more awesome decision. That is why the decision should be made by a unanimous jury, and made beyond a reasonable doubt.

CONCLUSION

For the reasons indicated, the judgment should be reversed. If this Court concludes that it should be remanded for additional proceedings, a new trial should be held on all issues. At a minimum, the case should be remanded for hearings on a motion for a new trial and a modification of the sentence.

Respectfully submitted,



THOMAS KALLAY

For the appellant

[i] (See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).) Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[ii] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

[iii] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992);

Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

PROOF OF SERVICE BY MAIL

In Re: APPELLANT'S OPENING BRIEF; No. S053228
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STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 350 South Figueroa Street, Suite 400, Los Angeles, California 90071. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

RICHARD BREEN,
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, 5th Floor
Los Angeles, CA 90013
(Attorney for The State of California)

LESTER KURIYAMA
Office of the District Attorney
County of Los Angeles
210 West Temple Street, Room 18000
Los Angeles, CA 90012
(Attorney for The County of Los Angeles)

ROWAN K. KLEIN, ESQ.
10537 West Pico Blvd., Suite 854
Los Angeles, CA 90064
(courtesy copy)

CLERK,
Los Angeles County Superior Court
For: Hon. Charles E. Horan, Judge
111 North Hill Street, Room 109
Los Angeles, CA 90012

MICHAEL MILLMAN, ESQ.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Mr. Andre S. Alexander
E75526
San Quentin State Prison
San Quentin, CA 94974
LEGAL MAIL

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on September 22, 2003, at Los Angeles, California.

E. Gonzales