IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LEON Defendants and Appellant	No. S056766 Los Angles County Superior Court No. PA012903

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Los Angles County

The Honorable Ronald S. Coen

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE/S

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE/S

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

STATUTES

JURY INSTRUCTIONS

CONSTITUTION

TABLE OF AUTHORITIES

CASES **PAGE/S**

OTHER AUTHORITIES

\IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Crim. S056766
	)	
Plaintiff and Respondent,	)	Los Angeles County
	)	Superior Court
v.	)	No. PA012903
	)	
RICHARD LEON	)	
	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a death judgment that finally disposes of all issues between the parties. (Penal Code section 1239.)

STATEMENT OF THE CASE

Richard Leon (a.k.a. Richard Leon Browne), together with Daniel Kevin Taylor, Daron Earnest White, and Ray Rijos, was arrested on February 18, 1993. The four were originally charged as co-defendants in a felony complaint, filed on February 22, 1993, with ten counts: one count of murder with special circumstances, seven counts of robbery or attempted robbery, one count of assault with a firearm, and one count of resisting, delaying, and obstructing a police officer. (7 CT 1518.)[1] The Los Angeles Municipal Court granted a severance of the co-defendants' trials on March 23, 1994. (7 CT 1691.)

Between the filing of the original felony complaint and the amended

[1] In this brief, "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript; and "SCT" refers to the Supplemental Clerk's Transcript.

information in Superior Court, there were four amended complaints. (7 CT 1532, 1548, 1566, 1584.) The final amended information against Mr. Leon alleged twenty-three counts, with two counts of murder (Pen. Code § 187(a)) with special circumstances, to wit, murder committed during the commission of a robbery (Pen. Code §§ 190.2(a)(3)), sixteen counts of robbery (Pen. Code § 211), three counts of assault with a firearm (Pen. Code § 245(a)(2)), and resisting and evading a police officer (Pen. Code § 148(a), VC § 2800.2). (7 CT 1502).

The charges arose out of thirteen separate incidents that occurred between January 12, 1993 and February 18, 1993 in Los Angeles, California. Mr. Leon's preliminary hearing lasted sixteen days between May 12 and June 20, 1994. (1 CT 188 - 6 CT 1479.) The Los Angeles Municipal Court dismissed counts eight, twenty through twenty-two, twenty-five through twenty-eight, and thirty, and held Mr. Leon to answer to the remaining counts on June 20, 1994. (8 CT 1775.) The District Attorney filed the information in the Los Angeles Superior Court on July 1, 1994.

On February 14, 1995, the defense filed a motion to set aside the information, pursuant to Penal Code section 995. (8 CT 1791.) The Court granted the 995 motion in part, dismissing three counts of robbery, and denied the motion as to the other counts on April 4, 1995. (8 CT 1803.)

On October 10, 1995, the case was assigned to Judge Ronald Coen for further proceedings. (8 CT 1811.) The prosecution filed an amended information with twenty-three counts on November 1, 1995, and again amended the information, on December 6, 1995, adding allegations of prior felony convictions pursuant to Penal Code section 667(a)(1). (7 CT 1502, 8 CT 1816.) That same day at his arraignment, Mr. Leon denied the

allegations. (8 CT 1816.) On the defendant's motion, the trial was continued to March 15, 1996 for further preparation. (8 CT 1816.)

The prosecution filed notice of penalty phase evidence pursuant to Penal Code section 190.3 on March 22, 1996. (8 CT 1824.)

The court ordered time-qualification of the jury pool on March 27, 1996, with the length of the trial estimated at two months. (8 CT 1830.) The defense made a motion on April 23, 1996 not to hardship pre-screen jurors, to have voir dire conducted by the court and counsel, and to have Mr. Leon present during the hardship selection process. (8 CT 1832.) Jury selection commenced on April 30, 1996, with hardship screening conducted by the court and counsel without Mr. Leon present. (8 CT 8 CT 1871-74.)

On May 1, 1996, the defense moved to discharge the jury panel on the grounds that its selection was not random because 140 prospective jurors out of 285 were discharged for hardship without inquiry into their claims, and the defense was therefore unable to establish whether the discharges were proper. (8 CT 1872-1879.) The same day, the court denied the motion to discharge the jury panel. (8 CT 1880.) On May 3, 1996, the California Court of Appeal (Second Appellate District) issued an alternative writ of mandate ordering the trial court to either vacate the denial of the motion to discharge the jury panel or to show cause. The appellate court also issued a temporary stay order of all jury selection and trial proceedings. (8 CT 1882-1884.)

The Superior Court vacated its denial of the motion and discharged the jury panel on May 6, 1996. (8 CT 1891.) On May 8, 1996, jury selection commenced anew. (8 CT 1922.) Hardship screening took place on May 8, 1996. (8 CT 1922.) Voir dire in this case took place over a period of two days. (8 CT 1940, 1942.) The jurors were sworn on May 15,

1996 (8 CT 1940), and the alternate jurors were sworn on May 16, 1996. (8 CT 1942.)

The guilt phase trial commenced on May 20, 1996. (8 CT 1922.) The prosecution's case-in-chief took thirteen days, from May 20, 1996 through June 11, 1996. (16 RT 653 - 29 RT 2054.) The defense presented its case-in-chief in one day, on June 17, 1996. (30 RT 2101- 2134.) Both attorneys' closing arguments took place from June 17 to 19, 1996. (30 RT 2147 - 31 RT 2295.) The court instructed the jury on June 19. (31 RT 2295-2347, 8 CT 1977.) The jury deliberated over five days from June 19 to 25, 1996. (8 CT 1977, 1982-1983, 1987.) The court denied a written request from the jury to visit the crime scenes on June 21, 1996. (9 CT 1983.) Mr. Leon waived his right to a jury trial as to his prior convictions, and admitted his felony convictions in case numbers A912916 and YA001361 (Pen. Code § 667(a)(1)). (9 CT 1983.) The jury issued its verdict on June 26, 1996, finding Mr. Leon guilty on all counts and all special circumstances true. (9 CT 2068-91.)

The court scheduled the penalty phase trial to begin on July 8, 1996. (9 CT 2058.) The prosecution presented victim impact evidence as well as evidence of a prior conviction and of alleged prior criminal activity. (10 CT 2292.) The prosecution rested its penalty phase case on July 15, 1996, and the defense gave its opening statement. (10 CT 2302.) All sides rested and presented their closing arguments on July 22, 1996. (41 RT 3268-3335.)

The jury commenced deliberations the next day and on July 24, 1996, the jury issued a verdict of death for both counts of murder. (10 CT 2314, 2373.) The defense made motions for a new trial and to modify the verdict of death, pursuant to Penal Code section 190.4(e). (10 CT 2379-2381, 2386.) On October 1, 1996, the trial judge denied both motions for a

new trial and to modify the verdict. (10 CT 2386.) The judge then pronounced the judgment of death pursuant to the verdict and findings of the jury. (10 CT 2391-2395.)

This appeal to the California Supreme Court is automatic.[2]

STATEMENT OF FACTS

I. GUILT PHASE

A. Introduction

Mr. Leon's convictions arise from eleven separate incidents occurring between January 14, 1993 and February 18, 1993, in Los Angeles. Multiple suspects were involved in each of the incidents.

B. Chan's Shell Service Station Robbery

Mr. Leon was charged with the January 14, 1993 robbery of Chan's Shell Service Station in Hollywood. David Su, the manager of Chan's Shell Service, and Roberto Zaldivar, an employee, were working that day. (17 RT 713-715.) At about 7:00 p.m., Su saw a man walk into the mini market. (17 RT 715.) As Su was engaged in another task, the man came around and put a gun next to Su's neck and demanded that Su open the cash register. (17 RT 715.) Su opened the register with a key, and the man took all the money out of the register. (17 RT 716-717.) The man then ordered Su to the ground. (17 RT 716.) Zaldivar had been in the restroom changing clothes and when he opened the bathroom door he saw Su lying on the floor and a man holding a gun to his head. (17 RT 760-762.) The man with the gun told him to get back into the restroom, and Zaldivar complied. (17 RT 762.) When Zaldivar exited the restroom again about two minutes later, the

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[2] The jury found two allegations of robbery felony murder special circumstance to be true (9 CT 2068, 2085) and one allegation of multiple murder special circumstance to be true. (9 CT 2086.)

man was gone. (17 RT 762.) A video camera in the store recorded the robbery. (People's Exhibit 7, 17 RT 717.)

Mr. Su picked out Mr. Leon in a lineup [3] but he reported that the suspect appeared heavier than the robber, and did not have a moustache, whereas the robber did have one. (People's Exhibit 16, 17 RT 726-728.) Su also chose Mr. Leon's photo from a photo six-pack, but he took five minutes to choose a photo after eliminating four photos. (17 RT 733.) He also wrote on his report that he was not sure of his identification. (People's Exhibit 13, 17 RT 740-741.) Mr. Su testified at trial that the

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[3] The identification procedures used by the prosecution in putting together its case against Mr. Leon were as follows: Witnesses from the ten different incidents were shown sets of photo lineup cards with six photos on each card (hereafter referred to as "photo six-packs" or simply "six-packs").

> The detectives investigating the various incidents each created their own set of photo-six packs. In total, Mr. Leon's photo was included on four photo six-packs, which will be referred to by their exhibit numbers. Mr. Leon's photo was in position 2 in People's Exhibit 43, a six-pack of Hispanic men. Mr. Leon's photo was in position 5 in People's Exhibit 23, a six-pack of white men. In People's Exhibit 10, a six-pack of white and Hispanic men, Mr. Leon was in position 3. In People's Exhibit 79, a six-pack of Hispanic men, Mr. Leon's photo was in position 6.
>
> Additionally, many witnesses attended live lineups. There were three live lineups in total, and the witnesses observed multiple lines on each lineup date. The first lineup occurred on August 26, 1993, and Mr. Leon was in position 4, line number 6. The next lineup was held on September 9, 1993, and Mr. Leon was in position 4, line 3. The last lineup was held on May 17, 1994, and Mr. Leon was in position 5, line 3. The live lineups will hereafter be referred to by the month in which they occurred, for example, "the August lineup." Finally, some witnesses were asked to make in-court identifications. Not all of the witnesses took part in all of the identification procedures.

police showed him security camera footage and pictures before he looked at the six-pack, and that this helped him make his identification. (17 RT 746.) Su identified Mr. Leon in court. (17 RT 728.

Mr. Zaldivar did not identify Mr. Leon in any photo six-pack. (17 RT 763.) Zaldivar also attended lineup, where he chose a suspect who was not Mr. Leon. (17 RT 766.) He did not identify Mr. Leon as the suspect in the courtroom. (17 RT 767.)

Thus, of the two eyewitnesses to the robbery of Chan's Shell Service Station, one did not identify Mr. Leon at all, and the other identified Mr. Leon but said he was not sure because he had not looked at the robber during the incident.

C. Ben's Jewelry Robbery

Mr. Leon was charged with the January 19, 1993, robbery of Ben's Jewelry in Beverly Hills. Several people were working that day: Shant Broutian, a jeweler, Marina Pekel, a secretary, and Yossi Dina, the owner. (18 RT 793, 798-799.) Two customers, Clifford Young and Gregory Lansing, also were in the store during the robbery. Ms. Pekel "buzzed" a customer through the security door.
(24 RT 1574.) This customer looked around and then left; as he was walking out another man, a young African American man, entered.
(18 RT 808, 24 RT 1575, 1577.)

After entering, this man asked to see an item. (18 RT 800.) A second man, a Caucasian with long hair and wearing a long green coat walked in. (18 RT 803.) He then pulled out a gun and jumped or forced his way to the other side of the counter. (24 RT 1575, 1587-1588.)

Shant Broutian saw the white man move quickly to try to get past the counter to the back of the store. (18 RT 1804.) Broutian reached for his

gun, and turned around to find himself facing the white man who was holding a gun. (18 RT 805-807.) Broutian relinquished his gun. (18 RT 806-807.) Another African American man entered the store as the white man directed the store employees to get on the floor. (24 RT 1577.)

Yossi Dina, the owner of the store, testified that he heard a commotion and saw something happening through a double mirror. (18 RT 842.) He opened a drawer of his desk to take out a gun when a young African American man aimed a gun at his face and then put it into Dina's mouth. (18 RT 842-844.) Dina put down his gun; the man took it and asked for the key to the showcase. (18 RT 846-847, 870.)

The black man told the employees to go into the bathroom and sit on the floor. (24 RT 1577.) The robbers bound the mens' hands and feet with duct tape and told them to stay in the bathroom. (18 RT 809, 812-814.) Another black man escorted Ms. Pekel back into the public area and told her to empty the counters, which she did. (24 RT 1578-1579.) She was then taken back to the bathroom and tied up. (24 RT 1579-1581.)

Two customers, Greg Lansing and Clifford Young, who had entered the store during the robbery, were also taken to the bathroom and tied up. (18 RT 813-814.) The robbers took money from both these men. (19 RT 938, 20 RT 991.) One of the suspects told everyone in the bathroom to be quiet, or they would be killed. (19 RT 940.) After the employees freed themselves, they discovered that the safe was open and most of its contents gone, including expensive watches, loose diamonds, and fine jewelry. (18 RT 8181-819.)

Mr. Dina testified that the white man stayed in the hallway, remained very quiet, and did not participate in binding the employees with duct tape. (18 RT 874.) Mr. Broutian also testified that the white robber did not tie

anyone up, and that he was never rough with him. (18 RT 833-837.)

These witnesses did not uniformly identify Mr. Leon as a participant in the robbery. WhileDina identified Mr. Leon in a photo six-pack, in the September live lineup, and in court (18 RT 858-866), Mr. Young did not attend a live lineup (19 RT 941-942), and there is no record that he looked at a six-pack or identified Mr. Leon in court.

From the photo six-pack (People's Exhibit 23), Shant Broutian chose two photographs, one of whom was not Mr. Leon; he testified that he had picked out both because he "didn't want to pinpoint one person" as he was not sure, except that they both resembled the robber. (18 RT 822-824.) Broutian further stated that "he could never be a hundred percent sure." (18 RT 824.) In the live lineup, he did not definitively select Mr. Leon as a suspect. (7 CT 1756.) During his testimony at the trial, Broutian identified Mr. Leon; however, in court he testified that Mr. Leon looked like or resembled the person he saw in the store. (18 RT 824-825.)

Gregory Lansing circled two photos in the six-pack but only initialed the photo which was not Mr. Leon. (People's Exhibit 40, 20 RT 1001.) At a lineup, he selected Mr. Leon. (7 CT 1716, 1753.) During the trial, Lansing identified Mr. Leon as the person with two guns at the jewelry store. (20 RT 999.) Ms. Pekel selected Mr. Leon's photo from a photo six-pack (People's Exhibit 95), but she was not asked to identify a suspect in court.

D. H & R Pawn Shop Robbery

Mr. Leon was charged with the January 30, 1993, robbery of H & R Pawnshop in North Hollywood. Ruben Avsharian, the owner of the shop, was present during the robbery, as were his employees, Hunan Ganazyan, Vardkes Aslanyan and Samuel Karabeyan, and a friend, Ambertsum

Sarkisyan.[4] (20 RT 1006-1008.) Avsharian let two men, one Caucasian and one African American, through the security door. The men were trying to sell a necklace, but Avsharian and the men could not agree on a price, so the men left. (20 RT 1008-1009.)

Shortly thereafter, the two men returned with a third man, another African American. (20 RT 1012-1013.) After briefly browsing, the men headed toward the door. (20 RT 1013.) Then Avsharian heard loud noises, and he turned around to see all three men pointing guns at him and his employees. (20 RT 1014.) The men told everyone to get down, and Avsharian heard shooting. (20 RT 1014-1015.)

Mr. Aslanyan testified that both black suspects had guns, and the white man had a gun but it did not appear to be pointed anywhere in particular. (20 RT 1039-1040.) On cross-examination, Aslanyan was shown the transcript of his preliminary hearing testimony in which he had stated that the white man did not have a gun in his hand. Aslanyan conceded that he did not remember details because it had been a long time since the incident. (20 RT 1091-1092, 1100.)

Hunan Ganazyan testified that one man put a gun to his temple and told him to lie down, which he did. (20 RT 1050-1052.) Avsharian saw the two black men begin firing, and the white man jump toward another counter. (20 RT 1042.) Both Ganazyan and Aslanyan heard gunshots and glass breaking. (20 RT 1056, 1059, 1099.) When Aslanyan heard the glass

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[4] Mr. Karabeyan and Mr. Sarkisyan did not testify at trial. In addition, during the investigation, they did not identify Mr. Leon as a participant in the robbery. Ambertsum Sarkisian did not identify Mr. Leon in the September lineup. (7 CT 1743.) Samuel Karabeyan did not choose Mr. Leon from any photo six-pack, nor did he select Mr. Leon at the September lineup. (7 CT 1744.)

break, the man with the gun was standing near the showcase. (20 RT 1059.) One shot struck Avsharian on the left wrist. (20 RT 1017-1018.) Another bullet struck Sarkisyan in the left leg. (20 RT 1019.) Avsharian and Sarkisyan hid in a storage room until Aslanyan opened the door to allow the intruders to leave. (20 RT 1020, 1085.)

Ruben Avsharian identified Mr. Leon in a photo six-pack. (People's Exhibit 44, 20 RT 1030.) He also identified Mr. Leon in a lineup, but he said the suspect's hair had been longer and he had a moustache, whereas Mr. Leon did not. (7 CT 1749, 20 RT 1029.) During trial in this case, Avsharian was not asked to make an identification.

Hunan Ganazyan, who testified at trial through an Armenian translator, said he identified Mr. Leon in the six-pack and at a lineup. (People's Exhibit 43, 20 RT 1062, 7 CT 1757.) However, Ashvarian had accompanied Ganazyan at both the photo and live lineups and translated for him from Armenian into English. (20 RT 1076-1078.) Ganazyan did not seem to have had an independent Armenian translator for the photo six-pack identification or at the line-up. At trial, he identified Mr. Leon as a participant in the robbery. (20 RT 1051.) Aslanyan Vardkes selected Mr. Leon from a photo six-pack and in the a lineup (People's Exhibit 49, 7 CT 1751) and identified him at trial. (20 RT 1090-1091.)

E. Sun Valley Shell Gas Station Robbery and Homicide

Mr. Leon was charged with the February 22, 1992, robbery of Sun Valley Shell Gas Station in Los Angeles County and the homicide of Norair Akhverdian. That day, Melikset "Nick" Kirakosyan and Mr. Akhverdian were working the 2:00 p.m. to 10:00 p.m. shift at the station. (24 RT 1552.) At about 7:30 p.m., a customer, Raffi Rassam, entered the store to pay for

gas; he did not see anybody else inside. (28 RT 1902.) Rassam saw two vehicles parked in an area behind the store, a Jeep Cherokee and a white car. (28 RT 1905.) He saw a person sitting inside the Cherokee which had its engine running. (28 RT 1905-1906.) Rassam attempted to pump gas but it did not work, so he turned to go back to the store. (28 RT 1907.) He heard coins falling on the floor inside the store and saw Akhverdian with a frightened look on his face. There was another person, with his back to Rassam, inside the store. (28 RT 1907.)

Rassam took a few steps back to take cover; he watched as the man jumped from behind the counter, and then turn and shoot Akhverdian. (28 RT 1909-1911.) The man walked quickly out of the store towards the parked cars, although Rassam did not see whether the man got into a vehicle. (28 RT 1911, 1913.) Rassam ran to a nearby restaurant and called the police. (28 RT 1912-1914.)

Nick Kirakosyan, who was working in the back room of the store, heard a gun shot coming from the store and Mr. Adkverdian yelling. (24 RT 1553-1556.) When Kirakosyan entered the store area, he found Mr. Akhverdian on the floor behind the cash register. No one else was present. (24 RT 1556.) Kirakosyan called 9-1-1 and tried to help Akhverdian. Kirakosyan never saw the suspect (24 RT 1553-1556) and did not recognize the person depicted in the security footage from the station. (24 RT 1564-1565.)

Rassam could not remember whether he was shown photos and video footage between the time of the incident and the time he identified suspects in photo or live lineups. (28 RT 1968.) However, Rassam testified that he was shown videotapes of other similar robberies approximately a week or two after he witnessed the incident at the Sun Valley Shell station.

He also attended a live lineup, about six months after the incident. (28 RT 1971-1972). He said that he "may have" formed the opinion that the robberies depicted in the videotapes were committed by the same person he had seen committing the crimes at the Sun Valley Shell station. (28 RT 1970.)

Rassam identified two photographs, only one of which was Mr. Leon; he commented that both suspects "resembled the type of face build" he saw. (People's Exhibit 132, 28 RT 1915-1916.) He also identified Mr. Leon in a line-up but said "it looked like he was scruffier." (People's Exhibit 134, 28 RT 1917-1918.) He identified Mr. Leon at trial. (28 RT 1920.)

F. Jack's Liquor Store Robbery and Homicide

Mr. Leon was charged with the February 10, 1993, robbery of Jack's Liquor Store, located in Hollywood, and the murder of its owner, Varouj Armenian. Witnesses included Hratch Hannessian, Yepraksia Kazanchian, Anthony Schilling, and Gordon Keller. Hannessian was the owner of a bookstore located next to Jack's Liquor. Kazanchian worked at Tony's Burgers in the same shopping center. Schilling and Keller were repairing the roof of a costume shop in the shopping center. (23 RT 1348, 25 RT 1599, 30 RT 2057.) All of the witnesses heard two or three gunshots. (23 RT 1349, 30 RT 2059, 2114-2115.)

Hannessian testified that seconds after the shots, he looked out of his door and the side window of his bookstore and saw a man with a ponytail leave the liquor store, step into the street and then turn to face the bookstore and try to put a gun inside his shirt or pants. (23 RT 1350-1353.) Hannessian saw the man turn left on Hollywood Blvd. (23 RT 1354.)

Keller testified that after he heard the shots, he looked down from the rooftop of the costume shop and saw two people in front of the liquor store below. (30 RT 2117-2118.) The first was Caucasian with sandy-blonde or dirty blonde hair in a short ponytail approximately three or four inches in length. (30 RT 2118, 2127.) The second had dark hair with a dark complexion; Keller thought he might have been African-American or Hispanic. (30 RT 2119.) From his place on the roof, Keller could not see their faces, just their foreheads. (30 RT 2118-2119.) At trial, Keller testified that Mr. Leon's hair color was not the same as the pony-tailed man he saw on February 10, 1993. (30 RT 2126.)

Anthony Schilling, who was also on the roof, described the first man as having long, brown hair in a ponytail. (30 RT 2062.) He testified that he saw another man jog up to the man with the ponytail. (30 RT 2064-2065, 2068.) Schilling saw the two men walk on together at a "normal" pace and turn down Alexandria Street. (30 RT 2065.) Schilling said the second man appeared to be African-American,[5] with a heavier build and of average height, about 5'10" or 5'11, which was shorter than the white man. (30 RT 2061-2068.)

Yepraksia Kazanchian, who was working at Tony's Burgers in the same shopping center, saw a beige or white car with oak paneling stop on Hollywood Boulevard approximately 25 to 30 feet from the liquor store. (25 RT 1601-1602.) On cross-examination, Kazanchian said she could not remember if the vehicle was ever parked. (RT 1613-1614.) She testified

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[5] When asked if the second man was possibly African American, Schilling said he was reluctant to use racial descriptors, but he did say the second man appeared to have physical characteristics consistent with people identified as African American. (30 RT 2068.)

that the car she saw looked like that the one depicted in People's Exhibit 96, a photo of a white Jeep with side paneling, the car Mr. Leon was in at the time of his arrest. (25 RT 1604-1605.) Schilling, however, did not see a white Jeep parked in front of the liquor store. (30 RT 2088-2091.)

One of these witnesses, Mr. Kazanchian, did not see any suspects at the scene. (25 RT 1606.) Mr. Hannessian testified that he saw the suspect through the glass of his store's front window, at about a twenty-five feet distance. (23 RT 1350-1353, 1434.) He viewed videos of other robberies before making his identification. (23 RT 1413-1414.) Hannessian did not select Mr. Leon from a photo six-pack (People's 79, 23 RT 1418-1419); however, he did select Mr. Leon at a line-up. (People's Exhibit 73.) At trial, Hannessian was not asked to make an identification in court.

At trial, Schilling and Keller both testified that Mr. Leon's hair color was not the same as the pony-tailed man they saw on February 10, 1993. (30 RT 2126.) Schilling said he did not see the suspect in court. (30 RT 2083.) Thus, only one of four witnesses who testified about the Jack's Liquor Store robbery and homicide positively identified Mr. Leon as being present at the crime scene.

G. Seven Star Motel Robbery

Mr. Leon was charged with the February 11, 1993, robbery of Seven Star Motel, located in Hollywood. At that time, Mei Chai was the manager of the motel. At about 2:15 p.m., she opened her office door and two men, one Caucasian and one African American, pushed their way into the office. (19 RT 950-951, 955-956.) The black man had an object that looked like a gun in his hand covered with a towel. (19 RT 962.) The white man opened the money drawer and took all of the money inside. (19 RT 957.) He asked for more money and took her purse, which contained approximately $70 in

cash.[6] (19 RT 957-958.) Ms. Chai did not see a gun in the white man's hands. (19 RT 959.)

During the investigation of this case, Ms. Chai selected Mr. Leon from a photo six-pack, which she initialed although the report was not in her handwriting. (People's Exhibit 38, 19 RT 967.) She selected Mr. Leon from the May lineup. (26 RT 1704-1705.) When Ms. Chai reported the robbery to the police, she told them that she recognized the white man as somebody who had rented a room at the hotel a few weeks [7] before the robbery. (19 RT 972-973.) Ms. Chai gave the police an index card with Mr. Leon's name on it .(19 RT 978.) She said she had also seen him, on the day of the robbery, around the office. (19 RT 969-970.) Ms. Chai identified Mr. Leon at trial as the white man who robbed her. (19 RT 960.)

H. Rocky's Video Robbery

Mr. Leon was charged with the robbery on February 17, 1993, of Rocky's Video in Arleta. That day, Maria Guadalupe Medina was working at the store with her nephew, Jose. At about 12:15 p.m., three men walked into the store, two African Americans and one Caucasian. (22 RT 1264-1265, 21 RT 1159-1160.) The white man jumped over the counter while one of the other men walked around behind the counter. (22 RT 1266-1267, 21 RT 1174.) They took money from the cash drawer and left. (22 RT 1267-1268.) When the two men had gone, the third man was still

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[6] Chai stated on her live lineup report that the suspect stole $470 from her purse (People's Exhibit 39; 19 RT 966-968); however, at court she said the amount taken from her purse was "seventy, not much even." (19 RT 959.)

[7] At trial she said it had been only a few days before the robbery, but then agreed that her preliminary transcript testimony was probably more correct, and it had in fact been a few weeks. (19 RT 973.)

waiting outside with a machine gun. (21 RT 1174-1175, 22 RT 1271.) Between $100 and $200 was taken. After the men left, Jose noticed that a radio was missing. (21 RT 1175, 22 RT 1271.)

Ms. Medina and Jose selected Mr. Leon from a photo six-pack and at a line-p. (People's Exhibits 49, 57, 66, 67.) Jose Medina, however, said of his six-pack selection that Mr. Leon "sort of" looks like the suspect. (People's Exhibit 49.) At trial both witnesses identified Mr. Leon. (21 RT 1160-1164, 1180, 22 RT 1265-1266.)

I. Nice Price Store Robbery

Mr. Leon was charged with the February 17, 1993 robbery of Nice Price Store, located next to Rocky's Video Store. (24 RT 1489.) The only witness to testify was Alma Najarro, the owner of the store. (24 RT 1489.) At approximately 12:20 p.m., she saw two men enter her store. (24 RT 1492.) One of the men told her that it was a robbery.[8] (24 RT 1498.) Najarro said the black man moved behind her at the register. (24 RT 1497.) He told her to give them the cash from the register, which she did. She could not remember to whom she gave the currency. (24 RT 1500-01.) The white man asked for the money in her purse, which she provided. (24 RT 1502-03.) She could not remember how much money she gave them. (24 RT 1501-03.)

Ms. Najarro identified Mr. Leon in a photo six-pack but at the time

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[8] Initially, Najarro's testimony was interpreted as "other man came in, the one that spoke Spanish . . . . he was telling me it was a robbery." (24 RT 1493.) She then testified that she could not remember whether he spoke in English or in Spanish. (24 RT 1498.) Finally, during cross-examination, she said that the man spoke in English. (24 RT 1520-1521.)

said she was not cert[7]ain. (People's Exhibit 86, 24 RT 1518.) She described the robber as looking "Latin," with long hair and acne. (24 RT 1510.) She did not attend a live lineup. (24 RT 1516.) Ms. Najarro identified Mr. Leon in court as one of the robbers. (24 RT 1517.)

J. Valley Market Robbery

Mr. Leon was charged with the robbery of Valley Market in North Hollywood on February 17, 1993. (21 RT 1198.) Joon Kim, who was working at Valley Market that day, testified that at approximately 12:25 p.m.[8] three men entered the store. One of them pointed a black revolver at Kim's face and asked for money from the cash register, which the man reached over the counter and grabbed. (21 RT 1212-1203, 1208.)

Right after the robbery, Mr. Kim told the police that the robber was "black." (21 RT 1208-1209.) In court, Kim did not describe Mr. Leon as black but as ethnically mixed, and not white. (21 RT 1208-1216.) While Kim selected Mr. Leon from a photo six-pack, noting that the photo "looked like" the suspect (People's Exhibit 58, 21 RT 2104), he did not identify Mr. Leon at a line-up. (7 CT 1745.) Kim said that all of the participants in the line-up looked alike to him. (21 RT 1207.) He testified that police had shown him video footage several times, but he was unclear as to how many times he had viewed the video between the time of the robbery, the time he made a photo line-up identification, and the preliminary hearing. (21 RT 1211-1215.)

K. Original Blooming Design Robbery

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[8] The videotape from the store's security camera displayed the time as 13:20:45, or 1:20 p.m., on February 17, 1993. (RT 1203.)

Mr. Leon was charged with the February 17, 1993 robbery of Original Blooming Design, a flower shop in Arleta. (22 RT 1333.) Witnesses to this robbery included Homer Vela, who was working at the florist's that day, and Michael Madelon, Jr., who worked at a nearby business at the time of the robbery. (22 RT 1221, 1283.) Only Madelon testified at trial.

