SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	**S055856**
vs.	**CAPITAL CASE**
ORLANDO GENE ROMERO AND CHRISTOPHER SELF, Defendants and Appellants.	

Automatic Appeal from the Superior Court of California
Riverside County Superior Court No. CR46579
The Honorable Ronald L. Taylor, Judge

APPELLANT'S REPLY BRIEF
[CHRISTOPHER SELF]

WILLIAM D. FARBER
Attorney at Law
State Bar No. 45121
369-B Third Street # 164
San Rafael, CA 94901

Telephone: (415) 472-7279

Attorney for Defendant and Appellant Christopher Self

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NO WAIVER OR ABANDONMENT OF ASSIGNMENTS OF ERROR RAISED IN APPELLANT'S OPENING BRIEF, GENERALLY

This reply brief on behalf of Christopher Self is intended to supplement appellant's opening brief and to reply to arguments, contentions, or assertions raised in the respondent's brief (RB) where reply is deemed to be helpful or necessary to the Court's consideration of the issue or issues raised. Appellant addresses specific contentions made by respondent but does not necessarily reply to those arguments that are adequately addressed in the opening brief.

The decision not to address a particular argument, issue, or contention asserted by respondent does not constitute a concession, abandonment or waiver of the point made by appellant. Appellant continues to assert all assignments of error and arguments made in his opening brief and does not intend to concede, waive, or abandon any issue, argument, or assignment of

error raised in the opening brief. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

The arguments in this reply brief are numbered in accord with the assignments of error raised in appellant's opening brief.

A. Guilt Trial Issues and Assignments of Error

I

THE JUROR QUESTIONNAIRE ADOPTED BY THE TRIAL COURT LED TO THE IMPERMISSIBLE AND IMPROPER DISCHARGE OF PROSPECTIVE JURORS BASED ON RACE AND ETHNICITY, AND RESULTED IN THE SELECTION OF A BIASED JURY THAT DENIED APPELLANT'S RIGHT TO AN IMPARTIAL JURY REPRESENTING A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF ARTICLE I, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION AND THE FIRST, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant repeatedly objected to the use of a jury questionnaire.[1] (See

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[1]/ Respondent repeatedly cites and relies on augmented jury questionnaires obtained from District Attorney files. (See RB 87, 111, 114.) There is no indication in the superior court files or in the certified record on appeal that the augmented jury questionnaires were ever lodged or filed in this case in the superior court as required by California Rules of Court, rule 8.155(a)(1)(A). The Rules of Court do not contemplate that the Court would be or become a fact finder as to which records or documents may or may not have been lodged or filed in the superior court. (See *Regents of University of California v. Shelly* (2004) 122 Cal.App.4th 824, 826, fn. 1 [party failed to demonstrate that the documents for which augmentation was sought actually were lodged or filed with the trial court.]; *In re Marriage of Rosendale* (2004) 119 Cal.App.4th 1202, 1216 [no indication proffered item was ever filed or lodged with the trial court.].) In *People v. Brooks* (1980) 26 Cal.3d 471, the Court discussed that the purpose of the augmentation procedure is to supplement an incomplete but existing record: "Augmentation is not available, however, for the purpose of adding material that was not a proper part of the record in the trial court." (*Id.* at p. 484.)

(4 CT 1080-1081; 5 CT 919-949; 10 RT 2021, 2026-2028; 11 RT 2060.)

(4 CT 1080-1081; 5 CT 919-949; 10 RT 2021, 2026-2028; 11 RT 2060.)

Respondent concedes appellant objected. (RB 85.) Included were questions requiring every prospective juror to specify his or her race and ethnic origin (Question 1d). The jury ultimately selected was strikingly homogeneous in character and make-up: all 12 regular jurors initially selected were Caucasian. In a county with a substantial Hispanic population, there were no Hispanics on appellant's jury, either seated or alternate jurors.

B. The Questions on Race and Ethnicity Resulted in the Nonrepresentation of Hispanics on Appellant's Jury and the Selection of a Biased Jury; the Issue Has Not Been Waived or Forfeited

The right to a trial by impartial jurors drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the United States Constitution and by article I, section 16 of the California Constitution. (*People v. Sanders* (1990) 51 Cal.3d 471, 491.) The right to a jury drawn from a representative cross-section under the Sixth Amendment is a fundamental, substantive right. Its violation removes "from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

It is not necessary to assume that the excluded group will consistently

vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. (*Peters v. Kiff* (1972) 407 U.S. 493, 503-504 [92 S.Ct. 2163, 33 L.Ed.2d 83].) "The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (*Ballard v. United States* (1946) 329 U.S. 187, 195 [67 S.Ct. 261, 91 L.Ed. 181].)

Respondent asserts that although appellant objected to the questionnaire as a whole, he failed to object to specific questions, including asking prospective jurors to identify their race or ethnicity. Thus, according to respondent, by not objecting to the question regarding race and ethnicity, appellant waived his claim of error and is precluded from advancing his claims of error on appeal. (RB 84, 93.) Initially, it must be stressed that the court's use of a question on race and ethnicity was not on its face designed to discover racial or ethnic prejudice. The race question did not probe or inquire into prospective jurors' racial or ethnic biases. Rather, the questionnaire was simply employed to identify and single-out prospective jurors on the basis of their race or ethnicity. In *United States v. Greer* (5th Cir. 1991) 939 F.2d 1076, 1086, for example, the Court of Appeals ruled that the defendants were wrong in contending that the trial court could

properly have asked Jewish prospective jurors during jury selection to identify themselves. Such a question would have been improper because the information sought did not tend to reveal bias or prejudice; did not address issues of particular relevance to the facts or circumstances of the case involved; and did not in any manner result in the disclosure of pertinent information that would have disqualified the affected individuals as prospective jurors or from serving on the jury had they been selected.

Moreover, even if the court or prosecutor in the present case had learned which prospective jurors were Hispanic, the prosecutor constitutionally could not have based his peremptory challenges upon this information, for the Supreme Court categorically prohibits racial and ethnic discrimination in the process of jury selection. (See, e.g., *Batson v. Kentucky* (1986) 476 U.S. 79, 87 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

In challenging appellant's claim, respondent overlooks that the obligation to impanel an impartial jury lies in the first instance with the trial judge. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189 [101 S.Ct. 1629, 68 L.Ed.2d 22].) The High Court has repeatedly explained that although a defendant has no right to a petit jury composed in whole or in part of persons of his own race, he "does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." (*Batson v. Kentucky, supra,* 476 U. S. at pp. 85-86.) The Supreme Court has

also recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state reliance on, or utilization of, group stereotypes rooted in, and reflective of, historical prejudice. (See *J.E.B. v. Alabama ex rel. TB* (1994) 511 U.S. 127, 128 [114 S.Ct. 1419, 128 L.Ed.2d 89] [race and gender are unconstitutional proxies for juror competence and impartiality].)

In his objections to the questionnaire as a whole, appellant told the court that it was a means for the prosecution to identify jurors who might have some reservations about the death penalty and that prospective jurors, so identified, would be struck by the People. (10 RT 2026.) That is precisely what the prosecutor accomplished, relying in part on the race and ethnicity question. The results "bespeaks discrimination." (*Hernandez v. Texas* (1954) 347 U.S. 475, 482 [74 S.Ct. 667, 98 L.Ed. 866] [systematic exclusion of persons of Mexican descent from jury service in county in which the petitioner was indicted and tried for murder deprived him of equal protection of laws under the Fourteenth Amendment].) Given the substantial disparity between the initial number of Hispanic prospective jurors and the percentage -- zero -- of their representation on the jury ultimately selected, the use of a questionnaire, the use of a race and ethnicity question, and the totality of the circumstances, including prosecutorial misconduct in targeting all Hispanic prospective jurors, certainly establish

a pattern of invidious discrimination.

The court had a duty not to facilitate or permit a course of conduct during jury selection -- here, the use of a race and ethnicity question -- which effectively operated to discriminate in the selection of jurors on racial grounds. (See *Hill v. Texas* (1942) 316 U. S. 400, 404 [62 S.Ct. 1159, 86 L.Ed. 1559].) Respondent conveniently overlooks that the use of a questionnaire with questions that sought to identify race and ethnicity, in tandem with the prosecutor's misconduct, resulted in the removal of *all* Hispanics from appellant's jury and thus established a prima facie case of invidious discrimination. That being so, the burden of proof shifts to the state to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures produced the monochromatic result that occurred in this case. (*Turner v. Fouche* (1970) 396 U. S. 346, 361 [90 S.Ct. 532, 24 L.Ed.2d 567].)

The race and ethnicity question identified all members of a protected group entitled to serve on the jury in this case. As demonstrated in Argument II, *infra*, having identified Hispanic prospective jurors by the race and ethnicity question, the prosecutor then purposefully targeted those same jurors during voir dire in order to eliminate them from the jury. Thus, whether the race or ethnicity question now is considered separately or in conjunction with the questionnaire as a whole, at trial it served to achieve

the constitutionally impermissible purpose of removing from the jury panel all members of a protected group and thus violated appellant's fundamental Sixth Amendment right to a jury drawn from a representative cross-section of the population in Riverside County.

If appellant forfeited this assignment of error or invited the error, then trial counsel rendered appellant ineffective assistance of counsel under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. 1, §§ 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

If, in addition to making a general objection to the questionnaire on constitutional grounds, counsel was additionally required to object to each specific question, counsel rendered ineffective assistance in failing to do so. There was no possible reason for counsel to refrain from objecting or to conclude that it was in appellant's best interest not to raise objections to every question of the proposed questionnaire. The race and ethnicity question in particular permitted the prosecutor unreasonably to focus his voir dire on the remaining Hispanic prospective jurors and to engage in a selection process that resulted in the total exclusion of all Hispanics from appellant's jury. The record affords no basis for thereby concluding that counsel's omissions were based on an informed tactical choice. It is

patently unreasonable to assume or infer that defense counsel himself preferred to dispense with all Hispanic jurors in this case. (*People v. Bolin* (1998) 18 Cal. 4th 297, 317.)

Any failure on trial counsel's part in this regard thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) The prejudice caused by counsel's error is clear, since it resulted in *Witherspoon* error and the other statutory and constitutional violations asserted by appellant, including a biased jury and unreliable guilt and penalty verdicts. (*Strickland v. Washington, supra*, 466 U.S. at p.687 [prejudice shown where capital trial's result is unreliable].)

C. In the Absence of Voir Dire Examination, Reliance Upon Juror Questionnaires Alone to Discharge or Disqualify Prospective Jurors Violated Appellant's Rights to a Fair Trial by Jury, Due Process, a Reliable Guilt and Penalty Determination, and Equal Protection of the Laws Guaranteed by Article I, Sections 15 and 16 of the California Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The purpose of voir dire is to detect bias and prejudice in prospective jurors, thus ensuring that a defendant will be tried by as fair and impartial a jury as possible. In *Morgan v. Illinois* (1992) 504 U.S. 719 [112 S.Ct. 2222, 119 L.Ed.2d 492], the United States Supreme Court discussed at length the

critical importance of voir dire to a reasonable determination of juror bias. In other decisions, the United States Supreme Court contemplates actual voir dire of potential jurors by the trial court. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 651-657 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *Ross v Oklahoma* (1988) 487 U.S. 81, 83 [108 S.Ct. 2273, 101 L.Ed.2d 80]; *Darden v. Wainwright* (1986) 477 U.S. 168, 175-178 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Wainwright v. Witt* (1985) 469 U.S. 412, 415-416 [105 S.Ct. 844, 83 L.Ed.2d 841]; *Adams v. Texas* (1980) 448 U.S. 38, 41-42 [100 S.Ct. 2521, 65 L.Ed.2d 581]; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 514-515 [88 S.Ct. 1770, 20 L.Ed.2d 776].)

In *Dennis v. United States* (1950) 339 U. S. 162, 168 [86 S.Ct. 1840, 16 L.Ed.2d 973], the United States Supreme Court stressed the "serious duty" of the trial court to determine the question of actual bias and that in exercising its discretion in this regard, "the trial court must be zealous to protect the rights of an accused." In *Witt*, the High Court emphasized that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

If an *actual* voir dire examination can be constitutionally insufficient to make the determination required by *Witherspoon*, (see *Gray v. Mississippi* (1987) 481 U.S. 648, 662-663 [107 S.Ct. 2045, 95 L.Ed.2d

622] [we must assume rehabilitation on the *Witherspoon* question would have been possible when "inadequate questioning" in the voir dire procedure makes it impossible for an appellate court to determine "whether the trial judge erred in removing (the venire persons) for cause."], it necessarily follows that sole reliance on a written questionnaire to determine qualifications, without voir dire examination, is implicitly insufficient. While a questionnaire may serve as an efficient vehicle for collecting some information about views or attitudes on criminal guilt and penalty, it is not the most reliable way to collect other types of information as required in a capital case.

In this case, over 50 prospective jurors were discharged for cause on the basis of juror questionnaire responses alone. Some jurors -- including prospective jurors Baum-Moss, Lewis, Tartaglia, and Mejia [see subsection D, *infra*] -- were discharged even though the court itself indicated they had not stated sufficient cause in their questionnaire responses to warrant excusal. One juror was discharged simply because he was uncomfortable with the death penalty (Sheridan). Another juror was discharged because he would have a difficult time imposing the death penalty (Campbell). Still another juror was discharged because of a preference for life imprisonment (Koehn). As to these and the other discharged prospective jurors, the court did not conduct any examination whatsoever in open court. Instead, the trial

court used the written questionnaires to excuse these prospective jurors from the venire, without the examination process normally used in voir dire proceedings -- literally to inquire of and seek to elicit from jurors information relevant to their qualifications to serve.

Respondent asserts there was no constitutional error "from the court's reliance on written questionnaires to dismiss prospective jurors for cause" and that the procedure was a constitutional exercise of the trial court's discretion." (RB 84; 97, fn. 42.) Respondent argues this wholesale dismissal of prospective jurors based on their various attitudes and views on the death penalty as expressed in the questionnaires was proper. Respondent disregards the well-settled principle that jurors who oppose the death penalty or believe it unjust may serve as jurors in capital cases "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].) In other words, personal opposition to capital punishment is not a constitutional impediment to jury service as long as each prospective juror is able to set aside his or her personal beliefs and fairly consider all sentencing options under the rule of law.

Appellant was entitled under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 15 and 16 of the

California Constitution to be tried by a fair, representative, and impartial jury, "a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required." (*Gray v. Mississippi, supra,* 481 U.S. at p. 659, fn. 9 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *Morgan v. Illinois, supra*, 504 U.S. at pp. 726-728.) The trial court was therefore obligated to determine that the people selected to serve on the jury did not hold views concerning capital punishment that would "'prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath.'" (*Wainwright v. Witt, supra*, 469 U.S. at p. 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581]; U.S. Const., 6th & 14th Amends.) Its failure to do so was federal constitutional error.

Simply put, the questionnaire used in this case raised more questions than it answered. Without follow-up questioning, the answers elicited by the questionnaire did not permit the court or counsel to fully explore the views and attitudes of prospective jurors. It could not be assumed that prospective jurors understood each question as it was intended to be understood. It is possible, based on their questionnaire responses, that prospective jurors could have been rehabilitated by oral voir dire.

As this case illustrates, written questions are by nature superficial and

vulnerable to misinterpretation. Thus, the use of a written questionnaire alone as the basis for discharging prospective jurors without any follow-up questioning on voir dire fails to safeguard the neutrality, diversity, and integrity required of a capital jury. *Witherspoon* did not allow the trial judge to dismiss prospective jurors for cause merely for expressing objections to the death penalty. To do so without further questioning for clarification, as the court did here, violates the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 521-523.) Indeed, the United States Supreme Court teaches that we must assume rehabilitation on the *Witherspoon* question would have been possible when "inadequate questioning" in the voir dire procedure makes it impossible for an appellate court to determine "whether the trial judge erred in removing [the venire persons] for cause." (*Gray v. Mississippi,* supra, 481 U.S. at pp.662-663.)

Appellant was severely prejudiced by the improper procedure used by the trial court to strike prospective jurors without so much as a perfunctory voir dire examination. The questionnaires impermissibly reduced the determination of bias to a set of questions and answers that attempted to "obtain results in the manner of a catechism," (*Wainwright v. Witt, supra,* 469 U.S. at p. 424), without the benefit of the trial court seeing and hearing the prospective jurors.

Those who gave ambiguous responses or who were less rigid in their

views were summarily dismissed for cause on the basis of their questionnaire responses alone and thus wrongfully excluded from appellant's jury selection process. This procedure for excusing prospective jurors directly contravened the principles articulated in *Wainwright v. Witt, supra,* 469 U.S. 412. The procedure was defective because it was insufficient to determine whether those jurors would be able to follow conscientiously the instructions of the trial court and consider fairly the imposition of the death penalty or whether their views would substantially impair their respective abilities to carry out their oaths and duties as jurors. While answers in the pre-voir dire questionnaires might have constituted valid reasons to exercise peremptory challenges, absent any follow-up questioning in voir dire, the questionnaires did not justify the exclusion of prospective jurors without a determination as to whether their views would prevent or substantially impair the performance of their duties as jurors. (See *People v. Cash* (2002) 28 Cal.4th 703, 719-720.)

D. The Trial Court Erred in Excusing at Least Five Prospective Jurors Without Voir Dire Examination Despite Finding That Their Questionnaire Responses Alone Did Not Constitute Sufficient Cause Justifying Discharge

A trial court's ruling regarding a prospective juror's qualifications must be supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) Thus, even assuming for purposes of argument that it is

constitutionally acceptable for the trial court to excuse a prospective juror for cause solely on the basis of written questionnaire answers, such a determination must be supported by substantial evidence. Moreover, "substantial evidence" surely involves more than a juror's initial response, particularly where the response is ambiguous or appears to reflect bias. As the case law make clear, even a juror's answers during voir dire may be insufficient to excuse him without thorough exploration of his responses.

In appellant's case, no less than five prospective jurors were wrongfully excluded from the venire before voir dire proceedings began, based on the court's improper determination that their questionnaires contained inappropriate, ambiguous, or conflicting responses and answers.

For example, the trial court excused three prospective jurors from appellant's venire panel even though it found their questionnaire responses did not warrant excusal for bias or substantial impairment of their ability to perform the duties of a juror in a capital case. The court excused Kay Tartaglia for cause, while conceding that she had not said anything in court or in her questionnaire that would justify her removal for cause. (25 RT 4088.) Respondent now disingenuously asserts that in her questionnaire, prospective juror Tartaglia gave disqualifying responses. (RB 120.)

The trial court listed juror Beatrice Mejia, an Hispanic, "as possible cause" (26 RT 4162-4163), but nevertheless discharged her for cause

without follow-up voir dire. Respondent now argues that Mejia's equivocal questionnaire responses -- without any clarifying follow-up -- also disqualified her as a prospective juror. (RB 123-125.)

The trial court excused Pamela Campbell for cause, noting that her responses indicated only that "she would have a difficult time imposing the death penalty" (27 RT 4314), but still conducting no voir dire examination into Ms. Campbell's views or responses on the questionnaire regarding capital punishment. A prospective juror is not required to affirm that she would favor, or lean toward, the death penalty under any particular circumstances in order to serve. Even those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases, as long as they are able to subjugate their own beliefs to the need to follow the court's instructions. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Respondent points to Campbell's questionnaire responses -- again without follow-up -- in which she indicated she would automatically vote in favor of life imprisonment without the possibility of parole for unintentional or accidental killing, circumstances that did not exist in the present case. (See RB 125.)

The trial court ruled that Yolanda Baum-Moss' questionnaire stated no grounds to excuse her for cause, but excused her anyway, solely on the basis of the responses in her questionnaire. (23 RT 3799.) Respondent now

asserts that Baum-Moss was generally disqualified because she did not like the death penalty or life without parole and was unsure whether she would automatically vote against the death penalty for an aider and abettor. (RB 118-119.) Here, too, there was no follow-up questioning of Baum-Moss for the purpose of ascertaining or clarifying her views and position on the penalty relevant to the facts and circumstances of the present case.

Although the prosecutor sought to remove prospective juror Peggy Koehn because of "[h]er indication as to the *Witherspoon* [sic] that she would not be sure if she could -- she was unsure if she would automatically vote against the death penalty" and because she indicated "a preference for LWOP" (25 RT 4090), it was the court that discharged her for cause without proper examination. The trial court failed to conduct voir dire and made no attempt to explore the nature of her uncertainty about the death penalty or to determine if prospective juror Koehn could set aside her views in this case or if they substantially impaired her ability to serve as a juror.. (25 RT 4090.) Prospective juror Koehn was discharged solely because of her questionnaire responses in respect to accidental or unintentional killings and not on the basis of any questioning relevant to the issues involved in this case. Respondent now asserts prospective juror Koehn was properly dismissed because her questionnaire responses demonstrated substantial impairment. (RT 123.)

Respondent cannot seriously contest that each of these five jurors was discharged for cause, although none ever stated an unwillingness or inability to set aside her own beliefs and follow the law. (See *Lockhart v. McCree, supra*, 476 U.S. at p. 176.) The discharge of these jurors thus contravenes United States Supreme Court decisions which clearly establish that a juror may not be excused solely because he or she expresses opposition to the death penalty. (*Lockhart v. McCree, supra*, 476 U.S. 162.)