Madelon testified that on February 17, 1993, at some time between 11:00 a.m. and 12:00 p.m., he walked from his place of work to the nearby Altadena Market, and he saw a car backed into a parking space in front of his store, which was in the same shopping center as Original Blooming Design. (22 RT 1223-1224.) The vehicle was running and a man was sitting in the driver's seat with his hand over his eyes. (22 RT 1224.) Madelon walked up to the right side of the car, which he described as an older, dirty, tan Jeep Wagoneer with four doors and bad exhaust. (22 RT 1224-1226.) He did not see the man's face, but he said that the man sitting in the car with his hand covering his face was African American. (22 RT 1226, 1229.) He did not identify Mr. Leon in the photo six–pack, and he never attended a live lineup. (22 RT 1229.)

Over defense objection, the trial court allowed the prosecution to read the preliminary hearing testimony of Homer Vela, because the police said they could not locate him at the time of the trial. (22 RT 1283.) At the preliminary hearing, Vela testified that three men came into the store. One of the men grabbed Vela by the hair and forced him to the ground, telling him not to look up. (22 RT 1285.) One man put a gun to his head. (22 RT 1286.) One of the men tried to open the cash register but had trouble with it. He grabbed Vela by the neck and told him to open it, which Vela did. (22 RT 1288-1289.) The men told Vela to lie down again, and the man

with the gun took the money from the register and asked if there was more money in the store. (22 RT 1289-1291.) Vela emptied his pockets to show that he had no money. (22 RT 1289.) The man behind the counter said, "Let's go, let's go. Leave him alone." (22 RT 1290-1293.) The men left, and Vela called the police. (22 RT 1291.)

The preliminary hearing testimony of Homer Vela, which was the evidence offered by the prosecution at trial, revealed confusion on his part about what the robbers looked like. At one point, Vela said there were two Hispanic men and one African American man, but at another point, he said two of the men were African American and one was Hispanic. (22 RT 1294.) Later he said one was black, one he was almost certain was Hispanic, and the third man looked "mixed." (22 RT 1293-1294.) Vela described the man who put a gun to his head as tall, slim, and fair-skinned, with pitted or scarred skin. (22 RT 1286, 1294-1299.) He described the gun as a small handgun. (22 RT 1287.) He also described the man who came behind the counter as being Hispanic, with a "chunky" build, and about 5'8" or 5'9" tall. (22 RT 1295.) Vela identified Mr. Leon at the preliminary hearing as the man with the gun who took the money from the register. (22 RT 1291.) Vela said he was incorrect when he told police that all three men wore baseball caps. (22 RT 1297.)

Los Angeles Police Officer Michael Windsor, who responded to the robbery at Original Blooming Design, testified about his interview of Homer Vela after the robbery. (22 RT 1332-1334.) Over defense objection, Officer Windsor testified about Vela's description of the suspects. Windsor said that Vela described the shorter suspect as possibly being of mixed race, such as African American and Hispanic, and the tall suspect as being African American. (22 RT 1338-1342.)

Officer Windsor also testified that Vela gave a tentative identification of Mr. Leon in a photo lineup, saying that Mr. Leon "may" have been the suspect. Vela did not identify Mr. Leon in the September lineup. (Defendant's Exhibit A1, 7 CT 1747.) Vela did not make any identification at two of the lineups and at the third one, he wrote that one of the men in the lineups, a fair-skinned black man (who was not Mr. Leon), looked "familiar." (22 RT 1318-1322.)

L. Forensic Evidence

For some of the incidents, the prosecution introduced fingerprint evidence. Evidence concerning weapons (including ballistics evidence) was also admitted.

1. Fingerprint Evidence

Clark Fogg, a police identification technician for the Los Angeles Police Department ("LAPD"), dusted Ben's Jewelry Store for fingerprints. (19 RT 887, 896.) Several law enforcement officers and witnesses were present at the scene after the robbery; the store had not been secured to prevent people from touching items inside the store. (19 RT 889-891.) Fogg recovered nine latent fingerprints in Ben's Jewelry. (19 RT 901-910.) None of these prints matched those of Mr. Leon (19 RT 911.

Peggy Fiderio, a field forensic print expert for the Los Angeles Police Department ("LAPD") who processed crime scenes, collected fingerprints at the H&R Pawn Shop after the robbery. (22 RT 1235, 1240.) The lift cards from the scene were sent to a forensic print expert at the LAPD, who processed the prints. (22 RT 1252.) The print expert, who had about twelve years of experience processing fingerprints, found that none of the lifted prints were matches with Mr. Leon's prints. (22 RT 1252, 1260.)

The District Attorney then contacted Fiderio, who had received a subpoena for the case. (22 RT 1251.) The prosecutor told Fiderio that she was going to have to testify "and it was negative testimony," meaning that no match had been found. (22 RT 1251-1252.) The District Attorney sent the prints to Fiderio, who compared the prints again that Friday before she testified [9]. (22 RT 1252.) Reversing the findings of the original LAPD print expert, Fiderio now concluded that one of the prints did match Mr. Leon's print, and she contacted the District Attorney's Office. (22 RT 1254.)

Fiderio wrote a report in which she said that one of the lifted prints, People's Exhibit 63, matched Mr. Leon's print. (People's Exhibit 65, 22 RT 1249.) She said that she had another print expert in her lab confirm her result. (22 RT 1253.) The report was dated May 24, 1996. (People's Exhibit 65.)

On Tuesday, May 28, Fiderio took a new set of exemplar prints from Mr. Leon in court. (People's Exhibit 62, 22 RT 1240.) She did not explain why she took another exemplar. That afternoon, the day before she was to testify as to her findings, Fiderio compared the new exemplar of Mr. Leon's prints to another print lifted from the scene, People's Exhibit 64. (22 RT 1249.) She then concluded that there was a match between Mr. Leon's prints and the print in People's Exhibit 64. (22 RT 1247.)

It is not clear from the record whether her second apparent match was verified by a second expert, and whether she wrote a report about this second finding. The next day, Wednesday, May 29, 1996, Fiderio appeared

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[9] Fiderio apparently used prints taken from Mr. Leon when he was thirteen years old as the first exemplar of Mr. Leon's prints to compare to the prints lifted at the crime scene. (22 RT 1231-1232.)

in court and testified that she thought both People's Exhibits 63 and 64 were matches to Mr. Leon's prints. (22 RT 1230-1262.) The two prints that Fiderio said she could match were a partial palm print (People's 63) and a partial print of the "lower portion" of the palm, the "delta area" near the wrist (People's 64), both lifted from a glass counter top in H&R Pawn Shop. (People's Exhibits 63 and 64, 22 RT 1243-1245.) Fiderio said the print she lifted in People's 64 was "very, very faint," but that she used it nevertheless. (22 RT 1246.) She also testified that she could not tell what which palm the print in People's 63 was from until she compared it with Mr. Leon's exemplar, at which point she formed the opinion that People's 63 was a left palm print and that it matched Mr. Leon's left palm print. (22 RT 1246.) Fiderio said that one of the partial palm prints on the same card, People's Exhibit 63, did not match Mr. Leon's print. (22 RT 1260.) Other than the two partial palm prints, Fiderio did not testify that any of the prints on the remaining 22 lift cards matched Mr. Leon's prints. (22 RT 1234-1262.)

Under the criteria established by LAPD, a finding of ten similar characteristics is sufficient to determine a match between two fingerprints. (22 RT 1257.) Fiderio testified that "sometimes [she] looks for ten [matching characteristics], and sometimes [she] looks for more." (22 RT 1258.) She said of her comparison of Mr. Leon's prints, "I'm not going to go on an insufficient number of characteristics," but that every agency requires a different minimum number of similar characteristics to make a match. (22 RT 1257.) She did not state how many similar characteristics she found in her comparison of Mr. Leon's prints to the prints lifted at the H&R Pawn Shop. (See People's. Exhibit 65, her report.) Fiderio testified that she subscribed to the "widely-held opinion" that each individual has a

distinct fingerprint, although she conceded that it is not an actual demonstrable fact. (22 RT 1258-1260.

The LAPD also examined for fingerprints the Kit Kat candy bar and one dollar bill found that on the counter in Jack's Liquor Store; none were found. (23 RT 1470-1471.)

2. Weapons Evidence

Detective Oppelt testified that he found two guns in the Jeep Mr. Leon had been driving at the time of his arrest. (26 RT 1683-1685.) One was a blue steel semiautomatic handgun with only one hand grip; "Iver Johnson" and "C.A.L. Dot Dot 380" stamped on it. (People's Exhibit 5, 26 RT 1683-1685.) The Iver Johnson gun had a clip containing eight bullets which were stamped ".380." (26 RT 1688-1689.) The LAPD firearms expert who testified in this case described the Iver Johnson as damaged and in "overall rather poor" condition but "functional." (27 RT 1814.)

The other gun was a blue steel automatic handgun with both of its handgrips, and with "Interarms" stamped on its barrel and "Walther" on its side hand grip. (People's Exhibit 6, 26 RT 1690.) The Walther was loaded with eight bullets, all stamped ".380." (26 RT 1692.)

Detective Oppelt testified initially that the Iver Johnson gun was found in the center of a front seat; later he described it as being found in the "inside console." (People's Exhibit 105, 26 RT 1684-1687.) According to Oppelt, the Walther was found on the left front floorboard near the driver's door. (26 RT 1690.) During cross-examination, Detective Oppelt acknowledged that the property report listed the Walther as having been found on the front driver's seat; this was an "error." Oppelt said he believed that Detective White submitted a follow-up report to correct the

error.[10] (26 RT 1763-1764..) In the police report and testimony about Mr. Leon's vehicle stop and arrest, Officers Eum and Tompkins stated that Mr. Leon's Jeep accelerated rapidly, made sharp turns, wove in and out of traffic, hit several vehicles at sixty-five miles an hour, and finally crashed, causing it to fly straight into the air before it finally landed. (25 RT 1624-1626.)

Witnesses at several of the crime scenes testified about the guns the suspects were carrying.

Gregory Lansing testified about the two guns he saw during the Ben's Jewelry robbery. He described one as a "little silver pistol" that was "sleek looking" and the other as darker and looking like a "revolver or pistol." (20 RT 1002.) Shant Broutian described the white suspect's gun as black and like a revolver. (18 RT 805-807.)

Three witnesses from H&R pawn shop testified about the appearance of guns. Mr. Avsharian thought that one of the heavier, shorter African American men had a "uzi type" handgun; he was unsure what type of gun the second African American man carried but thought the white man held a snub-nose revolver similar to one Avsharian himself owned. (20 RT 1039-1040.) Mr. Ganazyan testified that the gun put to his temple by one of the suspects had a black clip and was not a revolver, but rather a semiautomatic pistol. (20 RT 1050-1053, 1065.)

Testifying about the Jack's Liquor Store robbery, Hratch Hannessian said he was certain that the white suspect had a four-inch, black revolver

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[10] The follow-up report notwithstanding, the prosecutor made reference to the Walther's being in the driver's seat during her opening argument, citing it as evidence that Mr. Leon must have been a gun-man in one or more shooting. (31 RT 2182.)

with a wooden handle. (23 RT 1281, 1400.) Hannessian was familiar with guns because he owned a handgun. (23 RT 1404.) He knew the gun he saw was a revolver because it had a cylinder rather than a magazine. (23 RT 1405-1406.) A drawing of a Walther automatic definitely did not depict the gun he saw. (Defendant's Exhibit E, 23 RT 1408-1409.) He described the suspect holding the revolver as having a brown ponytail that was almost waist length. (23 RT 1373-1374.)

Jose Medina of Rocky's Video testified that both of the men who went behind the counter had automatic handguns. (21 RT 1176.)

Alma Najarro of the Nice Price store thought the white man had a machine gun, not a handgun, because it looked "big." (24 RT 1498.) She testified she never told the police that the white man had a small handgun because she could never give a good description of the type of gun.[11] (24 RT 1511.)

Joon Auk Kim, who testified about the Valley Market robbery, said one of the suspects carried a black revolver. (21 RT 1201-1202, 1208.)

Homer Vela of Original Blooming Design described the weapon he saw as a small handgun. (22 RT 1287.)

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[11] Los Angeles Police Officer Gregory Kim spoke with Ms. Najarro shortly after the robbery. (27 RT 1780-81.) He said that Najarro described two people, one Hispanic male with a blue steel semiautomatic handgun and one African American man with a machine-gun type of handgun. (27 RT 1780-81.) Officer Kim testified that Ms. Najarro did not describe the Hispanic man's gun as a blue steel semiautomatic handgun, but rather, he said he pointed to his gun for comparison and asked Najarro if it was "something like that." (27 RT 1783-84.) When she responded affirmatively, Officer Kim came up with the description himself. (27 RT 1783-84.) Najarro also stated that she did not see the African American man holding a gun, only that she felt something behind her. (24 RT 1499.)

3. Ballistics Evidence

Richard Maruoka, a criminalist with the LAPD, analyzed bullets and spent casings found at the crime scenes at H&R Pawn Shop, the Sun Valley gas station, and Jack's Liquor Store. (27 RT 1785-1786.) Maruoka did not claim that no two gun barrels are alike, but that he is trained to differentiate, where possible, between consecutively manufactured guns of the same make. (27 RT 1840.) He conceded, however, that sometimes, marks on bullets and projectiles are indistinguishable from one another, even if they were made from different guns. (27 RT 1836-1837.) Maruoka further testified that, in the case of high quality weapons, there is significantly less variation from one gun to the next. In his view, the Walther is a very high quality weapon. (27 RT 1842.) Over defense objection, Maruoka testified that Walthers are "unique" in that so few of them are seen at his firearms lab. (27 RT 1862.) However, he also acknowledged that Walther is a "significant" manufacturer of .380 semiautomatics. (27 RT 1862.)

Officer Roberto Yanez collected spent casings, slugs, and other evidence from the crime scene at H&R Pawn Shop. (People's Exhibit 42, 21 RT 1129-1132.) Over defense objection, Officer Yanez was permitted to opine on the nature and trajectory of casings found in the area based on his experience shooting guns, although he was not a qualified expert. (21 RT 1140-1141.) Criminalist Maruoka testified that one bullet and four spent cartridge cases collected at H&R Pawn Shop could be tied to the Iver Johnson gun. (27 RT 1812.) He testified that none of the bullets or casings at H&R Pawnshop matched the Walther. (27 RT 1813.) Four 9-millimeter Luger caliber cartridge cases and two 9-millimeter jacketed bullets were also found on the scene, but none was a match to either gun put in evidence

in this case.[12] (27 RT 1823.)

Detective Marshall White participated in gathering evidence from the scene of the Sun Valley Shell Station shooting. (27 RT 1883.) He recovered one shell casing near the entrance to the store. (27 RT 1884-1885.) An expended bullet was also found embedded in the counter directly behind the cash register. (27 RT 1888.) Detective White also observed a drop of blood right outside the door. (27 RT 1886.) This blood was never analyzed, although it appeared to be fresh. (27 RT 1896.) Criminalist Maruoka found that one bullet and one spent casing from the Sun Valley crime scene matched the Walther gun.

From the crime scene at Jack's Liquor Store, police collected several empty casings, bullets, and bullet fragments. Detective Espinoza found the decedent's body no more than two feet from the front door and about six feet from the cash register.[13] (23 RT 1447-1449, 1454.) The body was partially propped against a small service door, leading to behind the store's counter. (23 RT 1447.) There were gunshot wounds to the face and back of the head. (23 RT 1448.)

Detective Espinoza collected two empty .380 bullet casings, one

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[12] Mr. Maruoka testified that the unmatched bullets and casings could have been fired from a wide range of guns, including guns made by the following manufacturers: Astra, Beretta, Llama, Star, A.A. Arms, S.W.D., Stallard Arms, J and R Engineering, Intratec, Smith and Wesson, and Browning. (27 RT 1823.)

[13] Detective Espinoza determined that the paramedics who had arrived previously had moved the body to render first aid and determine death. (23 RT 1449.)

marked "R.P." and one marked "W.W."[14] (23 RT 1459.) One casing, stamped with "R.P.," was found on top of the counter leading to the cash register. (23 RT 1460.) The second casing, marked "W.W.," was found to the left of the decedent's knee.[15] (23 RT 1459-1461.) Detective Espinoza also collected one intact copper-jacketed bullet [16] and one bullet fragment. (23 RT 1459.) The bullet was also found next to the decedent's left knee [17] (23 RT 1460), and the fragment was found on the floor near to the right hip of the decedent. (23 RT 1463.)

Maruoka testified that he examined the cartridge cases, the bullet, and the expended lead core fragment from a bullet collected at Jack's Liquor Store. (People's Exhibits 84A-D, 27 RT 1829-1830.) He believed that the two cartridges and the intact bullet all matched the Walther.[18] (People's Exhibit 84; 27 RT 1829-1833.) The poor condition of bullet fragment made it unidentifiable. (27 RT 1831.) According to Maruoka, the bullet and cartridges from Jack's Liquor Store could not have been fired from a revolver or snub-nosed revolver, of the type depicted in Defendant's

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[14] The locations of casings and bullets are marked on People's Exhibit 71, a diagram of Jack's Liquor Store. (23 RT 1460.)

[15] Later, the detective testified that this casing was found to the *right* of the decedent's leg. (27 RT 1876.)

[16] In processing the evidence, the envelope containing the intact bullet was marked as found "next to right hip." (23 RT 1469.)

[17] Detective Espinoza testified that this casing was found to the *right* of the victim's leg. (23 RT 1463, 27 RT 1876.)

[18] See section III-D-2, *supra*, for witness Hannessian's description of the man he identified as Mr. Leon and the gun he was holding, which Hannessian said was a revolver with a wooden handle, and which he was sure was not the Walther semiautomatic.

Exhibit G.[19] (27 RT 1852.) Although Maruoka did not document the travel of the casing during the test firings of the guns in this case, he testified that because most people are right-handed, a semiautomatic will normally eject the firing cartridge case to the right. (27 RT 1846.)

II. PENALTY PHASE

A. The Prosecution's Case

At the penalty phase of Mr. Leon's trial, the prosecutor, in her effort to persuade the jury to return a sentence of death, offered in aggravation victim impact evidence as well as evidence of Mr. Leon's prior criminal convictions and alleged prior acts of violence.

1. Victim Impact Evidence

a. Norair Akhverdian

The prosecution presented victim impact evidence in the form of the testimony of relatives of both the men who were killed, Norair Akhverdian and Varouj Armenian.

Zhneta Torsyan, the wife of Mr. Akhverdian, testified with the assistance of an Armenian interpreter. At the time of her husband's death, their two children were ages five and three. (34 RT 2534.) Ms. Torsyan learned of the robbery and shooting from her husband's brother. When she arrived at the hospital, the doctors told her that her husband was dead. (34 RT 2535.) She testified that Mr. Akhverdian and she had a happy marriage and that he was a "great" husband and father. He was also close to her two older children from another marriage. (34 RT 2536.)

According to Ms. Torsyan, since the killing, she has had heart

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[19] Exhibit G was a diagram of a snub nose revolver and a 4 inch revolver.

problems which require that she take medication. Also, his death has adversely affected not only her husband's biological children but his two stepchildren, whom he treated as his own. (34 RT 2537.)

Mr. Akhveridan's younger brother, Hrair Akhverdyan,[20] also testified. He described his close relationship with his brother and stated that Norair frequently assumed a father-like, advisory role for his five siblings. Norair enjoyed helping others and coaching children and young people in swimming and soccer. He was good with his own family and with other families. Hrair and Norair got together every Sunday. (34 RT 2539-2540.) At first, Hrair could not believe his brother had been shot. He rushed to the hospital where he learned Norair had died; thus, he did not have an opportunity to see Norair before he died. (34 RT 2540-2541.)

A videotape of Norair Akhverdian and his family was played for the jury, and Hrair described parts of the tape. The video was filmed at a family wedding, and Hrair identified various portions showing Norair with his wife, his children and stepchildren, and their mother. (34 RT 2543-2545.)

b. Varouj Armenian

Margaret Armenian testified about her life with Varouj Armenian, her husband of seven years, who was 39 years old at the time of his death. (34 RT 2547.) They have two children, Christina and Jack. At the time of Varouj Armenian's death, Christina was five years old and Jack was four. The Armenians owned a liquor store.

Mrs. Armenian described Varouj as the perfect husband, who was

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[20] Although Norair and Hrair were brothers, they spelled their last name differently.

loved by everyone who knew him. (34 RT 2548.) He was everything to her, and she didn't know how to go on without him. Mrs. Armenian also described Varouj as a very good father who was very involved in caring for their children. (34 RT 2548-2549.) On the day of her husband's death, Mrs. Armenian's mother told her that something was going on at their liquor store. (34 RT 2550.) Varouj and Margaret Armenian had been planning on having lunch together at the store that day. (34 RT 2551.)

The prosecutor played the jury a videotape of Varouj Armenian, showing him with his family and performing as a singer. (34 RT 2552.) Mrs. Armenian described what was depicted in the video, including their engagement, marriage, the christening of their children, and Mrs. Armenian's birthday celebration, four days before Varouj was killed. (34 RT 2552-2254.)

On cross-examination, Mrs. Armenian acknowledged that she had filed for divorce from her husband in 1988, and that the divorce became final in March of 1989. (34 RT 2555.) At the time, Varouj Armenian was not working and was living with his mother. Nonetheless, he visited the children regularly. They did not know about the divorce and just thought their father was away pursuing his singing career. (34 RT 2563.) Mrs. Armenian never stopped loving her husband, who always talked about getting back together. By the end of 1990, they had reconciled and remarried. (34 RT 2563-2565.)

Seven-year-old Jack Armenian testified that he missed his father and felt sad since his death. (34 RT 2580-2581.) His nine-year-old sister Christina remembered her father combing her hair, helping brush her teeth, and taking her to kindergarten. She also felt sad after her father's death. (34 RT 2582-2583.)

Varouj's older brother, Garo Armenian, testified that he did not know that Varouj and his wife had divorced. (34 RT 2586.) According to Garo, he saw his brother and sister-in-law once a week; he never saw them quarrel nor did he see his brother treat his children badly. (34 RT 2587.) On occasion, Varouj was out of work, and Garo helped him financially. (34 RT 2587-2588.) On cross-examination, Garo admitted he was unaware that between January and April 15th of 1988, Varouj had lived with their mother. (34 RT 2589.)

2. A Prior Conviction Offered as Factor C Aggravation

The prosecution offered several witnesses to testify about a robbery of which appellant had been convicted and served prison time.

Spencer Woodard testified that in the early morning hours of October 1, 1985, he was driving to work near Palos Verdes Drive. (35 RT 2701.) He saw a person, who looked as though he had been beaten, sitting near a drainage ditch. (35 RT 2701-2702.) Woodard asked the man what happened and whether he needed help. The man said he had been out drinking with some people the night before. They were at bar and then ended up in Palos Verdes. (35 RT 2702.) The man, Richard Burd, asked Woodard to take him to the hospital. (35 RT 2703.) Woodard took Burd to a nearby police station and spoke with a Detective Vanderpool. (35 RT 2703-2704.)

Richard Burd testified that on September 30, 1985, he left work at around 7:00 p.m. after having a couple of beers with a co-worker. He drove a co-worker to the Hawthorne area. (36 RT 2707.) After dropping this person off, Burd picked up a hitchhiker whom he identified as Mr. Leon.

(36 RT 2708.) Subsequently, at Mr. Leon's behest, they picked up a man named Paul. The three of them purchased beer and drove to the Redondo Breakwater, an area with which Mr. Burd was not familiar. (36 2710-2713.) They drank there for awhile and then drove to Palos Verdes where they ended up at a drainage ditch and tunnel. (36 RT 2713-2714.) Burd recalled sitting with Paul and Mr. Leon, drinking beer, talking, hollering in the tunnel to hear the echo and singing. (36 RT 2715.) The next thing Mr. Burd remembered was waking up the next morning. He was in the same location, except he was on his back, hurt, dazed, and with blood all over his face and hands. His glasses were missing, and he could not see out of his left eye. (36 RT 2715-2716.) He climbed up a hill and saw a car; the next thing he remembered was being in the hospital. (36 RT 2716-2717.)

At the time of the incident, Burd was about 32 years old. He did not remember talking to Mr. Leon about drugs. (36 RT 2721.) As far as he could recall, he did not use drugs that night although at a preliminary hearing on November 1985, a judge advised him he did not have to answer a certain question regarding the use of drugs. (36 RT 2723.) He also did not remember telling police that he and the men had shared a 20-pack of Budweiser. (36 RT 2724.) Burd insisted he was not drunk at the time nor did he know if the others were drunk. He did recall some or all of them "howling" into the tunnel. (36 RT 2726.) Burd did not recall other details he gave to police about where he was at the time he was knocked unconscious. (36 RT 2727.)

Arthur Crabby was a police officer who had investigated the Burd robbery. (34 RT 2590-2591.) Crabby testified that several days after the incident, Mr. Burd took the police to the house in Lawndale, where Mr. Leon was arrested. (34 RT 2594-2597.) Mr. Leon told Crabby that he and a

friend, Paul Webber, drove with Mr. Burd to a rural area in Palos Verdes, where he hit Burd over the head with a beer bottle, and Webber took Burd's car keys and wallet. (34 RT 2602-2603.)

3. Uncharged Criminal Incidents Offered as Factor B Aggravation

a. The Jail Incident Involving Chris Anders

Chris Anders testified about an incident which allegedly occurred at the Los Angeles County Jail on August 20, 1993. Anders was incarcerated there as a result of a conviction for a violation of Penal Code section 422, terrorist threats. (34 RT 2611.) He was returning from a visit during which he had received a $20 bill. (34 RT 2612-2613.) He asked a fellow inmate, identified as Mr. Leon, for "jailhouse change" which meant Mr. Leon could keep $1. (34 RT 2613-2614, 2618.) Mr. Leon agreed, and Anders gave him the $20 bill. Mr. Leon shoved the bill down his pants and walked away. (34 RT 2615.) Anders followed him and yelled at him, "What the fuck is going on?" Mr. Leon turned and swung a couple of times but missed Anders. When Anders jerked his head back to avoid the swing, his head hit the concrete wall, and he fell to his knees. Anders grabbed Mr. Leon's foot and twisted it, causing Mr. Leon to fall. Mr. Leon threw the $20 bill on the ground. (34 RT 2616.) When officers arrived, Anders told him, "He tried to rob me. That's my money right there." (34 RT 2630.) According to Anders, he is 6' 4" tall, about four inches taller than Mr. Leon. (34 RT 2621.)

On cross-examination, Anders agreed that he had tried to negotiate with the district attorney for a favorable deal on his own charges. His offer to cooperate with the prosecutor was based on a conversation he had with a man charged with a couple of murders. Anders spoke with an investigator

from the District Attorney's Office about the man's admissions but was later told the prosecutor was not interested in having Anders testify. (34 RT 2632-2634.) Anders claimed that no special offers or deals were made in exchange for his testimony at Mr. Leon's penalty trial. (34 RT 2635.)

John Meehan, a Los Angeles County Deputy Sheriff, testified regarding the incident involving Chris Anders. Meehan spoke with Christopher Anders and Mr. Leon following an altercation in a hallway separating the county jail from the reception center. (35 RT 2686-2687.) Mr. Leon said "nothing" happened while Anders gave an oral and written statement. He claimed that Mr. Leon snatched a $20 bill from him (Anders) and refused to return it. When Anders followed after Mr. Leon, Mr. Leon turned around and struck Anders and pushed him against a wall causing Anders to strike his head. (RT 2687-2688.) By the time Meehan arrived at the hallway, he saw two inmates in a "fighting stance." (RT 2694-2695.) He saw red marks on Anders' face and back. (RT 2697.)

b. The Jail Incident Involving Brian Soh

On July 27, 1994, Los Angeles County Deputy Sheriff Jeffrey Hutchison worked at the North County Correctional Facility in Saugus. (34 RT 2637.) Hutchison testified that he first saw Mr. Leon as he was coming out of a corridor with another inmate named Bryant. They followed a third inmate, Brian Soh, into a day room. (34 RT 2638-2639.) Mr. Leon and Bryant called out to Soh. (34 RT 2640.) According to Hutchison, both Bryant and Mr. Leon were taller than Soh who was approximately 5'7" tall. According to Hutchison, Soh appeared frightened while Bryant and Mr. Leon looked angry or upset. (34 RT 2640-2641, 2651.) Hutchison saw Soh "kind of drop his expression" and in a slouch reach into his pocket and pull something out which he gave to Bryant. Bryant and Mr. Leon left the day

room. (34 RT 2641.)

The exchange of property between inmates at the L.A. County Jail was against jail rules. (34 RT 2654.) Hutchison saw no physical contact except touching of hands between Bryant and Soh. (34 RT 2656.) Hutchison stopped Bryant and Mr. Leon in the hall and asked what was going on. Mr. Leon denied anything was going on. Hutchison asked Bryant if he had received anything from Soh; Bryant denied that he had. (34 RT 2644.)

Officer Hutchison went back to the day room to speak with Soh. (34 RT 2644.) Soh's demeanor had changed; he seemed angry when he told Hutchison that the two inmates had made him give them all his money. (34 RT 2645.) Hutchison went back to the hall and saw a crumpled $20 bill near Mr. Leon's foot.[21] Mr. Leon denied knowing its origin. After Hutchison picked up the bill, Soh said it belonged to him. Hutchison's impression was that Soh was mentally retarded or handicapped. (34 RT 2646-2647.)

On reopened cross-examination, Officer Hutchison could not remember Soh being described as 6 ' 2" tall. In Hutchison's report on the incident, Bryant was described as 6 ' tall, weighing 160 pounds; Leon was described as 6 ' 2" tall, weighing 195 pounds. (34 RT 2662-2663.) During the defense portion of the penalty phase trial, the parties stipulated that at the time of his arrest on March 24, 1994, Soh was reported to be 6 ' 3" tall and to weigh 210 pounds. (36 RT 2777.)

c. The Jailhouse Melee

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[21] Hutchison could not recall if the bill was between the two inmates, only that it was close to one of Leon's feet. (RT 2655.)

Deputy Sheriff Keith Warloe was assigned to the main court lockup on June 16, 1994. (35 RT 2670.) He monitored inmates in cells waiting to go to or return from court. On that date, Mr. Leon was one of the inmates in lockup. Warloe heard a loud commotion and, through a viewing window, observed a fight. He saw between ten and fifteen inmates in a "swarm of people. " Mr. Leon was not in that group. (35 RT 2672-2673.) Warloe saw Mr. Leon leave his position on the west side of the cell, go to the east side where the "pack" was and throw a punch into the pack. Warloe thought a punch landed, although he did not see on whom or what. Mr. Leon returned to the west side of the cell momentarily and then returned to the pack to throw another punch. Warloe did not see anybody come after Mr. Leon. Eventually some officers broke up the fight and removed several inmates, including Mr. Leon. (35 RT 2674-2675.)

At the time of trial in this case, Warloe had no independent recollection of the appearance of the inmate whom he saw throw these punches. Over defense objection, Warloe was allowed to examine Mr. Leon's wristband in open court, and testify that Mr. Leon was that inmate. He also testified that his report on the incident noted that the person had several tattoos. (35 RT 2677-2679.)

B. The Defense Case at the Penalty Phase Trial

Mr. Leon's case in mitigation included rebutting the prosecution's aggravating evidence and offering evidence about the problems Mr. Leon faced growing up as an Native American boy, who also experienced an abusive upbringing and became a drug addict and alcoholic.

1. Defense evidence regarding the Soh incident

The defense presented the testimony of Detective Marshall White, who had interviewed Bryan Soh on May 15,1996, about two months before

Mr. Leon's trial. This interview concerned the incident in the Los Angeles County Jail which the prosecutor had used as an aggravating factor against Mr. Leon in his penalty phase trial. Soh told White he was approached by two inmates, Bryant and Mr. Leon, and one put a headlock on him and the other went through his pockets, removing money. (36 RT 2774-2775.) This version of the facts directly contradicted the testimony of Deputy Hutchison earlier in the penalty trial. Deputy Hutchison testified that he had observed the entire incident and saw no physical contact among the participants except the touching of hands between Bryant and Soh. (34 RT 2656.)

Bryan Soh's medical records from two mental health facilities, Metropolitan State Hospital and Camarillo State Hospital, were admitted into evidence. (36 RT 2776.) As noted above, the prosecution and defense stipulated that at the time of his arrest on March 24, 1994, Soh was reported to be 6' 3" tall. (36 RT 2777.)

2. The Testimony of Tina Vae Browne

Mr. Leon is eleven months younger than his sister, Tina. Tina Browne testified that her earliest childhood memory was when she was about three years old. The two children lived with their parents in a truck their father used for work. At some point, their parents took the kids to live with their paternal grandmother; they stayed there for a long time. (37 RT 2786-2787.)

Ms. Browne testified that when she was about four years old and Mr. Leon, whom she called Richy,[22] was three years old, they began living with

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[22] Tina referred to Mr. Leon as "Richy," as did other witnesses. As Mr. Leon's father was Richard Browne, Sr., Mr. Leon will be referred to as "Richy" to avoid confusion between the father and son.

her parents in a big pink house. During this period, Tina remembered that their parents often stayed up late, sometimes all night long. (RT 2789.) She recounted one memory: once when she climbed up on the counter to get into a cupboard, she accidentially knocked a five pound bag of sugar on the floor. When her father woke up, he became very angry, blamed Richy and beat him. Tina did not want to admit she was at fault because she was afraid she would be beat even though her father never beat her because her mother would intervene. (37 RT 2790.)

Ms. Browne also testified about an incident, which her father bragged about to his friends, when he put Richy, about four years old at the time, into a closet. With the door closed, her father blew marijuana smoke into Richy's face and then laughed when Richy came out and tried to walk around, appearing to be stoned. (37 RT 2804.)

Tina described her parents' friends as follows:

> They were very dirty. Scary looking. They just acted strange. They'd talk and just run around. Now I know it was because they were drug addicts, but as a child I didn't know that. I just thought they were weird.

(37 RT 2791.)

The family moved frequently. After the pink house, they moved in with their maternal grandmother on Sequoia Street in Los Angeles. Tina remembered that their father only slept at that house; he would leave when awake because it was a small two-bedroom house. He did not have a job and would take Richy, now about eight or nine years old, with him when he left. (37 RT 2792-2793.) Their maternal grandmother did not like their father because he was "white." Their grandmother, a full-blooded "Indian"

woman, viewed white men as bad. (37 RT 2794-2795.) She often urged their mother to leave their father because "he's no good." (37 RT 2796.) On the weekends, their uncles, aunts and cousins would gather in their grandmother's large backyard. There was a lot of drinking, and some people would get drunk. Their mother and grandmother were very proud of their Native American heritage and encouraged Tina and Richy to become involved in activities at the American Indian Center in downtown Los Angeles. (37 RT 2847.)

Ms. Browne described a family dynamic in which Richy was the scapegoat, blamed for things that angered their father. She testified about extended physical beatings where her father would strike Richy with a belt or tracks from a race set. Richy would cry and scream during these beatings. Tina remembered one time when, after the beating, she went into the bedroom and Richy was on the bed crying, rolled up in a ball. He was about eight or nine years old at the time. (37 RT 2797-2798.)

About a year later, the family moved into a big Victorian house in south Los Angeles. There were three bedrooms on the top floor, and the children were kept upstairs while their parents had lots of parties on the first floor. Ms. Browne remembered not being allowed to go downstairs, and "weird" people coming through the house. When she was about 11 or 12 and Richy was about 10 or 11 years old, their mother had her first heart attack. (37 RT 2800-2801.) With their mother hospitalized, Tina, Richy and their brothers were left in the care of a father who virtually ignored them. Downstairs, she found people asleep on the floor as well as needles, paraphernalia, marijuana, and beer cans. (37 RT 2802.)

About a year later, the family was evicted from that house, and they moved near relatives in Lawndale. Ms. Browne testified that this was a

good period in their lives. Their parents had quit doing drugs, and they lived in a nice three-bedroom house with a double-car garage. (37 RT 2806.) Their father had a job and bought a station wagon. They even got a dog. Life was "going great then." (37 RT 2806.)

Ms. Browne testified about incidents which occurred before they moved to Lawndale. Several times she saw Richy give their father money which he had stolen while visiting their grandmother when she was working as a live-in maid for the Berman family. She learned that her father had told Richy how to take money from Mr. Berman when he was sleeping. (37 RT 2808-2809.)

When Richy was about 12 years old, he ran away from home for about three days. He went with a friend to the Bermans and stole money. Then he and his friend stayed in Hollywood while they spent the money. Their father found Richy, brought him home and punished him. He seemed to be angry that Richy had not turned the money over to the family. (37 RT 2810-2811.) Ms. Browne testified that their mother did not know about this father-son larceny scheme. (37 RT 2811.) Two months later, Richy ran away again and stole more money from the Bermans. This time, their father took Richy to the authorities, and he was placed in juvenile hall as an incorrigible. (37 RT 2811.)

Richy was in and out of the house during their teen years. When he was detained at Boys' Republic, he did well, even becoming "mayor" of the institution at one point. However, Richy did get in trouble at these juvenile facilities and was AWOL for about three months. During that period, their mother saw him at a convenience store. She was deeply hurt because Richy did not talk to her but ran away. (37 RT 2813-2814.) Richy never saw his mother again, because soon after she had another heart attack and then died

while he was again incarcerated at Boys' Republic. (37 RT 2815-2816.)

Following their mother's death, their father slipped into old habits, drinking and smoking marijuana and not going to work. He lost the job which had supported their suburban lifestyle. He often took the two younger children, Nicky and Joey, with him to stay in the car while he went drinking. (37 RT 2820.)

When Richy returned from Boys' Republic, Tina and he started using drugs. (37 RT 2821.) Although their father was drinking and doing drugs, he was angry about Richy's and Tina's behavior. He moved with Nicky and Joey to the mountains to live in a trailer. Tina and Richy, now 18 and 17 years old, stayed alone at the house. They sold the household furnishings at garage sales and used the proceeds for drugs. When the utilities and telephone services were shut off, they moved into a low cost apartment. (37 RT 2822.) Soon thereafter, Ms. Browne became pregnant. Because the baby's father was not involved, Richy took on the role of provider, paying the rent and other bills. (37 RT 2823.)

On cross-examination, Ms. Browne agreed that when she was young, including when she was pregnant, she had used speed. (37 RT 2827.) She was never sure how her brother got money that supported them, although she suspected he was committing crimes. (37 RT 2828.)

Ms. Browne believed that her father taught Mr. Leon how to steal and how to be a violent person. (37 RT 2830.) She agreed that she never saw the beatings, but she could hear them through the closed door. She could not recall seeing bruises on Mr. Leon or whether he had needed medical attention. (37 RT 2832.) Ms. Browne testified that her father beat Mr. Leon on his buttocks because she had heard him say, "Pull your pants down and lay on the bed face down." (37 RT 2833.) She maintained that

these beatings were not a result of Mr. Leon's actions. When asked about Mr. Leon's behavior at that time, she testified that the "provocation was nothing serious . . . ordinary mischief. . ." (37 RT 2835.)

In response to the prosecutor's questions on cross-examination, Ms. Browne stated that at age 12 when Mr. Leon was stealing from the Bermans, he did not know the difference between right and wrong. Because his father put him up to stealing, she believed that Mr. Leon must have thought it was all right. (37 RT 2850.) In Ms. Browne's view, the primary difference between her brother Richy and her as they were growing up was that she was a girl, and her mother protected her. (37 RT 2852.) She also agreed that in this trial, she had testified about events which she had not earlier disclosed to the defense investigator. (37 RT 2852-2854.) Some of the things she had never told anyone before. (37 RT 2852.)

On re-direct examination, Ms. Browne explained that her mother supervised, reprimanded and disciplined her while her father took over those duties with Mr. Leon. Her father never abused her in the same way he did Mr. Leon. (37 RT 2863.) She reiterated that it was difficult to open up to others about unpleasant family secrets. (37 RT 2870.) She held back on specifics of her father beating Mr. Leon and had never even talked to Mr. Leon about it. (37 RT 2873.) Ms. Browne denied that she had fabricated these beatings. (37 RT 2875-2876.)

3. The Testimony of Nicholas Browne

Nicholas Browne, often referred to as Nicky, is Mr. Leon's youngest brother, seven years his junior. (37 RT 2890.) He testified that their father used physical force when angered. When Nicholas was 14 years, his father put a pillow over Nicholas' face while he was lying on a couch and jumped up and down, almost suffocating him. When his father let him up,

Nicholas' mouth and nose were bleeding. (37 RT 2879.) When his father was angry he would make threatening statements, like "I brought you into this world, I can take you out of this world," or that he would send Nicholas to "see [Nick's] mother in the spiritual world." (37 RT 2880, 2882.) Nicholas was denied food as punishment on occasion. (37 RT 2882.) Nicholas testified about an incident with his father which was similar to the one described by Tina involving Mr. Leon and marijuana. His father asked Nicholas if he wanted to get "coo-coo." He gave him a cigarette, but Nicholas realized it was not a regular cigarette and quickly extinguished it because he believed it was probably laced with PCP. (37 RT 2880-2881.)

Other abusive behavior emerged after their mother died and the younger boys moved with the father to the mountains to live in a trailer. When Mr. Browne got angry at the boys, he would move the trailer during the day while they were at school. When his brother and he came home, their "house" would be gone. Nicholas found this extremely upsetting, and it would sometimes take them an hour or two to find it. (37 RT 2883-2884.)

Nicholas remembered the Christmas of 1988; Mr. Leon was working, and he showered the family with gifts. He gave Nicholas a basketball and a Laker's shirt. About this time, their father moved from Los Angeles to Las Vegas and left Nicholas alone. (37 RT 2884.) Mr. Leon made sure Nicholas had food, clothes and a place to sleep. Nicholas testified that loved his brother even though he had been convicted of very serious crimes. (37 RT 2885.)

4. The Testimony of Shirley Kolb

Shirley M. Kolb, Mr. Leon's maternal aunt, testified about the relocation of Mr. Leon's family to Los Angeles from a reservation in Pine

Ridge, South Dakota. Ms. Kolb was several years older than Mr. Leon's mother, Vae Rose. Their parents did not approve of Vae's choice of Richard Browne, Sr., as a boyfriend, but eventually gave their consent to a marriage when they realized they would lose contact with Vae if they tried to break them up. (37 RT 2897-2898.)

Ms. Kolb testified that her mother Josephine's dislike of Richard Browne increased after Tina and Richy were born. According to Ms. Kolb, Richard would not work or support his children, and he used a lot of drugs. (37 RT 2901.) Josephine would pick up things for the children and buy extra food for them. When Tina was about eight or nine years old, Ms. Kolb left Los Angeles. (37 RT 2902.)

After Vae Rose's death, Ms. Kolb received a telephone call from Tina who wanted to know if Richy and she could come live with Kolb in Hayden, Colorado. Kolb agreed to the arrangement. She later received another call from Tina, who wanted to know if their father could also come. Kolb told her that Richy and she were welcome but their father would have to have his own place. (37 RT 2907-2908.) They did not move to Colorado.

5. The Testimony of Boyd Hiatt

Boyd Hiatt, Mr. Leon's cousin, was two years younger than Mr. Leon's mother, Vae Rose. (37 RT 2910.) At the time of the trial in this case, he was living on the Pine Ridge reservation in South Dakota. (37 RT 2911.) When Vae Rose was nine years old, she and her parents moved from the reservation to Los Angeles. (37 RT 2911.) When Boyd first met Mr. Leon's father, Richard Browne, both Boyd and Richard were using drugs. According to Boyd, Richard introduced Vae to drug use, including marijuana, speed, bennies, amphetamines and intravenous drugs. (37 RT

2912.)

After Richard and Vae married, Boyd would visit them and "hang out." According to Hiatt, there would be addicts, robbers and thieves visiting their house. There always seemed to be some kind of commotion. (37 RT 2913.) Hiatt recalled seeing Vae use drugs, such as speed and marijuana, and smoke during her pregnancy with Mr. Leon. (37 RT 2914-2915.) He also recalled an incident where somebody overdosed on methamphetamine, and nobody knew what to do about it. One time, he remembered Tina, then quite young, found a benzedrine tablet on the floor and ingested it. She was rushed to the hospital. (37 RT 2915-2916.)

Mr. Hiatt testified about Richard Browne's treatment of Mr. Leon. Mr. Leon's father often yelled at him, humiliating him in front of others. He would tell Mr. Leon, "I made you" and "I can unmake you." Browne would tell friends to hide their valuables because Mr. Leon was coming to visit. Hiatt testified that he had seen Mr. Leon's father turn him upside down, shake him to get all the money out of his pockets. (37 RT 2917.)

When visiting Grandma Josephine's house, Mr. Leon heard her verbally put down his father, Richard. Although Richard would leave when this started, Mr. Leon stayed and heard the insults. Mr. Leon's uncles would often join in denigrating his father. (37 RT 2919-2920.)

On cross-examination, Mr. Hiatt agreed that he had had problems of his own and had spent time in county jails . He also admitted that he was under the influence of drugs during much of the time he spent visiting the Brownes' home. The visits ceased when Mr. Leon was about nine or ten years old. (37 RT 2921-2922.) Hiatt testified he stopped using drugs when he was about 27 years old. (37 RT 2923.) He did not think Richard Browne loved Mr. Leon because he never saw Richard hug or be kind to

son, mostly he just yelled at him. (37 RT 2923.) Hiatt testified that Mr. Leon's mother seemed to love him. Over the years, Hiatt heard stories about Mr. Leon getting involved in drugs and alcohol at an early age. (37 RT 2924.)

6. The Testimony of Karen Chambers

Karen Chambers, a retired biology teacher and school counselor, testified that in 1978, she knew Mr. Leon, known then as Richard Browne, when she was teaching in the Lawndale school district. (38 RT 2951-2952.) She had not seen Mr. Leon since that time.

In addition to holding a masters degree in psychology, Ms. Chambers had trained with behavioral scientists who worked with recovering alcoholics and drug addicts and their families. As a result, she was familiar with symptoms exhibited by children from dysfunctional drug-addicted and alcoholic families. (38 RT 2952-2953.) She testified about the symptoms exhibited by children from these families. She described four roles that such children adopt to cope with their family situation: (1) the perfect child who does everything right for attention; (2) the clown who vies for attention by acting out; (3) the bad child; and (4) the lost child. (38 RT 2954.)

Ms. Chambers described Mr. Leon as the classic "lost child." He did not act out but was relatively invisible and hard to get to know. (38 RT 2955) The "lost child" tends to be withdrawn, to separate from others and not get much attention. When Chambers knew Mr. Leon in 1978, he was socially withdrawn and did not interact a lot with other children. (38 RT 2964.) Ms. Chambers did not see Mr. Leon in his family setting, but she counseled him regularly. Even though it had been 18 years since she had seen Mr. Leon, she remembered spending a lot of time with him. (38 RT 2955.)

On cross-examination, Ms. Chambers said she did not know that Mr. Leon had "robbed" a blind man in his home or that he had been in and out of different juvenile institutions during his adolescence. (38 RT 2958-2959.) Ms. Chambers was unaware of Mr. Leon's adult criminal history. (38 RT 2960.) She also was not aware of disciplinary problems at the time she counseled Mr. Leon and did not remember seeing evidence of physical abuse. Ms. Chambers also knew Mr. Leon's sister, Tina Browne, because she was also one of her students as well. (38 RT 2961.) Her memory was that Tina was a very good student who exemplified adapting to being a child of addictive parents by being the "perfect child." (38 RT 2962.) Ms. Chambers testified that she counseled Mr. Leon about "trouble" at home. (38 RT 2965.)

7. The Testimony of Donald Friel Turney

Donald Friel Turney, a school counselor, was involved in adult education for people in jail. According to Turney, in August 1994, while Mr. Leon was an inmate, he obtained his high school diploma and a certificate of achievement in computer operations. (38 RT 2967-2968.) He attended classes from January 1994 through September 1994 while learning computer operations. (38 RT 2969.)

In March of 1994, Mr. Turney received and reviewed an official transcript, marked as Exhibit Z, for Mr. Leon from various youth training schools. (38 RT 2984-2985.) The transcript showed that in grade 12, Mr. Leon had attended a substance abuse education class and received a grade of "A." (38 RT 2986.)

8. The Testimony of Debra Lyn Browne

At the time of her testimony, Debra Lyn Browne was married to

although separated from Mr. Leon's father, Richard Browne, Sr., with whom she had four children. (38 RT 2988.) She also had two older children from a previous relationship. Ms. Browne testified that in the past, Mr. Leon had often babysat her children.

In about 1991, Ms. Browne moved to Las Vegas with the two younger boys, and she was barely making enough money to pay rent. At the time Mr. Leon was also living in Las Vegas in his own place and working. Mr. Leon would come by with food or milk and diapers and to help her out. On cross- examination, she admitted that in 1988, her husband and she received drugs from Mr. Leon in exchange for the use of a car. During that time, for a period of about six months, she was using methamphetamine. (38 RT 2992- 2993.)

9. The Testimony of Dr. Robert Ryan

Dr. Robert Ryan testified as an expert in alcohol and drug abuse, particularly as such abuse exists among Native Americans. Dr. Ryan is himself Native American and grew up on an Indian reservation. (39 RT 3042-3043.) He testified that he had been in the counseling field since 1973 and headed the American Indian Mental Health Research Center from 1976 to 1981. He is a licensed professional counselor in Oregon and a certified mental health counselor in Washington state. He attained the highest level of certified chemical dependency specialist. (39 RT 3042-3043.) At the time of trial, Dr. Ryan directed a residential treatment program for adolescent Native Americans. (39 RT 3045.)

Dr. Ryan interviewed Mr. Leon prior to trial. He also reviewed Mr. Leon's court and probation records as well as his school records, CYA evaluations and prison parole records. Dr. Ryan also reviewed copies of relevant police reports and interviews with Mr. Leon's family. (39 RT

3046-3047.)

It was Dr. Ryan's professional opinion that Mr. Leon was addicted to alcohol and drugs. Mr. Leon has a familial history of alcohol abuse. Drinking appeared to have been an important part of all family activities on the maternal side of his family. (39 RT 3071.) Dr. Ryan testified that Mr. Leon was addicted to both alcohol and drugs, a conclusion based on the following factors. (39 RT 3072.) First, it appeared that Mr. Leon was exposed to alcohol and drugs from birth or perhaps even, given his parents' use, in utero. Mr. Leon had started drinking as early as age nine. (39 RT 3072.) Parental abuse of alcohol and drugs is one of the best predictors of such abuse by children. The correlation between alcoholism on the part of a father and his sons is particularly strong. (39 RT 3075.) Mr. Leon also experienced a conflict of identity because his father was white and his mother's Indian family rejected his father at least in part for that reason. (39 RT 3074.)

Dr. Ryan described the course of Mr. Leon's adolescence. When Mr. Leon was doing well at Boys' Republic and wanted to go home, his parents would not allow it. At that point, in Dr. Ryan's view, Mr. Leon became very disillusioned and felt unwanted by his parents. Looking at Mr. Leon's records, Dr. Ryan discerned an acceleration of his drug use resulting from his feelings that because he no longer had a home or family support, he was ready to give up. (39 RT 3076.) Dr. Ryan described increasing negative behavior by Mr. Leon which ended up with him going AWOL from Boys' Republic. While on AWOL, Mr. Leon was picked up for another crime and went back to Boys' Republic.

After Mr. Leon's mother died, he turned to heavier drugs. (39 RT 3078-3079.) According to Mr. Leon's records, whenever he was released

from custody, he would start using drugs again. (39 RT 3079.) Dr. Ryan concluded that at the time of the commission of the crimes in this case, Mr. Leon was an addict; he was using a variety of drugs as well as alcohol. (39 RT 3079.) Dr. Ryan based his opinion on court records, prison medical records and Mr. Leon's statements. (39 RT 3080.) Mr. Leon experienced blackouts and periods of time he could not remember. Almost every crime Mr. Leon committed was under the influence of a drug or alcohol. (39 RT 3079-3081.)

Dr. Ryan testified about the history of Native Americans, particularly the Sioux people, over the past century . (39 RT 3049-3059.) In the 1880s, the Sioux were put on reservations by the federal government. (39 RT 3051.) Indian children were then separated from their parents and sent off to boarding schools. (39 RT 3055.) In addition, the government forbade traditional Native American religious practices. (39 RT 3055.) By the 1950s, the federal government had started relocating Indian families away from the reservations to urban settings, with the stated goal of training them in different trades and occupations. (39 RT 3056.) In Dr. Ryan's view, these relocations programs generally failed. For example, he cited studies of Navajo people who had moved to Denver, showing that about 99% of those relocated suffered from alcoholism. (39 RT 3057.)

Dr. Ryan opined that anger and misplaced aggression were common among those who had been relocated because their efforts to fit into white society did not succeed. Those who were trained in occupations often could not get jobs because of the color of their skin (39 RT 3058-3060.)

Dr. Ryan testified that there continues to be much anger among Native Americans about the injustice their families have suffered over the generations, including the loss of land and identity. These feelings are

passed from generation to generation. (39 RT 3060-3061.) Dr. Ryan related this phenomenon to Mr. Leon's life. His mother's family moved from reservation in South Dakota to Los Angeles as part of a relocation program. (39 RT 3062.) Mr. Leon also listened to his grandmother's constant disparagement of his white father, which reflected her deep distrust of all white people. (39 RT 3063-3064.) While Mr. Leon was taught to be proud of being Indian, he did not really experience Native American culture in a meaningful way because it was not available in Los Angeles. Dr. Ryan characterized the powwows Mr. Leon may have attended as being social events which did not provide exposure to the deeper roots of Native American values. (39 RT 3065.)

Dr. Ryan also testified about the history of prevalent alcohol addiction among Native Americans and in Mr. Leon's family of origin. The problem dates back to early trading between the white inmmigrants to North America and the Native Americans. White traders provided Native Americans with rum. It was not until 1953 that Indian people could purchase alcohol legally. (39 RT 3068-3069.) When alcohol was illegal, it was common for Indians to drink it quickly and thus become drunk; therefore, there was not a tradition of social drinking. (39 RT 3069.) In addition, there was a lot of bootlegging of alcohol on reservations. These factors, combined with the lack of jobs, led many Native Americans to seek escape through alcohol. (39 RT 3070.) Alcohol and now drug addiction is the biggest health problem on reservations. (3071-3071.)

On cross-examination, Dr. Ryan reiterated his opinion that the cultural and familial background of Mr. Leon largely determined the course of his life. Dr. Ryan described Mr. Leon as a "marginal man," who existed in a vacuum between two cultures. (39 RT 3124.) When pressed by the

prosecutor to agree that Mr. Leon made the "choice" to commit crimes, Dr. Ryan questioned the relevance of "choice" in this context because such factors as Mr. Leon's parents' drug use were beyond his control yet dramatically affected the course of his life. (39 RT 3126-3127.)

C. The Prosecution's Rebuttal Case

1. The Testimony of Boyd Hiatt

The prosecutor recalled Mr. Leon's mother's cousin, Boyd Hiatt, to the stand. Hiatt testified to a close relationship with Vae Rose and Richard Browne, Sr., when their children were small. According to Hiatt, at that time, he did not see Vae and Richard consume large amounts of alcohol. (40 RT 3159.) Prior to Mr. Leon's arrest, he lived with Hiatt for about a month and a half. (40 RT 3160.) He explained that he was mistaken when he told the defense paralegal it was for six to nine months. (RT 3160.)

Mr. Hiatt testified that before February 1993, he tried to help Richard get his life together. During this period, Mr. Leon worked for about a month serving coffee at Alcoholic Anonymous meetings. Hiatt agreed that he had been mistaken when he told the defense paralegal that Mr. Leon did this job for two to three months. (40 RT 3162.) He testified that he took Mr. Leon to about three or four powwows in Orange County and Cerritos and helped connect Mr. Leon with a spiritual advisor. At the powwows, sobriety was emphasized. (40 RT 3163-3166.) During that period, Mr. Leon's brother, Nick, was also living with Mr. Hiatt. Nick had an argument with Hiatt and left; shortly thereafter, Mr. Leon also left Hiatt's house. (40 RT 3168-3169.) About a year later, Mr. Hiatt learned that Mr. Leon had been arrested for the current offenses. (40 RT 3168-3169.)

On cross-examination, Mr. Hiatt explained that Mr. Leon had stayed with him for about six months before October 1991. As far as he knew, Richard was clean and sober during that time. Mr. Hiatt testified that as a very young man he had used drugs but had stopped about the time when he turned 21. About that same time, he started drinking alcohol and eventually became an alcoholic. (40 RT 3172.) Hiatt became sober and maintained the sobriety for eight years. (40 RT 3175-3176.) It was during this period that Mr. Leon came to live with him. (40 RT 3173.)

In explaining his statement during direct examination that he did not see Richard Browne, Sr., drink heavily, Hiatt testified that he did not really monitor Browne's consumption of beer. At the family gatherings at Vae Mae's mother's house, there was heavy consumption of beer by the adults. (40 RT 3182.) Hiatt remembered that Richard Browne, Sr. occasionally got drunk which displeased Mr. Leon's mother, Vae Rose. Richard smoked marijuana "all the time" and admitted to using hard drugs, including speed. (40 RT 3182-3184.) The parties stipulated that (1) Boyd Hiatt had previously given inconsistent statements to the defense investigator to the effect that he remembered Vae Rose and Richard Browne, Sr. drinking only minimally and (2) Tina Browne in the earlier interviews with the defense investigator did not state that Mr. Leon had been beaten regularly as a child. (40 RT 3197-3198.)

D. The Defense's Surrebuttal Case

John Jenks, a former police officer and narcotics investigator with two law enforcement agencies in Ventura County, testified as an expert witness on drug and alcohol dependency. (41 RT 3237.) Mr. Jenks described himself as alcoholic/addict, and at the time of his testimony, he had been sober for almost nine years. (41 RT 3238.) After leaving the

police department, he completed a two year advanced drug and alcohol counseling skills certificate program at the University of California at Santa Barbara. (41 RT 3239.) Jenks had previously testified as an expert witness in the area of drug and alcohol dependency. (41 RT 3240.)

Jenks testified that the basic definition of addiction is the continued and repeated use of the substance despite adverse consequences. (41 RT 3251.) He described the four basic stages of addiction, a progressive illness: (1) experimentation; (2) social use; (3) development of personal or financial problems; and (4) addiction or dependence, whether psychological or physical. (41 RT 3252.) In the first six to 18 months of recovery, addicts and alcoholics will suffer from post acute withdrawal symptoms which means they are not emotionally balanced. Their thought processes are clouded, and reason and judgment are impaired. In his experience, it is very common for addicts to relapse. (41 RT 3256.)

The reason for relapse may be a trigger, something which emotionally or situationally triggers the addict's abuse. (RT 3257.) Triggers include emotional stress, environment, fear, and loneliness. A common sign of a relapse is isolation or withdrawal from others and support. (RT 3258.)

A person may show the effects of the use of drugs and alcohol regardless of whether the person is actually intoxicated or not. The abuser can appear normal to the outside observer. (41 RT 3259.) Jenks has seen clients using methamphetamine go as long as 10 to 14 days without sleep or food, just doing drugs. This is known as a "run," a period of intense drug use, commonly seen with drugs such as cocaine or methamphetamine. Mr. Jenks testified that addiction affects one's moral judgment because the

drug becomes "God," the only important thing in life. Families, careers, health, everything becomes a distant, secondary concern. (41 RT 3260.)

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I

THE INADEQUATE JURY SELECTION PROCESS IN THIS CASE VIOLATED MR. LEON'S CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY

The trial judge unnecessarily restricted the jury selection process in this case. He severely limited voir dire, despite defense counsel's repeated requests that the process, including the juror questionnaire, be expanded so as to ensure that the jury in this case would be impartial and unbiased, particularly on the issue of the death penalty in a case involving more than one charged murder. The inquiries of the prospective jurors about their attitudes about the death penalty were limited to the few questions on the juror questionnaire and the same four pattern questions,[23] posed in open

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[23] Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty issue?

> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance merely to avoid the death penalty issue?
>
> Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for the a verdict of death?
>
> Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for death and never vote for life imprisonment without the possibility of parole? (14 RT 385-387.)

court to the small number of prospective jurors actually questioned on voir dire by the trial judge. The record shows that the trial court appeared to be most interested in hastening the jury selection process. It is never appropriate to choose efficiency over fairness and justice, particularly in a capital case. Because of this combination of limited inquiry in the juror questionnaire on the sentencing options, death penalty and life without parole, and very limited and mechanistic voir dire on these subjects, Mr. Leon was denied his federal and state constitutional rights to a fair and impartial jury. (U.S. Const., Amends. V, VI, VIII, XIV; Cal.Const., art. I, §§ 7, 15, 16, 17, 24 & 29.)