Respondent overlooks that neither *Witherspoon* nor *Witt* requires that a prospective juror automatically be excused if he or she expresses a personal opposition to the death penalty. Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree, supra,* 476 U.S. at p. 176; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) None of the written questions put to these five prospective jurors articulated the proper legal standard under *Witherspoon/Witt*. (See, e.g., *Darden v. Wainwright* (11th Cir. 1985) 767 F.2d 752, 754 [upholding exclusion of prospective juror where the trial judge articulated an unquestionably correct legal standard [under *Witt*] on many . . . occasions during the voir dire"), aff'd (1986) 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2d 144].

Nor did their written answers indicate an intention to disregard or

circumvent the law or the court's instructions. Unlike *Castro v. Ward* (10th Cir. 1998) 138 F.3d 810, where the trial judge asked follow-up questions during voir dire, and had the opportunity to observe the prospective juror's demeanor, here the trial judge did nothing other than rely on the ambiguous, written responses as the basis for its decisions to discharge prospective jurors for cause. In *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1271, fn. 7, the Court of Appeals stressed that "[a]lthough we do not wish to foreclose the possibility that some responses to written questions would sufficiently support excusing a prospective juror for cause, the ambiguity of the written questions at issue here exemplifies the danger of relying solely on questionnaire answers in this delicate inquiry."

To exclude prospective jurors simply because of their uncertainty about, or reluctance to impose, the death penalty, with no exploration of their attitudes or views to determine their qualification to serve -- as did the trial court in appellant's case -- deprives a defendant of the right to the impartial jury to which he is entitled under the law. (*Adams v. Texas*, *supra*, 448 U.S. at p. 50.) Having failed to find sufficient cause to justify the discharge of prospective jurors Baum-Moss, Koehn, Tartaglia, Mejia, and Campbell, the trial court here erred in excusing them without voir dire examination, in violation of appellant's rights to a fair trial by a neutral and impartial jury, due process, and a reliable determination of guilt and penalty

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

E. Counsel's Stipulations Did Not Waive Issues Raised in this Assignment of Error

Respondent argues appellant's claim is procedurally barred because appellant's trial counsel stipulated to the removal of prospective jurors based on their questionnaire responses alone. (RB 84, 96-97.) Appellant respectfully disagrees on several grounds.

First, as a matter of federal and state constitutional law, the trial court did not have the power to dispense with the voir dire of prospective jurors, especially in a capital case where a heightened degree of due process was required. Trial counsel therefore could not have forfeited the issue or invited the error, because no act or statement of trial counsel could confer on the trial court discretion which it did not legally have. Thus, the claim that the court erred in excusing potential jurors based solely on their questionnaires is cognizable on appeal.

Second, at least as to six prospective jurors, the court itself ruled that while their questionnaire responses did not provide sufficient cause to excuse them, they should nevertheless be excused for cause. By the court's own findings, then, the evidence was insufficient to support the discharges, yet it conducted no voir dire whatsoever. Hence, even with counsel's

stipulations, the court erred and abused its discretion.

The trial court did far more than merely pass on the adequacy of trial counsel's stipulations. The trial court initiated and fully participated in the selection and exclusion process and effectively prompted counsel's so-called stipulations. Having denied defense counsel's objections to the questionnaire and declaring its intention to proceed as it did, the court left counsel no choice but to stipulate. Abandoning its role as a neutral arbiter of the trial, the court independently identified jurors to be discharged for cause based on jury questionnaire responses. The trial court repeatedly made affirmative findings of impairment on its own review of jury questionnaires and, on that basis and on its own motion, excused jurors for cause. Thus, any suggestion that counsel waived this error by stipulating to other excusals should be rejected on grounds of futility. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.)

Moreover, stipulations notwithstanding, defense counsel objected to the court's procedure, refused to participate in redrafting or formulating the questionnaire, and complained about the inability to rehabilitate arguably qualified jurors. When the court noted counsel's objections for the record and explicitly ruled it would utilize the questionnaire procedure, defense counsel's objections notwithstanding, any further objections were futile.

Third, an appellate court can reach a question a party has not

preserved for review if the issue involves neither the admission nor the exclusion of evidence. (*People* v. *Gutierrez* (2009) 174 Cal.App.4th 515, 520 (citing *People* v. *Williams* (1998) 17 Ca1.4th 148, 161, fn. 6); see *People* v. *Marchand* (2002) 98 Cal.App.4th 1056, 1061 [appellate court has discretion to adjudicate an important question of constitutional law despite party's forfeiture of right to appellate review].) Here, neither the admission nor exclusion of evidence is implicated. What is at stake is nothing less fundamental than the denial of appellant's right to a fair and impartial jury drawn from a representative cross-section of the community, a fair trial, and due process of law. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7 & 16; see also *People* v. *Johnson* (2004) 119 Cal.App.4th 976, 985 [appellate court reached merits of reasonable doubt instructions despite absence of contemporaneous trial objection].)

The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. (*United States v. Blount* (6th Cir, 1973) 479 F.2d 650, 651; see *also Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22] [voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored]; *Mu'Min v. Virginia* (1991) 500 U.S. 415, 431 [111 S.Ct. 1899, 114 L.Ed.2d 493] [voir dire serves the dual purpose of

enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges].)

Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense. The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. (See *Morgan v. Illinois* (1992) 504 U.S. 719 [112 S.Ct. 2222, 119 L.Ed.2d 492].) The right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors.'" (*Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751].)

If, by stipulating to the elimination of qualified, prospective jurors, appellant waived or forfeited this assignment of error or invited the error, then trial counsel rendered appellant ineffective assistance of counsel under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. 1, §§ 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

There was no possible reason for counsel to conclude that it was in appellant's best interest to discharge potentially qualified jurors with views and positions on the death penalty that in no way required their

exclusion from the jury in this case. Indeed, in respect to at least 6 of the prospective jurors excluded from the ultimate panel based on questionnaire responses alone, the court itself noted their views did not automatically disqualify them from jury service in this case. The record thus affords no basis for concluding that counsel's omissions were based on a viable jury selection strategy or an informed tactical choice.

Despite the presumption that defense counsel's decisions were guided by sound trial strategy, it is not sufficient for respondent to merely offer up its speculation, i.e., counsel's desire to expedite voir dire (RB 111), in an effort to justify or excuse his ineffectiveness. Nor can respondent cavalierly recite "strategy" like a talisman that automatically defeats a claim of ineffectiveness.

Strategy means a reasonable "plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result." (Random House Dictionary 1298 (Rev. ed. 1975).) It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney would assess as reasonable to achieve a specific goal. (See *Cone v. Bell* (6th Cir. 2001) 243 F.3d 961, 978; see also *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 704 [court must assess whether the strategy itself was constitutionally deficient].) In short, counsel's trial strategy itself must be objectively

reasonable. (See *Strickland v. Washington, supra*, 466 U.S. at p. 681.) Here, counsel's stipulations did not reflect a reasonable strategy, particularly since the questionnaire responses alone did not disqualify all the jurors the court discharged without follow-up voir dire.

The decision to acquiesce or participate in discharging numerous, potentially qualified jurors whose views on the death penalty were balanced, nuanced, and diverse was unreasonable defense trial strategy. Even assuming that it was reasonable for defense counsel to expedite voir dire, as respondent speculates, it was not reasonable to stipulate to the discharge of a host of prospective jurors who had not been questioned to determine their fitness to serve.

A defense strategy that leads to the discharge of potentially qualified, unbiased, and untainted jurors is not reasonable; any effective attorney must conduct a voir dire examination to determine whether prospective jurors are potentially qualified to serve and free from bias or prejudice. Here, it was unreasonable for defense counsel purposefully to allow the court and prosecutor to eliminate prospective jurors without insisting on appellant's right to use voir dire to ascertain their qualifications to serve during both guilt and penalty phases of trial in this case.

II

THE PROSECUTOR COMMITTED MISCONDUCT DURING TRIAL IN VIOLATION OF APPELLANT'S RIGHTS TO TRIAL BY JURY, FAIR TRIAL, AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE PROSECUTOR'S MISCONDUCT ALSO UNDERMINED THE RELIABILITY OF THE GUILT AND PENALTY DETERMINATIONS IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITTION

A. The Prosecutor Committed Misconduct During Jury Selection by Targeting and Eliminating All Hispanic Prospective Jurors

Under the state and federal constitutions appellant was guaranteed a trial by an impartial jury drawn from a representative cross-section of the community. Among the safeguards that serve to protect that fundamental right is the prohibition against racial discrimination in the selection of jurors. (U.S. Const., 6th, 14th Amends.; Cal. Const. art I, § 16; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.)

As discussed in his opening brief (Self AOB 198-207), appellant's jury as selected was devoid of Hispanics. The absence of Hispanics on appellant's jury was not accidental. Hardship claims led to the dismissal of many, otherwise qualified low or middle income Hispanic prospective jurors. The pool of Hispanic prospective jurors who were otherwise

qualified to sit on appellant's jury was further decimated by the written juror questionnaire that propounded improper and impermissible questions on race and ethnicity. (See Argument I, *supra*.)

During voir dire, the prosecutor committed misconduct by focusing on well-qualified Hispanic prospective jurors after they had been initially screened and passed for cause. The prosecutor's improper manipulation of the jury selection process through use of impermissible questions regarding race and ethnicity, as well as the disproportionate questioning of Hispanic venirepersons, resulted in the total elimination of Hispanics from appellant's jury. (See *People v. Burgener* (2003) 29 Cal.4th 833, 857 [under-representation must result from improper feature of jury selection process].)

The prosecutor's insidious goal was to eliminate all eligible, qualified Hispanic prospective jurors from the final jury pool. The prosecutor was successful. The lone Hispanic prospective juror who managed to survive the ethnic culling process and was called to serve as an alternate was quickly dispatched by peremptory challenge. In the end, there were no regular or alternate Hispanic jurors seated on appellant's jury.[2]

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[2]/ Respondent asserts that Black-Belizean Alternate Juror No. 2 -- who became Juror No. 14 -- "could be classified as 'Hispanic.'" (RB 130, fn. 48; see also RB 92-93, fn. 41.) Whether a Black from Belize can claim Hispanic ancestry is beyond the scope of this brief and, in any event, neither absolves the prosecutor from his unconstitutional conduct nor negates appellant's claim. Respondent cannot refute what is evident on the record -- that all Hispanic prospective jurors were specifically targeted during the jury

Respondent first offers that appellant failed to make specific and timely objections in the trial court and is thus now barred on appeal from asserting claims of prosecutorial misconduct during the voir dire process. (RB 130.) Respondent's claim is without merit.

First, beyond cavil, a trial court has a duty to control the proceedings and to provide a fair trial to both defense and prosecution. Ordinarily, if the defense fails to object to improper judicial and prosecutorial conduct, it forfeits the right to raise any claim of misconduct on appeal. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) However, appellant is not barred from asserting his claim of prosecutorial misconduct during jury selection, because it involves "the due administration of justice"' and may therefore be raised on appeal even without an objection at trial.

In *Catchpole v. Brannon* (1995) 36 Cal.App.4th 231, the court displayed gender bias during the proceedings. (*Id.* at p. 251.) Reversing the judgment for the defendant and remanding the case for trial before a different judge, the reviewing court declined to apply forfeiture principles to the plaintiff's bias claim even though she had not objected to the trial court's improper comments. The reviewing court posited that trial counsel may have refrained from objecting because of the risk of offending the trial judge. Moreover, "doubt whether the problem could be cured by objection

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selection process and that by the end of the jury selection process, there were no Hispanics on appellant's jury.

might discourage the assertion of even meritorious claims." (*Id.* at p. 244.) Additionally, forfeiture would "have the unjust effect of insulating judges from accountability for bias." (*Ibid.*) The reviewing court concluded that the plaintiff's failure to object in the case before it was excused because of the "public interest" and "administration of justice" factors inherent in the issue of judicial gender bias. (*Ibid.*)

The trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." (*Quercia v. United States* (1933) 289 U. S. 466, 469 [53 S.Ct. 698, 77 L.Ed. 1321].) Here, the court erred in permitting questions that sought to identify jurors based on race and ethnicity. In so doing, the court effectively facilitated actual bias in the jury selection process and, by extension, in the administration of justice. Thus, appellant's claim is cognizable on appeal.

There is no authority permitting the prosecutor, as a judicial officer, to use race and ethnicity in a deliberately unfair and impermissible manner to exclude Hispanic venirepersons from serving on appellant's jury. (See *In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1498-1501 [judgment reversed where obvious double-standard was utilized in dissolution proceedings].; but see *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4 [disapproving *Catchpole* for the proposition that due process may be

violated by the appearance of bias alone].) The numbers here are most troubling, as all Hispanic prospective jurors -- one way or another -- were eliminated from the jury in this case. As the High Court said in *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], quoted in *People v. Johnson* (2003) 30 Cal.4th 1302, 1327, "[h]appenstance is unlikely to produce [such a] disparity." (See also *People v. Hall* (1983) 35 Cal.3d 161, 168-169 [disparate treatment of jurors who differ only in ethnicity strongly suggestive of bias].) *Catchpole* is, therefore, apposite and serves to excuse appellant's failure to object to the prosecutor's misconduct in this case. Appellant should not be deemed to have forfeited his claim of prosecutorial misconduct.

Even if the principles of *Catchpole* were inapplicable to appellant's case, his related ineffective assistance of counsel claim requires this Court to address the merits of the claim of error in any case. If appellant forfeited this assignment of error or invited the error, then trial counsel rendered appellant ineffective assistance of counsel under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. I, §§ 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

There was no possible tactical or strategic reason for counsel, without objection, to engage in a jury selection process that resulted in the total

exclusion of all Hispanics from appellant's jury. The record affords no basis for concluding that counsel's omissions were based on an informed tactical choice. It is beyond the realm of possibility that defense counsel himself preferred to dispense with all Hispanic jurors in this case. (*People v. Bolin* (1998) 18 Cal. 4th 297, 317.)

Any failure on trial counsel's part in this regard thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) The prejudice caused by counsel's error is clear, since it resulted in *Witherspoon* error and the other statutory and constitutional violations enumerated above, a biased jury, and unreliable guilt and penalty verdicts. (*Strickland v. Washington, supra,* 466 U.S. at p. 687 [prejudice shown where capital trial's result is unreliable].) Appellant's rights to due process and a reliable determination of guilt and sentence under the Fifth, Fourteenth and Eighth Amendments to the United States Constitution are clearly implicated.

Turning to the substance of appellant's claim, respondent argues that the prosecutor's "race-based targeting" of Hispanic prospective jurors is unsupported by the record. (RB 131-133.) According to respondent, the prosecutor explored the prospective jurors' capacity to serve as jurors on a

capital case, as was his right and responsibility, and "in no way unfairly targeted Hispanic jurors for questioning." (RB 133.)

With respect to juror Mendoza, for example, respondent contends that the prosecutor's questions properly focused on his questionnaire responses and could even be "fairly interpreted as attempts to rehabilitate him" and evaluate his ability to serve. No so. Before questioning Hispanic prospective juror Mendoza, the prosecutor asked two Caucasian jurors relatively brief questions about whether they could impose the death penalty. In contrast, prospective juror Mendoza was asked 19 detailed questions about the circumstances that would justify a verdict of death, the kinds of victims that would call for the death penalty, and his views on the burden of proof. (See 23 RT 3830-3832.) The prosecutor repeatedly returned to prospective juror Mendoza, asking at least seven additional questions beyond his initial examination. (See 23 RT 3840, 3842, 3856.)

Similarly, Hispanic prospective juror Guzman was asked 19 detailed and specific questions. In contrast, Caucasian prospective juror Green, whose questioning immediately followed Guzman, was asked but three. (See 23 RT 3783-3784.) Prospective juror Gezewski, also Caucasian, was asked but two. (23 RT 3786-3787.) On the one hand, the prosecutor asked prospective juror Guzman, "What kind of things would you look for to determine whether or not the death penalty is appropriate?" (23 RT 3780.)

After Guzman's clear and specific response about evidence of planning, the prosecutor followed with several additional, voir dire questions. Yet, when Caucasian prospective juror Gezewski answered the same question with an ambiguous and indecipherable reply, stating "The special circumstance, checking the special circumstances, whether they consisted of -- or how it came about or whatever, to that which way I will go one way or the other, death or parole -- without parole," the prosecutor did not ask a single follow-up question. (See 23 RT 3786-3787.)

After briefly questioning two non-Hispanic prospective jurors after his introductory remarks, the prosecutor asked Hispanic prospective juror Parra at least 38 questions. (25 RT 4129-4135.) The prosecutor asked but a single question each of Caucasian prospective jurors Blankenship and Arnold. Turning then to Hispanic prospective juror Rolon, the prosecutor asked her 15 questions about the felony murder and accomplice liability. (25 RT 4151-4153.) None of the Caucasian prospective jurors was questioned on these topics, or as extensively, as were the Hispanic venirepersons.

In respect to prospective juror Avalos, respondent argues that the prosecutor's questions properly "centered around" the responses she gave during voir dire. The record shows that the prosecutor initially asked Hispanic prospective juror Avalos seven detailed questions about testimony from witnesses with different backgrounds and lifestyles, whether those

witnesses could be truthful, and whether she would weigh and consider their testimony. (23 RT 3838-3840.) After questioning several other prospective jurors, the prosecutor returned to Avalos with nine additional questions regarding whether she could return a verdict of death; her views regarding her Catholic religion and background; and information regarding her church attendance. (See 23 RT 3849-3851.) These questions were not asked of any non-Hispanic prospective jurors.

In respect to prospective juror Zapata, respondent argues that the prosecutor "understandably" explored his questionnaire and voir dire responses concerning whether he was sure he could impose the death penalty under the applicable burden of proof. (RB 132.) Unlike his questioning of non-Hispanic jurors, however, the prosecutor initially asked nine questions about Zapata's views on the burden of proof as to both guilt and penalty, eyewitness testimony, and coconspirator testimony. (See 24 RT 3983-3985.) Contrary to his examination of non-Hispanic prospective jurors, the prosecutor returned to Zapata with further questions about the burden of proof and penalty (see 24 RT 3996), followed by a series of seven more questions on felony-murder, accomplice liability, and penalty. (24 RT 4000-4001.) None of the Caucasian prospective jurors was questioned in this manner or to the same extent.

Respondent does not address other portions of the record showing

that, contrary to the extensive follow-up questioning of Hispanic prospective jurors, vague or nonresponsive answers given by Caucasian prospective jurors were not followed by further questioning. Virtually identical, or even clearer, responses by Hispanic prospective jurors invariably were followed with detailed and probing questions by the prosecutor. Beyond any doubt, Hispanic prospective jurors were targeted and treated in a markedly different and unfair manner selection than were Caucasian prospective jurors.

The targeting of all Hispanic prospective jurors during voir dire involved a sustained and continuous effort by the prosecutor, who manifestly assumed that all Hispanic prospective jurors were biased, either against the death penalty or perhaps in favor of the defendants who, not coincidently, were also Hispanic.[3] As this Court held in *People v. Johnson* (1989) 47 Cal.3d 1194, 1215, "[g]roup bias is a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." Here, the improper use of race and ethnicity by the prosecutor during jury selection was neither brief nor isolated and should not go unaddressed by this Court. The prosecutor's tactics manifested an attitude of racial and ethnic discrimination that amounted to misconduct under the circumstances of this case.

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[3]/ Appellant also asserts that the prosecutor's conduct would be no less impermissible or improper even if defendants were *not* Hispanic.

B. The Prosecutor Repeatedly Vouched for the Credibility and Truthfulness of Accomplice Jose Munoz

In addition to his misconduct during jury selection, the prosecutor also committed misconduct by improperly vouching for the credibility of the state's primary witness, Jose Munoz.

Generally, improper vouching involves either blunt comments of a witness's veracity or comments that imply that the prosecutor has special knowledge of facts not in front of the jury or about the credibility and truthfulness of witnesses and their testimony. Improper bolstering, as a form of vouching, also occurs when the prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury. (*United States v. Sanchez* (4th Cir. 1997) 118 F.3d 192, 198.) Bolstering and vouching are much alike and go to the heart of a fair trial. (*United States v. Francis* (6th Cir. 1999) 170 F.3d 546, 551.)

Prosecutorial vouching constitutes both a deceptive and reprehensible method employed by the prosecution to persuade the jury to convict. This is particularly true in this case where the prosecutor vouched for and gave his personal endorsement of Jose Munoz, the most crucial prosecution witness without whose testimony appellant could not have been convicted on virtually every count. (Self AOB 208-215.) Although counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds, (see *Sacher v. United States* (1952) 343 U. S. 1, 8 [72 S.Ct. 451, 96

L.Ed. 717]), well-established principles hold that the prosecutor has a special obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 633, 79 L.Ed. 1314].) Here, the prosecutor devoted page after page of closing argument to assertions of his belief in the veracity and credibility of Jose Munoz. (See 45 RT 6791-6795.)

Respondent here asserts that by failing to object to the prosecutor's misconduct or request jury admonishment, appellant waived the claim on appeal. (RB 128-129.) It should be noted that vouching for a government witness in closing argument has been held to be plain error by the United States Supreme Court and the Courts of Appeal, reviewable even though no objection was raised. (See, e. g., *United States v. Young* (1985), 470 U.S. 1, 16 [105 S.Ct. 1038, 84 L.Ed.2d 1]; *United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1444; *United States v. Ludwig* (10th Cir. 1974) 508 F.2d 140; see also *United States v. Carleo* (10th Cir. 1978) 576 F.2d 846.) In this regard, there are two exceptions to the general rule of forfeiture, and appellant invokes them both.

First, any objection to the repeated misconduct of the prosecutor in vouching for the credibility and truthfulness of Jose Munoz would have been futile. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. In

addition, the failure to request the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Further, any objection to the repeated misconduct of the prosecutor in vouching for the credibility and truthfulness of Jose Munoz would have had no significant impact. Here, during trial the court gave the prosecutor wide latitude to present Jose Munoz' testimony. The trial court routinely overruled the relatively few objections defense counsel managed to raise during trial. (See, e.g., 33 RT 5196-5197; 37 RT 5575-5577, 5596-5597.) On the one hand, it was thus unlikely that the court would have sustained any objection to the prosecutor's comments considering the nature and scope of Munoz' testimony already permitted by the court. On the other hand, once the jury heard the prosecutor vouch for Munoz' credibility and truthfulness, it would have been virtually impossible for the jury to disregard those comments. Any objection or admonition would simply have called attention to the prosecutor's improper argument, thereby increasing the harm already done.

Second, defense counsel was constitutionally ineffective for failing to have made timely objections and requests for admonitions under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. 1, §§ 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668,

687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

The record in this case is noteworthy because of the relative absence of objections by defense counsel at all stages of the trial. Throughout trial, counsel just seemed to be going through the motions of representing appellant.[4] In respect to the prosecutor's misconduct in supporting the testimony of Jose Munoz, there was no possible reason for counsel to permit the jury repeatedly to be told by the prosecutor that he personally vouched

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[4]/ By closing argument, defense counsel effectively had abandoned Mr. Self's defense. (See 45 RT 6782.) While the nature and magnitude of counsel's substandard performance is partially evident on the appellate record, a substantial quantum of the pertinent facts and evidence in support of such claims lie outside the record on appeal. Consequently, in deference to this Court's pronouncements that claims regarding counsel's ineffectiveness are best suited for collateral proceedings in habeas corpus, (see, e.g., *People v. Lopez* (2008) 42 Cal.4th 960, 972 [except in rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [claim that trial counsel rendered ineffective assistance in failing to make a motion to suppress evidence was not suitable for resolution on appeal because the record did not show the reasons for counsel's failure to do so]), and, out of an abundance of caution in an effort to avoid procedural bars triggered by the failure to raise claims on appeal, (see, e.g., *In re Waltreus* (1965) 62 Cal.2d 218, 225 [arguments raised and rejected on appeal may not be raised again through habeas corpus proceeding]; *In re Dixon* (1953) 41 Cal.2d 756, 759 [writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction]), appellate counsel has limited such claims to instances where there is potentially sufficient support on the appellate record for a cognizable claim or, alternatively, has asserted ineffective assistance in response to the state's purported claims of waiver or forfeiture. Habeas counsel for Mr. Self will present a petition for writ of habeas corpus on his behalf and will supplement appellate counsel's claims, as appropriate.

for the credibility and truthfulness of his star witness. Likewise, there can be no possible justification or support for counsel to conclude that it was in appellant's best interest to permit the prosecutor to vouch for the credibility of Jose Munoz when the viability of the state's entire case was predicated on his credibility and veracity. The record affords no basis for concluding that counsel's omissions were based on an informed tactical choice. Indeed, it is light years beyond the realm of possibility that defense counsel would accept prosecutorial testimonials on Jose Munoz' behalf in this case.

Any failure on trial counsel's part in this regard thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].)

Respondent repeatedly offers that the prosecutor's statements did not constitute vouching -- "but were instead permissible assurances of witness honesty and reliability based on reasonable inferences from the record." (RB 137.) Yet, the record reveals that the prosecutor was not simply positing Munoz' credibility based on the circumstances of this case. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1059, revd. on other grounds sub nom. *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293].) Rather, he purposefully and affirmatively sought to bolster his case

by vouching for his witness.

The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor overlooked. Contrary to respondent's assertions, the prosecutor here crossed the line of proper argument by suggesting both that a determination had been made outside of the trial that Munoz was telling the truth and that the prosecutor's office was privy to information -- not admitted at trial -- bearing on Munoz' veracity. (See, for example, 45 RT 6723-6725 [referring to pretrial interviews]; 6742 [referring to police interviews]; 6738-6739 [referring to things Munoz said before as consistent with his trial testimony].)

Without any doubt, the prosecutor invoked the prestige and reputation of his office, offering the impression that he had taken steps to assure Jose Munoz' truthfulness at trial and personally believed as well that Munoz was telling the truth in his accomplice testimony at trial. By his remarks, the prosecutor thus intended the jury to believe that additional inculpatory evidence to support Munoz' veracity, known only to the prosecution, had been withheld from them. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 35.) Such argument was manifestly improper. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 571.)

Finally, respondent offers, without elaboration, that there was no

reasonable likelihood that the jury construed or applied the prosecutor's argument in an objectionable fashion. (RB139.) Vouching is especially problematic in cases where, as here, the credibility of a witness or witnesses is crucial. (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1276.)

The determination of whether a prosecutor's behavior constituted prejudicial error must be made in the context of the whole trial. (*United States v. Young* (1985) 470 U.S. 1, 11 [105 S.Ct. 1038, 84 L.Ed.2d 1].) This must be done because the line between vigorous advocacy and the denial of a fair trial is a fine line. Prosecutors may be zealous advocates and enforcers of the law but must, at the same time, act in a manner that ensures a fair and just trial. (See *United States v. Reliford* (6th Cir. 1995) 58 F.3d 247, 251.)

To be prejudicial, misconduct must bear a reasonable possibility of influencing the penalty verdict. In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, the Court must decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. (*People v. Cunningham* (2001) 25 Ca1.4th 926, 1019.) Here, the prosecutor failed in his duty to refrain from improper methods, and did so pervasively and repeatedly, presenting to the jury unsubstantiated arguments, implicit opinions, and conclusory assertions, all aimed at gaining unfair and improper advantage in the quest to obtain a capital conviction and sentence

against appellant.

There is no bright-line rule dictating when vouching will result in reversal. Various factors must be considered, including the form of vouching; how much the vouching implied that the prosecutor possessed extra-record knowledge of or the capacity to monitor the witness's truthfulness; the degree of personal opinion asserted; the timing of the vouching; and the importance of the witness's testimony and the vouching to the case overall. (*United States v. Necoechea, supra*, 986 F.2d at p. 1278.) All of these factors were present and manifested in this case.

Most importantly, other than Jose Munoz, there were no eyewitnesses to most of the charged crimes. As to the murders, appellant's role and participation were detailed only by Munoz. The prosecution's case was largely based on circumstantial evidence and the testimony of an accomplice and fellow conspirator. By vouching for the credibility and truthfulness of Jose Munoz, the prosecutor improperly skewed the jury's guilt and penalty deliberations toward death. The prosecutor's actions amounted to an egregious pattern of misconduct that rendered appellant's trial fundamentally unfair in violation of appellant's constitutional rights to a fair trial, due process, and a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

C. The Prosecutor Repeatedly Misrepresented the Nature of Mitigation Evidence and the Burden of Proof

During jury selection both defense counsel and the prosecutor were permitted to voir dire the jury. Repeatedly, the prosecutor erroneously mischaracterized the nature and import of mitigation evidence. (See 23 RT 3765-3766; 24 RT 3873-3874; 25 RT 4047, 4126; see also 26 RT 4210; 27 4402; 28 RT 4541-4542; 29 RT 4612.) The prosecutor also repeatedly departed from the language of Penal Code section 190.3, factor (k), effectively urging the jury to disregard the mitigating evidence presented by appellant.

The prosecutor's examples of mitigating evidence described extreme circumstances he knew to be inapplicable to appellant, both in theory and in fact. His extreme examples distorted "reasonableness" within the meaning of *Tennard v. Dretke* (2004) 542 U.S. 274, 284 [124 S.Ct. 2562, 159 L.Ed.2d 384], and *McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441 [110 S.Ct. 1227, 108 L.Ed.2d 369] [relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value]. (See *Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1051.) The prosecutor's examples of mitigating circumstances thus purposely and

impermissibly "set the bar" too high, a tactic designed to undermine appellant's evidence in mitigation and to characterize him as unworthy of the jury's consideration or of a sentence less than death.

The prosecutor's closing argument (54 RT 8082-8117 [including his references to appellant as an artist whose "chosen medium is blood"] exacerbated the prejudicial impact of his improper statements during jury selection, referring dismissively to appellant's artwork, to testimony of appellant's mother and cousin, and to the fact that, in essence, appellant had done nothing of import in his life. (See *Coleman v. Calderon*, *supra*, 210 F.3d at p. 1051.)

The prosecutor's argument and statements permitted the jury to infer that only highly or strongly mitigating evidence would be worthy of consideration in deciding penalty and that appellant was required to introduce strong and compelling evidence of mitigation to counter any evidence in aggravation to establish that he did not warrant death in this case. Thus, not only did the prosecutor mislead the jury as to the nature of mitigating evidence, he improperly insinuated by his comments that appellant somehow bore a heavy burden of proof in order to obtain a sentence less than death -- a burden that did not exist.

Respondent first asserts that appellant failed to object to the prosecutors statements during voir dire and during argument to the jury and

thus waived his claim of prosecutorial misconduct on appeal. (RB 128-129.)

Appellant should not be deemed to have waived the assignment of error, because any objection to the prosecutor's repeated statements would have been futile. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. The failure to request the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.) Here, any objection to the prosecutor's misconduct would have been futile. Objection would simply have called attention to the prosecutor's statements and argument mischaracterizing the nature of mitigation evidence, thereby increasing the harm already done.

Alternatively, if this Court deems counsel's failure to object a waiver of forfeiture of this claim, then defense counsel was constitutionally ineffective for failing to make timely objections and request appropriate admonitions under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. I, § 15; *Strickland v. Washington, supra,* 466 U.S. at p. 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].) In assessing claims of ineffective assistance of trial counsel, the Court considers whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered

prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217].)

A reviewing court generally presumes that counsel's performance falls within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. The defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or, as is the case here, there simply could be no satisfactory explanation. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Here, there was no possible reason -- much less a satisfactory explanation -- for counsel in a capital trial to permit the prosecutor to misrepresent the nature of mitigation evidence. While sensible concessions are an acceptable and often necessary trial tactic (see, e.g., *People v. Hart* (1999) 20 Cal.4th 546, 631), here there was no reason in law or fact for defense counsel to allow without challenge the prosecutor's misleading and improper description of mitigating evidence, particularly when the evidence

in mitigation to be offered (and ultimately offered) by appellant did not rise to the extreme examples given by the prosecutor during jury selection and in argument to the jury. Unless the erroneous types of Penal Code section 190.3, factor (k) mitigating evidence postulated by the prosecutor were challenged by defense counsel, appellant stood little chance that his evidence in mitigation would be understood, considered, or appropriately evaluated by the jury during its penalty deliberations.

There can be no possible justification or support for counsel to allow the prosecutor to postulate only extreme examples of mitigation evidence the jury could properly consider or otherwise insinuate that appellant somehow bore a heavy burden of proof in order to merit a sentence less than death. The record affords no basis for concluding that counsel's failure to object was based on an informed tactical choice. Defense counsel's failure in this regard to ensure the jury properly understood the nature and permissible scope of mitigation evidence thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].)

As respondent correctly notes (RB 135), in *People v. Seaton* (2001) 26 Cal.4th 598, another Riverside County case utilizing the same script, the

prosecutor also used language similar to the prosecutor's remarks in the present case. During voir dire, as here, to illustrate mitigating evidence, the prosecutor also repeatedly mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, or had saved someone's life. (*Id.* at p. 635.) Relying on (and quoting) *People v. Medina* (1995) 11 Cal.4th 694, 741, where the prosecutor gave illustrations similar to those used in *Seaton*, the Court stated: "The prosecutor's statements, though somewhat simplistic, were not legally erroneous, and defendant had ample opportunity to correct, clarify, or amplify the prosecutor's remarks through his own voir dire questions and comments. [P] Moreover, as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it.'" (*People v. Seaton, supra,* 26 Cal.4th at p. 636)

Appellant urges that the Court's rulings in both *Medina* and *Seaton* should be reexamined. The Court's premise in *Medina* (*People v. Medina, supra*, 11 Cal.4th at p. 741) -- that prosecutorial statements are unlikely to affect or unduly influence a jury's verdict -- is speculative and unsupported by empirical evidence or decisional law. Neither the *Medina* nor the *Seaton*

Court addressed the more fundamental objections to the prosecutor's statements, which impacted not only the burden of proof as to evidence in aggravation and mitigation, but also permitted the jury to infer that the absence of the noble circumstances in mitigation described by the prosecutor amounted to aggravation.

Jurors are "free to reject death [based on] any constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540, fn. & italics omitted, revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934.) The law does not "require any juror to vote for the death penalty unless, upon completion of the [individual and normative] 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brown, supra*, 40 Cal.3d at p. 541.)

As the Court also held in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1190-1191, there is no statutory or constitutional duty to instruct on the prosecutorial burden at the penalty phase of a capital trial. As the Court further explained in *People v. Carpenter* (1997) 15 Cal.4th 312, 417 and *People v. Bonillas* (1989) 48 Cal.3d 757, 790, because capital sentencing is a moral and normative process, it is not necessary to give instructions associated with the usual fact-finding process. Precisely because there is no burden of proof, the jury being the "final sentencer" (*Walton v. Arizona*

(1990) 497 U.S. 639, 653 [110 S.Ct. 3047, 111 L.Ed.2d 511]), it is crucial that the jurors be properly informed at all stages of trial about their role, as well as the nature and meaning of aggravation and mitigation, and that they not be misled by the prosecutor as to the sentencing and evaluative process.

Here, the prosecutor's repeated statements about mitigation to prospective jurors during voir dire and to sitting jurors at trial were highly misleading and improper. The prosecutor's statements to prospective jurors were misleading because they set forth an unconstitutionally high standard in defining "mitigation." By the very nature of the prosecutor's comments during jury selection, it is more than reasonably likely that the jury later applied his remarks in a way that prevented the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Respondent finally offers that after the conclusion of the penalty phase, the court instructed appellant's jury with multiple instructions concerning the nature and scope of mitigating evidence. (RB 136-137.) Respondent also offers that during closing argument defense counsel actually amplified the prosecutor's illustrations of mitigating evidence, implying thereby that counsel both accurately described the nature of evidence in mitigation or somehow cured the prosecutor's misconduct. (RB 136.)

The prosecutor's misconduct was not cured by the closing argument of defense counsel or any of the instructions actually given by the trial court. By failing to challenge and correct the prosecutor's mischaracterization, defense counsel's argument actually lent support to his erroneous descriptions and characterizations of mitigating evidence, further bolstering appellant's previous argument that his attorney was ineffective.

As to the jury instructions, CALJIC No. 8.88 defined the jury's sentencing discretion and the nature of its deliberative process. CALJIC No. 8.88 informed the jury that "[a] mitigating circumstance is any fact, condition, or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."

Based on the prosecutor's statements at the beginning of trial, and absent challenge or clarification by defense counsel, the jury likely concluded that any such "fact, condition or event" had to be as extreme as the prosecutor described even to be considered. Thus, the prosecutor's misleading statements regarding mitigation, repeated throughout voir dire and amplified by closing argument, violated appellant's constitutional rights to due process, a fair trial, and a reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogues.

CALJIC No. 8.88 fails to inform the jury who bears the burden of proof for the penalty phase. Nor is there any legal requirement that the jury be informed of a burden of proof. (*People v. Cornwell* (2005) 37 Cal.4th 50, 103-104; *People v. Moon* (2005) 37 Cal.4th 1, 44.) By repeatedly mischaracterizing the nature of mitigating evidence and by implying that appellant bore a nonexistent burden of proof in order to obtain a sentence less than death, the prosecutor engaged in a pattern of misconduct so pervasive that it infected the integrity of the guilt verdicts and the reliability of the penalty proceedings.

For the reasons discussed above, the prosecutor's actions during voir dire and trial amounted to a prejudicial pattern of misconduct that rendered appellant's trial fundamentally unfair, in violation of appellant's constitutional rights to a fair trial, due process, and a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING SEVERANCE OF THE INFLAMMATORY MAGNOLIA CENTER INTERIORS BURGLARY AND VANDALISM COUNTS 11 AND 12 FROM ALL OTHER CHARGED CRIMES; DENIAL OF SEVERANCE UNDER THE CIRCUMSTANCES OF THIS CASE DENIED APPELLANT A FAIR TRIAL BY AN IMPARTIAL JURY AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND PRODUCED AN UNRELIABLE DETERMINATION OF GUILT AND PENALTY ON ALL COUNTS IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The trial court denied appellant's motion to sever the three alleged murder and special circumstances counts from all other unrelated, non-capital counts. (6 CT 1216.) Finding that all of the crimes were of the same class and the evidence cross-admissible -- except as to counts 11 and 12 involving Magnolia Center Interiors (29 RT 4690-4692) -- the court denied appellant's severance motion as to all counts. (29 RT 4691-462.)

A. Counts 11 and 12 were Unconnected to the Other Charged Crimes

Penal Code section 954 allows the prosecution to charge two or more different offenses connected in their commission, or having a common element of substantial importance in their commission, under a separate count. It is a permissive-joinder statute, not a mandatory statute. (*People v. Leney* (1989) 213 Cal.App.3d 265, 269.) Cross-admissibility of evidence is

not required. (Pen. Code § 954.1; *People v. Ochoa* (2001) 26 Cal.4th 398, 423.)

The standard of review for the grant of a consolidation motion is abuse of discretion. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) There is a statutory preference for consolidating trial of separately charged offenses if connected together in their commission. (Pen. Code § 954; see *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) "[A] conclusion as to whether two or more offenses are properly joined under Penal Code section 954 is examined independently as the resolution of a predominantly legal mixed fact-law question -- whether the offenses were connected in their commission." (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.) The test for determining whether offenses are linked together in their commission is whether they share a common element of substantial importance. (*People v. Lucky* (1988) 45 Cal.3d 259, 276.) What matters is the totality of the facts. (*People v. Flint* (1975) 51 Cal.App.3d 333, 336.)

The intent or motivation with which different offenses are committed can qualify as a common element of substantial importance in their commission and establish that such crimes were connected together in their commission. (*Alcala v. Superior Court, supra*, 43 Cal.4th at pp. 1219-1220 [intent or motivation to brutally kill young women tied all offenses together]; *People v. Mendoza* (2000) 24 Cal.4th 130, 160 [intent to

feloniously obtain property connected the various offenses].) Offenses may also be connected together in their commission where there is a close spatial and temporal relationship between them. (*People v. Alvarez, supra*, 14 Cal.4th at p. 188.)

Respondent asserts the Magnolia Center Interiors burglary and vandalism counts (counts 11 and 12) were properly joined and that the trial court did not abuse its discretion when it declined severance. (RB 72-73.) Respondent argues that all of the crimes in this case, including counts 11 and 12, displayed the common element of intent to feloniously obtain property. It is unclear whether respondent also asserts that counts 11 and 12 were of the same class.[5] In any event, respondent posits that counts 11 and 12 occurred "amidst a prolific crime spree," and involved the "common thread of intent to feloniously obtain property." (RB 76.) Hence, according

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[5]/ At RB 76, footnote 36, respondent asserts in a single sentence that "it could be argued that appellants' crimes were not only connected in their commission but also of the same class . . . ." Respondent, however, does not actually make the argument that the crimes were of the same class or present separate, supporting argument or analysis, thus implicitly conceding that counts 11 and 12 were not of the same class as the other charged crimes.

Moreover, points "perfunctorily asserted without argument in support" are not properly raised. (*People v. Williams* (1997) 16 Cal.4th 153, 206.) Therefore, respondent's speculation that the crimes were properly joined because they were of the same class should be summarily rejected as undeveloped and lacking foundation. (*Ibid.*; *People v. Stanley* (1995) 10 Cal.4th 764, 793; see also *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5 [undeveloped, perfunctory argument in footnote insufficient]; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [reviewing court may disregard claims perfunctorily asserted without development and without clear indication they are intended to be discrete contentions].

to respondent, the Magnolia Center Interiors charges were properly joined with the other alleged counts in this case. (RB 76.)