Where a state procedure impinges on a criminal defendant's right to an impartial jury, the defendant's subsequent conviction is unconstitutional and must be reversed. For example, in *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509, the Supreme Court reversed because state law did not allow for a change of venue in misdemeanor cases. Defendant Groppi had moved for and was denied a change of venue on the ground of adverse pretrial publicity. The Supreme Court reversed his conviction, finding a violation of his Sixth Amendment right to a fair and impartial jury. (See also *Ham v. South Carolina* (1972) 409 U.S. 524 [African American defendant is entitled to a reversal of his narcotics conviction because trial court refused to let him question prospective jurors about racial prejudice, thus denying him a fair and impartial jury]; *Morford v. United States* (1950) 339 U.S. 258, 259 [Supreme Court reversed defendant's conviction because he was not allowed to question prospective jurors about possible prejudice that might arise because of his membership in the Communist Party, thus depriving him of a fair and impartial jury.])

These decisions by the Supreme Court make clear that the right to a fair and impartial jury includes a right to procedures that will ensure such impartiality. In *Pointer v. Texas* (1894) 151 U.S. 396, 408, the Court observed that the right to challenge prospective jurors is "one of the most important of the rights secured to the accused." In point of fact, however, the right to challenge prospective jurors has little practical meaning without the right to ask adequate questions of them. (*Swain v. Alabama* (1965) 380 U.S. 202, 221.) Such questioning can be adequate only if it is searching enough to uncover biases, prejudices and misconceptions that can undermine a prospective juror's ability to act in a fair and impartial manner. As the following discussion will establish, the voir dire process, including the use of perfunctory juror questionnaires, in this case was wholly inadequate to ensure that a fair and impartial jury heard and decided Mr. Leon's case and sentenced him to death.

A. The Defense Efforts to Make the Jury Selection Process Constitutionally Adequate

1. The First Defense Motion Concerning The Juror Questionnaire

On April 26, 1996, defense counsel filed "Defendant's Proposed Modifications to the Court's Jury Questionnaire." (8 CT 1840-1869.) The proposed modifications appear in bold print and were added to a copy of the court's questionnaire. (8 CT 1841-1869.) The hearing on this defense request took place on April 29, 1996. (1-10 RT 131A-145A.) First, the trial court refused the defense counsel's suggestion that the judge ask the prosecutor whether she would agree to the modifications proposed by the defense. (1-10 RT 132A.) He also rejected most of the defense's proposed modifications, including questions 10-1 and 11-1 (1-10 RT 132A); question

16-2 (1-10 RT 134A); questions 21-1 and 22-2 (1-10 RT 135A); and questions 22 and 22-1. (1-10 RT 136A.)

The trial judge rejected all of the proposed changes to his jury questionnaire regarding the issue of penalty. The modifications requested by the defense amounted to a new series of questions, numbered 55-1 through 55-5. These proposed questions read as follows:

> 55-1. Assume, for the purpose of the following questions only, that a defendant has been found guilty of two counts of murder in the first degree, and that the special circumstance of multiple murder and/or the special circumstance of robbery murder has been found to be true.
>
> At the penalty phase, do you feel so strongly about the death penalty that regardless of the evidence presented by the defendant and the prosecution in the guilt and penalty phases of the trial:
>
> (a) You would <u>always</u> vote <u>against</u> the death penalty?
>
> ___Yes
>
> ___ No
>
> Please explain_____
>
> (b) You would <u>always</u> vote <u>in favor</u> of the death penalty?
>
> ___Yes
>
> ___No
>
> Please explain_____
>
> 55-2. Do you feel that any attempt by the defense to put on mitigation evidence of the defendant's background and character is an "abuse excuse," and should be ignored? Please explain.
>
> 55-3. Do you accept the fact that a sentence of life in prison without the possibility of parole means that the person will never get out of prison until they die? Please explain
>
> 55-4. In deciding penalty – that is, life in prison without the possibility of parole or death—would the costs of keeping someone in prison for life be a consideration for you? __ no ___yes. Please explain.

> 55-5. If you were instructed by the court that your decision is to be based solely on aggravating and mitigating factors, which do not include costs, would you be able to follow that instruction?
> ____Yes ___No

(8 CT 1867-1869, underscoring in original.)

The trial judge rejected proposed question 55-1 on the ground that, before the prospective jurors filled out the questionnaire, he would "identify briefly the charges, among [the] special circumstances of murder committed during the commission of a robbery." (1-10 RT 137A-138A.) While defense counsel agreed that such an oral instruction would be helpful, he argued that it was important to include in the question the fact that this case involved allegations that Mr. Leon had committed more than one murder:

> . . .I'm just asking the court that in order to clearly indicate that the jurors will not automatically vote for death when considering a multiple murder special circumstance, that it be laid [*sic*] at the time that they're being asked these questions so that they are – it's directly in front of them, and they will know that that's what they're thinking about. . . . 'will you automatically impose the death penalty in considering [the] special circumstance of multiple murder?'

(1-10 RT 138A.)

The trial judge rejected this argument, stating only: "I'm not convinced as to that question, and it will not be given." (1-10 RT 139A.)

Moreover, the trial judge's statements to the venire panel about the fact that the case involved two murders did not address the defense's concern that any automatic death penalty juror should be identified during the jury selection process. Indeed, before he distributed the juror questionnaires, the only statement made by the trial judge about the homicide allegations in this case was the following:

> Defendant is charged in two counts with a violation of Penal Code section 187 which is known as murder. Special circumstances are alleged. That is that the murders were committed in the course of a robbery and that there are multiple murders.

(13 RT 224-225.)

This statement was not as clear as that proposed by the defense in question 55-1, *ante*. Moreover, because this information was given orally before the prospective jurors actually answered the juror questionnaire, it is more likely that they would forget this factor when considering their own propensity to favor the death penalty. Proposed question 55-1 plainly juxtaposed the allegations before them, particularly the allegations that defendant had committed two first degree murders, and asked whether if they were to find Mr. Leon guilty of multiple murder that would predispose them to always vote for the death penalty. (8 CT 1867-1868.)

The trial court also rejected the defense's proposed question 55-2, quoted *ante*, regarding the so-called "abuse excuse." During the hearing on the proposed modifications to the juror questionnaire, defense counsel argued that this question was important because the highly publicized – including live coverage of the trial itself on Court TV – Menendez case had just concluded in Los Angeles Superior Court. Counsel argued that, as a result of the Menendez brothers' trial, the term "abuse excuse" ". . .is one that is common and current in our society." (1-10 RT 141A.) He further observed:

> Listen [*sic*] to any talk radio in this community will reveal that there are any number of people who feel it makes absolutely no difference what a defendant's background or character is, that they wouldn't consider any of those factors, that given the circumstances of a crime they feel that although those things should be ignored and they just wouldn't consider such evidence. . . .and I believe that a reference on

> the abuse excuse or something of that sort ought to be made, because otherwise I don't know that the question clearly identifies what is common and current in our community today.

(1-10 RT 141A.) [24]

The trial judge rejected this argument, saying only "I'm unconvinced."(1-10 RT 142A.)

Addressing proposed question 55-3, quoted *ante*, defense counsel argued that this is a question often included in juror questionnaires in capital cases because there are many prospective jurors who do not believe that life without the possibility of parole ("LWOP") really means that the person will never get out of prison. (1-10 RT 142A..) If jurors do not believe that LWOP means the defendant will never get out of prison, counsel urged, they will not be able to evaluate and weigh impartially the mitigating and aggravating evidence. (1-10 RT 142A.) The trial court rejected 55-3, stating: "again, as (sic) covered enough in 55-e and f [of the court's questionnaire], and based upon your explanation, I am unconvinced to give 55-3." (1-10 RT 142A..) This was a puzzling statement by the judge since neither 55-e or 55-f in the questionnaire first submitted by the trial

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[24] Indeed, defense counsel's concerns were prescient. During her penalty phase closing argument, the prosecutor labeled Mr. Leon's case in mitigation as the "abuse excuse." (41 RT 3289.) And she spent most of her argument urging the jury to reject Mr. Leon's mitigation evidence because it was just an "abuse excuse." (41 RT 3292-3297.) Moreover, the prosecutor even referred back to other criminal defendants, such as the Menendez brothers, although she didn't name them:

> I think you ought to reject this abuse excuse wholesale. This excuse has been offered by many, many defendants. It's not new. It's being offered all the time.

(41 RT 3292.) This issue is discussed *post* in the prejudice analysis in this argument.

court explains or even mentions LWOP.[25] (8 CT 1867.) The questionnaire ultimately used by the trial court did not include any statements or questions about the meaning of LWOP. (8 CT 1896-1919.)

The trial court also denied the defense's proposed questions 55-4 and 55-5, both quoted *ante*. These questions were related to one another and concerned whether the prospective jurors would consider the cost of keeping someone in prison for life in making their determination about the appropriate penalty. (8 CT 1869.) At the hearing, defense counsel argued that these two questions were necessary because some prospective jurors improperly would consider what they imagined to be the costs to the taxpayers of a LWOP sentence; accordingly, prospective jurors should be questioned whether they can consider both mitigating and aggravating factors without regard to the costs involved in the sentences. (1-10 RT 142A-143A.) Once again, the trial judge dismissed the request by simply stating "I remain unconvinced. Those questions will not be given." (1-10 RT 143A.)

2. Second Set of Motions Regarding Jury Selection

On May 14, 1996, defense counsel filed a "Motion for Attorney

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[25] These sections of question number 55 on the trial judge's version of the juror questionnaire which was considered during the hearing on the defense proposed modifications read as follows:

If your answer to question (c) or question (d) was "yes," would you change your answer, if you are instructed and ordered by the court that you must consider and weigh the evidence and the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and the character of the defendant, before voting on the issue of penalty.

(f) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?
(8 CT 1867.)

Conducted, Sequestered Individual Voir Dire," (8 CT 1923-1937), and on May 15, 1996, "Defendants [sic] Proposed Voir Dire Questions." (8 CT 1938-1939.) During a hearing on May 15, defense counsel argued that such voir dire was necessary because the completed juror questionnaires showed that the questions on that form concerning attitudes about the death penalty were inadequate. Mr. Leon's lawyer observed that he had looked at the 108 completed juror questionnaires, and not one of them indicated that the prospective juror would automatically vote for the death penalty. (14 RT 356.) The trial judge countered that there was one questionnaire that showed that the prospective juror would automatically vote for the death penalty. (14 RT 356.) Defense counsel responded that even if there were one such questionnaire, it was statistically aberrant that only one person, out of 108 prospective jurors, qualified as an automatic-death-penalty juror.[26]

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[26] Studies confirm defense counsel's position that it was aberrant that the juror questionnaire answers of only one individual out of 108 indicated he or she would automatically vote for the death penalty should Mr. Leon be convicted of first degree murder with a special circumstance. The Capital Jury Project (CJP), a National Science Foundation-funded, multi-state research effort designed to study the decision-making processes of jurors in capital cases, have been interviewing actual jurors since 1990. By 2001, the CJP had interviewed a total of 1,115 jurors who had sat on 340 capital trials in fourteen states. (Blume and Eisenberg, *Lessons from the Capital Jury Project* in Beyond Repair? America's Death Penalty, Garvey edit., 2003, pp. 146-147.) One of the findings coming out the CJP's work was that 14% of 187 jurors who had sat in capital trials in South Carolina believed that the death penalty was the only acceptable punishment for a convicted murderer. (*Ibid.* at p. 151.) In another analysis based on interviews of jurors who sat in capital cases in Alabama, California, Florida, Georgia, Kentucky, Missouri, North Carolina, Pennsylvania, South Virginia, the percentage of these jurors who believed that the death penalty was the only acceptable punishment in murder cases where the defendant had killed more than one person was 52%. (Bowers et al., *Foreclosed*

(14 RT 356-357.) Given that evidence, counsel argued that the juror questionnaire was not uncovering biases that some prospective jurors undoubtedly had. (14 RT 357.) Mr. Leon's lawyer noted: "The only way to uncover the bias is to do a sequestered voir dire and/or to do – to allow the attorneys some latitude with individual questioning so that we might attempt to delve into the bias." (14 RT 357.) The trial judge denied the motion, observing "I find there is insufficient good cause that has been presented for me to grant that." (14 RT 357.)

Defense counsel also pointed out that the juror questionnaire, as written by the trial judge, did not adequately inquire about the prospective jurors' ability to look at the mitigating evidence should they decide that Mr. Leon had committed two murders and at least one special circumstance. (14 RT 358, 360-361.) Defense counsel noted that it would be possible for a prospective juror to answer honestly in his/her juror questionnaire that he or she would not automatically vote for the death penalty but nonetheless be impaired in his or her ability to consider the mitigating evidence and to actually engage in an unbiased weighing of the aggravating and mitigating evidence. (14 RT 364.) Further, counsel argued, just as the court's questionnaire asked about the prospective juror's general feelings about the death penalty, it should also include a question about one's general feelings about LWOP. (14 RT 364-365.)

Defense counsel argued that these additional voir dire questions were necessary because:

Impartiality in Capital Sentencing: Jurors Predispositions, Guilt Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476, 1501 tbl. 6.)

> Mr. Leon is not getting and not going to get a fair and impartial jury to which he is clearly entitled. I ask all of this and request all of this both under state law and federal law, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution, state Article I, sections 1, 7, 13, 16, 17 and 27. . . .I have requested and the court has denied my request to do that examination myself. I can now only ask the Court to do the kind of examination that needs to be done to assure that we get a fair and impartial jury. I'm only asking for an examination for cause. I know there are jurors there who have cause, if only the Court will ask the questions that will expose that bias and dismiss those jurors appropriately.

(14 RT 365.)

The trial judge dismissed counsel's concerns: "your assumptions, and that's what they are, is [*sic*] purely speculative." (14 RT 365.)

B. The Inadequate Jury Selection Process in this Case

1. The Court's Juror Questionnaire

The trial judge erred when he refused to adopt any of the questions offered by defense counsel to improve the juror questionnaire. The juror questionnaire used in this case was 20 pages long and contained 59 questions. (1 SCT 1-22.) Only three of these questions addressed the issue of the death penalty.[27] (1 SCT 17-21.) With no explanation, other than

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[27] The juror questionnaire actually used in Mr. Leon's case contained the following questions about prospective jurors' attitudes about the death penalty:

> 56. What are GENERAL FEELINGS regarding the death penalty?
>
> 57. What are your feelings on the following specific questions:
> (a) Do you feel that the death penalty is used too often? Too seldomly? Please explain:
> (b) Do you belong to any group(s) that advocate(s) the increased use or the abolition of the death penalty? (Yes? No?)
> 1. What group(s)?
> 2. Do you share the views of this group(s)?

terse statements about his belief that the questionnaire he had drafted was sufficient, the trial judge refused to include any of the questions about the death penalty and LWOP proposed by the defense. (10 RT 137A-138A, 142A-143A; 14 RT 356-357.) The trial court's responses to defense counsel's requests amounted to a complete refusal to address the concerns

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> 3. How strongly do you hold these views?
> (c) Is you view in answers (a) and (b) based on religious consideration (Yes? No?)
>
> 58. In a death penalty case, there may be two separate phases or trials, one on the issue of guilt and the other on penalty. The first phase is the "guilt" phase, where the jury decides on the issue of guilty as to the charges against the defendant and the truth of any alleged special circumstance(s). The second phase is called the "penalty" phase. If, and only if, in the guilt phase, the jury finds the defendant guilty of first degree murder (which will be defined at trial) and further finds any alleged special circumstances to be true, then and only then would there be a second phase or trial in which the same jury would determine whether the penalty would be death or life imprisonment without possibility of parole. (A special circumstance is an alleged description which relates to the charged murder, upon which the jury is to make a finding. For example, was the murder committed in the commission of certain felonies such as robbery, rape, or other enumerated offenses, or was the murder an intentional killing of a peace officer in the course of the performance of duty, a previous conviction of murder, etc.?)
>
> The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating facts and mitigating factors (bad and good things) that relate to the facts of the crime and the background and character of the defendant, including a consideration of mercy. The weighing of these factors is not quantitative but qualitative, in which the jury, in order to fix the penalty of death, must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without parole.

(1 SCT 18-21.)

of counsel about seating an impartial jury.

On the issue of the multiple murder special circumstance and Mr. Leon's proposed juror questionnaire question (55-1 described *ante*), this Court's observation that "[m]ultiple murder falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors'" (*People v. Vieira* (2005) 35 Cal.4th 264, 286, quoting *People v. Cash* (2002) 28 Cal.4th 703, 721) is particularly apt.

Under the principles stated in both *Vieira* and *Cash*, Mr. Leon was entitled to inquire whether the prospective jurors would be prevented or substantially impaired from returning a sentence other than death should they find that appellant had committed two murders and also find true the special circumstance of multiple murder under the California death penalty statute. In *Cash*, this Court explained that, "death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be resented." (*People v. Cash, supra,* 28 Cal.4th at pp. 721-722.) Question 55-1 offered by Mr. Leon met this standard. The trial judge erred when he categorically refused to allow any questions to the prospective jurors concerning whether the multiple murder allegations in this case would affect their ability to consider impartially both possible verdicts at a penalty phase.

In a capital case, a trial court should proceed with great care, clarity and patience in conducting jury selection. (*People v. Heard* (2003) 31 Cal.4th 946, 968.) In the *Heard* case, the Court reversed the death sentence

of the defendant because the trial judge erred in excusing for cause a prospective juror where the record did not support a finding that his views about the death penalty would substantially impair his ability to serve as a juror under the *Witt/Witherspoon* standard. Because the juror questionnaire of the disputed prospective juror was lost,[28] the adequacy of the questionnaire was not at issue in *Heard, supra*. This Court did find, however, that the trial court's dismissal of a prospective juror for cause was erroneous and required reversal of the death judgement. (*Id.* at p. 951.) In making this finding, the Court concluded that the trial judge "had conducted *a seriously deficient examination of a prospective juror* during the jury selection process." (*Ibid*, italics added.)

The Court emphasized in *Heard* the importance of adequate jury selection procedures in capital cases:

> . . .we note our dismay regarding the adequacy of the trial court's efforts to fulfill its responsibilities in selecting a jury in this case. Unlike other duties imposed by law upon a trial court that may call for the rendition of quick and difficult decisions under unexpected circumstances in the midst of trial, the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion. In California, numerous resources exist that assist trial courts in conducting voir dire in death penalty trials, and in preventing the type of readily avoidable error that was committed in this case. In view of the extremely serious consequence– an automatic reversal of any ensuing death penalty judgment – that results from a trial court's error in improperly excluding a prospective juror for cause during the death-qualification stage of jury selection, we expect a trial court to make a special effort to be apprised

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[28] The questionnaires of all the prospective jurors, except those actually chosen for the jury, were lost and were not part of the appellate record in the *Heard* case.

> of and to follow the well-established principles and protocols pertaining to the death-qualification of a capital jury. As the present case demonstrates, an inadequate or incomplete examination of potential jurors can have disastrous consequences as to the validity of a judgment. *The error that occurred in this case – introducing a fatal flaw that tainted the outcome of the penalty phase even before the jury was sworn – underscores the need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials.*

(*Id.* at pp. 966-967, italics added.)

2. The Voir Dire in This Case was Improperly Truncated

In this case, the trial judge not only unnecessarily limited the questions regarding the death penalty on the juror questionnaire, he refused to allow the defense attorney to ask any follow-up questions nor did he ask any follow-up questions himself. (14 RT 388; 14 RT 425-429; 14 RT 447-449; 14 RT 434; 14 RT 474-475; 15 RT 528-529; 15 RT 550-551; 15 RT 558-559.) The judge wanted to have strict control over the voir dire process and was more committed to a swift jury selection than to a full and fair procedure. As this Court observed in *Heard*, rushing through the jury selection process in a capital case is not proper:

> Nor do we believe additional follow-up questions or observations by the court would have been unduly burdensome: in a capital case that required more than three weeks, the trial court's expenditure of another minute or two in making thoughtful inquiries, followed by a somewhat more thorough explanation of its reasons for excusing or not excusing Prospective Juror H., would have made the difference between rendering a supportable ruling and a reversible one.

(*Heard, supra*, 31 Cal.4th at p. 968.)

In this case, the trial court asked the same questions to each prospective juror [29] who had been selected to be voir dired.[30] First, he asked the individual if there was anything that person wished to change in his or her answers on the juror questionnaire. (14 RT 380.) Second, if a person had written on his or her questionnaire that he or she needed to speak privately with the judge, the person was called up for a side bar conference. (14 RT 380.) In some instances, individuals were asked about answers on their questionnaires. For example, several prospective jurors wrote that it would be difficult for them to presume Mr. Leon to be innocent because he had been arrested and charged. (14 RT 383-384.) However, the only questions asked of most of the prospective jurors called up for voir dire were the four questions about the death penalty; those questions are set forth in footnote 1 *ante*.

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[29] Even the prosecutor expressed concern about the trial judge's insistence on asking the same four questions about the death penalty:

> I noticed when you were asking this [prospective] juror questions about the death penalty, that he appeared to be uncomfortable with it. Maybe it was because you were asking him in front of the whole jury, and I'm very concerned about the impact that these questions and these answers might have on the jurors that were sitting out there. So I was going to suggest, especially for the death questions, that you bring them [each prospective juror who is being voir dired] up here and question them out of the presence of everybody. (14 RT 388-389.)

The trial judge denied this request. (14 RT 389.)

[30] For the initial round of individual voir dire, 18 prospective jurors were selected to sit in the jury box for questioning. (14 RT 373-374.) The second round of jury selection for the jury put 8 more prospective jurors in the box for questioning. (14 RT 431.) During the third round, an additional 7 prospective jurors were questioned. (14 RT 453.)

C. These Errors Require Reversal of Mr. Leon's Death Sentence

Because the voir dire and juror questionnaires were so inadequate, it is difficult to identify all of the prejudice that might have resulted from the trial court's failure to ask questions which would have lead to the revelation of possible biases on the part of specific prospective jurors. Similarly, the lack of adequate voir dire makes it impossible to pinpoint the jurors who actually served on Mr. Leon's jury who may have had biases and prejudices that interfered with their ability to serve as impartial jurors. Since the failure to conduct an adequate jury selection process implicates Mr. Leon's constitutional rights to a fair and impartial jury, the burden is on the prosecution to establish beyond a reasonable doubt that this failure did not affect the outcome of Mr. Leon's trial. (*Chapman v. California* (1967) 386 U.S. 18, 26.)

In *People v. Cash, supra*, this Court found that the trial court erred in preventing all death-qualification voir dire beyond that set forth in the information. (*Cash, supra*, 28 Cal.4th 703, 719.) As in *Cash*, counsel in this case unsuccessfully sought to include a question – proposed 55-1 – to inquire whether certain facts relevant to the case might compel any of the prospective jurors to vote automatically for death. In *Cash*, this Court was clear that restricting the death-qualification voir dire in such a manner was error, and reversed the death judgment, stating that in deciding where to strike the balance in a particular case, trial courts *may not* strike the balance by precluding mention of any general fact or circumstance not expressly pleaded in the information.

The record in this case does show that the absence of adequate questions about prospective jurors' attitudes about the death sentence and

the sentence of life without the possibility of parole failed to uncover possible automatic-death-penalty ("ADP") prospective jurors. By the trial judge's own calculus, the juror questionnaire drafted by him revealed only one prospective juror out of 108 who completed the questionnaire as a possible ADP juror. (14 RT 356.) If, in fact, there was only one ADP prospective juror that would mean that less than 1% of the venire qualified as ADP. That percentage so diverges from the numbers which have emerged from studies of actual death penalty jurors that it strains credulity. (See footnote 4 *ante* discussing studies that show that 14% of jurors who have actually been involved in capital trials qualified as ADP, and, if the case involved more than one murder, 52% of the jurors were ADP.)

Another issue raised by the defense in its efforts to improve the effectiveness of the juror questionnaire in uncovering potential biases of prospective jurors was the possible adverse effect of the recent, highly publicized Los Angeles trial of the Menendez brothers for the murder of their parents. Defense counsel was concerned that Menendez trial and the attendant ballyhoo about the so-called "abuse excuse" might have prejudiced jurors' ability to consider mitigating evidence about Mr. Leon's life. Accordingly, the defense proposed that the following question be included in the questionnaire: "Do you feel that any attempt by the defense to put on mitigation evidence of the defendant's background and character is an "abuse excuse," and should be ignored? Please explain." (8 CT 1868.) Mr. Leon's attorney argued that because this term was so omnipresent that the prospective jurors needed to be questioned about their understanding of and beliefs about "abuse excuse." (1-10 RT 141A.)

The trial judge summarily rejected this argument (1-10 RT 142A), but the prosecutor during closing argument to the jury at the end of penalty

phase repeatedly referred to Mr. Leon's mitigation case as an "abuse excuse," and urged them to reject it. (41 RT 3289, 3292-3297.) For example, she argued:

> I think you ought to reject this abuse excuse wholesale. This excuse has been offered by many, many defendants. It's not new. It's being offered all the time.

(41 RT 3292.)

This argument by the prosecutor in this case was completely foreseeable, yet the trial judge refused to include a question for the prospective jurors about what they had heard and what they thought about the "abuse excuse," as that term was being discussed widely and frequently in the media at the time of Mr. Leon's trial.

Given these circumstances, the prosecution cannot prove beyond a reasonable doubt that the trial court's refusal to ask this question about the "abuse excuse" did not result in one or more jurors deciding to sentence Mr. Leon to death because prior to trial they had embraced the notion of the "abuse excuse" and were thus unable to consider the mitigating evidence offered by him. Under the standard set forth in *Chapman v. California, supra*, Mr. Leon's death sentence must be reversed.

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II

THE INADEQUATE JUROR QUESTIONNAIRE AND VOIR DIRE RESULTED IN THE IMPROPER EXCLUSIONS FOR CAUSE OF PROSPECTIVE JURORS IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL PENALTY PHASE JURY

The right to jury trial guarantees to defendants charged with crimes a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722, quoted in *Morgan v. Illinois* (1992) 504 U.S. 719, 727.) "The state may not, in a capital trial, excuse all jurors who express conscientious objections to capital punishment. Doing so violates the defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) The party attempting to exclude a prospective juror for cause bears the burden of showing that person was not qualified for jury service. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423; *People v. Stewart* (2004) 33 Cal.4th 425, 445.)

The lodestar for this analysis is found in *Wainwright v. Witt, supra.* There, the United States Supreme Court held that "[a] prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would 'prevent or substantially impair' the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*Witt, supra*, 469 U.S. at p. 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) A prospective juror is substantially impaired or prevented from performing as a capital juror only if, as a result of views concerning capital punishment, he or she cannot conscientiously consider

all of the sentencing alternatives, including the death penalty where appropriate. Such a prospective juror is properly excluded. (*People v. Stewart, supra,* 33 Cal.4th at p. 441.) Exclusion of even a single prospective juror who is not "substantially impaired" violates the defendant's "right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment. . . ." (*Uttecht v. Brown* (2007) 551 U.S. 1, 8.) The exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of any death sentence. *(Gray v. Mississippi* (1987) 481 U.S. 648, 668.).

In this case, the trial court erred when it granted the prosecutor's challenge for cause of three prospective jurors on the ground that their attitudes about the death penalty disqualified them under the *Witt/Witherspoon* rule. As the proponent of these challenges, the burden rested with the prosecution to establish a record justifying the granting of the challenges. (*People v. Stewart, supra*, 33 Cal.4th at p. 445; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270.) The prosecutor did not meet that burden in this case.

A. Three Prospective Jurors Were Improperly Dismissed for Cause

1. Ruben Casarez.

The trial judge asked Mr. Casarez the four questions [31] regarding the issue of penalty that he asked all prospective jurors.(14 RT 385.) Casarez said he would vote for life imprisonment, "regardless of the evidence." (14 RT 386.) The prosecutor then challenged Casarez for cause based on his

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[31] For the text of these four questions, see footnote 1, *ante*, which sets forth the questions.

attitude about the death penalty. Defense counsel objected to this challenge, noting that on his questionnaire, Mr. Casarez responded "yes" to the question whether he could change his views on the death penalty and life without the possibility of parole if he were instructed by the court that he must consider the evidence of aggravating and mitigating factors before voting on the issue of penalty. (14 RT 387.) Also, on the questionnaire, Mr. Casarez answered yes to the question of whether he could set aside his personal feelings regarding what the law ought to be and follow the law as explained by the trial judge. (14 RT 387.)

Defense counsel requested the trial judge to ask Mr. Casarez about his answers to these questions on his questionnaire:

> I ask that those questions be put to him so that he can demonstrate further whether, in fact, he is willing to set aside his views, follow the instructions, weigh the evidence and come back with death if that's what he finds.

(14 RT 388.)

The trial judge summarily dismissed this request, saying "[u]nder *Witt* this juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions." (14 SCT 388.)

It is well-established that normally an appellate court must defer to the trial judge's determination that a prospective juror will be substantially impaired in a capital case because of his or her attitudes about the death penalty. (*Uttecht v. Brown, supra*, 551 U.S. at p.7.) However, such deference is owed on the theory that the trial judge has had an opportunity to observe and assess the prospective juror's demeanor and credibility. (*Ibid.*)

In this case, the trial judge's determination is not entitled to such deference because, given the brevity of the voir dire, it would be impossible

to make any meaningful assessment of Mr. Casarez's demeanor based on his yes and no answers to four questions about the death penalty which had been asked in open court of all prospective jurors. As noted previously in footnote 7 *ante,* even the prosecutor doubted the wisdom of asking these questions in open court. ((14 RT 388-389.) Not only was there an insufficient basis in the de minimus voir dire process, but Mr. Casarez's answers on the juror questionnaire about the death penalty were contradictory. While stating on the questionnaire that he would vote for life imprisonment and that he didn't believe the death penalty is a "humain [*sic*]" punishment, he also affirmed that he could consider both aggravating and mitigating evidence before voting on penalty and that he could set aside his personal feelings and follow the law given by judge. (3 SCT 867, 870-871.)

It would have been very easy and not unduly time-consuming for the trial judge to ask the follow-up questions requested by defense counsel in order to clarify whether these contradictions would substantially impair Mr. Casarez under the *Witt/Witherspoon* standard. Given these factors, the trial judge erred in dismissing Mr. Casarez for cause over Mr. Leon's objections.

2. Darunee Achen

The prosecutor also challenged prospective juror Darunee Achen for cause. In both her answers on the questionnaire and in voir dire, there were indications that Ms. Achen opposed the death penalty. (14 RT 432-434; 3 SCT 798-800.) However, as defense counsel pointed out in his objection to her removal for cause, Ms. Achen's questionnaire did contain some contradictions that needed to be clarified by additional voir dire. (14 RT 434.) For example, in answering the question about her general feelings about the death penalty, Ms. Achen wrote: "I opposted *[sic]* to the death penalty." (3 SCT 798.) In responding to the question of whether she felt the

death penalty is used either too often or too seldomly, she wrote: "I think we should not have a death penalty at all." (3 SCT 799.) However, in responding to question 58(c) which asked whether she would automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, Ms. Achen answered no. (3 SCT 801.) She answered yes to the question, "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you." (3 SCT 802.)

Based on these answers, defense counsel asked the judge to inquire further. He also noted that at the beginning of the court's voir dire of Ms. Achen, she said she did not want to change any of her answers on the questionnaire. (14 RT 434.) The trial judge did not respond to these points made by defense counsel or to his request for follow-up questions. His only response was: "Challenge is sustained." (14 RT 434.)

3. Nenita Clarin

The prosecutor also successfully challenged for cause prospective alternate juror Nenita Clarin. (15 RT 551.) As was true in the cases of Mr. Casarez and Ms. Achen, defense counsel objected to the challenge because he wanted the trial judge to ask some clarifying, follow-up questions. (15 RT 550-551.) While Ms. Clarin did answer yes to the trial judge's question of whether she would automatically vote for a sentence of life without the possibility of parole (15 RT 550), she answered no to the other three questions. (15 RT 549-550.) Further, as defense counsel argued, Ms. Clarin stated on her questionnaire that she could set aside her personal feelings about the death penalty and could consider and weigh the aggravating and

mitigation evidence presented during the penalty phase.[32] (2 SCT 480.) Citing these answers on Ms. Clarin's questionnaire, defense counsel argued: ". . . she is not in fact disqualified by virtue of her answer to the *Witherspoon* question." (15 RT 551.) Once again, the trial judge hastily dismissed the defense's claims, stating: "Again, I am not going to cite all the cases regarding equivocal responses. This happens to be unequivocal in any event. The challenge is sustained." (15 RT 551.)

Other answers given by Ms. Clarin refuted the prosecutor's claim that she should be removed from the jury because of her views against the death penalty. In particular, her questionnaire shows that she was operating under the assumption that life without possibility of parole was in fact a more severe sentence than the death penalty. In answer to the question about what her general feelings about the death penalty, Ms. Clarin wrote: "I disagree because if he is guilty and death penalty will the punishment–person will not suffer anymore." (2 SCT 476.) This answer suggests that Ms. Clarin was worried that if Mr. Leon received the death penalty he would not suffer sufficiently.

Similarly, her answer to the very next question —"What are your feelings on the following specific questions: (a) Do you feel that the death

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[32] Question 58 (e) asked: "If your answer to either question (c) or question (d) was 'yes,' would you change your answer, if you are instructed and ordered by the court that you must consider and weigh the evidence an the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?" Ms. Clarin answered "yes" to this question.

Question 58 (f) asked: "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you." Ms. Clarin also answered "yes" to this question. (2 SCT 480.)

penalty is used too often? Too seldomly?"— Ms.Clarin wrote: "Too seldomly." (2 SCT 477.) This answer is completely inconsistent with the position that Ms. Clarin was an intractable opponent of the death penalty.

The record in this case shows that in the instances of these three prospective jurors, contradictions were present in their written questionnaire and answers to the four questions about the death penalty asked during voir dire, which necessitated additional inquiry by the trial court, as had been requested by defense counsel. The trial judge erred when he summarily refused to do any follow-up questioning of Mr. Casarez, Ms. Achen and Ms. Clarin before excusing them for cause based solely on their alleged views about the death penalty. In this case, there was no need for the trial judge to race through jury selection; the voir dire lasted for less than two days. Allowing for some follow-up questions on voir dire would not have been unduly burdensome to the court, to the attorneys or to the prospective jurors.

B. The Trial Judge's Decision to Dismiss These Prospective Jurors is Not Entitled to Deference

The inadequate voir dire in this case contrasts sharply with the voir dire at issue in *Uttecht v. Brown* (2007) 551 US. 1, the most recent ruling of the United States Supreme Court regarding *Witt/Witherspoon* exclusions. The voir dire in *Brown* took more than two weeks with 11 days of voir dire devoted to death qualification. (*Id.* at p. 10.) By contrast, the voir dire in this case, after the hardships challenges had taken place, took less than two days. (14 RT 374-15 RT 588.) In *Utteckt,* in addition to initial voir dire by the trial court and counsel, before deciding a contested challenge, the trial court gave each side a chance to recall the potential juror for additional questioning. (*Ibid.*) By contrast, the trial judge in this case did not allow either defense counsel or the prosecutor to ask any questions during voir

dire; indeed, he even refused to ask any follow-up questions himself. (14 RT 388; 14 RT 425-429; 14 RT 447-449; 14 RT 434; 14 RT 474-475; 15 RT 528-529; 15 RT 550-551; 15 RT 558-559.) The decision in *Uttecht v. Brown, supra,* includes the transcript of the voir dire proceedings as an appendix. (*Id.*, 551 U.S. at pp. 22-35.) This appendix shows that the voir dire went on for many transcript pages.

The facts of this case are also distinguishable from those in this Court's decision in *People v. Carasi* (2008) 44 Cal.4th 1263. The *Carasi* decision addressed the question of whether the trial court had erred in refusing the defense request that the prospective jurors be informed during jury selection that the case involved two premeditated murders and three special circumstances allegations, including one for murder for financial gain. Relying on the holding of *People v. Cash* (2002) 28 Cal.4th 703, 721, Mr. Carasi argued that a trial court cannot bar questioning prospective jurors about any fact present in the case that could cause some jurors invariably to vote for the death penalty in his case. This Court found that the *Cash* decision did not apply in *Carasi* because in the latter case the trial court never ruled that prospective jurors could not be asked whether the fact that the case involved more than one murder would affect their decisions about the penalty. (*Carasi, supra*, 44 Cal.4th at p. 1287.) By contrast, in the instant case, the trial judge denied Mr. Leon's proposed modified question 55-1 which stated:

> Assume, for the purpose of the following questions only, that a defendant has been found guilty of two counts of murder in the first degree, and that the special circumstance of multiple murder and/or the special circumstance of robbery murder has been found to be true.
>
> At the penalty phase, do you feel so strongly about the death penalty that regardless of the evidence presented by the defendant and the

prosecution in the guilt and penalty phases of the trial:

(a) You would always vote against the death penalty?

___Yes

___ No

Please explain_____

(b) You would always vote in favor of the death penalty?

___Yes

___No

Please explain_____

(8 CT 1867-1868, emphasis in the original.)

This question, proposed by the defense and rejected by the trial judge, would have squarely put before the prospective jurors the issue of whether the fact that this case involved two murders might affect their ability to consider impartially both possible sentences, death and life without the possibility of parole.

Further, the jury selection process in the *Carasi* case was much more extensive than the one afforded Mr. Leon in this case. First, of the 70 questions on the *Carasi* juror questionnaire, 30 concerned the issue of capital punishment. (*Id.* at p. 1281.) Second, the trial court in *Casari* asked the attorneys to suggest additional or clarifying questions and then asked many of those questions. (*Ibid.*) This contrasts sharply with the behavior of Mr. Leon's trial judge who refused all requests of counsel to ask follow-up questions. (14 RT 388; 14 RT 425-429; 14 RT 447-449; 14 RT 434; 14 RT 474-475; 15 RT 528-529; 15 RT 550-551; 15 RT 558-559.)

Voir dire is the means by which to achieve the constitutional goal of an impartial jury. In *Morgan v. Illinois, supra,* the Supreme Court noted that "'[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of

fairness.'" (*Morgan, supra*, 504 U.S. at p. 730, quoting *Aldridge v. United States* (1931) 283 U.S. 308, 310.)

In the context of a *Batson/Wheeler* claim in that case, this Court made the following observations about limiting voir dire in *People v. Lenix* (2008) 44 Cal.4th 602:

> If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates information they need to make informed decisions rather than rely on less demonstrable intuition.

(*Id.* at p. 625.)

The Court further noted: "The exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts. Nevertheless, in exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (*Id.* at p. 625, n. 16.)

In *People v. Stitley* (2005) 35 Cal.4th 514, this Court reminded trial courts of their duty to know and follow proper procedure, and to devote sufficient time and effort to the jury selection process. While recognizing trial courts' broad discretion over the number and nature of questions about the death penalty, this Court pointed out in *Stitley* that in previous decisions it had found voir dire to be adequate "because the court and/or counsel asked additional questions to clarify ambiguous responses and to reliably expose disqualifying bias." (*Id.* at p. 540.)

By contrast, in the instant case, the trial judge refused to allow the lawyers to ask any questions and also refused to do any follow-up questioning himself. He asked all of the prospective jurors the same four

questions concerning their views about the death penalty and the sentence of life without the possibility of parole; all of these questions elicited only a yes or no answer. The limitations of the juror questionnaire, taken together with a very truncated voir dire process, resulted in a violation of Mr. Leon's right to impartial jury, particularly on the issue of penalty. The record shows that the trial judge chose his own desire for a very fast jury selection process over Mr. Leon's rights to a fair and reliable capital trial, as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as sections 7, 15, 16,17, 24 and 29 of Article 1 of the California Constitution. Here, reversal of the death sentence is appropriate because voir dire on the issues of attitudes about the death penalty was so inadequate that the resulting penalty phase trial was fundamentally unfair. (*Stitely, supra*, 35 Cal.4th at p.538, citing *People v. Holt* (1997) 15 Cal.4th 619, 661; *State v Williams* (N.J. 1988) 113 N.J. 393, 435; *United States v. Underwood* (7th Cir. 1997) 122 F.3d 389, 392-395; *United States v. Rucker* (4th Cir.1977) 557 F.2d 1046, 1049.)

When the process is examined as a whole, it is apparent that the voir dire in this case was inadequate, superficial, and accordingly unconstitutional. In the *Uttecht* decision, the Supreme Court observed: "The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown, supra*, 551 U.S. at p. 20.) If deference is due to the findings of a trial court that conducted a "diligent and thoughtful" voir dire, the converse must also be true. Such deference will not be accorded to rulings that are the product of a deficient and confusing voir dire or the inability of the trial court to distinguish disqualifying from

non-disqualifying responses. (*Gray v. Mississippi, supra,* 481 U.S. at p. 661, fn. 10; *People v. Stewart, supra*, 33 Cal.4th at p. 447; *People v. Heard, supra*, 31 Cal.4th at p. 968.)

Because of the flawed process in this case which included a deficient questionnaire, the trial court's insistence on asking prospective jurors only four questions on voir dire concerning their views about capital punishment and the refusal to ask any follow-up questions requested by defense counsel, it was impossible to know with any degree of certainty whether the members of the empaneled jury were fair and impartial. Where, as here, the trial court's inadequate voir dire deprived the defendant of his constitutional rights to due process of law, a fair and impartial jury, and fair and reliable guilt and sentencing determinations under the federal and state constitutions, Mr. Leon's sentence of death must be reversed. (*Morgan v. Illinois, supra*, 504 U.S. 719, 738 ["Because the 'inadequacy of voir dire' leads us to doubt the petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand"], quoting *Turner v. Murray* (1986) 476 U.S. 28, 37 (plurality opinion)). Moreover, the improper exclusion of even a single juror who is not "substantially impaired" violates the defendant's "right to an impartial jury drawn from a venire that has not been has not been titled in favor of capital punishment. . . ." (*Uttecht v. Brown, supra*, 127 S.Ct. at p. 2224) and requires a per se reversal of the death sentence. (*Gray v. Mississippi, supra,* 481 U.S. at p. 668.)

The record in this case does not support a finding that any of the three prospective jurors, discussed *ante*, were so substantially impaired as to justify dismissal for cause based on their attitudes about the death penalty. Accordingly, the Court should reverse Mr. Leon's death sentence.

III

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT THE TESTIMONY OF JULIO CUBE PURSUANT TO EVIDENCE CODE SECTION 1101, SUBDIVISION (B)

The trial judge violated Mr. Leon's rights to a fair trial, due process and a reliable determination of guilt under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when it erroneously allowed the prosecution to present, under Evidence Code section 1101, subdivision (b) (hereafter "section 1101(b)"), the testimony of Julio Cube about two uncharged robberies. This decision by the trial court also was also erroneous under the case law of the California appellate courts regarding section 1101(b).

A. Procedural Background

Over defense objections, Julio Cube testified as the first witness in the prosecution's case-in-chief at the guilt phase trial. (16 RT 656-710.) Originally, Mr. Leon was charged, inter alia, in two counts for two alleged robberies of Mr. Cube, which supposedly took place on January 13 and 14, 1993.[33] (7 CT 1614-1615.) After the preliminary hearing, however, these two counts involving Mr. Cube as the complainant, were dismissed by the magistrate, Gregg Marcus. (7 CT 1775.)

Magistrate Marcus explained these dismissals as follows:

> The court is going to dismiss Count 20, that's the Jambi robbery, based on insufficient identification by Mr. Cube and his confusion

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[33] Subsequently, in an amended felony complaint, the date of the second robbery of Mr. Cube was changed to February 14, 1993. (7 CT 1615.)

> and non-reporting, the fact that there may have been more than one incident, and the Court seemed satisfied that **Mr. Cube really could not identify the defendant**. He thought so at one in time and then confused the robberies to the point in time and then confused the robberies where I believe he was totally confused in his testimony.

(6 CT 1465, emphasis added.)

On July 12, 1994, defense counsel filed, pursuant to Penal Code section 995, a "Motion to Set Aside Information." (8 CT 1767.) The defense filed another document, entitled "Additional Explication of Issues Raised by Defendant Motion to Set Aside Information (Penal Code section 995)," on February 14, 1995. (8 CT 1783-1790.)

On April 4, 1995, Judge Superior Court Judith M.. Ashmann held a hearing concerning the 995 motion. (1-10 RT 25-50.) On the specific question of whether the two robbery counts involving Mr. Cube should be dismissed, defense counsel discussed, inter alia, the magistrate's finding at the preliminary hearing:

> . . . The magistrate heard it and, for a variety of reasons, felt it was just not a strong enough identification that it rose to a reasonable suspicion."

(1-10 RT 38.)

During this hearing, the prosecutor conceded that Cube's in-court identification of Mr. Leon at the preliminary hearing had been "qualified" and that his line-up identification had been "tentative." (1-10 RT 40.) The prosecutor emphasized, however, that when Mr. Leon was arrested in this case, several months after the alleged robberies of Mr. Cube, the gun taken from Cube's jewelry store was found in Mr. Leon's car. (1-10 RT 40.)

In response to the parties' arguments, Judge Ashmann observed:

> I'm troubled by the fact that the magistrate seemed to be making a factual finding because he does say based on insufficient

> identification. To me, that's not just the ramblings of a magistrate which I – what I, as a magistrate, used to do at that time as well. So I'm not being critical. That doesn't seem to be just the musings of the magistrate, but it really seems to be making a factual finding that the identification was insufficient. . . .It's a credibility finding.

(1-10 RT 41-42.)

Finally, Judge Ashmann granted the 995 motion and dismissed Counts 20 and 21:

> I think that — first of all, the evidence itself is weak, and secondly, the statement by the magistrate that it was – I think as to counts 20 and 21 that the 995 should be granted, that those charges should not have been refiled.

(1-10 RT 44.)

Because the prosecutor intended to call Mr. Cube as her first witness at the guilt phase, the trial court, Judge Ronald Coen, held a 402 hearing on May 20, 1996, to consider defense counsel's claim that this testimony should not be allowed. First, the defense argued that Mr. Cube's testimony should be excluded under Evidence Code section 352. (16 RT 594.) Counsel pointed out that there was other evidence tying Mr. Leon to the gun, the supposed reason for introducing Cube's testimony about the two robberies which had been dismissed under section 995. (16 RT 594.) He further argued:

> . . . .the People are bringing in evidence of two crimes which they cannot charge. And it is so prejudicial, so little probative [sic] to merely establish, if it does at all, that he got the gun. The problem I have is that the later evidence the case shows him with a gun and corroborates that evidence. And essentially what we have, we have two uncharged robberies which cannot be charged in this case due to the magistrate's filing, which will be used obviously in a negative and be extremely prejudicial.

(16 RT 595.)

The trial judge discussed what both the magistrate had said about dismissing these two counts and what Judge Ashmann had said about granting the 995 motion. (16 RT 601-603.) In his view, his colleague, Judge Ashmann, "confused" the meaning of the magistrate's findings. The trial judge believed that the finding of insufficient identification is a "legal ruling" rather than a factual finding. (16 RT 603.) He further found:

> Even if it were a factual finding, that would preclude the refiling of that count as it would be binding on all subsequent judges or all reviewing courts. However, that would not estop the presentation of evidence pursuant to Evidence Code section 1101, subdivision (b). However, my holding was that that was a legal ruling in any event, regardless of the outcome of the 995. As such, based upon *People v. Ewoldt* [1994] 7 Cal.4th 380, *such evidence will be allowed for purposes of intent and common design or plan.*

(16 RT 604; italics added.)

The trial judge never addressed defense counsel's objection that Cube's testimony should be precluded under Evidence Code section 352.

B. Julio Cube's Testimony at Trial

In January and February of 1993, Mr. Cube worked in the family business, Jambi 3 Jewelry in Hollywood. (16 RT 657, 676.) On January 12, 1993, at about 3 p.m., Cube was at the work table when a man entered, walked up to the counter and then moved around and pushed Cube's belly with a bowie knife, demanding Cube's money. (16 RT 658-659.) First, as ordered by the intruder, Cube opened the cash register, took out the paper bills and gave them to the man. (16 RT 659-660.) Thereafter, under orders from this man, Cube opened the safe, and the man searched the inside of the safe with his hands, pulling out the gun that was inside. The intruder took the gun and left the store, whereupon Mr. Cube called the police. (16 RT 662-664.) Cube identified People's Exhibit 6 as the gun, a Walther, which

was taken from him. (16 RT 666.)

Mr. Cube testified that on February 14, 2010, he was robbed again at the Jambi Jewelry 3 store. It occurred at closing time, between 5 and 6 p.m.; he had locked up the front door when a man appeared with some jewelry. Since Cube could not understand what the man was saying, he opened the door. (16 RT 667–668.) Another man appeared, pushed Mr. Cube back and put a gun to the right side of his neck. He forced Cube to open the cash register and then took the money and left. (16 RT 668-670.) Mr. Cube did not call the police after this second alleged robbery. (16 RT 689.)

Cube testified about the photo line-up and the live line-up he had seen as part of the investigation of these robberies. He identified one photograph, #3, from the photo line-up (marked People's Exhibit 10). However, at the time of making that identification, Mr. Cube told the police that he was only 10-25 percent sure of this identification. (16 RT 670-671.) On June 6, 1994, more than year later, he viewed six men in a live line-up. On the documents kept on that line-up, Mr. Cube was quoted as saying: "Suspect number 6 look [*sic*] similar to the one who robbed me on the afternoon 4:00 p.m., ore of less, on 1-12-93. But due to the time it happened and fear at that time I'm not 100 percent certain." (16 RT 674.)

Cube testified that he thought the same man robbed him both times, although he admitted that he was only 10-25 percent sure of this. (16 RT 698.) He also stated that he did not believe that the gun used at the second robbery was the Walther that had been stolen from him during the first robbery. (16 RT 691, 695-696.) Cube thought that the same man was involved in both robberies because of the man's voice and the words he used. (16 RT 692, 697.)

C. Jury Instructions Regarding Cube's Testimony

The confusion generated by the trial judge's handling of the defense objections to allowing Julio Cube to testify surfaced again when the trial judge and attorneys discussed proposed jury instructions. During that colloquy, the judge stated that he intended to give a redacted version of the 1994 version of CALJIC No. 2.50, which would include only two of its bracketed paragraphs: the one referring to the existence of intent as a necessary element of the crime charge and the other referring to the defendant having the knowledge or possessing the means, here the gun, to commit the crime charged. (29 RT 2030.)

The prosecutor asked why the judge was not including the part of CALJIC No. 2.50 which concerned the issue of "plan." The judge responded that he would indeed include the following portion of the instruction:

> A characteristic method, plan, or scheme in the commission of the criminal act similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged.

(29 RT 2031.)

Defense counsel asked the judge not to instruct that the evidence given by Julio Cube was section 1101, subdivision (b) evidence because this

> evidence came in because it was evidence that arguably tied the defendant to the gun. It was not let in for the purpose of 1101(b) at the time I argued against it. It was never even suggested that that was coming in for that purpose.

(29 RT 2031-2032.)

Both the prosecutor and the trial judge insisted that the judge had said that the evidence was coming in for purposes of "common plan,

scheme and intent." (29 RT 2032.) The trial court overruled the defense objection to the instruction and also said he was not going to give the portion of the instruction which involved "the existence of the intent which is a necessary element." (29 RT 2032.)

The trial judge also rejected the prosecutor's request to include in his instruction the part of CALJIC No. 2.50 which relates to identity. He explained that during the 402 hearing he had found, under the principles set forth in *Ewoldt, supra*, that there was not enough similarity between the Cube robberies and the charged robberies to merit an identity instruction concerning Cube's testimony. (29 RT 2033.) At that point, defense counsel reiterated his objection to the instruction containing the language "characteristic method, plan or scheme." (29 RT 2033-2034.)

D. The Trial Judge's Erred in Admitting the Testimony of Julio Cube Under Evidence Code Section 1101, Subdivision (b)

As noted above, the trial judge allowed Julio Cube to testify in the guilt phase for the prosecution about two robberies, originally charged in this case but dismissed under section 995. Citing Evidence Code section 1101, subdivision (b), the trial judge ruled that "based upon *People v. Ewoldt, supra*, such evidence will be allowed for purposes of intent and common design or plan." (16 RT 604.)

This Court clearly explained when evidence of other crimes is admissible under section 1101 in *People v. Ewoldt, supra*, and *People v. Balcom* (1994) 7 Cal.4th 414. Both decisions specifically recognize that other crimes evidence is extremely prejudicial when improperly admitted. (*Ewodt, supra*, at p. 404; *Balcom, supra*, at p. 422.) Because of the potential prejudice, this Court also reiterated that admission of this type of

evidence "requires extremely careful analysis." (*Ibid.*)

Evidence Code section 1101, subdivision (b) provides that evidence of uncharged misconduct is admissible when "relevant to prove some fact (such as motive, opportunity, intent, . . .) other than [the defendant's] disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) "The admissibility of other crimes evidence depends on (1) the materiality of the fact sought to be proved, (2) the tendency of the uncharged crimes to prove that fact, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379; *People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

Section 1101, subdivision (a) also states:

> . . .[e]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

The reasons for exclusion of such evidence are: "*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.[Citations omitted.]"[34] [Citations.] (1 Witkin, Evid. (4th ed. 2000) § 42, p. 375, original italics.)

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[34] The testimony of Julio Cube was indeed a distraction, as demonstrated by the fact that defense counsel devoted a significant part of his closing argument to the jurors explaining why they should reject Cube's testimony. (31 RT 2253-2257.)

As noted previously, evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*Ewoldt, supra*, 7 Cal.4th at p. 404, quoting *People v. Smallwood* (1986) 42 Cal.3d 415, 428.) The primary focus of that analysis is to ensure that the evidence is *not* offered to prove character or propensity, and that its practical value outweighs the danger that the jury will treat it as evidence of the defendant's criminal propensity. Therefore, even if other crimes evidence is relevant under section 1101, it must be excluded, under Evidence Code section 352, when its probative value is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ewoldt, supra*, 7 Cal.4th at p. 404, citing *People v. Thompson* (1988) 45 Cal.3d 86, 109.) Trial court rulings on the admissibility of evidence under section 1101, and on the admission or exclusion of evidence under section 352, are reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [§ 1101]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [§ 352].)

1. Intent

The trial judge initially ruled that the testimony of Julio Cube would be admitted, under section 1101, subdivision (b), because it was relevant for purposes of determining if Mr. Leon had the requisite intent in the crimes actually charged against him. (16 RT 604.) Later, after Cube's testimony in the guilt phase of Mr. Leon's trial and while the trial judge and attorneys were discussing jury instructions, the judge stated that he had specifically found there was not enough similarity between the Cube robberies and the charged robberies to establish identity under the provisions of this Court's decision in *Ewoldt, supra*. (29 RT 2033.)

While a plea of not guilty technically places all elements in issue, any element that is to be proved with other crimes evidence must genuinely be in dispute. (See, e.g., *Balcom, supra*, 7 Cal.4th at p. 426; *Ewoldt, supra*, 7 Cal.4th at p. 406; *People v. Bonin* (1989) 47 Cal.3d 808, 848-849; *People v. Alcala* (1984) 36 Cal.3d 604, 631-632.) In this case, no one could reasonably argue that there was any doubt the person or persons who committed the robberies charged against Mr. Leon had an "intent" to rob. All of the witnesses to the charged crimes called by the prosecutor testified to circumstances that made it clear that whoever committed these crimes had an intent to rob.

This case presents facts similar to those involved in *Balcom, supra,* where the defendant's not guilty plea technically placed intent in issue. In the *Balcom* case, however, this Court held that other crimes evidence was not admissible to prove intent

> because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue.

(*Balcom, supra*, 7 Cal.4th at pp. 422-423.)

Thus, in this case, the ruling that the prosecutor could introduce the testimony of Julio Cube about two robberies to show intent to steal in the charged robberies, though the two robberies had been dismissed under Penal Code section 995, was improper and prejudicial. Even if these robberies met the requirements for other crimes evidence to show intent, their probative value was de minimus, at best. The prosecutor had more than enough evidence to establish that whoever had committed the crimes alleged in this case had the requisite intent, and thus, the testimony of Mr. Cube was "merely cumulative" and should have been excluded.

In this case, it was not the intent of the perpetrators of the crimes that was at issue, it was their identity. Moreover, identity was also an issue in the uncharged robberies of Julio Cube. Indeed, the magistrate at the preliminary hearing and the superior court judge hearing Mr. Leon's 995 motion both determined that Mr. Cube's identification of Mr. Leon as the person who robbed him twice was so confusing and inadequate as to require the dismissal of these robbery counts against Mr. Leon. Because the Cube robberies were dropped as charges against Mr. Leon precisely because the identification evidence given by Julio Cube was so inadequate, the prosecution's request to present Cube's testimony under Evidence Code section 1101, subdivision (b) violated the principle, articulated in *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 166-167, that other crimes evidence to prove intent, motive or premeditation, is not admissible if the identity of the perpetrator of such uncharged crimes is not established.

If the perpetrator's identity is in dispute, and the uncharged crimes are not similar to the charged crime in ways "so unusual and distinctive as to be like a signature," the uncharged conduct is not admissible to prove intent, motive or lack of mistake or accident because "all of those issues presume the identity of the actor is known." (*Hassoldt, supra*, 84 Cal.App.4th at p. 166, citing *Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) As the following discussion shows, the Jambi Jewelry 3 robberies did not meet the standard of being so unusual and distinctive as to be like a signature.

2. Common plan and scheme

The trial judge allowed Julio Cube to testify about the robberies of Jambi 3 Jewelry on the ground that they were admissible to show a common plan or design under the terms of section 1101, subdivision (b).

Accordingly, the court instructed the jurors at the guilt phase, using a modified version of CALJIC No. 2.50, to consider evidence presented of uncharged misconduct for purposes of showing a common plan or scheme.[35] (29 RT 2033-2034.) However, during the colloquy among counsel and the trial judge about the proposed guilt phase jury instructions, defense counsel argued that Cube's testimony did not show any characteristic method, plan or scheme. (29 RT 2034.)

The first robbery of Julio Cube at Jambi 3 Jewelry occurred on January 12, 1993, and involved only one robber and the weapon used was a knife. (16 RT 658-660.) By contrast, most of the robberies actually charged against Mr. Leon involved more than one perpetrator. The robbery

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[35] The following written version of CALJIC No. 2.50 was given to Mr. Leon's jury:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged.
>
> The defendant had knowledge or possessed the means that might have been useful for the commission of the crime. charged.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.(9 CT 2006-2007.)

of Ben's Jewelry involved three robbers (18 RT 795-844), as did the robbery of H & R Pawnshop (20 RT 1012-1014), the robbery of Rocky's Video Store (22 RT 1266-1268), the robbery of Valley Market (21 RT 1201-1203); and the robbery of Original Blooming Design (22 RT 1283-1286). According to two witnesses the robbery/homicide occurring at Jack's Liquor Store involved two men. (30 RT 2117-2119, 2062-2068.) While another witness saw only one man leave the liquor store. (23 RT 1350-1353.) The Seven Star Motel robbery also involved two robbers (19 RT 950-959) as did the Nice Price Store robbery. (24 RT 1498-1503.) Only two of the other robberies charged against Mr. Leon involved only one perpetrator, the Chan's Shell Service robbery (17 RT 715-716) and the Sun Valley Gas Station robbery and murder. (28 RT 1906-1911.) None of the charged crimes involved the use of a knife.

The types of businesses involved in the instant case also varied and included gas stations, jewelry stores, a pawn shop, a florist, a liquor store, a motel, a video store, and a grocery store. Therefore, the similarities between the Cube robberies and the charged robberies were not sufficiently similar to meet the standard this Court has set for other crimes evidence offered to prove the existence of a common plan; that is, that the charged and uncharged crimes must show "'not merely a similarity in results, but such a concurrence of common features that the various acts are to be naturally explained as caused by a general plan of which they are the individual manifestations.'" (*Ewoldt, supra*, 7 Cal.4th at p. 402, quoting 2 Wigmore, Evidence (Chadbourne rev. ed. 1979) §304, p. 249.)

As defense counsel pointed out at trial there was nothing particularly distinctive about any of the robberies in this case. This is a far different situation than that presented in *Ewoldt* and the cases upon which *Ewoldt*

relied in holding that "evidence of uncharged crimes is admissible to establish a common design or plan." (*Ewoldt, supra*, 7 Cal.4th at p. 401.). The charged and uncharged crimes in *Ewoldt* did appear to have been separate manifestations of a common plan, since in each case the defendant molested one of his stepdaughters, both of whom lived with the defendant and were about the same age when the molestation occurred. Also, Ewoldt molested both girls while they were asleep in bed. And when discovered, he offered the same excuse that he was only "straightening up the covers." (*Ewoldt, supra*, 7 Cal.4th at p. 403.)