Appellant disagrees. Unlike all of the other charged crimes, the crimes charged in counts 11 and 12 involved a night-time commercial burglary and vandalism. The burglary and vandalism involved neither assaultive behavior nor conduct. In contrast, the charged murders -- involving shootings at close range -- bore nothing at all in common with the Magnolia Center Interiors burglary and vandalism, which involved only property damage. In *People v. Valdez* (2004) 32 Cal.4th 73, 119, for example, the Court held that the defendant's commission of a murder and subsequent escape from jail were connected in their commission, as the defendant's motive for the escape was to avoid prosecution for the murder. No such connection is evident between the Magnolia Center Interiors burglary and vandalism counts and the capital charges in this case. The Magnolia Center Interiors counts were totally dissimilar crimes in motive, purpose, and execution from the charged murders. Moreover, virtually all of the other crimes required an assessment of Jose Munoz' credibility, but counts 11 and 12 did not involve Munoz or his credibility.

Offenses arising out of the same acts, transactions or events are connected in their commission. (*People v. Molano* (1967) 253 Cal.App.2d 841, 845, overruled on another ground by *People v. Roberts* (1992) 2

Cal.4th 271, 314.) Here, the charged murders and the Magnolia Center Interiors burglary and vandalism involved unrelated offenses with different settings, victims, and alleged motivations. The Magnolia Center Interiors crimes involved the theft of property, property damage, and vandalism. While the murders and other charged assaultive crimes were generally similar in purpose and intent, sharing a common modus operandi that included the use of firearms, there was nothing like that degree of similarity -- as between the murders and the Magnolia Center Interiors offenses -- that justified joinder.

Further, the Magnolia Center Interiors offenses shared few, if any, "distinctive marks" in common with the charged murders. The only arguably common feature between the Mans-Jones homicides and the Magnolia Center Interiors offenses was the BK shoeprints, but this was hardly distinctive since the "BK" brand was widely available. There were no common distinctive features between the Aragon killing and the Magnolia Center Interiors property crimes. Here, none of the evidence about the homicides had independent significance as to the Magnolia Center Interiors burglary and vandalism, and vice versa. None of the evidence as to the Aragon killing helped prove that appellant committed the Magnolia Center Interiors burglary and vandalism.

Although BK shoeprints were found at the scene of the Mans-Jones

killings, that evidence did not directly link appellant to the burglary and vandalism charged in counts 11 and 12. Appellant was wearing BK shoes when arrested, and that evidence -- not BK shoeprint evidence at the Mans-Jones crime scene -- and his possession of property stolen from inside Magnolia Center Interiors linked him to those crimes. Thus, none of the evidence found inside or pertaining to the Magnolia Center Interiors helped prove that appellant killed any of the three murder victims or shed any light on his role, identity, motive, signature, or intent in those crimes.

B. The Evidence Was Not Cross-Admissible

The denial of a severance may be an abuse of discretion where evidence related to the crimes to be tried jointly would not be cross-admissible in separate trials; certain of the charges are unusually likely to inflame the jury against the defendant; and any one of the charges carries the death penalty. The first criterion is the most significant. If evidence on each of the joined charges were admissible in a separate trial on the other, any inference of prejudice would be thereby dispelled. (*People v. Cunningham* (2001) 25 Cal.4th 926, 985; *People v. Soper* (2009) 45 Cal.4th 759, 775 ["If we determine that evidence underlying properly joined charges would not be cross-admissible, we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence

of defendant's guilt of each set of offenses.'"].) Cross-admissibility is also a factor courts must consider in determining whether due process requires severance of charges properly joined under Penal Code section 954. (*People v. Marshall* (1997) 15 Cal.4th 1, 27.)

Cross-admissibility pertains to the admissibility of evidence tending to prove *a disputed fact of consequence*, not the cross-admissibility of another charged offense. (Evid. Code §§ 210, 780 [evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence, including evidence relevant to the credibility of a witness]; see also *People v. Geier* (2007) 41 Cal.4th 555, 576.) Under Evidence Code section 210, evidence which has no tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action is irrelevant. (*People v. Hills* (1992) 3 Cal.App.4th 16, 29.) By definition, irrelevant matters have no tendency in reason to prove or disprove any disputed fact of consequence to the determination of a matter, and are specifically excluded from consideration. (Evid. Code § 350.)

Respondent points to evidence pertaining to the Magnolia Center Interiors crimes that was of little or no consequence in proving disputed facts of consequence to the charged murders, robberies, and other alleged assaultive crimes. The record does not show how appellant's state of mind in committing an act of vandalism became a disputed fact of consequence to

the determination of his culpability for murder.

Respondent offers that that keys and other items stolen from Magnolia Center Interiors were found during a search of appellant's grandmother's house, along with jewelry stolen from Feltonberger, Steenblock, and Jerry Mills. (RB 78.) Respondent further offers that shoe prints resembling the "British Knights" prints found at the Mans-Jones and Feltonberger crime scenes were also found in fire extinguisher dust at the Magnolia Center Interiors, "thus further establishing [appellant's] actual participation in the burglary and vandalism.[6] (See RB 79.)

Respondent additionally offers that threatening graffiti written on the walls of the store resembled graffiti written on a shoe box recovered from appellant's car[7] and an empty briefcase[8] recovered from the trunk of the Dodge Colt used in several of the crimes. (RB 79.) Respondent thus argues that the nature of the graffiti tended to undercut appellant's attempts to paint Jose Munoz -- who did not participate in the Magnolia Center Interiors crime -- as the violent ringleader in the murders and robberies and instead

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[6]/ Respondent errs is stating the that footprints were identified as BK shoeprints similar to those worn by appellant. There was no testimony at trial identifying Magnolia Center Interiors footprints as similar to any other footprints. (See 34 RT 5370-5371; 45 RT 6706; see also Romero RB 23-24.)

[7]/ There was no testimony at trial comparing or even describing the shoebox graffiti. (See 32 RT 5039-5041; 34 RT 5365-5375; 37 RT 5687-5688.)

[8]/ The briefcase was of no significance or probative value in respect to any of the other charged crimes. There was no evidence at trial that it was tied to any other crime allegedly committed by appellant. (37 RT 5687-5688.)

displayed appellant's intent, shared with his brother, to steal property and harm people. (RB 79.) All of these factors, according to respondent, "created a web of evidence" proving appellant's guilt. (RB 80.)

First, it is doubtful that Munoz' credibility was in any way impacted by the evidence of the Magnolia Center Interiors burglary and vandalism charges. The evidence pertaining to counts 11 and 12 in which, all parties acknowledged, Munoz did not participate, hardly served to enhance his credibility or veracity in respect to the other crimes in which he was involved or about which he testified. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

Next, the means and manner of the Magnolia Center Interiors burglary and vandalism deviated completely from all of the other alleged crimes. No weapon or instrument was shown to have been used or possessed in the Magnolia Center Interiors incident. Evidence pertaining or linking appellant to the charged murders was not probative of any contested factual issue relative to the Magnolia Center Interiors charges. Stolen keys and other Magnolia Center Interiors property had been found in appellant's room and residence. That evidence linked appellant to the charged burglary and vandalism, but not to the murders and robberies.

The fact that graffiti or purported BK shoeprints were found inside Magnolia Center Interiors did not render that evidence significantly cross-

admissible in the trial of the charged murders and robberies. Neither the graffiti nor purported BK shoeprints left inside the Magnolia Center Interiors were specifically linked to appellant and did not materially assist in proving either appellant's role or intent in the charged murders and robberies. Therefore, since evidence of the Magnolia Center Interiors burglary and vandalism was not relevant to any disputed fact of consequence respecting appellant's culpability for murder, or to Jose Munoz' credibility, respondent's assertions of cross-admissibility are tenuous at best and must be rejected.

C. The Evidence Was Extremely Inflammatory and Prejudicial

Evidence Code section 352 provides that the court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury.

The determination of prejudice is necessarily dependent on the particular circumstances of each individual case. Certain criteria have been postulated to provide guidance in ruling upon and reviewing a motion to sever. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) Refusal to sever may be an abuse of discretion where certain of the charges are

unusually likely to inflame the jury against the defendant. (*People v. Soper* (2009) 45 Cal.4th 759, 775; *People v. Hill* (1995) 34 Cal.App.4th 727, 734 ["where joinder is statutorily authorized, severance may be required if joinder results in prejudice so great as to deny the defendant a fair trial"].) Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the "defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process.'" (*People v. Macklem* (2007) 149 Cal.App.4th 674, 698; accord *People v. Soper, supra,* 45 Cal.4th at pp. 782-783.)

Respondent argues that appellant cannot establish he was prejudiced or suffered any "gross unfairness" from the court's decision to permit joinder of counts 11 and 12. (RB 73.) As to guilt, respondent contends there was no danger the Magnolia Center Interiors charges would unfairly bolster the other alleged counts. (RB 81.) As to penalty, respondent urges that "it is equally inconceivable that the burglary or stolen property evidence somehow tipped the scales in favor of a death verdict . . . ." (RB 83.)

Respondent is wrong. The key inquiry before the trial court on a motion to sever is whether joint trials pose an unacceptable risk of prejudice, i.e., of unfairly affecting the adjudication of one or more of the charges. (See *People v. Smith* (2007) 40 Cal.4th 483, 510 ["To demonstrate that a denial of severance was reversible error, defendant must 'clearly establish that

there [was] a substantial danger of prejudice requiring that the charges be separately tried.'"].) The chief source of potential prejudice is "spillover effect," i.e., the risk that evidence not admissible as to one of the charges, but admitted in connection with another, will affect the verdict on the charge as to which it is inadmissible. (See *People v. Soper, supra*, 45 Cal.4th at pp. 775, 781.)

In the present case, even assuming arguendo that all of the alleged crimes involved some cross-admissible evidence, joining them still constituted an abuse of discretion. Joinder permitted the jury to hear highly inflammatory evidence concerning the Magnolia Center Interiors burglary and vandalism that would have been irrelevant and inadmissible at a separate trial of the charged murders, and vice versa.

Evidence pertaining to the Magnolia Center Interiors charges had no link with or similarities to the murders or the issues in dispute with respect to the capital crimes. Moreover, evidence of the graffiti left on the walls and the defacement and destruction of the owner's sonogram of his unborn son was so inflammatory, appellant was more likely than not to suffer unfair prejudice at a joint trial which included those charges. (*Id.* at pp. 444-445; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1315 [defendant required to make a "clear showing of prejudice" in support of motion for separate trials].)

In ruling on appellant's severance motion, the trial court should have considered that, in a joint trial, the jurors deciding whether appellant committed three robbery-murders would be improperly influenced by the inflammatory testimony, graffiti, and other evidence relating to the Magnolia Center Interiors burglary and vandalism. Any testimony or repugnant graffiti evidence about death, dying, Satan, and the defacement of the sonogram with "you're going to die" graffiti was inherently prejudicial and likely to affect the outcome of the trial on the unrelated capital charges.

Even where the record fails to show that the trial court abused its discretion in denying severance, the Court is still obliged to reverse if the record on appeal shows that joinder of counts for trial resulted in gross unfairness depriving the defendant of due process of law. (*People v. Rogers* (2006) 39 Cal.4th 826, 851].) Although this rule places a "high burden" on the appealing defendant (*People v. Soper, supra*, 45 Cal.4th at p. 783), the present record satisfies that burden. No jury could compartmentalize the sonogram vandalism evidence, particularly when crimes unrelated to the Magnolia Center Interiors involved the alleged murders of three young men.

This case is thus a prime example of the "spillover effect" that can render the failure to sever charges fundamentally unfair. (See *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322; *Drew v. United States* (D.C.

Cir. 1964) 331 F.2d 85, 88.) The refusal to sever the Magnolia Center Interiors crimes permitted the state to use evidence from an unrelated case to convince the jury that appellant committed three unrelated murders and deserved to die. That fundamentally unfair procedure violated appellant's right to a fair trial, due process, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Untied States Constitution.

Had appellant been tried separately on the charged murders, there would have been no conceivable evidentiary value in introducing the Magnolia Center Interiors graffiti or the defaced sonogram of the owner's unborn son. Similarly, had appellant been tried separately on the Magnolia Center Interiors burglary and vandalism, there would have been no conceivable evidentiary value in introducing evidence of appellant's role and participation in three murders. The vandalism graffiti particularly was extremely incendiary and likely to stir the passions of the jury and cause strong feelings of anger and indignation. That evidence, which was completely irrelevant to any of the issues concerning the charged murders, was highly prejudicial.

Contrary to respondent's assertions, it was unlikely that in deciding penalty any trier of fact would remain uninfluenced by the wanton defacement of Magnolia Center Interiors and the vitriol directed at the

owner's unborn child. Respondent overlooks the prosecutor's argument at the conclusion of trial, which vividly illustrates that the Magnolia Center Interiors burglary and vandalism had not been offered for any purpose other than to inflame the jury. As stressed by the prosecutor, the graffiti and vandalism evidence were only revelatory of appellant's character -- a penalty-phase issue irrelevant to his guilt. Given the prejudicial effect of the denial of severance in this case, the jury's verdict cannot be considered reliable, and therefore cannot stand in the face of Eighth Amendment principles requiring reliability and prohibiting cruel and unusual punishment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392].)

IV

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S COUNT 15 ROBBERY CONVICTION

Appellant was convicted on count 15 of the November 20, 1992 robbery of beekeeper Albert Knoeffler in Riverside in violation of Penal Code section 211. At trial, beekeeper Knoeffler testified that he was robbed while tending his bees in Riverside. He was unable to identify anyone at the preliminary hearing or at trial. (34 RT 5348.)

In his testimony, Jose Munoz stated that he, Daniel Chavez, appellant, and codefendant Romero committed the Knoeffler robbery. Although Munoz testified that their purpose was "to go out stealing again" (39 RT 5958), he did not attribute any specific conduct or statements to appellant showing that appellant aided or abetted the commission of the Knoeffler robbery or that appellant actively encouraged or participated in the robbery in any manner. (See 40 RT 6225.)

The record is devoid of any direct or circumstantial evidence -- and no testimony by Jose Munoz -- that appellant committed the Knoeffler robbery, or was even present when Knoeffler was confronted and robbed. Since the prosecution never sought to prove, and did not argue, that appellant personally robbed Knoeffler, his liability could only have been predicated on an aiding or abetting theory.

Devoting but a single paragraph to the count 15 robbery, respondent essentially argues that because appellant committed other alleged crimes, he must have committed the Knoeffler robbery as well, "using the[] usual tactics." (RB 151.) According to respondent, appellant "minimizes or ignores the persuasive and substantial evidence supporting his convictions in Counts V, VI, VII, and XV." (RB 151.) In other words, respondent predicates appellant's guilt on evidence showing his involvement in other charged counts.

Respondent fundamentally ignores the evidence as to count 15. Munoz testified that appellant did nothing to facilitate the robbery. He did not drive the car; he did not serve as a getaway driver. He did not act as a look-out. He did not approach codefendant Romero, as did Munoz, to try to hurry commission of the crime, nor did he ever approach the victim. Review of the entire record in this case is not sufficiently persuasive to permit the conclusion that any rational trier of fact could have found either that appellant personally committed the robbery of Knoeffler or aided and abetted the commission of that crime.

Munoz did not testify that appellant ever got out of Alvarez's car or helped facilitate the robbery in any way -- directly or indirectly; passively or actively. (40 RT 6137, 6227.) Munoz did not testify that appellant was at any time armed while in the car or that appellant handled either weapon

before, during, or after the robbery. Munoz testified that only he and codefendant Romero handled the two weapons involved. (40 RT 6137.) Appellant did not drive either Knoeffler's truck or Sonia Alvarez's car after the robbery. Indeed, Munoz testified that Daniel Chavez drove Alvarez's car after the robbery. (39 RT 5964.)

Munoz recalled that only he and codefendant Romero abandoned Knoeffler's truck in an open field. Appellant stayed in Alvarez's car. Munoz did not testify that appellant helped in disposing of Knoeffler's truck after the robbery. (39 RT 5965.) Nor did Munoz testify that money taken from Knoeffler was ever divided, given to appellant, or that appellant otherwise benefited or received money in connection with the crime. Although Munoz, codefendant Romero, Chavez, and appellant went to the store some time after the robbery, Munoz did not testify that appellant ever handled, received, or personally spent any of the money obtained from Knoeffler. (39 RT 5966.)

By arguing appellant's guilt -- and accomplice corroboration -- solely on the basis of evidence in support of other charged crimes, respondent improperly contends that Munoz' testimony on other counts was sufficient to prove appellant's guilt in the Knoeffler robbery. Indeed, the prosecutor's argument to the jury urged a similar line of reasoning. Respondent's argument undermines CALJIC No. 17.02 given in this case and disregards

the principle that evidence pertaining to appellant's alleged culpability for one count could not be used to corroborate Jose Munoz' accomplice testimony or to prove appellant's guilt on other counts. (See Argument VI, *infra*.)

Substantial evidence must support each essential element of an offense. The record must disclose substantial evidence to support the verdict -- i.e., evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) If evidence or testimony is lacking in indicia of reliability, an appellate court must not hesitate to reverse the judgment of conviction. (*People v. Lang* (1974) 11 Cal.3d 134, 139.)

Because Jose Munoz was an accomplice to coappellant Romero in the commission of the Knoeffler robbery, Penal Code section 1111 required that, to establish appellant's culpability for this crime, Munoz' testimony had to be corroborated by independent evidence of appellant's guilt. Section 1111 served to ensure that appellant would not be convicted solely upon Munoz' testimony. (*People v. Davis* (2005) 36 Cal.4th 510, 547; *People v. Belton* (1979) 23 Cal.3d 516, 526.)

In any given case, one may speculate about any number of scenarios that may have occurred. A reasonable inference, however, may not be based

on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than mere speculation as to probabilities without evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1133.) Here, there was no evidence proving, or corroborating the testimony of Jose Munoz, that appellant was even in the car or otherwise present at the scene on the day Knoeffler was robbed. Other than speculation, supposition, surmise, or conjecture, respondent does not offer any evidence in the record specifically corroborating Munoz's testimony respecting the Knoeffler robbery and appellant's alleged involvement. Respondent's argument essentially boils down to the notion that because appellant committed other charged crimes, he necessarily aided and abetted his brother in the commission of count 15.

Even if it is conceded, arguendo, that appellant was in the car, there was no direct or circumstantial evidence -- and no testimony by Munoz -- that appellant was armed or that he furnished or handled the weapons used by codefendant Romero and Munoz. There was no evidence that appellant knew that codefendant Romero and Munoz were going to rob Knoeffler, nor evidence of any sort that he did anything to facilitate or encourage them, or by act or advice aided, promoted, instigated, or encouraged them, with the requisite intent to rob beekeeper Knoeffler as charged in count 15. Appellant's conviction for this count should be reversed.

V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS ON COUNTS 5-7 (MILLS-EWY)

Appellant was convicted on counts 5 through 7 of three crimes involving Kenneth Mills and Vicky Ewy that occurred on October 22, 1992: willful, deliberate, and premeditated attempted murder in violation of Penal Code sections 664/187, subdivision (a) (count 5); aggravated mayhem in violation of section 205 (count 6); and attempted robbery in violation of sections 664/211 (count 7).

Because of the unreliable nature of an accomplice's testimony, a conviction cannot be based on such testimony unless that testimony is corroborated by other evidence that tends to connect defendant to the offense. (Pen. Code § 1111; *People v. Tewksbury* (1976) 15 Cal.3d 953, 967.)

Respondent asserts that there was "powerful physical and circumstantial evidence" supporting appellant's conviction, "namely, the weapon used matched the description of Self's shotgun and the damage to the Mills-Ewy vehicle corroborated Munoz's account" that appellant fired the shotgun over the Dodge Colt's roof. (RB 158.) Appellant strongly disagrees that Munoz' testimony was sufficiently corroborated as to counts 5-7.

Respondent indirectly concedes that by virtue of Penal Code section 1111, Munoz was an accomplice and that appellant's conviction could not be based on Munoz' testimony alone unless corroborated by other evidence tending to connect appellant with the commission of the offense. (See RB 158.) Being an accomplice in law and in fact, Munoz' testimony had to be corroborated by independent evidence of appellant's guilt. (*People v. Davis* (2005) 36 Cal.4th 510, 547; *People v. Belton* (1979) 23 Cal.3d 516, 526.)

Appellant acknowledges that corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone. However, respondent overlooks that the corroborating evidence must tend to implicate the defendant by relating to some act or fact that is an element of the crime. (*People v. Lewis* (2001) 26 Cal.4th 334, 370.) While the corroborating evidence need not by itself establish every element, it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)

In *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543, the Court of Appeal stressed that "it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its

perpetrators." Corroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value. Corroborating evidence must raise more than a suspicion or conjecture of guilt. (*Id.*) It must actually connect the defendant with the crime in such a way as to reasonably satisfy the trier of fact as to the truthfulness of the accomplice. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1177-1178; *People v. Avila* (2006) 38 Cal.4th 491, 56.)

Respondent relies almost exclusively on the fact that weapon used in the shooting matched the description of the shotgun which appellant previously used or to which he had access. (RB 158.) Yet, this falls short of proving beyond a reasonable doubt that it was appellant who used the weapon in the Mills-Ewy incident. In the absence of additional facts and circumstances, evidence that merely connects a defendant to a weapon like that used in the charged crime is not sufficient to corroborate accomplice testimony implicating the defendant in the charged crime.. (See *People v. Trujillo* (1948) 32 Cal.2d 105, 111; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1021; *People v. Medina* (1974) 41 Cal.App.3d 438, 465-466.) As the Court explained in *People v. Trujillo, supra*, 32 Cal.2d at p. 111, it is not a single piece of evidence standing alone, but the "combined and cumulative weight of the evidence furnished by non-accomplice witnesses which supplies the test."

In *People v. McDermott* (2002) 28 Cal.4th 946, 985-986, for example, the prosecution presented independent evidence that the defendant was present at the location where the victim was killed. Similarly, in *People v. Barillas, supra*, 49 Cal.App.4th 1012, in addition to the accomplice testimony, there was evidence that another witness saw the defendant near the victim before the victim was shot. Likewise, in *People v. Henderson* (1949) 34 Cal.2d 340, 345-346, the accomplice's testimony was held to be sufficiently corroborated by evidence of the defendant's presence at the scene with the accomplice and by proof that he had recently purchased a shotgun of the kind used in the robbery. Here, other than Munoz' accomplice testimony, there was no direct or circumstantial evidence placing appellant in Alvarez's car together with codefendant Romero and Munoz when the Mills-Ewy shooting occurred.

Significantly, Munoz' testimony was refuted in key respects by Mills at trial and hence insufficiently corroborated as required by law. Munoz said that he, codefendant Romero, and appellant were in the car. Mills said he saw only two occupants Mills testified that when he looked over his left shoulder, he saw the silhouette of a car and a person leaning out of the front passenger window and pointing a gun. Munoz said he, not appellant, was sitting in the front passenger seat. Mills never testified that there was a third person in the car or otherwise corroborated Munoz'

testimony in this regard.

After the shooting, Mills was unable to describe the car involved in the shooting or its occupants. While in the hospital, however, Mills, reported that the other car was a late-model, 1980s hatchback, either dark gray or blue in color. (33 RT 5202.) Notably, Mills told police that he saw a man from the waist up pointing a gun; he also said he saw the muzzle blast but not the gun. He reported that the blast seemed to come from the front passenger window, not from the rear as Munoz had testified. Mills also recalled seeing two occupants in the other car -- the driver and front passenger -- and not three as Munoz had stated. (33 RT 5211-5214.)

Mills' statements to police after the shooting and his testimony at trial were totally at odds with Munoz' trial testimony. Mills said he saw only two occupants; Munoz said there were three. Mills said the shooter fired from the right front passenger window; Munoz testified appellant fired the shotgun over the top of the car from the left, rear window of the car.

Other than Munoz' testimony, there was no evidence as to appellant's presence at or participation in the Mills-Ewy shooting. No evidence of identity linked appellant in any way to this offense. No evidence placed appellant in Alvarez's car or at the scene of the shooting; nothing corroborated Munoz' testimony that appellant was the shooter. There was no evidence that appellant was seen with or was in the presence of

codefendant Romero or Munoz either before or after the shooting. There was no evidence that appellant was armed that night, before or after the shooting. Appellant never at any time made any statement to anyone or to the police which directly or indirectly implicated him in these crimes. There was no consciousness of guilt evidence that properly could be considered corroborative of Munoz' testimony. (See, e.g., *People v. Garrison* (1989) 47 Cal.3d 746, 773 [inference of consciousness of guilt constitutes an implied admission which may properly be considered as corroborative of an accomplice's testimony].)

Accomplice testimony is frequently cloaked with a plausibility which may interfere with the jury's ability to evaluate its credibility. An accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. (*People v. Tewksbury, supra,* 15 Cal.3d at p. 967.) For these reasons, substantial evidence must support each essential element of an offense. In light of the of the entire record, the absence of any evidence corroborating the testimony of Jose Munoz, and the absence of direct or circumstantial evidence of appellant's presence or participation in these crimes, the evidence is not sufficient to permit the conclusion that any rational trier of fact could have found that appellant was present, fired a

shotgun blast, or personally committed attempted murder, attempted robbery, and mayhem as charged in counts 5 through 7.

VI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY SUA SPONTE NOT TO AGGREGATE EVIDENCE OR INCIDENTS TO CORROBORATE THE ACCOMPLICE TESTIMONY OF JOSE MUNOZ AND TO DETERMINE GUILT

Appellant was charged with 19 separate crimes, including three murders, involving ten separate incidents. Respondent concedes that in respect to accomplice corroboration the court only instructed the jury in the language of CALJIC No. 17.02. (RB 175-177.) The use of CALJIC No. 17.02 failed to inform the jury that evidence corroborating Jose Munoz' accomplice testimony was required for each specific count and each incident-related count. By virtue of CALJIC No. 17.02 and the court's other instructions, it was more likely than not that the jury believed accomplice corroboration as to a single count satisfied the accomplice corroboration requirement as to all counts.

The trial court's instruction advised jurors that they were to decide each count separately. The instruction did not address the more critical issue regarding whether the jurors could rely on or consider evidence pertaining to one crime or incident to corroborate the testimony of Jose Munoz as to the other counts charged against appellant. Given the numerous offenses charged against appellant and the different evidence required to prove each offense, the failure to instruct the jury properly in this

regard left it free to consider any given offense as proof that appellant was guilty of the other offenses charged against him.

Respondent first contends that appellant waived his claim of error by failing to object to the instructions or otherwise request clarification or amplification. (RB 176, 178.) Ordinarily, where a party claims on appeal that a legally correct instruction was too general or incomplete, and in need of clarification, the party must show that he requested modification, clarification or amplification in the trial court; otherwise the contention is forfeited. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

The Court may nevertheless "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code § 1259.) "Substantial rights" are equated with an error resulting in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

In order to determine if appellant's substantial rights were affected by the lack of clarification or amplification of CALJIC No. 17.02, and hence whether the instructional error claim is preserved for appeal, the Court

may assume the instruction was erroneous and determine if it caused a miscarriage of justice under *People v. Watson, supra*, 46 Cal.2d 818, i.e., whether it is reasonably probable the outcome of the case would have been more favorable to defendants in the absence of the error.

In this regard, it is apparent that if the jury had been informed it could not use Jose Munoz's testimony at trial as to some counts to corroborate his trial testimony as to all or any other charged crimes or counts, the outcome would have been more favorable to appellant. The need for an instruction directing the jury to apply correctly the accomplice corroboration requirement was essential both because of the inordinate number of offenses charged and because proof of appellant's culpability on virtually every count charged rested solely on the testimony of Jose Munoz.

The trial court's failure properly to instruct the jury on accomplice corroboration effectively permitted the jury to apply the evidence "across offenses" and without regard to the standard of proof required. Thus, the jury could find, for example, that because Munoz' testimony with regard to the Feltonberger offenses was sufficiently corroborated, his testimony regarding the other offenses was also true.

Similarly, there was no evidence linking appellant to the Mills-Ewy shooting and virtually no evidence to corroborate Munoz' assertions that

appellant was both present and fired the shotgun blast into the Mills-Ewy vehicle. Yet, the jury was not obligated by the court's instructions to determine whether Munoz' testimony had been independently corroborated by evidence relating to that specific incident alone. The jury also likely used Feltonberger's corroborating testimony as to counts 18 and 19 to find the requisite corroboration on unrelated counts 5 through 7.

The same was true of the Mans-Jones (counts 1 and 2) and Aragon (count 3) murders. Jose Munoz' testimony was crucial in proving appellant's presence, participation, intent, state of mind, and special circumstances liability. Munoz' testimony was also crucially important in proving appellant's attitudes and reactions before, during, and after the killings, all of which were later certainly considered by the jury in weighing the appropriate penalty. In the absence of eyewitnesses to the Mans-Jones and Aragon killings, Jose Munoz' testimony was vital to secure appellant's convictions on the capital counts.

By virtue of the trial court's constitutionally inadequate instructions, Munoz' accomplice testimony as to counts 1 and 2 arguably was considered by the jury to be corroborated by the victim's testimony in the unrelated William Meredith robbery (count 4) or by Randolph (Half Pint) Rankins' testimony in respect to the shooting involved in counts 9 and 10. Once corroborated by unrelated evidence or testimony on other, unrelated counts,

the court's failure properly to instruct the jury resulted in it deeming Jose Munoz' testimony reliable and sufficient for all other counts, including the charged murders.

As a final illustration of the deficiencies in the court's instructions, discussed in Argument IV, *supra*, respondent predicates appellant's liability on the count 15 Knoeffler robbery on the basis of Jose Munoz' accomplice testimony as to the other alleged crimes. (RB 154-157).

"To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.) Here, other than Jose Munoz' accomplice testimony, there was no evidence beyond speculation, inference, or conjecture as to appellant's involvement in several of the charged crimes -- including the Feltonberger and Mills-Ewy shootings and the Knoeffler robbery. Therefore, because the trial court's accomplice corroboration instruction to the jury effectively operated to sanction the jury's use of Jose Munoz' testimony on some counts as corroboration of his trial testimony as to other alleged counts, this was error, and appellant's substantial rights were thereby affected. Hence, appellant did not waive or forfeit his claim of instructional error by failing to object to

the use of CALJIC No. 17.02 on this basis.

Respondent next asserts that even if the instructional error were not waived, the trial court nevertheless properly instructed appellant's jury regarding accomplice corroboration and its duty to decide each count separately. (RB 178-179.) In this vein, respondent argues that when read as a whole, the instructions given by the court adequately informed appellant's jury that each count supported by Munoz's testimony required corroborating evidence. According to respondent, then, by the instructions given, appellant's jury was told the corroborating evidence needed to be directly related to the charged crime they were considering and the corroboration could not come from an unrelated charge. (RB 179.)

Respondent's contentions are fallacious. In this regard, one need look only to respondent's argument in support of count 15 (RB 156) in which respondent points to the evidence of other crimes and Munoz' testimony as to the other charged crimes to provide the corroboration required by Penal Code section 1111. If respondent impermissibly and incorrectly applies the statute and principles of accomplice corroboration, surely the jury in this case did so as well. In the absence of clear and specific instruction precluding reliance or consideration of evidence pertaining to one crime or incident to corroborate the testimony of Jose Munoz as to the other counts charged against appellant, respondent cannot

tenably refute that the jury improperly believed corroboration of Munoz' testimony on any charge was sufficient to corroborate all charges.

Respondent further asserts that the instructions given in this case actually told the jury how to determine corroboration as to each charge. (RB 179-180.) No so. As given, CALJIC No. 17.02 actually informed the jurors on the procedure they were to follow in assessing appellant's guilt of each of the individual charges. The instruction told the jurors that they were to consider guilt of each count separately and return a verdict for each count, thereby directing a procedural approach rather than directing a substantive manner of consideration. This instruction fulfilled a procedural purpose by directing the jury as to the appropriate manner of deliberation. However, it completely failed to provide proper direction to the jury regarding the more substantive principle prohibiting the aggregation of evidence on one or more charges when deciding the key question of accomplice corroboration and ultimately appellant's guilt on any unrelated charge.

Respondent finally offers that the trial court was under no obligation to modify CALJIC No. 17.02 and that any modification or clarification would have been duplicative of the instructions given at trial. (RB 180.) Respondent overlooks that a trial court must, on its own motion and without request, instruct the jury on all general principles of law relevant to the case. (*People v. Horton* (1969) 1 Cal.3d 444, 449.)

Under the facts of this case, the trial court was obligated to provide an instruction to the jury that advised the jury of the proper manner for assessing both the sufficiency of the evidence to corroborate accomplice testimony and establish appellant's guilt of each of the charged offenses. This instructional obligation could have been done readily and easily by modifying CALJIC No. 17.02 to inform the jury that it should decide each count separately on the law and the evidence applicable to it, including the evidence required to corroborate the accomplice's testimony.

The United States Supreme Court has recognized that when a defendant is tried for multiple offenses, and is thus subject to a situation where evidence relating to one crime may influence the jury as to a totally different charge, the defendant is protected if the jury is given an instruction limiting the evidence to its proper function. (*Spencer v. Texas* (1967) 385 U.S. 554, 562 [87 S.Ct. 648, 17 L.Ed.2d 606].) This is what ensures that the defendant is receiving due process and a fair trial. A sua sponte instruction was necessary here precisely to protect appellant's right to due process and a fair trial.

As to each of the ten incidents involved in this case, there was an overwhelming amount of accomplice testimony that had to be corroborated before it could properly be considered as evidence of appellant's guilt. The use of CALJIC No. 17.02 and other instructions, without an essential

limiting or clarifying instruction, permitted the jury to consider appellant's guilt "across" offenses. A limiting instruction would have informed the jurors that they could not consider Jose Munoz' testimony as to appellant's guilt on particular counts unless his testimony had first been sufficiently corroborated by separate evidence of appellant's guilt on each of those counts.

Because due process and other fundamental rights are implicated, the proper standard of review -- if the error is not otherwise prejudicial per se -- is that reserved for errors of constitutional dimension under *Chapman v. California* (1967) 368 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed. 2d 705].) In light of the record as a whole and the facts of this case, the state cannot meet that burden; there is no way to determine on which testimony or evidence, beyond Munoz' testimony, the jury may have relied in convicting appellant on any particular count. As a consequence, the judgment of conviction on all counts and the penalty of death must be reversed.

VII

THE USE OF CALJIC 2.90 IN CONJUNCTION WITH OTHER JURY INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, UNANIMOUS VERDICT, AND DUE PROCESS OF LAW, AND RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The trial court gave a series of standard CALJIC instructions, beginning with No. 2.90, which separately and in the aggregate enabled the jury to convict appellant on a lesser standard than is required under both the state and federal constitutions. Appellant's jury heard at least six separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. CALJIC No. 2.90 was not sufficient by itself to serve as a counterweight to the contrary instructional pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest. (See *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L. Ed. 2d 368]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

In addition to CALJIC No. 2.90, the trial court instructed the jury in the language of CALJIC No. 2.11. By expressly telling the jury that neither

side is required to call all potential witnesses or to produce "all objects or documents" relevant to guilt, the court impliedly suggested that the production of some evidence by both sides was required.

The trial court instructed the jury on circumstantial evidence in the language of CALJIC No. 2.01. This circumstantial evidence instruction exacerbated the deficiencies of the presumption of innocence instruction by stating that each fact which is essential to complete a set of circumstances must be proved beyond a reasonable doubt. While the second paragraph of CALJIC No. 2.01 referred to establishing the defendant's guilt and addressed only the prosecution's evidence, the instruction as a whole did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

The trial court instructed the jury in the language of CALJIC No. 2.60 on the impact of the defendant not testifying and that no inference of guilt may be drawn. This instruction was limited explicitly to the defendant's failure to testify. It did not apply to the failure to present evidence. Hence, the instruction reinforced the misconception that appellant had the burden of producing some evidence to raise a reasonable doubt of his guilt on the various counts with which he was charged.

The trial court also instructed the jury in the language of CALJIC No. 2.61. By limiting its applicability to the decision whether or not to testify

and by admonishing the jury that "no lack of testimony on defendant's part will supply a failure of proof," the instruction, by implication, did not apply at all to appellant's failure to present evidence generally or the implication that the burden of proof might thereby be affected as a consequence.

The trial court instructed the jury in the language of CALJIC No. 2.21.2. This instruction similarly conveyed the implication that appellant was required to produce evidence to raise a reasonable doubt of his guilt in order to be acquitted.

Finally, the jury was instructed in the language of CALJIC No. 2.27. By specifically referring to any fact required to be established by the prosecution," this instruction impermissibly suggested by implication that some facts were required to be proven by the defense. Hence, the instruction contributed to the misleading message of the instructions as a whole that the defense has a burden as to affirmative defense theories to raise a reasonable doubt.

Each of the instructions given in this case individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the aggregate, and as read together as the jury was instructed to do, no reasonable juror could have been expected to understand -- in the face of so many instructions permitting

conviction upon a lesser showing -- that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt.

Respondent first asserts that because appellant requested instruction with the modified version of CALJIC No. 2.90 given by the court, his claims of error on appeal are barred under the doctrine of invited error. (RB 165.) The doctrine of invited error prevents an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201). The doctrine requires more than mere assent by defense counsel; defense counsel must have "intentionally caused the trial court to err" before defendant can be held to have invited the error (*People v. Marshall* (1990) 50 Cal.3d 907, 931).

In other words, the doctrine of invited error is limited to those situations where there is a "clearly implied tactical purpose" to counsel's actions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) Based on the record on appeal, the Court should not find or imply a clear tactical purpose to counsel's actions in requesting a modification of CALJIC No. 2.90 while leaving intact several other standard instructions that together served to undermine the burden of proof, as urged by appellant on appeal.

The instructions challenged here in conjunction with CALJIC No.

2.90 were commonly used pattern instructions. Trial counsel's failure to detect in the standard instructions the flaws urged on appeal or to request modification does not demonstrate a tactical intent to induce the error now claimed. (See *People v. Moore* (2011) 51 Cal.4th 386, 410.)

Without substantive analysis or discussion, respondent relies on prior decisions of the Court in which various challenges to the use of these instructions have been rejected. (RB 165.) In other decisions, the Court has rejected challenges that CALJIC No. 2.90 is faulty because it fails adequately to explain the meaning of the concept of reasonable doubt. (See e.g., *People v. Samuels* (2005) 36 Cal.4th 96, 131 [CALJIC No. 2.01 does not undermine the requirement of proof beyond a reasonable doubt]; *People v. Stitely* (2005) 35 Cal.4th 514, 555-556 [CALJIC No. 2.01 does not diminish prosecution's burden of proof]; *People v. Stewart* [(2004) 33 Cal.4th 425, 521 [CALJIC Nos. 2.01 and 2.02 do not unconstitutionally lessen the prosecution's burden of proof]; *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [CALJIC Nos. 2.21.2 and 2.22 do not improperly lessen the prosecution's burden of proof; CALJIC No. 2.51 does not relieve the prosecution of its burden of proof]; *People v. Frye* (1998) 18 Cal.4th 894, 958 [CALJIC No. 2.51 does not shift the burden of proof to defendant]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.21, and 2.27 do not permit conviction upon proof less than beyond a reasonable

doubt].)

Nevertheless, for the reasons advanced in appellant's opening brief (Self AOB 305-326), the Court should reconsider its rejection of instructional error claims related to the use of CALJIC No. 2.90 -- modified or unmodified -- when used in conjunction with the other instructions challenged here. Individually and collectively, they operated to dilute application of the constitutionally required reasonable doubt standard.

B. Penalty Phase Issues and Assignments of Error

VIII

APPELLANT'S JURY INCLUDED JURORS WITH ACTUAL PENALTY BIAS IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY IMPARTIAL JURY, DUE PROCESS, AND A TO RELIABLE ETERMINATION OF PENALTY GUARANTEED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; THE CONSTITUTIONAL VIOLATIONS AS TO PENALTY ARE REVERSIBLE PER SE

In the present case, at least eight actually biased jurors deliberated appellant's fate, and therefore his penalty must be reversed. The responses of Juror Nos. 1, 2, 4, 6, 8, 9, 11, and 14 -- all seated and regular jurors -- were strongly biased in favor of the death penalty and should have been dismissed for cause.

The Sixth Amendment, made applicable to state criminal proceedings through the Fourteenth, affords an accused the right to trial by an impartial jury. (See *Duncan v. Louisiana* (1968) 391 U.S. 145, 160 [88 S.Ct. 1444, 20 L.Ed.2d 491]; see also *United States v. Shackelford* (6th Cir. 1985) 777 F.2d 1141, 1145 [stating that the Sixth Amendment right to trial by jury is designed to ensure criminal defendants a fair trial by a "panel of impartial, 'indifferent' jurors"] (quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751].) Indeed, the Supreme Court has long recognized that the Sixth Amendment prohibits biased jurors from serving on criminal juries. (See *United States v. Wood* (1936) 299 U.S. 123, 133 [57

S.Ct. 177, 81 L.Ed. 78] [recognizing Sixth Amendment's text prohibits partial jurors, whether bias is "actual or implied"-- that is, it may be bias in fact or bias conclusively presumed as a matter of law].). As the Supreme Court elsewhere has observed, a "touchstone of a fair trial is an impartial trier of fact -- 'a jury capable and willing to decide the case solely on the evidence before it.'" (*McDonough Power Equip., Inc. v. Greenwood* (1984) 464 U.S. 548, 554 [104 S.Ct. 845, 78 L.Ed.2d 663] (quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78].)

The doctrine of implied or presumed bias has been recognized from our country's earliest days, and it remains firmly rooted. As Judge Kozinski aptly explained in 1998 for an en banc Ninth Circuit majority: "Presumed bias dates back in this country at least to Aaron Burr's trial for treason, where Chief Justice Marshall, riding circuit, noted that an individual under the influence of personal prejudice 'is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony.' Marshall explained, 'He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.' (*United States v. Burr* (D.Va 1807) 25 F. Cas. 49, 50." (*Dyer v. Calderon* (9th Cir. 1988) 151 F.3d 970, 983.) Moreover, as the *Dyer* court observed, "[n]o opinion in the two centuries of the Republic . . . has suggested that a criminal defendant might lawfully be

convicted by a jury tainted by implied bias." (*Id.* at 985; see also *Smith v. Phillips* (1982) 455 U.S. 209, 222 [102 S.Ct. 940, 71 L.Ed.2d 78] (O'Connor, J., concurring).)