The facts in *Ewoldt* were thus consistent with those of the cases upon which the *Ewoldt* Court relied in holding that other crimes evidence is admissible when crimes are "sufficiently similar to support the inference that they are manifestations of a common plan or design." (*Id.* at pp. 402-403; *People v. Lisenba* (1939) 14 Cal.2d 403 427-428 [in both cases the defendant drowned his then wife in a staged accident after obtaining a double-indemnity, accidental death policy, and after previously trying to stage such an accident]; *People v. Peete* (1946) 28 Cal.2d 306, 310-313 [in each case the defendant killed and buried him/her, and attempted to take over the house]; *People v. Ing* (1967) 65 Cal.2d 603, 612 [in each case the defendant raped a patient seeking an abortion after rendering her unconscious].)

The Court in *Ewoldt* properly held that under the facts of that case, like those in *Lisenba, Peete* and *Ing*, the charged and uncharged offenses were sufficiently similar to establish that the crimes were linked by a common plan. (*Ewold, supra,* 7 Cal.4th at pp. 402-403.) But that standard was not met here. Unlike in *Ewoldt* and the cases it relied on, where the defendants employed pre-designed strategies to accomplish specific

criminal purposes - molesting children, defrauding insurers, raping patients - the acts Mr. Leon allegedly committed can best be described as garden variety commercial robberies. The facts do not show "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.* at p. 394, quoting 2 Wigmore, *Evidence* (Chadbourn rev. ed. 1979) §304, p. 249.)

The following observation made by this Court in *Ewoldt*, *supra*, applies to this case:

> For example, *in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible.* Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, *if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.*

(*Ewoldt, supra*, 7 Cal.4th at p. 406, italics added.)

In this case, it was beyond dispute that the charged robberies occurred, and the facts of the uncharged robberies of Julio Cube were not sufficiently distinct, to justify their use as "common plan and scheme" evidence.

E. The Trial Judge Should Have Excluded Julio Cube's Testimony Under Evidence Code Section 352

As discussed *ante*, defense counsel requested that the trial judge preclude the testimony of Julio Cube under Evidence Code section 352 (16

RT 594); the trial judge never addressed or decided this claim. Evidence Code section 352 requires the trial court to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. "A careful weighing of prejudice against probative value under [section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) For purposes of section 352, "prejudicial evidence" is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues or creates a tendency to prejudge a person or cause on the basis of extraneous factors. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Zapien* (1993) 4 Cal.4th 929, 958.) In *People v. Cardenas* (1982) 31 Cal.3d 897, this Court concluded:

> If the prejudicial effect [of evidence] outweighs the probative value, the trial court should exclude the evidence. "[T]he fundamental rule [is] that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted." [Citation.]

(*Id.* at p. 904.)

To be admitted, other crimes evidence must not only be relevant, it must "shed great light" on a disputed issue. (*People v. Nible* (1998) 200 Cal.App.3d 838, 848.) Courts must receive such evidence with extreme caution, and resolve all doubts about its connection to the charged crime in favor of the accused. (*People v. Alcala, supra*, 36 Cal.3d 604, 631; *People v. Sam* (1969) 71 Cal.2d 194, 203.) Because such evidence can be so inflammatory, it must sometimes be excluded even when relevant under a theory that does not rely on proving disposition. (*People v. Alcala, supra*, 36 Cal.3d at p. 631; *People v. Kipp, supra*, 18 Cal.4th at p. 371; *United States v. Vargas* (7th Cir. 1978) 583 F.2d 380, 387, citing *United States v.*

Dow (7th Cir. 1972) 457 F.2d 246.) Moreover, such evidence must be excluded if it is merely cumulative to other evidence that could be used to prove the same issue. (*People v. Alcala, supra*, 36 Cal.3d at pp. 631-632; *People v. Thompson* (1980) 27 Cal.3d 303, 318; *People v. Stanley* (1967) 67 Cal.2d 812, 818-819.) "If there is any doubt, the evidence should be excluded." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 831; accord, *People v. Alcala, supra*, 36 Cal.3d at p. 631.)

In this case, the testimony of Julio Cube should have been excluded because of the possibility that the evidence would confuse the jury concerning the true issues in the case; the likelihood that admitting the evidence would require undue consumption of time; and the fact that the evidence was cumulative as to the issue — the intent of the perpetrators of the charged robberies — it was admitted to prove.[36] Because the evidence lacked any substantial probative value on a disputed material issue, the trial court erred in refusing to exclude it under section 352. (See *People v. Valdez* (2004) 32 Cal.4th 73, 109 [evidence with "minimal" probative value properly excluded under section 352]; *Balcom, supra*, 7 Cal.4th at p. 423 [where the trial testimony provides "compelling evidence of defendant's intent, evidence of defendant's uncharged offenses would be

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[36] As defense counsel pointed out, there was no need for the prosecution to present evidence of the Cube robberies in order to tie Mr. Leon to the gun, the Walther. That gun was found in the vehicle which Mr. Leon was driving at the time of his arrest. Further, since the evidence showing Mr. Leon to be the perpetrator of the Cube robberies was so tenuous — after all, the counts of robbery arising out of these alleged crimes were dismissed pre-trial because of the insufficiency of this evidence – the probative value of this evidence on the issue of the gun was very limited.(16 RT 595.)

merely cumulative on [that] issue"].) The fact that the robbery charge involving Julio Cube was dismissed from the complaint because of insufficient evidence is yet another reason to question the probative value of Mr. Cube's testimony. Since the magistrate and the superior court judge hearing the section 995 motion found Cube's identification evidence to be extremely tenuous, for purposes of the section 352 weighing process, that fact must also be considered in determining the true probative value of such evidence.

Further, even assuming that the charged and uncharged crimes here *were* sufficiently similar to support the inference that Mr. Leon probably harbored the same intent in each instance (*Ewoldt*, *supra*, 7 Cal.4th at p. 403), they were only barely so. As shown above, each of those crimes varied from the "pattern" the prosecutor claimed was found in all of them (9 RT 609), and the charged crime was different in many respects from the uncharged robberies of Julio Cube. (Section B(1) and (2), *ante*.) Since the probative value of other crimes evidence stems from the similarity between those crimes and the charged offenses (*Balcom*, *supra*, 7 Cal.4th at p. 427), and since these crimes were only minimally similar, the highly prejudicial nature of the evidence completely outweighed its probative value. Certainly, the evidence lacked any probative value on the issue of identity, the only truly disputed issue in this case, because the crimes lacked the requisite "signature" quality. (Section B(2) *ante*; *Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

The prejudicial effect of other crimes evidence is heightened when the defendant's uncharged acts did not result in criminal convictions, because that circumstance increases both "the danger" that the jury will punish the defendant for the uncharged offense, and "the likelihood of

'confusing the issues.'" (*Ewoldt, supra*, 7 Cal.4th at p. 405; see *People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

Further, while this Court has indicated that the prejudicial impact of evidence of uncharged crimes is minimized when the presentation of that evidence is brief (*People v. Gray*, (*2005*), 37 Cal.4th at p. 205 [the challenged testimony "t[ook] up just four pages of transcript"]), that was certainly not the case here. The prosecutor focused on the testimony of Cube at the very beginning of her closing argument to the jury at the guilt phase. She cited the Cube robberies as support for her theme of the case: "Examples of excessive violence in this case. Unnecessary cruelty towards the victims." (30 RT 2149.)

One purpose of section 352 is to preclude a "mini trial on a crime with which the defendant has not been charged," and the juror confusion and inordinate consumption of time such mini trials cause. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 544; see *People v. Harris* (1998) 60 Cal.App.4th 727, 738-739 [the "probability of confusing the jury with (uncharged crimes) evidence weighs in favor of exclusion"].) As discussed *ante*, the testimony of Julio Cube was quite extensive and thus time-consuming. In addition, because the evidence of these uncharged robberies was being used in a case with a series of other robberies, the inclusion of former may well have confused the jury.

Thus, even assuming arguendo that the uncharged robberies of Julio Cube were admissible to prove that Mr. Leon had an intent to rob in the charged robberies, despite the fact that the issue of the intent of the perpetrators of charged robberies was not truly in dispute, it is highly likely that the jury considered the evidence on the disputed issue of identity. This fact contravened the trial judge's specific finding that the charged and

uncharged crimes lacked the distinctive similarity required before other crimes evidence could be admissible on the issue of identity. (*Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

While the jurors were instructed to consider this evidence only for the limited purposes of determining if it tends to show a "characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged" and that the defendant had knowledge or possessed the means that might have been useful for the commission of the crime charged (9 CT 2006-2007), it is highly unlikely that they were able to follow those instructions. As noted in *People v. Brown* (1993) 17 Cal.App. 4th 1389, 1397, when evidence of similar uncharged offenses is admitted for some limited purpose under section 1101 there is always a concern that the jury will improperly consider it as proof of criminal propensity.

In this case the danger was particularly great because the record shows that while the trial judge acknowledged that the evidence concerning the two robberies of Julio Cube was not sufficiently similar to prove identity, in reality it was offered by the prosecution for exactly that purpose. The prosecutor said in her opening argument to the jury that Julio Cube had already identified Mr. Leon as the person who robbed him. (16 RT 649.) This claim was made despite the fact that both the magistrate at the preliminary hearing and the superior judge deciding the 995 motion found that Cube's pre-trial identification of Mr. Leon was so weak that the charges involving the two robberies should be dismissed. (6 CT 1465; 1-10 RT 41-42.)

Thus, it is clear from the record that the prosecutor was really using Cube's testimony to show the jury that Mr. Leon was implicated in yet another robbery. In addition, as the closing argument of the prosecutor demonstrates, she wanted to use the robberies of Julio Cube to support the theme of her closing argument at the guilt phase: that the crimes alleged in this case involved "cruel and unnecessary violence." (30 RT 2147.) At the very beginning of her argument, the prosecutor posited this as the theme of the case. (30 RT 2147.) She argued that Mr. Leon violated even the "criminal code" of the "wild west" in the various robberies with which he had been charged. (30 RT 2147-2148.)

The first incident that she cited as proof of this theme of "cruel and unnecessary violence" was the robbery of Rocky's Video Store where the robbers not only took the money from the business but took the boom box of a 12 year old boy who was working there. (30 RT 2138.) The second victim cited by the prosecutor in this argument was Mr. Cube:

> Same thing with Mr. Cube, the violence in that case is so unnecessary. I don't know whether you noticed but that [sic] Mr. Cube was disabled. He had one hand that was disfigured. He was a man of only five feet four inches tall. He was a man of 110 pounds. And the robber came back twice, once sticking a knife in his belly as he says, and the other time sticking a gun in his neck. Examples of excessive violence in this case. Unnecessary cruelty towards the victims...

(30 RT 2149.)

It is apparent from this argument that the prosecutor did not call Mr. Cube as a witness to prove that Mr. Leon possessed the gun which was tied by ballistics to the crimes charged against Mr. Leon. The prosecution already had more than adequate evidence of that since the gun was found in the vehicle that Mr. Leon had been traveling in when he was arrested. She

wanted the jury to use the testimony of Cube and indeed Cube's physical condition — that is, his "disfigured" hand and his slight stature — to bolster her theme that Mr. Leon is an unusually violent and cruel criminal. Defense counsel objected to this portion of the prosecutor's argument, pointing out that the level of violence was not relevant to the question of whether Mr. Leon was guilty of the crimes for which he was being tried. (30 RT 2149.)

Not only was the admission of Julio Cube's testimony about two uncharged robberies improper under sections 1101 and 352 of the Evidence Code, such evidence violated Mr. Leon's rights to a fair trial, due process and a reliable determination of guilt under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The admission of this evidence violated Mr. Leon's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find Mr. Leon guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render Mr. Leon's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated Mr. Leon's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S.

343, 346-347.) By ignoring well-established state law which prevents the State from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the trial court arbitrarily deprived Mr. Leon of a state-created liberty interest.

Under either the federal standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24) or the state standard (*People v. Watson* (1956) 46 Cal.2d 818, 836), this evidentiary error requires the reversal of Mr. Leon's convictions and death sentence. The admission of Julio Cube's testimony about two uncharged robberies and the highlighting of this testimony by the prosecutor during her closing argument at the guilt phase trial rendered Mr. Leon's case for life far less persuasive than it might [otherwise] have been." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302-303.) The State cannot establish that the improper Cube testimony did not affect both the convictions and the death sentences in this case.

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IV

THE TRIAL JUDGE ERRED IN ALLOWING A DETECTIVE TO OFFER INADMISSIBLE LAY OPINION TESTIMONY WHICH WAS HIGHLY PREJUDICIAL TO APPELLANT AND INVADED THE PROVINCE OF THE JURY

Over the objection of the defense, the trial judge permitted Detective Michael Oppelt to testify that it was Mr. Leon who appeared on two surveillance tapes taken of two different robberies. For the reasons that follow, the admission of this evidence was error which requires the reversal of Mr. Leon's convictions and sentence of death.

A. Factual Summary

The prosecutor requested that Detective Oppelt identify the person appearing in two surveillance tapes [37] from the scenes of the two robberies, one of which involved a murder, charged against Mr. Leon. (26 RT 1708-1709.) Over defense objection, the trial judge allowed the investigating officer, Detective Oppelt, to narrate the very low quality videos and offer opinion testimony regarding the identity of the persons depicted. (26 RT 1741-1755.)

Defense counsel argued that the officer's identification testimony amounted to improper lay opinion. He objected to the prosecutor's solicitation of the officer's opinion on the suspect's jacket, on the grounds

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[37] One of the videotapes, marked as People's Exhibit 9, was taken at the Valley Market on February 17, 1993. (26 RT 1708, 1743.) The other videotape, marked as People's Exhibit 8, was taken in Sun Valley Shell Gas Station. (26 RT 1745.) Subsequently, a copy of portions of Exhibit 8 were made by the police. One such copy, marked as exhibit 93, was played by the prosecutor, who asked Detective Oppelt questions about what was depicted in People's Exhibit 93. (26 RT 1748, 1751-1757.)

that the officer had no special training in identifying clothing,[38] and argued that if Oppelt's opinion was only that the jacket was similar to the one defendant had in his possession when he was arrested then the opinion would be inadmissible as irrelevant. (26 RT 1710.)

Defense counsel further argued that this type of opinion identification coming from a police officer would be particularly prejudicial because "the jury may conclude, and is likely to conclude, that as a police officer he might have more information than they have with regard to who is depicted on that videotape." (26 RT 1711.) Counsel pointed out that it is not easy for a jury to discern what in a police officer's testimony is merely opinion and what is not. Although the opinion of law enforcement personnel on the issue of identification is no more valid than anyone else's, it is likely to have a more prejudicial effect on the jurors. (*Ibid.*)

Citing three California Court of Appeal opinions,[39] the trial judge opined that a non-percipient witness is permitted to give identification testimony based on his or her knowledge of the defendant's appearance "at or before the time photo [video] was taken." (26 RT 1712.) The court also asserted that it "would make no difference" whether the witness is familiar with the person being identified prior to or subsequent to the recording of the video. (26 RT 1712-1713.)

In response to this analysis of the trial judge, defense counsel pointed

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[38] Defense counsel further objected to this identification testimony: "We are not talking about a clothing manufacturer of a particular kind of jacket where he is identifying that this is a particular jacket that is only sold in certain fine stores or anything of that sort." (26 RT 1710.)

[39] The three decisions cited were: *People v. Perry* (1976) 60 Cal.App.3d 608; *People v. Mixon* (1982) 129 Cal.App.3d 118; and *People v. Ingle* (1986) 178 Cal.App.3d 505.

out that in the cases cited by the judge, the witnesses had substantial prior knowledge of the person being identified. (26 RT 1713-1714.) Counsel again argued that this identification testimony by a police officer was more prejudicial than probative because the jury would give it special credence based on the witness' status as police officer. Moreover, the testimony of Detective Oppelt was not necessary because the prosecution had other witnesses who had made identifications in both instances. (26 RT 1714-1715.) In addition, defense counsel argued that particularly the video from the Chan Shell Service Station was of such poor quality that any identification based on it would not be reliable. (26 RT 1715.)

The trial judge rejected these arguments, stating that he would not speculate on whether the jurors would give undue weight to the identification testimony of Oppelt because he was a police officer. (26 RT 1716.) Although the trial court agreed that the prosecutor had not yet laid the foundation concerning the extent of Detective Oppelt's contact with Mr. Leon, if she did lay such a foundation, he would allow Oppelt to give his lay opinion about whether he saw Mr. Leon in the videotapes. (26 RT 1716.) Accordingly, the trial judge overruled the defense's objection to the opinion testimony of Detective Oppelt and his video identification. (26 RT 1717.)

Some days later, Detective Oppelt took the stand, and the prosecutor asked him to offer an opinion about whether the jacket seen on a person in the videotape, Exhibit 9, taken in the Valley Market was the same as the jacket found in Mr. Leon's possession at the time of his arrest. (26 RT 1741-1742.) The prosecutor then sought to lay a foundation for Detective Oppelt to identify Mr. Leon as the person in the video. In response to the prosecutor's questions, Oppelt testified that he had spent "collectively a

couple of hours" with Mr. Leon and had seen him "close to ten" times since Mr. Leon's arrest. (26 RT 1742-1743.) Defense counsel renewed his objection to this testimony on the ground that the prosecution had not established an adequate foundation for this evidence. His objection was overruled, and Oppelt was allowed to identify Mr. Leon in the videotape. (26 RT 1743.)

Over further objections by the defense, Detective Oppelt identified a car in one of the videotapes from the Sun Valley Shell Gas Station as the same vehicle Mr. Leon had occupied just before his arrest and a baseball cap worn by a person in one of the gas station videotapes as the same cap found in that vehicle at the time of Mr. Leon's arrest. (26 RT 1749-1755.) Detective Oppelt also identified the individual in the gas station during the robbery as wearing the same jacket as Mr. Leon was wearing at the time of the arrest. (26 RT 1752-1753.)

B. Lay Opinion Identification

One of the fundamental theories of evidence law, expressed in the "opinion rule," is that witnesses must ordinarily testify to facts, leaving inferences or conclusions to the jury or court. (Witkin, California Evidence (4th ed. 2000) 1 Opinion Evidence section 1, p. 528.) A jury is presumed to be able to form opinions and "resolve factual disputes" on the basis of straightforward, factual information and observation presented as evidence by the parties. (Mendez, Evidence, the California Code and the Federal Rules, A Problem Approach (4th ed. 2008) section 1601, p. 614.) A corollary of this principle is that a witness is not competent to testify on a matter — either as to facts or opinions — if the witness lacks personal knowledge of it. (Witkin, California Evidence, supra, § 1 , p. 528; Cal.

Evid. Code, § 702.)

The general requirement of personal knowledge is modified by the provisions for expert testimony, which generally involves an opinion formed on the basis of information not observed personally or contemporaneously. (See Cal.Evid.Code § 801.) Although Evidence Code section 702 expresses a preference for percipient witnesses, expert testimony is appropriate and admissible where some item of evidence is too obscure or complicated for a lay jury to assess its probative value and the expert has special knowledge or insight, or where an assessment and conclusion must be made of some fact in issue, such as a defendant's mental state. (See Mendez, Evidence, *supra*, § 16.01, p. 615.) The admissibility of expert testimony therefore presumes that the expert's opinion is needed to guide the jury's evaluation of certain facts not readily understood. (*Id.*, at § 16.03, p. 618.)

The California Evidence Code also provides for non-expert opinion testimony if it is "rationally based on the perception of the witness; and helpful to a clear understanding of his testimony." (Cal. Evid. Code § 800, subds. (a-b).) A witness would have a hard time describing a conclusion, for example, that it was raining at the time of the incident, without forming or expressing an opinion. (Mendez, Evidence, *supra,* § 16.01, p. 614.) An eyewitness identification, made in or out of court, is an expression of opinion. Where the person making the identification was not a percipient witness but makes an identification through a photograph or video tape, the identification is considered a lay opinion and generally is not admissible without laying a foundation for special knowledge. (Witkin, California Evidence, *supra*, §§ 5, 6, pp. 533-534.)

C. California Case law on Lay Opinion Identification Cited by Trial Judge

As noted previously, the trial judge relied on three decisions of the California Court of Appeal to justify his decision to allow Detective Oppelt to make identifications of Mr. Leon based on videotapes taken at the scenes of two different robberies charged against Mr. Leon. As discussed below, all three of these cases are distinguishable from the instant case.

In *People v. Perry* (1976) 60 Cal.App.3d 608, the trial court allowed two police officers and several others to give their opinions about the identity of one of the robbers on a surveillance tape made at the Sacramento Service and Development Corporation, where money and food stamps had been taken at gunpoint. The Court of Appeal noted that the issue raised — the admissibility of this identification testimony regarding a surveillance tape — was an issue of first impression. (*Id.* at p. 612.) Mr. Perry agreed that the identity of a person is a proper subject of non-expert opinion but argued that only a percipient witness should be permitted to offer such opinions. (*Ibid.*)

The appellate court held that identification testimony need not be confined to percipient witnesses, where the identification is sufficiently based on personal knowledge of the person's appearance and physical characteristics. (*Id.* at pp. 612-613.) Mr. Perry had changed his appearance by altering his facial hair before trial, but witnesses who were familiar with his appearance could make identifications based on their own perception and knowledge "not available directly to the jury." (*Id.* at p. 613.) The appellate court compared identifying a person on a surveillance camera based on prior knowledge of that person's appearance with lay opinion on the identity of handwriting. Handwriting identification is permitted under

Evidence Code section 1416 as long as the witness has personal knowledge of the supposed writer's handwriting from seeing the person write, or receiving a letter, or by other means.

In the *Perry* decision, the Court of Appeal held that the same rationale should apply "to evidence of the identity of a pictorially depicted subject when such evidence is based upon personal knowledge of the person's physical characteristics at the time of the film depiction." (*Id.* at p. 614.) Citing the fact that the witnesses based their opinion on their perception of the surveillance film and their *prior knowledge* of Mr. Perry's appearance, the Court of Appeal affirmed the decision of the trial judge allowing non-expert opinion testimony on identification in the *Perry* case.

In *People v. Mixon* (1982) 129 Cal.App.3d 118, the California Court of Appeal held that officers who had had prior contacts with the defendant could permissibly give an identification based on their opinion and perception. The trial judge in *Mixon* allowed police officers to testify that the defendant was the person captured on a surveillance camera robbing a gas station at gunpoint. Relying on the *Perry* decision, the trial court held that identity of a person is a proper subject of non-expert opinion, and photographic identification is admissible, particularly when it involves law enforcement witnesses, only when certain conditions are met. *(Mixon, supra*, 129 Cal.App.3d at p. 127.) Those prerequisites are: (1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aids the trier of fact in determining the crucial identity issue. (*Id.* at p. 128.)

In *Mixon, supra*, the trial judge examined the officers outside the presence of the jury and determined that prior contact with the defendant of these witnesses was ample, as one officer had had multiple and recent street

contacts with him, and the other had known defendant for a number of years, including when defendant was incarcerated at the California Youth Authority. (*Id.* at pp. 129-131.) The trial judge also relied on the fact that both officers identified Mr. Mixon unequivocally, suggesting a certainty that would come only with substantial familiarity. (*Ibid.*)

Unlike the *Perry* decision, the *Mixon* decision specifically addressed the question of law enforcement officers as witnesses giving opinion evidence about identification. The Court of Appeal noted in *Mixon* that this issue had never been addressed by the California appellate courts but that federal courts had expressed concern about the potential for prejudice inherent in an law enforcement officer's identification testimony. (*Id.* at p. 129.) For example, in *United States v. Butcher* (9th Cir. 1977) 557 F.2d 666, the Ninth Circuit recognized that establishing the foundational knowledge and contact necessary to allow a police officer to give identification testimony might "increase the possibility of prejudice to the defendant in that he [is] presented as a person subject to a certain degree of police scrutiny." (*Id.* at p. 669.) Therefore, in *Butcher*, the federal court of appeals held that such testimony "should be used *only if no other adequate identification testimony is available* to the prosecution. (*Id.* at p. 670, italics added.)

In *Mixon, supra*, the California Court of Appeal adopted this caveat from the *Butcher* decision, describing it as "a proper refinement of the holding of *People v. Perry*." (*Mixon, supra*, at p. 134.) The *Mixon* decision further stated that such law enforcement identification testimony should be excluded "if the prejudicial effect of such testimony outweighs its probative value." (*Ibid.*)

In *People v. Ingle* (1986) 178 Cal.App.3d 505, the Court of Appeal, citing both the *Perry* and *Mixon* decisions, held that it was clearly established that lay opinion testimony concerning the identity of a robber portrayed in a surveillance camera photograph or videotape of a robbery is admissible where the witness has personal knowledge of the defendant's appearance *at or before the photo was taken* and his testimony aids the trier of fact in determining the crucial identity issue." (*Id.* at p. 513, italics added.) The *Ingle* court held that when photo quality did not permit the jury to make an identification of the defendant, or where defendant may have changed his appearance, persons familiar with defendant's appearance could give an opinion on the identity of the persons depicted in a photograph or videotape which "does not usurp or improperly invade the province of the trier of fact." (*Ibid.*)

In *Ingle*, the witness who testified about the identity of the robber depicted in the surveillance videotape was actually the victim. The appellate court found that the trial court had properly allowed the victim to identify the defendant in the surveillance videotape:

> [she] had an adequate opportunity to view defendant's physical features during the robbery and to relate her observations and recollections to both the video picture and the defendant's person.

(*Id.* at p. 514.)

Contrary to the trial judge's analysis, the testimony of Detective Oppelt regarding the identification of Mr. Leon in the videotapes was not justified under the *Perry*, *Mixon* and *Ingle* decisions. The trial court described the three decisions and their meaning, noting explicitly that identification testimony is admissible as a lay opinion "where the witness

has personal knowledge of the defendant's appearance at or before the time the photo was taken." (26 RT 1712.). However, in the next breath, the judge expressed a contrary view: "[w]hether the person giving the opinion is familiar with the person depicted in the video by prior contacts or subsequent contacts make no difference." (*Ibid.*)

The reasoning of the trial judge about the admission of Detective Oppelt's testimony was flawed. First, the admissibility of lay opinion testimony regarding identification requires that the witness have some degree of knowledge or experience beyond the reach or province of the jury. The reason that identification is limited to witnesses whose knowledge of the person's appearance at or before the time the photograph or video was taken is that such witnesses are in a better position than the jurors to compare their perceptions with the images of the photo or video. If subsequent contact with the people allegedly depicted were sufficient, the jury would be equally well-placed to make the identification, and the lay opinion testimony would not be "helpful to a clear understanding of his testimony." (Cal. Evid. Code § 800, subd.(b).)

The *Perry*, *Mixon* and *Ingle* decisions, discussed above, make clear that, as with the identification of handwriting, the witness must have knowledge or familiarity with the appearance of the person being identified with which to compare the images depicted in the photographs or videotapes. Not only should that knowledge be acquired prior to the creation of the photographic or video evidence, but such knowledge should be substantial, rather than only a passing or fleeting view. The rule that a witness's knowledge of the subject he or she is asked to identify in a photo or video must have been obtained at or before the photo or video was made is a bedrock principle for the admissibility of this lay opinion evidence

regarding identification. In this case, Detective Oppelt's testimony did not meet that simple requirement. He had never had any contact with Mr. Leon before Mr. Leon's arrest in this case. The videos that Oppelt was asked to identify were made some time before Oppelt met Mr. Leon. For that reason alone, the trial judge erred in admitting Detective Oppelt's identification of Mr. Leon in the two surveillance videos.

Further, in admitting this testimony, the trial judge also ignored the limitation set forth in *United States v. Butcher, supra,* 557 F.2d 666, as adopted by the California Court of Appeal in *Mixon, supra*, 129 Cal.App.3d 118, 134: a police officer should not testify about identification unless no other identification testimony is available to the prosecution. In *Mixon*, the court of appeal described the *Butcher* rule, stated above, as a "proper refinement" of the *Perry* decision. In the instant case there were percipient witnesses available to testify, and the prosecution could have introduced the tapes themselves, without narration by Detective Oppelt. (26 RT 1715.)

D. The Admission of Detective Oppelt's Identification Testimony Prejudiced Mr. Leon

The trial court erred in allowing Detective Oppelt to identify Mr. Leon as one of the robbers depicted in two surveillance videotapes because Oppelt had never had any contact with Mr. Leon until after his arrest, which occurred more than a month after the videotapes had been made. The trial judge's admission of this testimony violated the principle set forth in the appellate opinions he had cited and relied upon in his ruling; that is, those decisions, *Perry, Mixon* and *Ingle*, discussed *ante*, require that any witness asked to identify a person in a photograph or videotape must have had knowledge of that person's appearance at or before the photograph or videotape was made.

Second and more importantly, because Detective Oppelt was a police officer, his testimony on this point unduly prejudiced Mr. Leon as it is likely that the jurors would give his opinion testimony about what was depicted in the two videotapes special consideration simply because he was a police officer. He had no special knowledge of defendant which justified allowing him to invade the province of the jury by telling them Mr. Leon was appeared in the surveillance tapes. In this case, Detective Oppelt was in no better position to make an identification of the people depicted in the two surveillance tapes than the jurors themselves. Indeed, it is reasonable to assume that the jury treated Detective Oppelt as a "de facto" expert witness. Although the jurors received an instruction on "Opinion Testimony of Lay Witness" (9 CT 2016), they were never told that it applied to Detective Oppelt's testimony. While the attorneys and the trial court discussed the issue of whether Detective Oppelt should be allowed to give a lay opinion regarding what he saw in the videotapes, the jury was not present for those discussion. (26 RT 1708-1717.)

During her closing argument to the jury at the guilt phase, the prosecutor relied heavily on these surveillance tapes in making her case that it was Mr. Leon who was seen in them committing robberies, and in one instance, murder. (30 RT 2164-2171.) Indeed, the prosecutor arranged to have the tapes shown in the jury deliberation room. (30 RT 2164.) She also played the tape, People's Exhibit 9, taken in the Valley Market, for the jury during her closing argument. (30 RT 2165.) In narrating the tape for the jury, the prosecutor pointed to one of the figures depicted and stated "you have heard testimony that this is the defendant." (30 RT 2166-2167.) Detective Oppelt's testimony identifying Mr. Leon in the tapes, therefore, became the cornerstone of the prosecutor's argument regarding the tapes

and how they supported the "theme" of her closing argument that these crimes were especially vicious and craven. (See Argment VI, *post*, regarding prosecutorial misconduct in the guilt phase closing arguments.) For example, referring to the tapes, the prosecutor argued:

> The defendant, you can see from some of the videos of the robbery, it's more than the way he looks. He has an attitude, a strut about him as he robs people. It is excessive, if you will, because if you look at , for instance, a good example of that is the video that we have of the Su or the Chan's Shell. The way he comes in he is displaying the gun in a very outward position. He is up on the guy's neck. I mean he turns what could be rather routine robbery into a very frightening and intimidating experience. And in that respect has left an indelible impression on those victims such that even today, some three and a half years later, they can come in, they can take the oath, and they can look over at this man and he can shave that mustache off his face. He can gain weight. He can undo the ponytail like he has done today. And they are sure he is the man. They can identify as the man.