Respondent argues that appellant's claim of jury bias must be rejected because he failed to challenge all but one juror for cause or to exercise available peremptory challenges. (RB 185-189.) The United States Supreme Court has held that any claim the jury was not impartial must focus on the jurors who ultimately sat. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 86 [108 S.Ct. 2273, 101 L.Ed.2d 80].) The Supreme Court has also referred to the trial court's "duty" to select an impartial jury. (*Frazier v. United States* (1948) 335 U.S. 497, 511 [69 S.Ct. 201, 93 L.Ed. 187], and the Court of Appeals for the Second Circuit has written that a trial judge has the authority and responsibility, either upon counsel's motion or sua sponte, to dismiss prospective jurors for cause (*United States v. Torres* (2d Cir. 1997) 128 F.3d 38, 43.)

In a recent case, the Court of Appeals for the Sixth Circuit held that even if defense counsel's decision to keep a biased juror on the panel could be classified as a strategic decision, that strategy might also be referred to as ill-advised and unreasonable, and the presence of a biased juror on the panel would require reversal. (*Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 428; see also *Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 676.)

The Court of Appeals for the Second Circuit has also suggested that there can be no waiver where a juror's bias or alleged bias is revealed at voir dire and the trial court erroneously rejects a challenge for cause. (*United States v. Nelson* (2d Cir. 2002) 277 F.3d 164, 204-206; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 85 [108 S.Ct. 2273, 101 L.Ed.2d 80 ["Had [the biased juror] sat on the jury that ultimately sentenced petitioner to death, and had the petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned."].)

A prospective juror may be challenged for cause based upon his or her views regarding capital punishment if those views would prevent or substantially impair the juror's performance of the duties defined by the court's instructions and his or her oath. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.) A prospective juror who would be unable conscientiously to consider all of the sentencing alternatives, including, when appropriate, the death penalty, is properly subject to excusal for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

Because Jurors Nos. 1, 2, 4, 6, 9, 11, and 14 were biased and should have been properly excused under the substantial impairment standard, defense counsel performed deficiently in not challenging those jurors for cause and in not exercising appellant's peremptory challenges. (See

Strickland v. Washington (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674] [claims of ineffective assistance of counsel entail deficient performance assessed under an objective standard of professional reasonableness and prejudice measured by a reasonable probability of a more favorable outcome in the absence of the deficient performance].) Moreover, counsel rendered ineffective assistance in failing to exercise peremptory challenges with respect to these jurors, including Juror No. 8 whom he challenged for cause.

Both state and federal cases are clear that when an actually biased juror sits, the penalty must automatically be reversed. Trial counsel's failure to object does not matter when a biased juror actually decides a capital defendant's fate. There is not a single case in which any court has held that a seated juror was biased, but also that counsel either waived his client's right to challenge the constitutional violation by failing to exhaust his peremptory challenges or was not ineffective in failing to remove that juror with a peremptory challenge. (*See, e.g., People v. Farnham* (2002) 28 Cal.4th 107, 132-133 [claim not preserved because exhaustion requirement not met, but also concluding jurors not biased]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 486-488 [same].)

Respondent also overlooks that the question of whether to seat a biased juror is not a discretionary or strategic decision. (*Gardner v. Florida*

(1977) 430 U.S. 349, 361 [97 S.Ct. 1197, 51 L.Ed.2d 393] [high court refuses to find that counsel's failure to object waived right to challenge court's consideration of undisclosed report in imposing death sentence; no basis for presuming that defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to object].) In all cases, an attorney's failure to remove a biased juror falls below an objective standard of reasonableness and cannot be justified by any conceivable trial tactic. (*People v. Weaver* (2001) 26 Cal.4th 876, 911 [the presence of even a single juror compromising the impartiality of the jury requires reversal; counsel would be constitutionally ineffective if he had failed to preserve the claim].)

Respondent next argues that in any event the challenged jurors did not demonstrate that their views on capital punishment would substantially impair the performance of their duties as jurors. Hence, according to respondent, there was no error, no ineffective assistance of counsel, and no violation of appellant's constitutional rights. (RB 185-186.)

Respondent offers that significant differences distinguish the answers of the juror in *People v. Boyette* (2002) 29 Cal.4th 381 from the jurors in this case. (RB 197.) The *Boyette* juror indicated both that he was strongly in favor of the death penalty and that he was "somewhat pro-death." (*Id.* at pp. 417-418.) Although agreeing that he could vote for life if it was appropriate,

the juror also stated he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty." (*Ibid.*) He equivocated when asked other questions regarding whether he could consider a life term. He also stated he could not "assume" a life sentence without parole meant exactly that. On appeal, this Court concluded the juror was biased. "This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing that view. He indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. ..." (*People v. Boyette, supra,* 29 Cal.4th at p. 419.)

Like the juror in *Boyette*, and contrary to respondent's assertions, the responses of Juror Nos. 1, 2, 4, 6, 8, 9, 11, and 14 -- all seated and regular jurors -- were strongly in favor of the death penalty. The responses of these jurors were far more strongly pro-death than those of the jurors in *People v. Ledesma* (1987) 43 Cal.4th 171 and *People v. Crittenden* (1994) 9 Cal.4th 83 on which respondent also relies. (RB 198-199.) Juror No. 1 believed in the death penalty. She stated too many condemned prisoners were never executed. (3 Supp CT [Redacted Juror Questionnaires] 653; see also 25 RT 4030 ["so many on death row for 20, 30 years and nothing happens"].)

Juror No. 1 indicated that she would only vote for life imprisonment without the possibility of parole if the killing had been accidental or unintentional and the defendant did not "fit the normal criminal mode." (3 Supp CT [Redacted Juror Questionnaires] 660.) Juror No. 1 was dubious of mitigating evidence. (3 Supp CT [Redacted Juror Questionnaires] 659.) Indeed, Juror No. 1 indicated she would not consider mitigating evidence, stating that if the defendant had been involved in a death, "they should pay for the crime." (3 Supp CT [Redacted Juror Questionnaires] 660.) Juror No. 1 suggested that she would virtually have "no choice" on imposing the death penalty under certain circumstances. (25 RT 4031.) Juror No. 1 thus hardly manifested agreement to consider mitigation and the possibility of life imprisonment without the possibility of parole as did one prospective juror in *Ledesma*. (See *People v. Ledesma, supra*, 39 Cal.4th at p. 672.)

In *People v. Crittenden, supra*, 9 Cal.4th 83, one prospective juror indicated he would be able to put aside his personal views concerning the death penalty; another juror stated he could go either way as to penalty. Here, Juror No. 2 believed in the death penalty and that it was used too seldom. In her opinion, a lot of people were sentenced to death but were still alive. (5 Supp CT [Redacted Juror Questionnaires] 1208; see also 23 RT 3821.) Juror No. 2 readily agreed that she could vote to have appellant executed. (23 RT 3829.) Juror No. 2 did not express any reluctance to

impose the death penalty even when the defendant did not actually kill anyone but simply may have influenced another to kill: "he might as well have been the one doing the murder." (23 RT 3855.) Juror No. 2 equated reckless indifference with intent to kill. (23 RT 3855-3856.) Juror No. 2 was unsure whether background information could ever be relevant to penalty. (5 Supp CT [Redacted Juror Questionnaires] 1208.)

Similarly, Juror No. 4 strongly believed in the death penalty. She stated that its use might make people think twice, presumably about committing crimes. She believed that the death penalty was too seldom used. (26 RT 4249.) Juror No. 4 did not believe that life imprisonment without possibility of parole was sufficiently harsh as compared to the death penalty. She thought that too many multiple murderers had gotten off without the death penalty and had gotten off to commit more murders. (26 RT 4250.) With particular relevance to the present case, Juror No. 4 believed that the death penalty was used too seldom and that such multiple murderers were permitted to "live out their lives after taking several others." (3 Supp CT [Redacted Juror Questionnaires] 764; see also 26 RT 4250.) Juror No. 4 also indicated that her strong views on the death penalty were based on the Bible's injunction of an "eye for an eye." (3 Supp CT [Redacted Juror Questionnaires] 765.)

As discussed above, bias may be actual or implied. "Actual bias is

'bias in fact' -- the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." (*Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463.) In certain cases, presumed or implied, as opposed to actual, bias requires that in certain cases courts should employ a conclusive presumption that a juror is biased." *Johnson v. Luoma* (6th Cir. 2005) 425 F.3d 318, 326 (quoting *United States v. Frost* (6th Cir. 1997) 125 F.3d 346, 379.) Bias may be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. (*Id.*) Examples of such a relationship are "that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." (*Smith v. Phillips* (1982) 455 U.S. 209, 222 [102 S.Ct. 940, 71 L.Ed.2d 78] (O'Connor, J., concurring).)

Here, Juror No. 6 had worked in law enforcement. (26 RT 4263.) She lost her brother in a homicide. (3 Supp CT [Redacted Juror Questionnaires] 822, 826.) Juror No. 6 mentioned that two brothers (as here) were responsible for her brother's murder. (3 Supp CT [Redacted Juror Questionnaires] 832.) Juror No. 6 manifested bias and prejudice against appellant simply because he had been arrested; indeed, according to Juror

No. 6, appellant was probably guilty because he had been arrested and was in custody. (3 Supp CT [Redacted Juror Questionnaires] 834.) Juror No. 6 favored the death penalty and expressed "no problem" with it, noting as well that the death penalty was used too seldom: "we don't use it often in this state -- it takes years to happen." (3 Supp CT [Redacted Juror Questionnaires] 838.) Juror No. 6 indicated that her views in support of the death penalty were deeply rooted and of long duration. (26 RT 4263-4264.) As to whether Juror No. 6 was willing to consider appellant's background on considering penalty, she indicated, by her answer, that background criminal history was possibly relevant but probably not his upbringing. (See (3 Supp CT [Redacted Juror Questionnaires] 844.) The background, relationships, and attitude of Juror No. 6 indicated she was an actual or implied biased juror.

In assessing bias, the relevant question is did the juror swear that he or she could set aside any opinion he or she might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed. (*Patton v. Yount* (1984) 467 U.S. 1025, 1036 [104 S.Ct. 2885, 81 L.Ed.2d 847].) By their responses and answers, Jurors Nos. 2, 4, and 6 expressed unalterable preference in favor of death. Contrary to the circumstances in both *People v. Crittenden, supra*, 9 Cal.4th at pp. 122-123 and *People v. Ledesma, supra*, 39 Cal.4th at pp. 672-673, each of these

jurors expressed or indicated they would not be able seriously to consider mitigating evidence. "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require [her] to do." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492].)

Juror No. 9 believed in the death penalty for first degree murder. (4 Supp CT [Redacted Juror Questionnaires] 986.) Juror No. 9 indicated that if a defendant were guilty, intended to kill and premeditated, he would strongly favor the death penalty. (24 RT 3969.) Juror No. 9 was in favor of the death penalty simply if the evidence of guilt were strong. (9 RT 3969.) As to factors in mitigation, Juror No. 9 indicated he would only consider that the defendant was a first-offender. (4 Supp CT [Redacted Juror Questionnaires] 992.)

Appellant was alleged to have been involved in three intentional killings and several other intentional shootings. Juror No. 8 indicated that she would automatically vote for the death penalty if someone went out and shot another person intentionally. (24 RT 3899.) The court denied appellant's challenge of Juror No. 8 for cause. (24 RT 3934-3936.) Juror No. 11 was biased against psychiatrists and psychologists, stating that they were unjustifiably used as a way out or for getting a lesser sentence. (4 Supp

CT [Redacted Juror Questionnaires] 1012.) She was biased against drug users, noting that the use of alcohol or drugs also caused individuals to commit crimes. (4 Supp CT [Redacted Juror Questionnaires] 1013.) Juror No. 11 strongly believed in the death penalty for murder. As to life imprisonment without possibility of parole, Juror No. 11 expressed a strong opinion that it was a waste to the taxpayers for a defendant to spend his life in prison. She believed that the death penalty was used too seldom. (4 Supp CT [Redacted Juror Questionnaires] 1023; 25 RT 4107.)

Certainly, determining when a juror will reject the law as given by the trial court in favor of her own belief system is a difficult undertaking, but despite the difficulty inherent in the task and that the record will not always make bias "unmistakably clear," "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) Here, Juror Nos. 8 and 14 stated in effect that some crimes "required" the death penalty and that a single murder would be sufficient to warrant the death penalty. (24 RT 3909-3910.) Juror No. 14 indicated that she would only consider background information about a defendant as it pertained to the particular case, suggesting thereby that she would not fully consider or evaluate the range of mitigating evidence that might be offered during the penalty trial. (See 3 Supp CT [Redacted Juror

Questionnaires] 696.)

In *Wainwright v. Witt, supra,* the United States Supreme Court held that a trial court may excuse a prospective juror for cause whenever the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424; see also *Witherspoon v. Illinois, supra,* 391 U.S. at pp. 522-523, fn. 21.) The High Court further emphasized that this standard does not require that a juror's bias be proved with "unmistakable clarity." (*Ibid.*) The relevant determination is not whether a prospective juror would always or automatically vote for one penalty or the other; nor is the question strictly whether the individual is unable to follow the law as respondent seems to imply. (RB 135.) Here, it is apparent -- if not unmistakably clear -- that the responses of Jurors Nos. 8, 9, 11, and 14 did not manifest the requisite fairness and impartiality required both by this Court and the United States Supreme Court consistent with the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as defined in *Witt.*

IX

THE TRIAL COURT ERRED BY ADMITTING, AND THE PROSECUTOR COMMITTED MISCONDUCT BY OFFERING AND ARGUING, IMPROPER, HIGHLY INFLAMMATORY, AND PREJUDICIAL VICTIM IMPACT EVIDENCE DURING THE PENALTY TRIAL

Appellant acknowledges that the Court has previously rejected, and continues to reject, various claims of error in respect to victim impact evidence and testimony. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 574, fn. 11.) Thus, the Court has rejected claims that victim impact evidence deprives defendants of a state-created liberty interest (e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 445, fn. 12) and that "circumstances of the crime," as used in Penal Code section 190.3, factor (a), is unconstitutionally vague, overbroad, subject to arbitrary decision-making, or fails to provide adequate notice. (E.g., *People v. Carrington* (2009) 47 Cal.4th 145, 197; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057.) The Court has also rejected claims that victim impact evidence must be limited to the circumstances known to the defendant or foreseeable at the time of the commission of the crime. (See, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 508; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

Respondent concedes that before trial, appellant sought to exclude victim impact evidence on grounds that the admission of this evidence would violate his rights to a fair trial, due process of law, and to a reliable

penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (RB 204.) Appellant also asserted that victim impact evidence would be highly prejudicial and fundamentally unfair and should therefore be excluded pursuant to Evidence Code section 352. (8 CT 1836-1860.) The trial court denied appellant's motion to exclude victim impact evidence during the penalty trial. (48 RT 7173-7176.)

Citing *People v. Wilson* (2005) 35 Cal.4th 309, respondent argues that appellant waived any specific challenges to the substance of the victim impact testimony. (RB 205.) Respondent further argues that appellant made only broad attacks on victim impact in general and, at no time, lodged any specific objections to the particular evidence admitted by the prosecutor. (RB 205.) Here, appellant objected on numerous constitutional grounds to the admissibility of victim impact evidence and, in particular, on Evidence Code section 352 grounds that the evidence would be highly prejudicial and fundamentally unfair. Surely appellant's objections at trial preserved for appeal the issue of the permissible nature and scope of the evidence and its prejudicial impact.

Respondent asserts that the victim impact evidence was relatively brief. (RB 204, 221.) Contrary to respondent's assertions, the victim impact evidence admitted during the penalty trial was not limited in scope or

purpose. It was excessive, improper, inflammatory, and highly prejudicial. During the entire penalty trial, the prosecutor sought to keep the jury's attention focused on the victims' relatives and friends. The prosecution's case in aggravation relied heavily on victim impact testimony. The seven victim impact witnesses were the lead-off penalty trial witnesses in the prosecution's case-in-chief. In argument to the jury, the prosecutor repeatedly referred to the victim impact testimony and relied heavily on that evidence in urging the jury to sentence appellant to death. The prosecutor's closing argument during the penalty trial comprises 33 pages of transcript on appeal. (See 54 RT 8082-8106, 8107-8116.) Fully a third of his argument referenced the victim impact evidence, including lengthy quotations of the relatives' testimony. (See 54 RT 8087-8098.) This evidence alone was repeatedly urged as justification for imposing death.

In *Payne v. Tennessee* (1991) 501 U.S. 808, 822-823 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court held that a state could allow the admission of evidence providing "'a quick glimpse of the life' which a defendant 'chose to extinguish'" in order "to show . . . each victim's 'uniqueness as an individual human being.'" *Payne* noted, however, that "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Id.* at p. 825.)

The High Court stressed in *Payne v. Tennessee, supra,* 501 U.S. 808, that victim impact evidence "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." The United States Constitution thus bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair. (*Id.* at p. 825.)

This Court has repeatedly held that victim impact evidence is relevant and admissible pursuant to Penal Code section 190.3, factor (a) as a circumstance of the crime so long as it is not so unduly prejudicial that it renders the trial fundamentally unfair. Thus, unless victim impact evidence invites a "purely irrational response," evidence of the effect of a capital murder is relevant and admissible under section 190.3, factor (a), as a circumstance of the crime. (E.g., *People v. Burney* (2009) 47 Cal.4th 203, 258.)

Appellant acknowledges that admission of testimony presented by a few close friends or relatives of each victim, as well as images of the victim while he or she was alive, has repeatedly been held constitutionally permissible. (*People v. Burney, supra,* 47 Cal.4th at p. 258; *People v. Boyette, supra,* 29 Cal.4th at p. 444.) Here, however, the victim impact evidence was not limited to the "quick glimpse" of the victims' lives

approved in *Payne v. Tennessee, supra*, 501 U.S. 808. Unlike virtually every other reported case, evidence of victim impact in this case amounted to an outpouring of grief in which family members and friends expressed and declared every dream, passing thought, speculative supposition, and imagined sense of suffering that entered their minds in connection with the deaths of the victims in this case.

The stepmother, sister, and neighbor of Jose Aragon; the mother and sister of Joe Mans; and the father of Timothy Jones all presented testimony as to the impact of the respective victims' deaths on their lives. Evidence regarding the character of the victim is admissible to demonstrate how a victim's family is impacted by the loss and to show the victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. (*People v. Brown* (2004) 33 Cal.4th 382, 398.) In this case, contrary to respondent's assertions (RB 204-221), the victim impact evidence presented went far beyond the character of the victims and the impact of their deaths upon their families. (*People v. Russell* (2010) 50 Cal.4th 1228, 1265.)

Of even greater import, the victim impact evidence was not delivered or presented "without undue emotion." (*People v. Burney, supra,* 47 Cal.4th at p. 258.) Although emotional testimony is not necessarily inflammatory, (see *People v. Verdugo* (2010) 50 Cal.4th 263, 298-299 [finding no error

when the victim's mother cried while testifying]), here, the evidence presented was offered primarily for its emotional impact. The victim impact evidence presented in this case invited a purely emotional response in the members of the jury.

Unlike *People v. Jurado* (2006) 38 Cal.4th 72, 132-134, for example, where the Court held that testimony from multiple family members causing some jurors to cry did not constitute error, here, the trial court recollections showed that the victim impact evidence in this case invited and caused severe, undue emotional responses among everyone present at trial, including the jury, emotional reactions that lingered long after the conclusion of trial in this case. Vividly recalling the victim impact evidence years after the conclusion of trial, the trial court attested to its undue and prejudicial emotional impact: "Some things that happened during trial I have a very vivid recollection of, one of them was the date we had victim witness testimony, which was a very painful and agonizing date for everyone who was in the courtroom. We had the victims, including the mother and father of the three people that were killed, testify and asked as to how that affected their lives. We had best friends and other relatives testifying. I would say there wasn't a dry eye in the courtroom. Everybody was crying that day. It was a very emotional day for everyone. That's the day that I will always have with me. And that's something that -- that had, had an impact on

myself and everybody else that was in the court that day. . . ." (3 RT [September 9-10, 2002] 318.)

With respect to the trial court's ruling and determination that the victim impact evidence was more probative than prejudicial in this case under Evidence Code section 352, the Court has also repeatedly stated that "the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Edwards* (1991) 54 Cal.3d 787, 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

In *People v. Murtishaw* (2011) 51 Cal.4th 574, the Court rejected constitutional challenges to admissibility of victim impact evidence and pursuant to Evidence Code section 352. The Court noted that before trial, the trial court conducted a hearing in respect to the victim impact evidence at the conclusion of which it imposed some limitations on it. Under these circumstances, this Court concluded that the trial court properly exercised its discretion under the standard set forth above. (*Id.* at p. 596.)

Here, however, the numerous speculative and inflammatory

assertions made by the victim impact witnesses in this case went far beyond the limitations imposed on the evidence by the trial court and the fundamental concept of direct impact previously articulated by this Court in such cases as *People v. Pollock* (2004) 32 Cal.4th 1153, 1180. Events that happened many years before the crime (as the victims' activities as children) or many years after (as the continuing reactions of the victims' relatives right up to the penalty trial) do not constitute "direct impact" or fall within any reasonable common-sense definition of the phrase "circumstances of the crime." All these types of evidence were introduced under the rubric of victim impact in this case. Such evidence effectively undermined factor (a) of Penal Code section 190.3. (But see *People v. Boyette, supra,* 29 Cal.4th at p. 445 [rejecting a similar argument where substantial, but less extensive, victim impact testimony was presented].)

This Court has previously permitted gravesite evidence in conjunction with other victim impact evidence. (See *People v. Harris* (2005) 37 Cal.4th 310, 351-352 [photographs of the victim's gravesite were relevant to the effect the murder had on her family; testimony about the effect of the accidental opening of the victim's closed casket during the funeral service was harmless error]; *People v. Zamudio* (2008) 43 Cal.4th 327, 367-368 [rejecting a challenge to the grave marker photographs included in a videotaped montage]; *People v. Kelly* (2007) 42 Cal.4th 763, 797 [videotape ended with a brief view of the victim's grave marker];

People v. Jurado, supra, 38 Cal.4th at pp. 133-134 [finding no error in the admission of testimony concerning relatives' visits to the victim's gravesite].)

In *People v. Booker* (2011) 51 Cal.4th 141, 192, victim impact testimony regarding the victim's funeral and cremation was admitted at trial. The Court held that evidence of a victim's family's grief at funeral services, and the condition of the victim's body, is admissible and relevant.

Here, however, the victim impact evidence did not consist of limited testimony about funeral arrangements for the victims, the funerals, or gravesites. Lydia Aragon, for example, was permitted by the court to testify at length about the funeral arrangements and funeral of Jose Aragon. Catherine Aragon described how she and her mother went to the cemetery every weekend to bring cards, flowers, and flags to her brother's grave. Catherine Mans told the jury that she did not attend her son's funeral because she did not want to see her son in a box. She went on to add that she had never visited his grave and expressed her intentions to do so immediately after her testimony. James Jones testified he visited his son in the cemetery every Memorial Day and would talk to him even though he knew he was not there. Such testimony clearly inflamed the jurors' sentiments against appellant but had absolutely no relevance to the issue of appellant's culpability or blameworthiness.

All of these aspects of the victim impact testimony -- its volume,

substance, and language -- demonstrate that the trial court failed in its duty carefully to limit or monitor the victim impact to evidence to ensure that emotion did not take precedence over reason. The prosecutor repeatedly exploited this evidence both at the beginning and conclusion of the penalty trial in argument to the jury. Under these circumstances, the admission of highly emotional and inflammatory victim impact testimony was undoubtedly prejudicial, undermining appellant's constitutional right to a fair and reliable capital sentencing proceeding. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, and 17.)

The evidence about the victims' character provided by family members was also excessive and inflammatory. Although the Court has not established specific guidelines for the admission of evidence about a victim's character, the cases in which the admission of such evidence has been approved generally involve evidence that was brief, factual, and noninflammatory. (See, e.g., *People v. Roldan* (2005) 50 Cal.4th 547, 576 [victim impact evidence limited to a single photograph of the victim with his children and one witness whose testimony was relatively short and subdued]; *People v. Wash* (1993) 6 Cal.4th 215, 267 [evidence of the victim's plan to enlist in the Army at time of her death]; *People v. Montiel* (1993) 5 Cal.4th 877, 934-935 [evidence that victim was in excellent health at time of his death, that he needed to use a walker to get around, and that he could still enjoy life]; *People v. Edwards*, *supra*, 54 Cal.3d at p. 832

[photographs of the victims shortly before their deaths].)

Here, the evidence about each victim's character, particularly that pertaining to Jose Aragon, far exceeded the "quick glimpse" of their lives otherwise approved in *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 822-823, or the "general factual profile of the victim" approved in *State v. Muhammad* (1996) 145 N.J. 23 [678 A.2d 164, 180] [imposing limitation on number of victim impact witnesses based on court's conclusion that "[t]he greater the number of survivors who are permitted to present victim impact evidence, the greater the potential . . . to unduly prejudice the jury against the defendant"].) The victims' virtues were explored through highly emotional and redundant inflammatory testimony that included details regarding not only their activities and achievements, but their survivors' tortured imaginings about the pain the victims suffered and the fear they must have felt. The survivors were permitted to testify at length and without limitation regarding dreams they had in which the victims lamented, *inter alia*, that "it hurts back there." None of this testimony was based in fact, yet it was elicited by the District Attorney to devastating and prejudicial effect against appellant.

The United States Supreme Court has also made clear that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. (*Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2 [leaving

intact the portion of *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] requiring exclusion of such evidence].)

In *Booth v. Maryland, supra,* 482 U.S. at pp. 502-503, 508-509, the United States Supreme Court held that it was error to admit evidence of the opinions held by the murder victim's relatives on the crime and the defendant. The admission of such opinions, the Court held, is clearly inconsistent with the reasoned decision-making required in capital cases and hence violates the Eighth Amendment to the Constitution of the United States. Here, the trial court permitted the state to introduce the very type of inflammatory opinion evidence prohibited by the principles articulated in *Booth* and left intact by *Payne.*

Appellant acknowledges that the Court has approved in other cases brief victim impact evidence if not unduly emotional. (See, e.g., *People v. Boyette, supra,* 29 Cal.4th at p. 444 [family members spoke of their love of the victims and how they missed having them in their lives; photographs were presented of the victims while alive]; *People v. Cruz* (2008) 44 Cal.4th 636, 652, 682 [the evidence included testimony by the victim's wife and children concerning the sorrow they felt and the devastating impact of the crime on their lives, as well as evidence concerning the victim's professional life].) Here, however, Lydia Aragon testified, for example, that Jose Aragon's "life's blood" was "splattered all over" his truck. She

speculatively described how she imagined him shot and left to die alone with "no one to cradle him, hold him, and say that you love him and to say good-bye." Lydia Aragon imagined Jose Aragon lying in his truck by himself while his ATM card was being used and the money in his account stolen. This clearly exceeded the bounds of constitutional propriety.

Catherine Mans told jurors that in her dreams Mans told her that he was okay. She described how in her dreams she asked her son what had happened, and he pointed to his back, saying "it hurts me back here." She described in detail how she kept thinking that her son was gasping for air and struggling to breathe when he died, because he was shot in the back of the neck. She thought he was in pain. Angela Mans described seeing her brother in his casket at the funeral and that, in her opinion, he had a scared expression on his face.

James Jones testified that he did not attend the trial very much because he could not stand the thought of what his son had gone through. He told the jury nevertheless that Timothy knew he was going to die but could not do anything about it. In James' opinion, Timothy suffered when he was killed.

This improper opinion evidence violated appellant's due process right to a fair trial under the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution

and his right to a fair and reliable penalty trial under the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution. (*Booth v. Maryland, supra*, 482 U.S. at pp. 502-503, 508-509; see also *People v. Pollock, supra,* 32 Cal.4th at p. 1180 [victim impact evidence may not include characterizations or opinions about the crime, the defendant, or the appropriate punishment].)

The victim impact evidence in this case involved three victims, three families, and highly inflammatory testimony that, by the trial court's own account, dramatically affected everyone in the courtroom. The victim impact testimony was voluminous and emotionally-charged. In addition to narrations about the victims' lives, descriptions of their characteristics and nature as children and young adults, poignant and emotionally-charged vignettes and anecdotes illustrating the devastation caused by theirs deaths, the testimony included the survivors' opinions regarding the crimes, the defendants, and grieving accounts of how they all had been adversely affected. When considered as a whole, the victim impact evidence in this case violated appellant's right to a fair and reliable capital sentencing hearing and to effective assistance of counsel and due process by making the penalty trial fundamentally unfair. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17; *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *Payne v. Tennessee, supra*, 501 U.S. 808; *Booth v. Maryland, supra*, 482 U.S. 496.)

X

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE

Appellant's proffered penalty Special Jury Instruction No. 9 [Cautionary and Limiting Instruction on Victim Impact Evidence] was refused by the trial court. (8 CT 1942-1943; 9 CT 2086 [Instruction].) Other than the standard instructions in the language of CALJIC No. 8.84.1 and 8.85, the trial court did not give any instruction on the use, consideration, or evaluation of victim impact evidence.

Respondent asserts that there is no state or federal requirement to give a limiting instruction on victim impact evidence. (RB 258.) Contrary to respondent's assertion, in the absence of adequate instruction, there was a very real danger that emotions engendered by the victim-impact evidence would preclude the jury from making a rational penalty decision unless the trial court provided some guidance on how the victim-impact evidence should be used and considered.

Recently, in *People v. Zamudio* (2008) 43 Cal.4th 327, the defendant contended on appeal that the trial court prejudicially erred in failing to give an instruction identical to Special Jury Instruction No. 9 that would also have explained the proper use of victim impact evidence and admonished the jury not to base its decision on emotion or improper facts. Relying on its

prior decisions in *People v. Ochoa* (2001) 26 Cal.4th 398, 455 and *People v. Harris* (2005) 37 Cal.4th 310, 358-359, the Court held that the trial court did not err in declining to give defendant's proposed instruction. According to the Court, the standard penalty instructions adequately informed the jury how to consider victim impact evidence. Moreover, the substance of the requested instruction, insofar as it correctly stated the law, was adequately covered by the modified version of CALJIC 8.84.1 the trial court gave. Further, the proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1.

In *Ochoa* and *Harris*, the Court previously concluded that trial courts did not err by refusing to provide instructions similar -- but not identical -- to the one requested by appellant here. In *Harris*, the Court explained that the requested instruction in that case was "unclear as to whose emotional reaction it directed the jurors to consider with caution -- that of the victim's family or the jurors' own." (*People v. Harris, supra*, 37 Cal.4th at p. 359.) In *Ochoa*, the Court concluded that the jury was adequately instructed pursuant to CALJIC No. 8.84.1. (*People v. Ochoa, supra*, 26 Cal.4th 398, 455; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 510-511 [where Court found no error in the refusal of similar instructions, again relying on both *Ochoa* and *Harris*].)

Appellant offers that respondent's contentions, and the Court's

reasoning in *Zamudio,* are flawed. *Zamudio* should be revisited. When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Wilson* (2008) 44 Cal.4th 758, 803-804.) In the present case, the totality of the jury instructions on mitigating and aggravating evidence failed to communicate clearly and concisely to the jury the nature, purpose, scope, and use of victim impact evidence in this case.

Absent appropriate instructions as to its use or consideration, such victim impact evidence would serve only to incline the jury toward irrational or purely emotional responses untethered to the facts appropriate to the penalty phase determination. (See *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Some guidance or appropriate limiting instruction, as proposed by appellant in the present case, was necessary for the jury's proper understanding of the case, and therefore it should have been given as requested by appellant.

In arguing that the trial court did not err in refusing appellant's proposed jury instruction on victim impact evidence, respondent overlooks that its propriety and applicability were governed both by statute and well-established legal principles. As noted in 1 Witkin, *Cal. Evidence 4th* (2000)

Circum. Evid. § 30, p. 360, "[s]ome evidence may be relevant for one purpose and inadmissible for another purpose, either because it is irrelevant or because some rule excludes it for that other purpose. It may be admitted, but only for the proper purpose, and under instructions of the court so limiting it."

Evidence Code section 355 has codified this rule, requiring upon request an appropriate instruction limiting to its proper scope the use or consideration of evidence admitted for one purpose and inadmissible as to another. This Court has characterized Evidence Code section 355 as "mandating [a] limiting instruction upon request. (*People v. Falsetta* (1999) 21 Cal.4th 903, 914.) Thus, the failure to give a limiting instruction upon request is error when evidence, as here, is introduced for a limited purpose. (*People v. Miranda* (1987) 44 Cal.3d 57, 83.)

The rule requiring a limiting instruction is a complement to the trial court's power to exclude unduly prejudicial evidence embodied in Evidence Code section 352. Both sections 352 and 355 of the Evidence Code deal with the dilemma created when evidence is offered for a legitimate purpose but may be misused by the jury for another, improper or inadmissible purpose. Exclusion is the more drastic remedy, and, within limits, it is discretionary. While the use of a limiting instruction may be the fallback solution, it becomes mandatory when proposed as in this case. (*Adkins v.*

Brett (1920) 184 Cal. 252, 258-259; *People v. Sweeny* (1960) 55 Cal.2d 27, 42-43; see also *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.)

Even if, as respondent asserts (RB 258), appellant's proposed instruction in victim impact evidence may have been somewhat unclear, appellant was not required to have proposed initially an absolutely correct instruction in order to become entitled to the protection of a limiting instruction. (*People v. Falsetta, supra*, 21 Cal.4th at p. 924; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.)

Appellant's proposed instruction on the whole appropriately directed the jury to the purpose of the victim-impact evidence, reminded the jury of the issue on which it was to focus -- the appropriate punishment for appellant -- and advised the jury not to let emotional evidence and argument interfere with its sober and rational exercise of judgment on that question. Even assuming for purposes of argument that some of the wording of appellant's proposed instruction might have been better stated, it would have been a minor matter to change any improper language. However, it was not within the trial court's discretion to refuse entirely to give appellant's proffered instruction because of disagreement with the clarity of some of its wording. (*People v. Falsetta, supra*, 21 Cal.4th at p. 924; U.S. Const., 8th & 14th Amends.)

Respondent repeatedly asserts that CALJIC Nos. 8.84.1 adequately addressed how the jury should consider victim impact evidence in this case. (RB 258.) CALJIC No. 8.84.1 given to appellant's jury did not fulfill the functions of a limiting instruction. Unlike appellant's proposed special instruction, CALJIC No. 8.84.1 did not draw the jury's attention to the victim-impact evidence and did not identify the proper and prohibited uses of this evidence. The only part of CALJIC No. 8.84.1 even marginally relevant to appellant's requested instruction was the general admonition to accept and follow the law which, in one form or another, is given in every trial.

The language of CALJIC No. 8.84.1 totally failed to implement the requirement of Evidence Code section 355 that when evidence has been admitted for one purpose but is inadmissible for another purpose, as the victim-impact evidence in this case, the trial court upon request must restrict the evidence to its proper scope and so instruct the jury. An instruction that fails even to mention the evidence at issue is insufficient to address the constitutional infirmity.

As a state-law error in a capital trial, the failure to give appellant's proffered limiting instruction requires reversal because it is at least reasonably possible that the error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) That the jury is presumed to have followed

other instructions, including CALJIC No. 8.84.1, does not address either the error involved or the correct standard of review. The reason for a limiting instruction in this case was to permit a fair trial and a reliable and individualized penalty determination. Its refusal thus violated appellant's Fourteenth Amendment right to due process and the Eighth Amendment's guarantee of a reliable penalty determination. It also violated appellant's due process right to the protections of state law and to equal protection of those laws. (U.S. Const., 14th Amend.; Evid. Code § 355; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].) Reversal is required because the state cannot show that the error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.) Indeed, respondent does not even try.

XI

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND PROTECTION FROM THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY GUARANTEED BY THE FIFTH, EIGHTH AND, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In the opening brief (Self AOB 393-404), appellant Self discussed that the failure to conduct comparative or intercase proportionality review of death sentences violates his right to be protected from the arbitrary and capricious imposition of capital punishment, as well as his rights to a fair trial, due process, and equal protection of the laws guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Respondent argues that intercase proportionality review is not constitutionally required and that this Court has consistently declined to undertake it. (RB 268-269; see *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Horning* (2004) 34 Cal.4th 871, 913; and *People v. Morrison* (2004) 34 Cal.4th 698, 730.)

In *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29] (cited by respondent at RB 268-269), the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Appellant

acknowledges that since *Pulley v. Harris, supra*, this Court has consistently held -- although without discussion or analysis -- that intercase proportionality review by the trial or appellate courts is not constitutionally required. (See, for example, *People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Bell* (2007) 40 Cal.4th 582, 621; *People v. Smith* (2007) 40 Cal.4th 483, 527; *People v. Williams* (2006) 40 Cal.4th 287, 338; *People v. Stanley* (2006) 39 Cal.4th 913, 966.) So, too, has the Court consistently ruled that equal protection does not required that capital defendants be afforded the same sentence review as other felons in the noncapital context. (See, for example, *People v. Beames, supra*, 40 Cal.4th at p. 935; *People v. Rogers* (2006) 39 Cal.4th 826, 894; *People v. Cook* (2006) 39 Cal.4th 566, 619.)

However, since, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders (*Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of White, J.)), and for the reasons fully discussed in appellant's opening brief (Self AOB 393-404, 407-415), the Court should reevaluate its reliance on *Pulley v. Harris, supra.*

XII

THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN SECTION 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Instructional errors are reviewable on appeal to the extent they affect the defendant's "substantial rights" whether or not objections were first raised at trial. (Pen. Code §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

Respondent does not dispute appellant's claim that, given the expansive interpretation of Penal Code section 190.3, subdivision (a) [factor (a)] by this Court, virtually any circumstance of the crime can be argued as aggravating. Nor does respondent dispute that section 190.3, subdivision (a) allows prosecutors to make the kind of diametrically inconsistent arguments described in appellant's opening brief. (Self AOB 405-430.) Rather, in respect to appellant's substantive claims, respondent simply cites the Court's rejection of similar claims in prior cases. (See RB 266-267.)

Recently, in *People v. Beames* (2007) 40 Cal.4th 907, although recognizing that there is a constitutionally required narrowing function, the Court held that a constitutionally valid death penalty statute is not required to exclude most murders from eligibility for the death penalty. (*Id.* at p.

934.) Appellant respectfully disagrees with this Court, as posited in *Beames,* that the United States Supreme Court has effectively abandoned a genuine narrowing requirement.

The Court in *Beames* cited *Tuilaepa v. California* (1994) 512 U.S. 967, 971-972 [114 S.Ct. 2630, 129 L. Ed. 2d 750], and Justice Kennard's concurring opinion in *People v. Jurado* (2006) 38 Cal.4th 72, 146, which, in turn, cites, *Tuilaepa* and *Arave v. Creech* (1993) 507 U.S. 463, 475 [113 S.Ct. 1534, 123 L.Ed.2d 188]. Neither case, however, abandoned a "genuine" narrowing requirement.

Appellant in the present case asserts a systemic challenge that Penal Code section 190.3, the implementing instructions, and the jurors' application of the sentencing factors, violate the narrowing requirement because its "eligibility" provisions (which include all of the ways in which first degree murder may be committed), plus all of the special circumstances, viewed cumulatively, make virtually every murderer death-eligible. (See AOB 407-415.)

Neither *Tuilaepa* nor *Creech* involved a systemic narrowing challenge. Indeed, *Tuilaepa* did not involve any form of narrowing challenge. Rather, the claim in *Tuilaepa* argued that three of section 190.3's aggravating factors -- "selection" factors -- were unconstitutionally vague. No issue was raised regarding this state's special circumstances provisions.

Each of the three opinions in *Tuilaepa* clearly stated -- in varying degrees of explicitness -- that the High Court was making no judgment whether California's special circumstances "collectively perform sufficient, meaningful narrowing" to pass muster under the Eighth Amendment. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 975 [majority opn. of Kennedy, J.] and 984 [concurring opn. of Stevens, J.]; see also *id.* at pp. 994-995 [dissenting opn., Blackmun, J.].)

As a prelude to resolving the vagueness claim at issue in *Tuilaepa*, Justice Kennedy's majority opinion made a general statement about "two different aspects of the capital decision-making process: the eligibility and the selection decision." The opinion stated that the "aggravating circumstances" that make a defendant "eligible for the death penalty" -- which, as the High Court recognized, is a "special circumstance" under the California statute -- must meet two requirements. First, while "the circumstance may not apply to every defendant convicted of murder," it must apply "only to a subclass of defendants convicted of murder." Second, the aggravating circumstances may not be unconstitutionally vague. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 971-972.)

The Court in *Beames* interpreted the phrase "may not apply to every defendant convicted of a murder" to mean that a scheme is constitutional as long as it does not make "all murderers" eligible for death. Appellant

disagrees that the statement can be so construed.

First, Justice Kennedy was referring to the threshold challenge a defendant may make regarding the particular eligibility factor -- the special circumstance -- used to make his case a capital prosecution. As all opinions in *Tuilaepa* make clear, it was not intended as a statement that an entire statutory scheme would pass constitutional muster as long as all of the eligibility factors, viewed cumulatively, make fewer than "all murderers" death eligible. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975, 985, 994-995.)

Second, as authority for the phrase used in *Tuilaepa* -- "may not apply to every defendant convicted of a murder" -- Justice Kennedy quoted language in *Arave v. Creech, supra*, that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." (*Arave v. Creech, supra*, 507 U.S. at p. 474.) As the quoted statement indicates, *Creech*, too, involved a challenge to the single eligibility factor of which the defendant was convicted. (See *id.* at p. 478.) *Creech* did not involve the kind of systemic challenge raised by appellant in this case.