(30 RT 2181-2182.)

The improper use of Detective Oppelt's opinion testimony regarding Mr. Leon's presence in the surveillance tapes improperly prejudiced Mr. Leon, and there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the verdict." (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

Moreover, allowing Detective Oppelt to identify Mr. Leon, his clothing and his car in the videotape involving the homicide of Mr. Ahverdian violated Mr. Leon's due process rights to fair trial in violation of the Sixth and Fourteenth Amendments. This testimony, because it was given by a police officer who had no prior knowledge of Mr. Leon about a videotape which was of extremely poor quality, unfairly favored the

prosecution and unconstitutionally lessened the State's burden of proving beyond a reasonable doubt that, in fact, Mr. Leon was the person depicted in the Chan Shell Station and Valley Market videotapes. (*In re Winship* (1970) 397 U.S. 358, 363.) In addition, as discussed *ante*, allowing Detective Oppelt to testify about his opinion about what was depicted in the videotapes violates California Evidence Code, sections 702, 800 and 801. The admission of this evidence therefore violated a state-created liberty interest protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

For all of the foregoing reasons, Mr. Leon's convictions and death sentence must be reversed.

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V

THE TESTIMONY OF DR. CARPENTER ABOUT THE AUTOPSY IN THE NORAIR AKHVERDIAN CASE VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

A criminal defendant's right to confront and cross-examine the witnesses against him is guaranteed by the Confrontation Clause of the Sixth Amendment. (*Pointer v. Texas* (1965) 380 U.S.400, 403-404.) It has also been long-established as essential to due process.. (U.S. Const. amends. VI & XIV; *In re Oliver* (1948) 333 U.S. 257, 273; and *Chambers v. Mississippi* (1973) 410 U.S.284, 294.) At issue here is whether it was permissible, under the Sixth Amendment, for the prosecutor to present the testimony of a medical examiner about the autopsy done on Norair Akhverian when he did not conduct the autopsy and relied upon a report and photographs done by another medical examiner who had never been cross-examined by Mr. Leon.

A. The *Crawford, Davis* and *Melendez-Diaz* Decisions

In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court set forth a clear standard, precluding the admission of testimonial statements of an absent declarant against a criminal defendant at trial unless the witness was unavailable and counsel for the defendant has had an opportunity at a prior proceeding to cross-examine the declarant regarding the statement. (*Id.* at p. 68.)

The *Crawford* decision rejected the view that the Confrontation Clause applied only to in-court testimony and that its application to out-of-court statements introduced at trial depended largely upon state statutory rules of evidence. The Supreme Court concluded that "testimonial"

statements or hearsay were a "core concern" of the Sixth Amendment, and that such testimonial statements were inadmissible against the defendant, whether or not the court had deemed such statements "reliable." The *Crawford* decision thus overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), to the extent *Roberts* held that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement fell within a firmly established hearsay exception and bore adequate "indicia of reliability." (*Crawford, supra*, 541 U.S. at pp. 63-64.) The *Crawford* decision concluded that the "reliability" standard set forth in *Roberts* was too amorphous to prevent the improper admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude." (*Id.* at p. 64.) The Court also observed that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *(Id.* at p. 63.)

Non-testimonial evidence, however, is subject to different analysis. For example, if the primary purpose of the evidence is to meet an ongoing emergency and is not to prove facts for a possible criminal prosecution, this evidence is considered non-testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 822.) The Supreme Court further elaborated on the meaning of "testimonial" and "non-testimonial in the *Davis* decision, *supra*. The Court held that statements by a victim of domestic violence to a 911 operator immediately after an assault were not testimonial, while statements made by a victim during a police interview shortly after an incident of domestic violence were testimonial and thus inadmissible absent confrontation. The Court summarized its holding concerning the Clause's applications to statements to police:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Id.* at p. 822.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S.___, 129 S.Ct. 2527, the United States Supreme Court found that the Confrontation Clause of the Sixth Amendment prohibits the prosecution from presenting at trial a laboratory test report by affidavit as evidence unless the analyst who conducted the test was available for cross-examination. Defendant Melendez-Diaz was charged with selling cocaine. Pursuant to a Massachusetts statute, the prosecution introduced at the trial three "certificates of forensic analysis" regarding the drugs found in defendant Melandez-Diaz's possession. Under the state law, such certificates were admissible if signed by the analyst conducting the test and sworn before a notary. On appeal to the Massachusetts Supreme Court, Mr. Melendez-Diaz argued that his confrontation rights under the Sixth Amendment had been violated because he had not had an opportunity to cross-examine the analyst. The state high court rejected this argument, and the United States Supreme Court granted certiorari.

Citing its previous decision in *Crawford, supra*, the Supreme Court held that this use of affidavits was not allowed unless the affiant was unavailable, and the defendant had previously had the opportunity to confront and cross-examine him. The Court further noted that "testimonial statements," for purposes of the Sixth Amendment, included affidavits, depositions, and prior testimony made under circumstances which would

lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

The majority in the *Melendez-Diaz* decision rejected the argument that a defendant's right to confront analyst-witnesses is not altered by the fact that they do not directly accuse the defendant of wrongdoing. (129 S.Ct. at p. 2535.) The Court also rejected the prosecution's argument that because an analyst report reflects a "near contemporaneous" observation and it is not provided in response to law enforcement interrogation that somehow makes the evidence non-testimonial and thus not subject to Sixth Amendment confrontation requirements. (*Ibid.*) The majority pointed out that the laboratory test and report were done at the request of the police. (129 S.Ct. at p. 2536.)

The *Melendez-Diaz* majority focused a substantial portion of its opinion on the issue of whether reports which involve scientific testing are outside the purview of the Confrontation Clause of the Sixth Amendment because they do not recount historical facts and are by their very nature neutral. Citing a recent report by the National Academy of Sciences on the state of forensic science in the United States, the majority noted that most forensic laboratories in this country are run by law enforcement agencies. As a result, some forensic scientists may feel pressure to alter procedures and even evidence in a manner favorable to the prosecution. Cross-examination is designed to test both the competence and reliability of such scientific testing. (129 S.Ct. at pp. 2525-2537.) These principles are applicable to the autopsy report and the testimony of the medical examiner in the instant case.

B. Under the *Crawford* and *Melendez-Diaz* Decisions, the Autopsy Report and its Contents Were Testimonial

The Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (*Crawford, supra*, 541 U.S. at p. 54; see also *Giles v. California* (2008) 554 U.S. __ , 128 S.Ct. 2678, 2682.) Autopsy reports would have been considered testimonial at the time of the inception of the Sixth Amendment.

The majority in *Melendez-Diaz* acknowledged the dissent's point that "there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test" than through confrontation, but also explicitly identified autopsy reports as an exception, observing that "forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated." The court concluded that confrontation remains the one constitutional way "to challenge or verify the results"of such forensic tests. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536 & fn. 5.) Given this language, it is plain that the Supreme Court considers autopsies to be testimonial.

Mr. Leon has not found any case suggesting that, when the Sixth Amendment was adopted, an autopsy report prepared as part of an ongoing homicide investigation would have been admissible absent confrontation of its author, whether under a business record exception, or for the "non-hearsay" purpose of establishing the basis of expert testimony. In *Melendez-Diaz*, the Court rejected the contention that anything admissible under a jurisdiction's business records exception is therefore non-testimonial:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. [Citation.] But that is

> not the case if the regularly conducted business activity is the production of evidence for use at trial.

(*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538, citation and footnote omitted])

In *Palmer v. Hoffman* (1943) 318 U.S. 109, cited in *Melendez-Diaz* on this point, the Supreme Court wrote that the business records exception was meant to apply to "entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls" and that relate to the "management or operation of the business[.]" (*Id.* at p. 113.) Such records are considered inherently trustworthy, as opposed to records that are created as a "system of recording events or occurrences" that have "little or nothing to do with the management or operation of the business" such as "employees' versions of their accidents." (*Ibid.*) Expanding the rule to incorporate "any regular course of conduct which may have some relationship to business .... opens wide the door to avoidance of cross-examination" because companies could routinely record certain activities not covered under the business records exception. (*Id.* at p. 114.)

Although it is the "business" of the coroner (or companies working for the coroner) to conduct autopsies, the purpose for doing so in suspected homicide cases is for prosecutorial use, rather than for the coroner's own administrative use. Such reports are thus precisely the type of out-of-court statement that must be excluded under *Palmer, supra,* because admitting them "opens wide the door to avoidance of cross-examination[.]" (318 U.S. at p. 114; see also Grimm, Deise, & Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial* (2010) 40 U. Balt. L.F. 155, 181 [concluding that autopsy reports in homicide cases are

testimonial under *Melendez-Diaz*].)

When the Sixth Amendment was adopted and until relatively recently (that is, until the decision in *Roberts, supra*, 448 U.S. 46 permitted statements deemed sufficiently "trustworthy" to evade confrontation), the contents of an autopsy report would not have been admissible absent the testimony of the pathologist who conducted the autopsy. (See *Crawford, supra*, 541 U.S. at p. 47, fn. 2, citing *State v. Houser* (1858) 26 Mo. 431, 436; see also *Palmer, supra,* 318 U.S. at pp. 111-114; *Commonwealth v. Slavski* (Mass. 1923) 140 N.E. 465, 468-469 [autopsy reports prepared by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are inadmissible hearsay]; *Commonwealth v. McCloud* (Pa. 1974) 322 A.2d 653, 656-657 ["evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation is impermissible unless the accused is afforded the opportunity to confront and cross-examine the medical examiner who performed the autopsy"]; *State v. Miller* (Or. Ct. App. 2006) 144 P.3d 1052, 1058-1060 [tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception].) The rationale of the cases allowing the introduction of autopsy reports as business, official, or medical records was soundly repudiated by the Court in the *Melendez-Diaz* decision.

1. Coroners Are Agents of Law Enforcement

In *Crawford*, the court particularly noted that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and

again throughout a history with which the Framers were keenly familiar." (541 U.S. at p. 56, fn. 7.) Coroners and deputy coroners whose primary duty is to conduct inquests and investigations into violent deaths are peace officers under California law. (Pen. Code, § 830.35, subd. (c).)

Government Code section 27491 requires the coroner "to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; ...." (See also *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277.) Government Code section 27491.4, subdivision (a), provides in pertinent part:

> ...The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. ...

When there are reasonable grounds to suspect that a death "has been occasioned by the act of another by criminal means, the coroner ... shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation." (Gov. Code, § 27491.1.)

In short, a forensic pathologist conducting an autopsy for the coroner in a case of suspected homicide is part of law enforcement. (*Dixon, supra*, 170 Cal.App.4th at p. 1277.) Indeed, in *Mar Shee v. Maryland Assurance Corp.* (1922) 190 Cal. 1, 4, this Court observed that the primary purpose of coroner's inquest "is to provide a means for the prompt securing of information for the use of those who are charged with the detection and prosecution of crime."

2. Some Appellate Courts Have Correctly Concluded That Autopsy Reports Prepared In Cases of Suspected Homicide Are Testimonial

Following *Melendez-Diaz*, a number of appellate courts have found autopsy reports prepared in cases of suspected homicide to be testimonial statements. For example, in *Wood v. State* (Tex.App. 2009) 299 S.W.3d 200, a Texas appellate court held that while not all autopsy reports are categorically testimonial, where the autopsy was conducted in a suspected homicide and homicide detectives were present during the autopsy, the pathologist preparing the report would understand that the report containing her findings and opinions would be used prosecutorially. The autopsy report thus "was a testimonial statement and [the pathologist who authored the report] was a witness within the meaning of the Confrontation Clause." (*Id.* at p. 210; see also *Martinez v. State* (Tex.App. 2010) 311 S.W.3d 104, 111[agreeing with *Wood, supra*].)

The North Carolina Supreme Court found that the United States Supreme Court in *Melendez-Diaz* "squarely rejected" the argument that an autopsy report was not "testimonial," and held that evidence of forensic analyses performed by a non-testifying forensic pathologist and a non-testifying forensic dentist violated the defendant's right to confrontation. (*State v. Locklear* (2009) 363 N.C. 438, 452; see also *State v. Johnson* (Minn.App. 2008) 756 N.W.2d 883, 890 [pre-*Melendez-Diaz* case holding that autopsy report prepared during pendency of homicide investigation was testimonial]; *State v. Bell* (Mo. App. 2009) 274 S.W.3d 592, 595 [same].)

Recent appellate decisions applying the analysis compelled under *Crawford* and *Melendez-Diaz* have held that expert testimony based on an

autopsy report is inadmissible absent confrontation of the pathologist who performed the autopsy. In *Wood v. State, supra*, 299 S.W.3d 200, the expert testified not only to his own opinion, but also disclosed to the jury the testimonial statements in the autopsy report upon which those opinions were based. Because the statements supported the testifying expert's opinion only if true, "the disclosure of the out-of-court testimonial statements underlying [the testifying expert's] opinion, even if only for the ostensible purpose of explaining and supporting those opinions, constituted the use of testimonial statements to prove the truth of the matters stated in violation of the Confrontation Clause." (*Id.* at p. 213; see also *Martinez v. State, supra*, 311 S.W.3d at p. 111 [same]; *State v. Bell* (Mo.App. 2009) 274 S.W.3d 592, 595 [autopsy report or testimony concerning autopsy report not admissible absent confrontation of pathologist who prepared report] *State v. Davidson* (Mo.App. 2007) 242 S.W.3d 409, 417 [same].)

In 2009 and 2010, various districts of the California Court of Appeals have addressed the application of the *Melendez-Diaz* holding to the admissibility of various scientific reports, including autopsy reports. These decisions have resulted in conflicting conclusions, and this Court has granted review. (See *People v. Gutierrez* (2009) 177 Cal.App.4th 654, rev.granted 12/2/09, (S176620); *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, rev. granted 12/2/09, (S176213); *People v. Dungo* (2009) 176 Cal.App.4th 1388, rev. granted 12/2/09 (S176886); *People v. Lopez* (2009) 177 Cal.App.4th 202, rev. granted 12/2/09, (S177046); and *People v. Anunciation*, rev.granted 3/18/10, S179423.) [40]

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[40] Of these cases, both *Dungo* and *Anunciation* dealt with the testimony of pathologists about autopsies in which they did not participate.

C. The Trial Testimony about the Autopsy of the Body of Norair Akhverdian

At trial, Dr. Eugene Carpenter testified about the autopsy of Norair Akhverdian, one of the homicide victims in this case, conducted by the Los Angeles Coroner's office. (26 RT 1720-1740.) Dr. Carpenter was a medical examiner in that office and was certified by the American Board of Pathologists as qualified to practice anatomic, clinical, and forensic pathology. (26 RT 1720.)

Dr. Carpenter testified concerning an autopsy report[41] about the body of Mr. Akhverdian. The autopsy and the resulting report were actually done by another medical examiner, Dr. James Wegner. (26 RT 1723.) At trial, Dr. Carpenter stated that Dr. Wegner had died. (26 RT 1723.)

Dr. Carpenter also testified about five photographs[42] of Mr. Akhverdian's body, which were taken in connection with the autopsy. He agreed that the photographs appeared to correspond with statements made in the autopsy report by Dr. Wegner. (26 RT 1726.) According to Wegner's report, the cause of Mr. Akhverdian's death was a gunshot wound to the thorax abdomen, known as a thoracoabdominal gunshot wound. (26 RT 1726.) Further, the report stated that the bullet entered Mr. Akverdian's chest at the lower left front several inches below the nipple, and it exited at the right lower chest at about the same level as the entrance wound. (26 RT

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[41] The report, dated February 4, 1993, was marked as People's Exhibit 111. (26 RT 1722.) This report was formally entered into evidence. (29 RT 2024-2025; 8 CT 1970.)

[42] The photographs were marked as People's Exhibits 112A, B, C, D, and E. (26 RT 1724-1725.) These photos were formally entered into evidence by the prosecution. (29 RT 2024-2025; 8 CT 1970.)

1727.)

Dr. Carpenter testified that Wegner's report could not state the range at which Akhverdian was shot because there was no clothing available for Wegner to examine. The report did say that there were no signs of soot or gunpowder residue or stippling on the body, suggesting that the tip of the barrel of the gun was no closer than two to four feet. (26 RT 1727.) Dr. Wegner's report also noted that the gunshot damaged the aorta and part of the liver. (26 RT 1728.)

The prosecutor displayed a diagram, which was part of the report and asked Dr. Carpenter questions about the five photographs.[42] The photo marked People's Exhibit 112A depicted the entrance wound to the lower left chest. (26 RT 1728-1729.) The photo marked People's Exhibit 112B showed a similar view but also included the abdomen. (26 RT 1729.) Exhibit 112C showed the same wound but at a closer angle.[43] (26 RT 1729.) The exit wound was depicted in the photographs marked as Exhibits 112D and 112E. (26 RT 1729.) Dr. Carpenter agreed with the prosecutor that the diagram displayed at trial showed Dr. Wegner's findings about the locations of the entrance and exit wounds. (26 RT 1729.)

Dr. Carpenter also testified that Dr. Wegner's autopsy report stated that Mr. Akhverdian was 67 inches (or 5' 7") tall, weighed 163 pounds and was 41 years old at the time of his death. (26 RT 1731.) Dr. Carpenter explained that the entrance wound in this case hit the heart, and that

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[42] According to Dr. Carpenter, these photographs were taken before the commencement of the autopsy. (26 RT 1725.)

[43] Later in his testimony, Dr. Carpenter acknowledged that he had misspoken because this photograph, People's Exhibit 112C, actually showed the exit wound not the entrance wound. (26 RT 1730.)

contrary to the assumptions of many people without medical knowledge, the heart is located in the middle of the chest at the midline rather than in the left side of the chest. (26 RT 1731-1732.) Even though the entrance wound depicted in the photographs and diagram of the body of Mr. Akhverdian appears to be too low for the bullet to have hit the heart, it was not because the position of the heart in fact alternates between a low and a high position as the heart rests on the muscle of the diaphragm and moves up and down during the breathing process. (27 RT 1734.)

The prosecutor asked Dr. Carpenter to opine on the trajectory of the bullet as it entered Mr. Akhverdian's body. Using the report and photographs taken from Dr. Wegner's autopsy, Dr. Carpenter testified that

> [t]he bullet passes through the body from the front toward the back, but also to the right to enter into the left chest and exit out the right chest. There is no real discernible or significant upward or downward direction.

(26 RT 1735.)

According to Dr. Carpenter, the wound was "thorough-and-thorough," leaving no bullet fragments in the body. (26 RT 1735.)

During cross-examination, Carpenter acknowledged that his testimony about the position of the heart in this body was not contained in this autopsy report but was rather a general or hypothetical observation. (26 RT 1736-1737.) He also agreed that ascertaining the time when the bullet entered Mr. Akhverdian's body was impossible. Dr. Wegner saw the body after it had been in the hospital, and there was evidence on the body of efforts to resuscitate Mr. Ahkverdian. Therefore, it was not possible to know how long after the wound was inflicted that Ahkverdian had died. (26 RT 1739-1740.)

D. Applying the Principles of *Crawford* and *Melendez-Diaz*

Given the facts of this case, the principles set forth in the *Crawford* and *Melendez-Diaz* apply to this case. That is, the prosecution offered a witness, who had not conducted the autopsy of the body of a homicide victim in this case, to testify about the information contained in the autopsy report. Also, the autopsy report itself as well as five autopsy photographs were entered into evidence by the prosecution.

This testimony involving the autopsy as well as the report and photographs clearly fall within the scope of the *Melendez-Diaz* holding. At trial, the prosecution established that the medical examiner, Dr. Wegner, who had conducted the autopsy of Norair Akhverdian was unavailable to testify because he was dead. However, it is also clear from that Mr. Leon never had an opportunity to cross-examine Dr. Wegner because Dr. Carpenter, rather Dr. Wegner, also testified at the preliminary hearing regarding autopsy conducted by Dr. Wegner.

Dr. Carpenter's testimony about the findings set forth in an autopsy report authored by Dr. Wegner, who did not testify at any proceedings in this case, violated Mr. Leon's Sixth Amendment right to confront witnesses against him. Dr. Carpenter did not participate in the autopsy at issue in this case. Under the analyses set forth in *Crawford v. Washington, supra*, and *Melendez-Diaz v. Massachusetts, supra*, the autopsy findings in this case were testimonial.

This Court should find that the testimony of Dr. Carpenter about an autopsy performed and reported upon by another medical examiner violated Mr. Leon's right to confront a witness against him under the Sixth Amendment. After the decision in *Melendez-Diaz*, it is clear that in a

homicide case an autopsy report, prepared by employees of the coroner's office in anticipation that the prosecution will use the report against any defendant ultimately charged criminally, constitutes testimonial hearsay.

As discussed *ante*, in California the coroner's function of conducting autopsies is a law enforcement function. In addition, by statute a coroner is a "peace officer." (Cal. Pen. Code § 830.30; Cal. Govt. Code § 27419.) Detective Oppelt, one of the police officers investigating the homicide of Norair Akveridan, was present at his autopsy. (4 CT 872.) The autopsy report and autopsy photographs were entered into evidence by the prosecution in this case. That fact makes the finding that the autopsy report was testimonial even more compelling here. There is no question in the instant case that the autopsy report and the autopsy photographs, entered into evidence as exhibits and described in the testimony of Dr. Carpenter, were admitted for the truth of their contents and thus were "testimonial" and subject to the confrontation requirements of the Sixth Amendment.

E. Reversal Is Required

Mr. Leon's conviction for the first degree murder of Norair Akhverdian must be reversed. Evidence admitted in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment requires reversal unless the prosecution can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under the *Chapman* test, the question is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."" *(Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original).

In the instant case, the prosecution cannot meet that test because it cannot assure that the verdict in this case was not attributed to the error in admitting through the testimony of Dr. Carpenter the autopsy report and photographs done by Dr. Wegner. Dr. Carpenter, rather than Dr. Wegner, also testified at the preliminary hearing regarding the autopsy conducted by Dr. Wegner. (4 CT 868-872, 874-877.) Carpenter's preliminary hearing testimony also showed that while Dr. Wegner had conducted the autopsy and dictated the report, he did not sign it. Rather, the report was ". . .initialed by the Chief Medical Examiner, Dr. Lakshmanan, in lieu of Dr. Wegner's signature." (4 CT 875.) Because there is no evidence that Dr. Wegner reviewed and signed off on the accuracy of the contents of his report, the inability to cross-examine him was particularly detrimental to making an assessment of this evidence.

The admission of this evidence rendered Mr. Leon's trial fundamentally unfair and violated his rights to due process of law, to a fair trial, and to reliable determinations of guilt and special circumstance allegations. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation]; *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1001; *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465.) It also violated the Eighth Amendment. The qualitative difference between the death penalty and all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, at p. 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349 [penalty phase].)

The error in this case cannot reasonably be determined to be harmless beyond a reasonable doubt.[44] Moreover, had the jury not heard this inadmissible evidence, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510.) Since the death verdict was not surely unattributable to the erroneous admission of this evidence (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of Mr. Leon's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7; 15-17; *Johnson v. Mississippi*, (1988) 486 U.S. 578,.590; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[44] In *People v. Seijas* (2005) 36 Cal.4th 291, 304, this Court found that an appellate court should generally apply the de novo standard of review to claims concerning a defendant's right to confront witnesses.

VI

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT IN HER CLOSING ARGUMENT TO THE JURY AT THE GUILT PHASE

During her guilt phase argument, the prosecutor committed serious misconduct by articulating a theme which appealed solely to the passions and emotions of the jurors and asked them to consider improper factors in their guilt phase determinations. This misconduct violated Mr. Leon's right to a fair jury trial, to due process, and to reliable determinations of guilt and death eligibility under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., V, VI, VIII, XIV Amends.)

A. The Prosecutor's Guilt Phase Closing Argument

At the very beginning of her closing argument, the prosecutor referred to the robberies involving Julio Cube:

> In Julio Cube's robbery, the case we are going to discuss later. Same thing with Mr. Cube, the violence in that case is so unnecessary. I don't know whether you noticed but Mr. Cube was disabled. He had one hand that was disfigured. He was a man of only five feet four inches tall. He was a man of 110 pounds. And the robber came back twice, once sticking a knife in his belly as he says, and the other time sticking a gun in his neck. Examples of excessive violence in this case. Unnecessary cruelty towards the victims.

(30 RT 2149.)

Defense counsel objected to these statements, stating that the prosecutor's argument

> . . .is simply appealing to the passion of the jury. It's not relevant to any of the other points that the people have to prove or to argue. Whether it is more or less violent has nothing to do with whether Mr. Leon is guilty of this. And to go on at length just simply describing

> the atrocity and violence, this argument is improper appealing to the passions of the jury.

(30 RT 2149.)

The trial judge overruled this objection; his only comment was "it is proper argument."[45] (30 RT 2149[3].)

After this objection was overruled, the prosecutor continued to use emotional and ultimately irrelevant terms to describe the evidence presented about the charged crimes. She noted that two women who were victims of two different charged robberies were "women working alone," and that the robbers took money from their purses as well as money belonging to the businesses. (30 RT 2150.)

Next the prosecutor described the impatience of the robbers at the H & R Pawn Shop. She rhetorically asked the jurors: "What really was the hurry? Was it necessary to use so much force and so much violence in that particular robbery?" (30 RT 2150.) The prosecutors continued this tone in describing the robbers at Chan's Shell and Valley Market:

> You see a very assaultive robber, not just show the gun or open his jacket and say give me the money. You see him reaching over, pointing at these people, gesturing, posturing with such arrogance, with arrogance he robs these people.

(30 RT 2151.)

Later in the closing argument, the prosecutor made a similar observation, stating that Mr. Leon had "an attitude, a strut about him as he robs people.

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[45] After this objection was overruled, defense counsel did not object to the subsequent improper statements made during the prosecutor's closing argument because it would have been futile to do so given the trial judge's response to this objection. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.)

It is excessive. I mean he turns what could be a rather routine robbery into a very frightening and intimidating experience." (31 RT 2181.)

The prosecutor continued to characterize the conduct of the robbers in these crimes in emotional terms. For example, in describing the shooting of Mr. Armenian, the prosecutor stated that the fact that he was shot one time in the back of the neck " . . . demonstrates just how this person was. It seems to me if you are after the money do you really need to shoot a person in the back?" (30 RT 2151.)

The prosecutor followed this statement with a description of what she called the "pathetic videotape" of Mr. Akhverdian. (30 RT 2151.) She continued by telling the jury that the tape shows that Mr. Akhverdian was "doing everything right." (30 RT 2152.) She further opined that Akhverdian reacted to this robbery just as he should have:

> . . . [didn't] fight the guy, [didn't] make any moves, [didn't] scare him. And you see Mr. Akhverdian on this videotape. And even though you don't have any sound you can tell from looking at his arms and hands he is holding them down. He is gesturing like this. He is just about offering the cash register with his hand. He is not interfering at all with the movement of his hand. . .

(30 RT 2152.)

The prosecutor then asked the jurors to imagine what Akhverdian was thinking after the robber took the money from the cash register:

> And this guy [Akhverdian], see how pathetic this is, this guy stands there and he is probably thinking okay, it's over. I have done things right. The robber is leaving, he going over the table and he [the robber] turns and he shoots this man. . . What could Mr. Akhverdian have done to cause a person to do that?

(30 RT 2152.)

All of the above-quoted argument by the prosecutor was improper and constituted prosecutorial misconduct. While making observations

about what the evidence showed about the nature of the crimes and of the characters of the perpetrators would be appropriate at the penalty phase of a capital trial because it would qualify as "circumstances of the crime," under Penal Code section 190.3, subdivision (a), it is not proper argument at the guilt phase where the jury is asked to consider the evidence rationally and objectively in order to determine whether the prosecution has met its burden to prove beyond a reasonable doubt all the elements of the crimes charged against the defendant. (See, e.g., *People v. Kipp* (2002) 26 Cal.4th 1100, 1129-1130; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, rev'd. on other grounds sub nom, *Stansbury v. California* (1994) 511 U.S. 3.)

B. Applicable Law

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to an "elevated standard of conduct" because he or she exercises the sovereign powers of the state. (*People v. Hill* (1997) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court has explained:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

(*Berger v. United States* (1935) 295 U.S. 78, 88.)

As Judge Kozinski of the Ninth Circuit Court of Appeals has observed: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord *United States v. Blueford* (9th Cir. 2002), 312 F.3d 962, 968; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 (disn. opn. of Douglas, J.) ["The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws that give those accused of a crime a fair trial"]; *United States v. Young* (1985) 470 U.S. 1, 7; *In re Ferguson* (1971) 5 Cal.3d 525, 531; see also *People v. Hunter* (1989) 49 Cal.3d 957, 975; *People v. Lyons* (1956) 47 Cal.2d 311, 318.)

Misconduct by a prosecutor violates the Due Process Clause of the Fifth and Fourteenth Amendments where it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright* (1986) 477 U.S. 168, 178-179.)

In addition, a prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury," even if such action does not render the trial fundamentally unfair. (*People v. Cook* (2006) 39 Cal.4th 566, 606; *People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Espinoza, supra,* 3 Cal.4th at p. 820.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. (*People v.*

Hill, supra, 17 Cal.4th at pp. 822-823 & fn.1; accord *People v. Smithey* (1999) 20 Cal.4th 936, 961.) When a claim of misconduct focuses upon comments made by the prosecutor before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Smithey, supra,* 20 Cal.4th at p. 960.)

As a general rule, a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim. (*People v. Stansbury, supra,* 4 Cal. 4th at p. 1057; *People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) Also improper was the prosecutor's suggestion that the jurors imagine the thoughts of the victims in their last seconds of life. (*People v. Stansbury, supra*, 4 Cal.4th at p. 1057.) In *People v. Jackson* (2009) 45 Cal.4th 662, 691, this Court observed:

> During the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim.