Third, the sentence in *Creech* that Justice Kennedy quoted in *Tuilaepa* originated in turn in two other High Court cases that struck down eligibility factors that were so vague a sentencer could interpret them as

applying to all or almost all murders. (See *Arave v. Creech, supra*, 507 U.S. at p. 474, citing the holdings in *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [108 S.Ct. 1853, 100 L.Ed.2d 372] and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429 [100 S.Ct. 1759, 64 L.Ed.2d 398].) It is one thing, in striking down an eligibility factor, for the Supreme Court to describe just how overbroad the factor is, as was the case in *Cartwright* and *Godfrey*. It is quite another to turn that description into a limitation on the "constitutionally required narrowing function" to which this Court referred in *Beames*. The United States Supreme Court did not do so in *Cartwright* or *Godfrey*, nor did it do so in *Creech*. To the contrary, the Supreme Court in *Creech* found the "utter disregard" eligibility factor at issue there constitutional because, in its construction of the factor, the Supreme Court of Idaho had "narrowed in a meaningful way" the category of defendants upon whom capital punishment may be imposed. (*Arave v. Creech, supra*, 507 U.S. at p. 476.)

Contrary to language in *Beames*, therefore, the United States Supreme Court has not abandoned the narrowing principle. It has not turned the descriptions in *Cartwright* and *Godfrey* into limitations. Thus, to comply with the Eighth Amendment, even single eligibility factors still must "narrow . . . in a meaningful way the category of defendants upon whom capital punishment may be imposed." Consequently, it also necessarily

follows that an entire statutory scheme, viewed cumulatively, must do so. (*Kansas v. Marsh* (2006) 548 U.S.163 [126 S.Ct. 2516, 2527, fn. 6].) Neither *Tuilaepa* nor *Creech* supports the contrary conclusion reached in *Beames*.

California's death penalty statute makes virtually every murder death-eligible, allows any conceivable circumstance of a crime to justify returning a verdict of death, and allows the decision to be made without critical reliability safeguards taken for granted in non-capital trials. The result is a "wanton and freakish" system (*Furman v. Georgia, supra,* 408 U.S. at p. 320 (conc. opn. of Stewart, J.)) that, because it arbitrarily determines the relatively few offenders subjected to capital punishment, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

XIII

PENAL CODE SECTION 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant demonstrated in the opening brief that the principal penalty phase determinations the jury had to make before it could return a verdict of death required certainty beyond a reasonable doubt. Appellant thus argued that the absence of a burden of proof and other omissions in the California capital sentencing scheme embodied in Penal Code section 190.3 and CALJIC Nos. 8.84-8.88 violated appellant's rights to trial by jury, fair trial, unanimous verdict, reliable penalty determination, due process, and equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Self AOB 433-442, citing, inter alia, *Apprendi v. New Jersey* (2000) 530 U.S. 466 120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 59 L.Ed.2d 403].)

In respect to appellant's substantive claims, respondent does not respond in kind to appellant's arguments other than to cite the Court's

rejection of similar claims in prior cases. (See RB 266-267.) In a number of recent cases, this Court has consistently ruled that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, or Fourteenth Amendment guarantees of due process and a reliable penalty determination. (*People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Morrison, supra,* 34 Cal.4th at p. 731.) The Court has also repeatedly ruled that neither *Apprendi*, *Ring*, *Blakely,* nor, more recently, *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], apply to the penalty phase of a capital trial under California's death penalty law. (See *People v. Lee* (2011) 51 Cal.4th 620, 651-652; *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Cox* (2003) 30 Cal.4th 916, 971-972.)

The Court's reasoning for this determination was set forth in *People v. Cox, supra*. In *Cunningham v. California, supra*, however, the United States Supreme Court rejected this Court's interpretation of *Apprendi* and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v.*

California, supra, 127 S.Ct. at pp. 868-873.) In so doing, it explicitly rejected the reasoning used by this Court in such cases as *Cox* to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In *Cunningham*, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to the California's DSL. The High Court examined whether or not the circumstances in aggravation were factual in nature and concluded they were. (*Id.* at p. 863.) As the Supreme Court held, "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.'" (*Cunningham v. California, supra*, 127 S.Ct. at p. 868.) In the wake of *Cunningham*, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In resisting the mandate of *Apprendi*, this Court has held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code § 190, subd. (a)), *Apprendi* does not apply. (See *People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating

factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at p. 263; see also *People v. Prince*, supra, 40 Cal.4th at pp. 1297-1298.)

The Court's interpretation is wrong. As Penal Code section 190.2, subdivision (a) indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts -- whether related to the offense or the offender -- beyond the elements of the charged offense." (*Cunningham v. California, supra*, 127 S.Ct. at p. 862.)

Even with the finding of factual aggravating factors that were required to support a death sentence in *Ring*, the judicial sentencing choice between life and death remained discretionary, because the statute specified that a life sentence should be imposed, if there were "mitigating circumstances sufficiency substantial to call for leniency." (*Ring v. Arizona,*

supra, 536 U.S. at p. 593.) *Ring* nevertheless held the state statute unconstitutional, because the finding of aggravating circumstances was not made by a unanimous jury. (*Id.* at p. 609.) Instead, *Ring* held that the Sixth and Fourteenth Amendment required a unanimous jury finding of any "aggravating circumstance necessary for imposition of the death penalty." (*Ibid.*)

Contrary to the pronouncement in *Williams v. New York* (1949) 337 U.S. 241 [69 S.Ct. 1079, 93 L.Ed. 1337], a California death sentence cannot be imposed for "no reason at all." *Apprendi* makes clear that the distinction is between sentencing schemes requiring a factual finding and those which allow a judge to impose an increased sentence as a discretionary choice, as long as the increased sentence is still within the maximum range permitted based on the facts admitted by defendant's guilty plea, or necessarily established by the guilty verdict. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 487.) Thus, under *Apprendi's* reasoning, findings of aggravating circumstances are necessary under California law to increase a sentence for special circumstances murder from life imprisonment without the possibility of parole to death. This requirement is evident for several reasons.

First, in order to return a death sentence, both Penal Code section 190.3 and CALJIC No. 8.88 require the jury to find that the aggravating circumstances outweigh mitigating circumstances. (See, e.g., CALJIC No.

8.88: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.") Manifestly, before substantial aggravating circumstances can outweigh mitigating circumstances, there must first be aggravating circumstances to consider. The mere finding of guilt on special circumstances murder is insufficient, because this Court has repeatedly recognized that Penal Code section 190.3, factor (a) -- the circumstances of the crime -- may be mitigating as opposed to aggravating in any given case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1189; *People v. Smith* (2003) 30 Cal.4th 581, 639; *People v. Haskett* (1990) 52 Cal.3d 210, 229, fn. 5.) Thus, the jury must first find something that is truly aggravating which is defined as "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*People v. Davenport* (1985) 41 Cal.3d 247, 289; accord, CALJIC No. 8.88.)

Second, as explained above, not only must the jury find the presence of aggravating circumstances, it must also find that they are so substantial in comparison to mitigation that death is warranted. As the Court recognized in *People v. Murtishaw* (1989) 49 Cal.3d 1001, 1027, in order to vote for the death penalty, a jury "must believe aggravation is so relatively great, and mitigation so comparatively minor, that the defendant deserves death rather

than society's next most serious punishment, life in prison without parole." (See also *People v. Breaux* (1991) 1 Cal.4th 281, 318 [a jury can "return a death verdict, only if aggravating circumstances predominated and death is the appropriate verdict"].)

Third, the California requirement that a death sentence cannot be returned unless there is not only aggravation but it is so substantial in comparison to mitigation that it warrants death, is similar to the Arizona standard found unconstitutional in *Ring* because of the failure to honor the Arizona defendant's Sixth and Fourteenth Amendment rights to a jury finding on any aggravating circumstance necessary to support a death sentence. As observed by the United States Supreme Court in *Ring*, the Arizona statute permitted a defendant to be sentenced "to death, only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" (*Ring v. Arizona, supra*, 536 U.S. at p. 593.)

Of course, a California capital defendant does have the right to have a unanimous jury decide the ultimate question of life or death. The Sixth Amendment, however, requires more than the mere right to a jury trial; the right to jury trial is meaningless without the corollary requirements of a unanimous finding, beyond a reasonable doubt, on each fact essential to a death sentence. Indeed, *Ring* specifically holds that "[i]f a State makes an

increase in a defendant's authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt." (*Id.* at p. 602.) Further, both *Apprendi v. New Jersey, supra*, 530 U.S. at p. 483 and *Blakely v. Washington, supra*, 542 U.S. at p. 313, expressly require those findings to be made by a unanimous jury.

Lest there be any doubt whether aggravating factors constitute the type of finding covered by the Sixth Amendment, Justice Scalia, concurring in *Ring v. Arizona, supra*, 536 U.S. at p. 610, stressed "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt." Justice Scalia also concluded his analysis by stating that "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Id.* at p. 612.)

Therefore, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* all apply to the California death penalty statute. While, as respondent notes (RB 155), a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, this

does not make the finding any less subject to *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. In *Blakely* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his or her own -- a finding which, appellant submits, must inevitably involve both normative and factual elements. The United States Supreme Court in *Blakely* rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra*, 542 U.S. at pp. 304-305.) Consequently, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the findings must be made by a jury and must be made beyond a reasonable doubt.

As discussed above, absent additional findings of fact at the penalty phase of a capital trial in California, the maximum sentence that can be imposed is life without the possibility of parole. (Pen. Code § 190.4, subd. (b).) The only way that a death sentence can be imposed is if jurors first find the existence of one or more aggravating circumstances and then find

that they substantially outweigh the mitigating circumstances. Additional factual findings are clearly required at the penalty phase to justify imposition of a death sentence in this state; those findings must be found by a unanimous jury beyond a reasonable doubt.

For the foregoing reasons, the Court should reconsider its rejection of claims that the California death penalty statutory scheme and sentencing instructions are unconstitutional to the extent that they (1) fail to require proof beyond a reasonable doubt as to any finding that an aggravating factor exists; (2) fail to require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and (3) fail to require that any aggravating factor relied upon as basis for death be found by a unanimous jury.

XIV

THE USE OF CALJIC NO. 8.88 (1989 REVISION), DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As demonstrated in appellant's opening brief (Self AOB 467-489), the use by the trial court of CALJIC No. 8.88 (1989 Revision) was constitutionally flawed. CALJIC No. 8.88 failed to convey critical deliberative principles and was misleading and vague. Whether considered singly or together, the flaws inherent in CALJIC No. 8.88 violated appellant's fundamental rights to due process, fair trial by jury (U.S. Const., 5th, 6th & 14th Amends.), and to a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In respect to appellant's substantive claims, respondent does not respond in kind to appellant's arguments other than to cite the Court's rejection of similar claims in prior cases. (See RB 265-267.) Appellant, therefore, will rely on the arguments previously made in the opening brief.

XV

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In his opening brief, appellant argued that capital punishment violates both international law and the Eighth Amendment's prohibition against cruel and unusual punishment because it is contrary to international norms of human decency. Appellant also argued that even if capital punishment itself does not violate the Eighth Amendment, its use as a regular punishment for a substantial number of crimes does. (See Self AOB 480-486.) To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, and because international treaties ratified by the United States are binding on state courts, the death penalty as administered in California, and specifically in appellant's case, is invalid.

Respondent correctly offers that this Court has repeatedly rejected arguments that the use of the death penalty violates international law, evolving international norms, and the Eighth Amendment. (See *People v. Lee* (2011) 51 Cal.4th 620, 654; *People v. Thomas* (2011) 51 Cal.4th 449, 507; *People v. Moore* (2011) 51 Cal.4th 386, 417; *People v. Perry* (2006) 38 Cal.4th 302, 322.) Respondent thus argues that the Court should continue

to do so in this case as well. (RB 269.)

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." (*Atkins v. Virginia* (2002) 536 U.S. 304, 311, fn. 7 [122 S.Ct. 2242, 153 L.Ed.2d 335].) The High Court explained in *Atkins* (*id.* at p. 311) that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." (*Weems v. United States* (1910) 217 U.S. 349, 367 [30 S.Ct. 544, 54 L.Ed. 793].)

Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted but by the norms that "currently prevail." (*Atkins v. Virginia, supra*, 536 U.S. at p. 311.) The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 10 [78 S.Ct. 590, 2 L.Ed.2d 630] (plurality opinion).) This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of

society change." (*Furman v. Georgia* (1972) 408 U.S. 238, 382 [92 S.Ct. 2726, 33 L.Ed.2d 346] (Burger, C. J., dissenting).)

Recent developments in Eighth Amendment jurisprudence and evolving standards of decency, however, undermine the Court's conclusions and support appellant's claims. Appellant notes the following, significant developments in the evolution of international norms in respect to the death penalty:

1. The United States Supreme Court affirmed that it has looked and will continued to look to the laws of other countries and to international authorities as instructive for its interpretations of the Eighth Amendment's prohibition of cruel and unusual punishments and in determining whether a punishment is cruel and unusual. (*Roper v. Simmons* (2005) 543 U.S. 551, 567, 575-577 [125 S.Ct. 1183, 161 L.Ed.2d 1].)

2. Every nation on the European continent has now abolished the death penalty in law except for the Russian Federation, which is "abolitionist in practice." (Amnesty International, *Abolitionist and Retentionist Countries* [as updated], at http://web//amnesty.org.

The United States Constitution and Supreme Court jurisprudence recognize that international law is part of the law of this land, and that international treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is equated with

federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; U.S. Const., art. I, § 8 [Congress has authority to define offenses against the law of nations].)

This Court has the authority and obligation to consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, this Court should enforce violations of international law where that law provides more protections for individuals than does domestic law.

Evolving standards of decency embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. Punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 999 [111 S.Ct. 2680, 115 L.Ed.2d 836] (Kennedy, J., concurring in part and concurring in judgment).) The natural response to heinous crimes is a "thirst for vengeance." (*Baze v. R*ees (2008) 553 U.S. 35 [128 S.Ct. 1520, 1548, 170 L.Ed.2d 420] (Stevens, J., concurring opn.).) When the law punishes by death, the law descends into brutality, transgressing the Eighth Amendment proscription against cruel and unusual punishment, applicable to the states through the Due Process Clause of the Fourteenth Amendment (see *Robinson v. California* (1962) 370 U.S. 660, 666 [82 S.Ct. 1417, 8 L.Ed.2d 758]); constitutes "gratuitous infliction of

suffering" (*Gregg v. Georgia* (1976) 428 U.S. 153, 183 [96 S.Ct. 2909, 49 L.Ed.2d 859]); and violates the commitment to decency and restraint embodied in the California and United States Constitutions.

Appellant, therefore, asks the Court to reconsider its position on this issue and, accordingly, to reverse the judgment of death imposed on appellant in this case as incompatible with current and evolving standards of international law as applied to or as binding on the laws of the United States and those of the several states, including California, and as contrary to the Eighth Amendment to the United States Constitution.

XVI

THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant's opening brief summarized the various errors that occurred during the guilt and penalty trials and the manner in which they had a combined, negative impact, rendering the degree of unfairness to appellant more than that flowing from the sum of the individual errors. (*People v. Hill, supra,* 17 Cal.4th at p. 847.) Respondent does not directly address -- or even mention -- *Hill* or appellant's arguments. Respondent simply offers instead that all of appellant's assignments of error are meritless or harmless individually, and in combination." (RB 270.) Appellant disagrees.

Even if no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764 [107 S.Ct. 3102, 97

L.Ed.2d 618].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.

Where the Court finds more than one error, it must carefully review not only the impact of each individual error, but the combined impact of all errors found. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 180; *People v. Jones* (2003) 29 Cal.4th 1229, 1268; see also *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [cautioning against a "balkanized" harmless error analytical approach].)

The guilt phase errors included the use of an improper and prejudicial jury questionnaire (Argument I); prosecutorial misconduct during jury selection and argument to the jury (Argument II); trial court error in denying severance of the highly inflammatory counts 11 and 12 (Argument III); insufficiency of the evidence as to count 15 (Argument IV); insufficiency of the evidence as to counts 5 through 7 (Argument V); trial court error in failing to instruct the jury not to aggregate evidence of incidents to corroborate crucial accomplice testimony (Argument VI); and instructional error as to the burden of proof (Argument VII). The cumulative effect of these guilt-phase errors infected appellant's trial so as to render the proceedings fundamentally unfair and a denial of due process (U.S. Const.,

14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill, supra,* 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

The death judgment must also be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1992) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *People v. Brown, supra,* 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the

guilt phase but prejudicial at the penalty phase]; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [98 S.Ct. 1930, 56 L.Ed.2d 468] [reviewing court is obliged to consider cumulative effect of multiple errors on sentencing outcome].)

The errors committed at the penalty phase trial of appellant's case included the seating of unconstitutionally-biased jurors to determine penalty in this case (Argument VIII); the erroneous admission into evidence of, and prosecutorial misconduct in arguing, prejudicial and inflammatory victim impact evidence (Argument IX); the trial court's error in failing to instruct the jury on the appropriate use of victim-impact evidence (Argument X); the failure of the California death penalty scheme to provide intercase proportionality review (Argument XI); the trial court's erroneous instructions on the mitigating and aggravating factors in section 190.3 and the unconstitutional application of these sentencing factors at appellant's penalty trial (Argument XII); the unconstitutionality of section 190.3 and implementing jury instructions owing to the failure to set out the appropriate burden of proof, as well as other constitutional infirmities (Argument XIII); the use of CALJIC No. 8.88 (1989 Revision) defining the scope of the jury's sentencing discretion and the nature of its deliberative process additionally contain other constitutional defects (Argument XIV); and the fact that appellant's death sentence violates international law (Argument XV).

Respondent also asserts that assuming error, even viewed cumulatively, it is not reasonably probable that appellant would have received more beneficial verdicts. Here, too, appellant, strongly disagrees. The combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence. The cumulative effect of these errors infected appellant's trial and resulted in a conviction fundamentally and inherently unfair, a denial of due process, and a constitutionally unreliable judgment of death. (U.S. Const., 5th, 6th, 8th & 14th Amendments; Cal. Const. art. I, §§ 7 & 15.)

While appellant did not expect a perfect trial, he did expect, and was entitled to, a fair one. (*Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; *Lutwak v. United States* (1953) 344 U.S. 604, 619 [73 S.Ct. 481, 97 L.Ed.2d 593].) Accordingly, the combined and cumulative impact of the various errors in this case requires reversal of appellant's conviction on all counts, reversal of the special circumstances. (*People v. Hill, supra*, 17 Cal.4th at p. 847.) Reversal of appellant's death judgment is also mandated precisely because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399 [107 S.Ct. 1821, 95 L.Ed.2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [106 S.Ct. 1669, 90

L.Ed.2d 1]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

XVII

APPELLANT SELF CONTINUES TO JOIN IN ALL ISSUES AND ASSIGNMENTS OF ERROR RAISED BY COAPPELLANT ROMERO WHICH MAY ACCRUE TO HIS BENEFIT

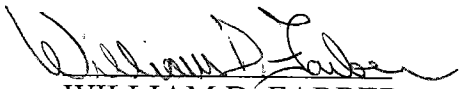
Appellant Self additionally joins in all guilt and penalty issues and assignments of error raised by coappellant Romero in his opening and reply briefs, including the analyses of prejudice, which may accrue to his benefit. (California Rules of Court, rules 8.200(a)(5); 8.630(a); *People* v. *Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5; *People* v. *Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

By reason of the foregoing, and of the arguments advanced in his opening brief, appellant Christopher Self respectfully requests that the judgment of conviction on all counts, the special circumstances, and the sentence of death in this case be reversed.

DATED: September 2, 2011.

Respectfully submitted,



WILLIAM D. FARBER
Attorney at Law

Attorney for Appellant Self

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13-point Times New Roman font and contains 35,760 words.

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

DATED: September 2, 2011.

WILLIAM D. FARBER

PROOF OF SERVICE

RE: **PEOPLE v. ROMERO and SELF**
Supreme Court No. S055856

I, WILLIAM D. FARBER, declare under penalty of perjury under the laws of the State of California that I am counsel of record for defendant and appellant Christopher Self in this case, and further that my business address is William D. Farber, Attorney at Law, 369-B Third Street # 164, San Rafael, CA 94901. On September 2, 2011, I served the attached: **APPELLANT'S REPLY BRIEF** by depositing each copy in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at Henderson, NV, addressed respectively as follows:

HOLLY WILKENS
Supervising Deputy Attorney General
State of California
110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

CALIFORNIA APPELLATE PROJECT
Central Docketing
101 Second Street
Suite 600
San Francisco, CA 94105

GERALDINE S. RUSSELL
Attorney at Law
P. O. Box 2160
La Mesa, CA 91943-2160

MICHAEL GOLDSTEIN
Attorney at Law
P.O. Box 30192
Oakland, CA 94604

JOHN R. GRELE
Attorney at Law
149 Natomas St., Third Floor
San Francisco, CA 94105

MICHAEL MAGNUSON
Attorney at Law
13215 Penn Street, # 205
Whittier, CA 90602

CHRISTOPHER SELF
P.O. Box K-21401
San Quentin, CA 94974

CLERK, SUPERIOR COURT
Riverside County
Appeals Division
4100 Main Street
Riverside, CA 92501

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

DATED: September 2, 2011.

WILLIAM D. FARBER