As describe *ante*, the prosecutor in this case violated this well-established rule when she asked the jurors to imagine how one of the homicide victims, Mr. Askhevarian, felt when he was shot during the course of the robbery of the gas station. (30 RT 2151-2152.)

Similarly, the prosecutor committed misconduct when she invited the jury to reflect on the particular vulnerabilities of some of the victims in the charged crimes, i.e., Mr. Cube and two woman victims, because those statements were designed to appeal the emotions of the jurors, including sympathy for the victims and disgust for Mr. Leon.. (30 RT 2149.)

Mr. Leon's trial counsel objected to the prosecutor's improper appeal to passion and prejudice at the very beginning of the prosecutor's closing argument, but the trial judge summarily dismissed this objection in the presence of the jury. This resolution of the defense objection by the trial court improperly gave credence to the prosecutor's improper argument. (*People v. Mahoney* (1927) 201 Cal. 618, 626-627 ["Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials ..."]; *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [". . . jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word."])

An appeal for sympathy for the victim is out of place during an objective determination of guilt. (*People v. Kipp, supra*, 26 Cal. 4th at pp. 1129-1130; *People v. Stansbury, supra*, 4 Cal.4th at p. 1057; accord *People v. Arias* (1996) 13 Cal.4th 92, 160; *People v. Pensinger* (1991) 52 Cal.3d 1210, 125; *People v. Fields* (1983) 35 Cal.3d 329, 362.) The prosecutor's argument, inviting the jury to reflect on the particular vulnerabilities of the victims, was an appeal for sympathy which was improper at the guilt phase of this capital trial.

C. Prejudice

Because the prosecutor's misconduct in argument denied appellant rights guaranteed by the federal constitution, reversal is mandated unless respondent can establish that it was harmless beyond a reasonable doubt. (*Chapman*, supra, 386 U.S. at 24.) "Under the *Chapman* test, the question is 'whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*Sullivan v. Louisiana, supra*, 508 U.S. 275.)

The prosecutor's improper argument described above was intended to encourage the jurors to make decisions at the guilt phase of Mr. Leon's trial based on their emotions rather than on an objective evaluation of the evidence. The state must carry its burden of establishing that the prosecutor's improper and misleading argument, and the absence of any action by the trial court to protect appellant from the prejudice resulting from that argument, was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case the California Supreme Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. *(Gamache v. California* (2010) __U.S.__,131 S.Ct 591,592.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that "in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman.*" (*Ibid.*)

In this case, the prosecution cannot prove beyond a reasonable doubt that the improper argument of the prosecutor did not affect the jury's guilt verdicts. There is no basis for concluding that the jury's verdicts were surely unattributable to the prosecutor's misconduct (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *Chapman, supra*, 386 U.S. at p. 24; *People v. Brown* (1998) 46 Cal.3d 432, 447-48), and the convictions and death judgment of Mr. Leon should be reversed.

Furthermore, to the extent that state law was violated, Mr. Leon's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the State arbitrarily withholding a non-constitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 1, 7, 15, 16; *Woodson v. North Carolina*, supra, 428 U.S. 280; *Gardner* v. *Florida, supra,* 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. at pp. 88- 89; see *Hicks v. Oklahoma, supra*, 447 U.S. 343.) Even if the error is assessed only under California law, it is reasonably probable that a result more favorable to Mr. Leon would have occurred had the misconduct not occurred.

The extent of the improper prosecutorial statements in this case contrasts with that at issue in *People v. Stanbury, supra.* In *Stanbury*, this Court found the portion of argument by the prosecutor asking the jury to imagine how the victims felt to be improper. Nonetheless, the Court held this error was harmless. In the *Stanbury* case, which involved the murder and sexual assault of a 10-year old girl, the only improper language was as follows:

> Think what she must have been thinking in her last moments of consciousness during the assault. Think of how she might have begged or pleaded or cried. All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator.
> (*Id.*, 4 Cal.4th at p. 1057.)

This Court found that while this short comment asking the jurors to put themselves in the shoes of the victim was improper, that because the closing argument had lasted for four days, it was unlikely that it affected the jurors' verdicts. (*Ibid.*)

By contrast, in the instant case, the prosecutor's arguments to the jury at the guilt phase of Mr. Leon's trial was about one to two hours in

length, not four days, and as quoted above, the improper remarks by the prosecutor were far more extensive. Reversal of the judgment is therefore required even under the *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

For all the above reasons, the prosecutor's argument constituted misconduct and denied Mr. Leon his rights to a fair trial, due process of law and reliable determination of his guilt on both counts of which he was convicted and on the special circumstances. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 15, 16, 17; see *Estelle v. McGuire*, *supra*, 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation].)

Moreover, the prosecutor's argument also violated the Eighth Amendment. The death penalty's qualitatively different character from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349 [penalty phase].) Since Mr. Leon's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the prosecutor's misconduct in argument to the jury in the guilt phase (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of Mr. Leon's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; Caldwell v. Mississippi (1985) 472 U.S. 320, 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Mr. Leon's convictions as well as the sentence of death should be reversed.

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VII

THE TRIAL COURT'S GIVING OF CALJIC NO. 2.52 REGARDING FLIGHT AFTER THE CRIME DENIED APPELLANT HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND REVERSAL IS REQUIRED

A. Introduction

Over defense counsel's objection (29 RT 2035), the trial judge instructed the jury regarding Flight After Crime, CALJIC No. 2.52. [48] (31 RT 2310; 9 CT 2011). Giving this instruction was error because it was unnecessary and impermissibly argumentative, and because it permitted the jury to draw an irrational and unjust inference from the evidence. This instructional error deprived Mr. Leon of his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and their state constitutional counterparts to due process, trial by jury, equal protection, and a reliable jury determination on issues of guilt, the special circumstances, and penalty.

B. Objection to the Instruction

In objecting to the flight after crime instruction, defense counsel argued:

> . . .the only flight is conceivable, I mean, other than the obvious leaving the scene of the perpetrator [sic], which I don't think

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[48] CALJIC No. 2.52, as given to appellant's jury, reads as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(31 RT 2310.)

> constitutes flight, would be the allegations that Mr. Leon failed to stop immediately when the investigating police attempted to pull him over. This is removed in time and place from the alleged events so as to suggest that it has limited relevance to the actual events.

(29 RT 2035.)

The trial judge dismissed this objection, stating there was a "plethora of law" stating that a flight instruction is proper whenever there is evidence that the defendant's departure from a crime scene or any other evidence that would permit an inference that the defendant's movement was motivated by "guilty knowledge." (29 RT 2035.) The court further noted, that based on "the totality of evidence before [him], which basically is the police pursuit, among other matters, the instruction is proper and will be given." (29 RT 2036.)

The trial judge in this case was incorrect when he stated that it is proper to include CALJIC No. 2.52 among the jury instructions any time there is flight from a crime scene. In *People v. Bonilla* (2007) 41 Cal.4th 313, 328, this Court observed: "Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.'" Both the defense counsel and the trial judge focused on the police stop of the Jeep on February 18, 1993, which occurred after a police chase of the vehicle. That chase, however, did not involve a flight from a crime scene. It occurred the day after the last robberies charged against Mr. Leon, and weeks after other robberies with which he was charged.

C. It Is Error to Give CALJIC No. 2.52 Because It Is Unnecessary and Argumentative, and Permits the Jury to Draw Irrational Permissive Inferences of Guilt

It is almost always error to give CALJIC No. 2.52 because it: (1) is

unnecessary, since it duplicates the standard circumstantial evidence instructions; (2) is unfairly partisan and argumentative, since it highlights the prosecution's version of the facts; and (3) permits the jury to draw irrational inferences of guilt, i.e., that because the defendant fled after committing a homicide, he must have premeditated that killing.

1. The Flight Instruction Improperly Duplicated the Circumstantial Evidence Instruction

The giving of CALJIC No. 2.52 was both unnecessary and repetitive of other instructions in this case. As a general rule, a defendant in a criminal case is not entitled to specific instructions on how the jury can consider evidence when those instructions simply reiterate a general principle upon which the jury has already been instructed. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) This rule applies equally to the prosecution. (*People v. Moore* (1954) 43 Cal.2d 517, 526 ["There should be absolute impartiality as between the People and the defendant in the matter of instructions"]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [jury instructions "should be impartial between the government and the defendant"]; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 475 [there "must be a two-way street" as between the prosecution and the defense.])

The trial court gave three instructions to the jury in this case concerning the subject of circumstantial evidence, CALJIC Nos. 2.00 (Direct and Circumstantial Evidence – Inferences), [49] 2.01 (Sufficiency of

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[49] CALJIC No. 2.00, as given to appellant's jury, reads as follows:

> Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Circumstantial Evidence – Generally) [50] and 2.02 (Sufficiency of

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Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They also may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

(31 RT 2299-2300: 9 CT 1994.)

[50] CALJIC No. 2.01, as given to appellant's jury, reads as follows:

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his]

Circumstantial Evidence to Prove Specific Intent or Mental State).[51] (14 RT 2187-2191; 5 CT 1100-1102.) Those three instructions fully informed the jurors that they could draw inferences of Mr. Leon's guilt, including his state of mind, from the circumstantial evidence in the case. There was no need to repeat this general principle in the form of a permissive inference of consciousness of guilt, and that is what the flight after crime instruction

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> [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(31 RT 2300; 9 CT 1995.)

[51] CALJIC No. 2.02, as given to appellant's jury, reads:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find a defendant guilty of the crime charged . . . in the information unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(31 RT 2299-2301; CT 1996.)

encouraged jurors to infer. This unnecessary and unfair benefit to the prosecution plainly violated Fourteenth Amendment due process and equal protection principles. (See *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474 [Due Process Clause speaks to "the balance of forces between the accused and his accuser"]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violated equal protection].)

2. The Flight After Crime Instruction Was Impermissibly Partisan and Argumentative

A trial court must not give instructions which are argumentative in nature. (*People* v. *Sanders* (1995) 11 Cal.4th 475, 560.) Argumentative instructions are those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Such instructions unfairly single out isolated facts favorable to one party, thereby "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.) Even neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and must be refused. (*Ibid.*)

Judged by these standards, CALJIC No. 2.52 is impermissibly argumentative. Structurally, it is no different than the instruction that was found to be argumentative in *People v. Mincey*, *supra*, 2 Cal.4th 408:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.)

Like CALJIC No. 2.52, the instruction in *Mincey* told the jury that "if you find" certain facts, then "you may" consider that evidence for a specific purpose. This Court held that the trial court properly refused to give this requested instruction because it asked the jurors to "infer the existence of [the proposing party's] version of the facts[.]" (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) Because this Court found that the instruction in *Mincey* was argumentative (*id.* at p. 437) it should hold that CALJIC No. 2.52 is impermissibly argumentative as well. An instruction that arbitrarily distinguishes between parties to the defendant's detriment cannot survive scrutiny under the Due Process and Equal Protection Clauses. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses unfairly advantaged prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].)

The alternate rationale that this Court has employed to uphold the use of CALJIC No. 2.52 focuses on the allegedly protective nature of the instruction by noting that it informs the jury that consciousness of guilt evidence is not sufficient by itself to prove guilt. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142; *People* v. *Kelly* (1992) 1 Cal.4th 495, 531-532.) This rationale is equally flawed, as the instruction does not specify what else is required beyond the suggested inference that the defendant feels conscious of his guilt before the jury can find guilt has been established beyond a reasonable doubt. The instruction thus permits the jury to seize upon an isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use it *in combination* with the consciousness of guilt evidence to find that the

defendant is guilty.

Indeed, in *People v. Seaton* (2001) 26 Cal.4th 598, this Court abandoned any pretext that the consciousness of guilt jury instructions – in that case, CALJIC No. 2.03--- is protective or neutral when it held that the failure to give this instruction constitutes harmless error because the instruction "benefit[s] the prosecution, not the defense[.]" (*Id.* at p. 673.) The *Seaton* decision, however, did not go far enough in considering the full impact of the instruction. The instruction not only benefits the prosecution, it also lowers the prosecution's burden of proof, and thereby violates the Due Process Clause of the federal Constitution. (See *In re Winship* (1970) 397 U.S. 358, 364.) As noted above, while CALJIC No. 2.52 states that consciousness of guilt evidence is not sufficient by itself to prove guilt, it does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt, and therefore permits the jury to conclude that the defendant is guilty based on the mere combination of the consciousness of guilt evidence and a single piece of evidence that does no more than establish an undisputed element of the charged crime. This amounts to an unconstitutional lessening of the burden of proof.

The appellate courts of at least nine states have held that instructions which tell jurors they may infer consciousness of guilt from evidence of flight should not be given because they unfairly highlight isolated evidence. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508; *Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed*

(Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[52]

The reasoning of two of the above-cited cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

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[52] At least one other state court has also held that the significance of flight should be addressed only in argument and not in jury instructions. (See, *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745.)

This argumentative instruction invades the province of the jury by focusing the jury's attention on evidence favorable to the prosecution, places the trial court's imprimatur on the prosecution's theory of the case, and lessens the prosecution's burden of proof. Giving that instruction therefore violates a defendant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

3. This Flight Instruction Permitted the Jury to Draw an Irrational and Unjust Inference about Appellant's Guilt

Under the facts of Mr. Leon's case, CALJIC No. 2.52 embodied both an irrational and unfair permissive inference. As recognized by this Court, the Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313, citing *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, *Barnes v. United States* (1973) 412 U.S. 837, 844-845, and *Leary v. United States* (1969) 395 U.S. 6, 46.) In this context, an inference will be deemed rational, and hence constitutional, only if the surrounding circumstances give "substantial assurance that the [inferred] fact is more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County Court v. Allen, supra,* 442 U.S. at p. 166, fn. 28, citing

Leary v. United States, *supra*, 395 U.S. at p. 36; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting the high court requires substantial assurances that an inferred fact is more likely than not to flow from the proved fact on which it is made to depend].) This test judges the inference under the specific facts of the individual case in which it operates. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 157, 162-163.)

Even assuming the inference upon which the jury was instructed could be considered more likely than not to flow from the proved fact on which it was made to depend, CALJIC No. 2.52 still was defective under the facts of this case. The language of CALJIC No. 2.52 focused solely on the prosecution's inculpatory interpretation of Mr. Leon's conduct, even though the evidence also supported the defense theory that the prosecution had failed to prove that appellant participated in the robberies and two felony murders with which he was charged. The instruction thereby improperly intruded on the jury's exclusive role as fact-finder by impermissibly focusing the jury on some, rather than all, of the facts in this case. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300.)

Mr. Leon's actions after committing a crime, upon which the consciousness-of-guilt inferences embodied in CALJIC No. 2.52 are based, simply are not probative of whether, assuming the defendant committed the charged crime, he or she harbored the mental state required for that crime. Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not

before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

This Court has previously rejected the claim that consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. Benavides* (2005) 35 Cal.4th 69, 100 [CALJIC No. 2.03].) However, Mr. Leon respectfully asks this Court to reconsider and overrule these holdings and to hold that delivery of CALJIC 2.52 is reversible constitutional error.

The foundation for those rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean 'consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.) However, the *Crandell* analysis is mistaken for at least three reasons.

First, the instructions do not speak of "consciousness of some wrongdoing" but of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the standard instructions given to the jury the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 9 CT 2020 [CALJIC No. 2.90, stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [or] her guilt is

satisfactorily shown."].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that a defendant is entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the flight instruction did not specifically mention the defendant's mental state, it also did not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any limits on the jury's use of the evidence. On the contrary, those instructions suggest that the scope of the permitted inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[53]

Third, this Court has itself drawn the very inference that *Crandell* asserts no reasonable juror would draw. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of the defendant's mental state at the time of the killing, and expressly relied on consciousness-of-guilt evidence, among other facts, to find an intent to rob. (*Id.* at p. 608.)[54]

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[53] In a different context, this Court has repeatedly held that an instruction referring only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

[54] In *Hayes*, this Court wrote:

Since this Court has considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with the intent to rob, it should acknowledge that lay jurors might also rely on such evidence in drawing conclusions about a defendant's mental state.

Because CALJIC No. 2.52 permits the jury to draw irrational inferences of guilt, its provision undermines the reasonable doubt requirement and denies a defendant a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) The instruction also violates a defendant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, violates his or her right to a fair and reliable capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.)

In short, under the circumstances of this case, the giving of CALJIC No. 2.52 denied Mr. Leon's Sixth, Eighth, and Fourteenth Amendment rights, as well as his rights under the state Constitution, to due process and a fair and reliable trial, at which a properly-instructed jury can determine

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> There was also substantial evidence, apart from James's testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested,* the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

whether all of the elements of the charged crimes have been proven beyond a reasonable doubt.

E. Reversal is Required

Because the giving of CALJIC No. 2.52 violated several provisions of the federal Constitution, the prosecution must show that giving the jury this instruction was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no "reasonable possibility" that this error "might have contributed to [appellant's] conviction." (*Ibid.*) The prosecution cannot meet this burden.

Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case the California Supreme Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. *(Gamache v. California* (2010) __U.S.__ S.Ct.___, 131 S.Ct 591,592.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that "in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman.*" (*Ibid.*)

In this case, the jurors could have believed that Mr. Leon was the victim of mistaken identity. CALJIC No. 2.52 directed the jurors away from this interpretation of the evidence, and unfairly focused their attention on the prosecution's theory that perpetrator of these offenses, whom the prosecutor claimed was Mr. Leon, had left the scene of the various crimes

and therefore was guilty of the charged crimes. Further, the instruction supported the prosecutor's theory that when Mr. Leon and his cohorts tried to evade being stopped in their vehicle on February 18, 1993, the jury should conclude that he was guilty of various robberies which had occurred weeks before that chase. Thus, under the facts of this case, it is reasonably possible that the erroneous instruction "might have contributed" to the jury's decision to convict Mr. Leon of the charged crimes. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Because the State cannot show the verdicts rendered at trial were "surely unattributable" to the trial court's error of giving CALJIC No. 2.52 on flight as evidence of consciousness of guilt (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), Mr. Leon's convictions and death sentence must be reversed.

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VIII

THE TRIAL JUDGE ABUSED HIS DISCRETION AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, A RELIABLE PENALTY DETERMINATION AND DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT REFUSED TO GRANT APPELLANT'S MOTION FOR A CONTINUANCE OF THE COMMENCEMENT OF THE PENALTY PHASE AS REQUESTED

A. Legal Standards

The trial court's denial of a motion for continuance to permit counsel to adequately prepare for the penalty phase of this capital case is reviewed for abuse of discretion. (*People v. Roybal* (1998) 19 Cal.4th 481, 504; *People v. Jones* (1998) 17 Cal.4th 279, 318; *People v. Mickey* (1991) 54 Cal. 3d 612, 660.) Although the trial court has broad discretion to determine whether good cause exists to grant a continuance of trial, that discretion must be exercised in conformity with applicable law. (Pen. Code, § 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012; *People v. Mickey, supra,* 54 Cal.3d at p. 660.) A trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. (*United States v. Morales* (9th Cir. 1997) (en banc) 108 F.3d 1031, 1035.) To exercise judicial discretion, a trial court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

This discretion may not be exercised in a manner which deprives the defendant of a reasonable opportunity to prepare his defense. (*Jennings v. Superior Court of Contra Costa County* (1967) 66 Cal.2d 867, 875-876; *People v. Murphy* (1963) 59 Cal.2d 818, 825.) When a denial of a

continuance impairs the fundamental rights of an accused, the trial court abuses its discretion. (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333; see also *United States v. Bogard* (9th Cir. 1988) 846 F.2d 563, 566 ["The concept of fairness, implicit in the right to due process, may dictate that an accused be granted a continuance in order to prepare an adequate defense. Denial of a continuance warrants reversal, however, only when the court has abused its discretion."].)

In *Jennings v. Superior Court, supra,* this Court observed that a "reasonable opportunity to prepare for trial is as fundamental as is the right to counsel." (*Jennings, supra,* 66 Cal.2d at p. 876.) A denial of a continuance may intrude upon a defendant's Sixth and Fourteenth Amendment rights to effective assistance of counsel. (See, e.g., *Morris v. Slappy* (1983) 461 U.S. 1, 11-12 ["an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel"].)

The denial of a continuance that requires unprepared counsel to proceed to trial amounts to a constructive denial of the right to counsel that invalidates the verdict. (*Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 581; see also *Chambers v. Maroney* (1970) 399 U.S.42, 59 (dis.opn. of Harlan, J.).) Especially in a capital case, where the Eighth and Fourteenth Amendments require reliability and a heightened standard of care, a trial court errs when it disregards a manifest demonstration that the defense is unprepared. (See *Lankford v. Idaho* (1991) 500 U.S. 110, 120-126.) Given these constitutional considerations, the guiding principle for determining if a motion for continuance should be granted is "above all, whether substantial justice will be accomplished or defeated by granting the motion." (*People v. Laursen* (1972) 8 Cal.3d 192, 204.)

By denying the motion for a continuance in this case, the trial court violated Mr. Leon's constitutional rights to a fair trial, effective counsel, confrontation, reliable guilt and penalty determinations and due process. (6th, 8th and 14th Amends.,U.S. Const.; Cal. Const., art. I, §§ 7, 15, 17.)

B. Factual Summary

On July 8, 1996, before the beginning of the penalty phase trial, defense counsel filed a motion to continue. That motion focused on the failure of the prosecution to give adequate notice regarding the witnesses it intended to call to testify about alleged jailhouse incidents it would offer as aggravating evidence at the penalty phase trial. (10 CT 2281-2283.) Notice of this proposed evidence was provided on March 26, 1996, almost two years after the incident and shortly before trial began, but the prosecutor failed to give information about the whereabouts of complainants nor the specifics of their criminal backgrounds. (10 CT 2281.) Throughout the course of the guilt phase trial, defense counsel asked the prosecutor if she had located the victims of these alleged incidents, and she said she had not. Counsel also noted that defense investigators attempted, without success, to locate them. (33 RT 2427-2428.)

After the jury announced its guilt phase verdicts on June 26, 1996, the prosecutor informed defense counsel that she had located one alleged victim of the alleged jailhouse incidents, Bryan Soh, and that she intended to call him as a witness. (10 CT 2281-2282.) The first time the prosecutor had notified the defense that Bryan Soh might be a witness against Mr. Leon at the penalty phase was in a letter dated April 1, 1996. (10 CT 2281.) That letter noted six incidents occurring in the county jail, and identified the potential witnesses, including Bryan Soh. (10 CT 2289-2290, 33 RT 2419.) At that time, the only information the defense had about Mr. Soh was an

address and phone number, which dated back to Soh's booking in county jail in 1994. (33 RT 2419.) Defense counsel did not receive Mr. Soh's rap sheet until June 26, 1996. (33 RT 2420.)

The next day, June 27, 1996, the prosecutor left a voice mail message for defense counsel, stating that they had found another complainant, Christopher Anders, whom they also would call. The rap sheet of Anders initially provided to the defense did not include Anders' felony conviction. The correct rap sheet was not given to the defense until July 2, 1996. (10 CT 2282.)

Investigation of Soh and Anders revealed that both previously had been represented by the Los Angeles Public Defender's Office, which also served as Mr. Leon's trial attorneys. Given the potential for a conflict of interest, defense counsel promptly sought court orders to examine the contents of the felony files of both Soh and Anders. In addition, because Mr. Soh had spent long periods of time in two mental hospitals, defense counsel sought court orders which would permit him to examine Soh's mental health files. (10 CT 2282.)

Defense counsel explained that because of time constraints, Camarillo State Hospital was not able to provide the defense with all of Soh's records. (10 CT 2283.) In addition, information in one of Anders' court files suggested that at the time of the alleged incident involving defendant, Anders was negotiating with the prosecution for a more favorable disposition of a case pending against him. Since the Public Defender's Office would have been involved in those negotiations, Mr. Leon's trial counsel explained that he needed to investigate further a potential conflict of interest that resulted from his office's previous representation of Anders. (10 CT 2283.)

During the July 8, 1996, hearing, counsel described how the issue of a potential conflict of interest vis-a-vis both Soh and Anderson and on the part of the Public Defender's Office hampered the investigation of these two prosecution witnesses. That is, counsel had to make sure that when he was investigating the backgrounds of these two former clients of his law office he did not use any information which his office or colleagues had obtained as a result of this representation. Defense counsel obtained orders from the trial judge to examine the felony cases of Soh and Anders. (33 RT 2404-2405.) Further, once counsel learned that Soh had been held at three different mental hospitals, he obtained court orders to examine Soh's medical records, which turned out to be voluminous. (33 RT 2406.)

Because the mental health files of Mr. Soh were so copious, counsel told the trial judge that he needed more time to review them in order to prepare for cross-examination of Soh. (33 RT 2406-2407.) In addition, the files that the defense had already received suggested real problems with Soh's credibility and his competency to be a witness. (33 RT 2412-2415.)

In addition, defense counsel explained that he did not receive the correct rap sheet on Christopher Anders until July 2, 1996, and he did not realize until July 3 that his office had represented Mr. Anders. (33 RT 2422-2423.) At the time the incident between Mr. Leon and Anders allegedly occurred, Anders was being represented by the Los Angeles Public Defender and was in negotiations with the District Attorney regarding his possible testimony as a prosecution witness in another criminal case. (33 RT 2424.)

Defense counsel stated that he could not conduct an adequate cross-examination of either Soh or Anders without a continuance of about two-three weeks. (33 RT 2427, 2433.) Counsel explained his duty at the

penalty phase of Mr. Leon's trial:

> . . .This is an extremely serious matter. *I can't think of anything more serious than a witness coming up here and saying that Mr. Leon was violent in custody.* And when there is clearly impeachment, a lot of impeachment available that casts serious doubt on that witness, I have every obligation to go for it. And I cannot go for it.

(33 RT 2433, italics added.)

He also told the trial court that, without the continuance, he would not be able to prepare adequately to cross-examine Soh and Anders. Counsel stated unequivocally that he was not prepared to go forward with the penalty phase:

> I felt like I have been on – this is trial by ordeal. And I have not slept and I have worked and I have continued to try to get ready, in addition to preparing everything else that must be prepared in a penalty phase, and I cannot do it. I cannot say to this court that I am prepared now to go forward with cross-examination of either of these witnesses, or that I can't conscientiously be prepared to go forward. I need time diligently [sic]. I have been working long hours. I did take the 4th of July off. And while I was not present in the office, I was at work on this case on Friday. And I was in the office on Saturday and in the office on Sunday until 11 o'clock. And I was in the office this morning at, I believe it was 6:30, working on these matters. And I can't now just say, well, I have everything that I'm going to get and go forward and cross-examine these witnesses. I can't do it.

(33 RT 2433-2434.)

Despite this plea by Mr. Leon's trial counsel, the trial judge refused his request for a short continuance. (33 RT 2434.) The court found there was not "good cause" to continue the trial, and that defense counsel was providing effective assistance of counsel under both the federal and state constitutions. (*Ibid.*) Initially, the trial judge said he might preclude the

testimony of Soh and Anders. (33 RT 2434.) However, in the end, the trial court permitted Anders to testify. Although it prohibited the prosecution from calling Soh as a witness, the court allowed Deputy Sheriff Jeffrey Hutchinson to testify about what Soh told him about the incident. (33 RT 2445.) This was the worst possible result because it allowed the jury to hear the out-of-court statements of Soh but deprived Mr. Leon of the opportunity to confront, cross-examine and impeach him.

C. Failure to Grant the Motion to Continue Requires Reversal of the Death Sentence

Counsel told the trial judge that he was not prepared to go forward with the penalty phase and accordingly needed a short continuance. When the trial judge ignored counsel's concerns, he erred by giving short shrift to the need for a constitutional, reliable process in this death penalty case. The court ignored the fact that it was not until April 1, 1996, a month before jury selection started, that the prosecution notified the defense that Bryan Soh and Christopher Anders would be witnesses at the penalty phase, despite the fact that the jailhouse incidents at issue occurred over two years before. Moreover, the trial judge knew that the prosecution had not notified the defense that these witnesses had criminal records and did not provide copies of their rap sheets until after the guilt phase was completed. Only then was the defense able to discover the potential conflict of interest posed by the Public Defender Office's previous representation of these witnesses and to learn of Soh's history of serious mental illness. Without the continuance, defense counsel did not have enough time to review Soh's copious mental health records to prepare to impeach the evidence offered by the prosecution regarding the incident involving Soh.

The denial of Mr. Leon's motion to continue prevented counsel from preparing to cross-examine Anders and completely denied any opportunity to cross-examine Soh or to prepare to rebut the hearsay testimony of deputy sheriff that Brian Soh had told him that he gave $20 to Mr. Leon and another county jail inmate because "it felt like they were going to beat the crap out of [me]" (33 RT 2490), thus violating Mr. Leon's rights to a fair trial, confrontation and effective assistance of counsel as guaranteed by the Sixth Amendment and to fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment. (*Crane v. Kentucky* (1986) 476 U.S. 683, 645 [the Constitution guarantees a "meaningful opportunity to present a complete defense"]; *Davis v. Alaska* (1974) 415 U.S. 308, 319 [a defendant's constitutional right to present evidence in his defense is "paramount"]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [the absence of proper confrontation calls into question the integrity of the fact-finding process]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 [the due process guarantee requires fundamental fairness in a criminal trial].) Further, because this was a death penalty case, the error also violated the Eighth Amendment guarantees of reliability in the penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) [55]

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[55] This Court has observed: "[A] trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. [Citations.]"(*People v. Snow* (2003) 30 Cal.4th 43, 70; see also *People v. Maddox* (1967) 67 Cal.2d 647, 653 [denial of continuance requires reversal because "a defendant may not be brought to trial. . . .without adequate opportunity for preparation of his defense"]; *People v. Fontana* (1982) 139 Cal.App.3d 326, 334 ["the trial court prejudicially abused its discretion in denying the motion to continue" and forcing unprepared counsel to proceed to trial.].)

The trial judge acknowledged that he excluded Soh as a witness but would allow Deputy Hutchinson to testify to what Soh would have testified to in order to avoid granting Mr. Leon's motion to continue. (33 RT 2514-2515.) Admitting into evidence the out-of-court statements of Soh was more than prejudicial to Mr. Leon because he was not allowed to cross-examine and impeach Soh. If the trial court had simply granted Mr. Leon's motion for a short continuance so that defense counsel could prepare adequately for such cross-examination, this problem could have been avoided. The trial judge's refusal to grant the continuance denied Mr. Leon's constitutional right to prepare for the testimony of a crucial prosecution witness and thus to a fundamentally fair trial as well as his constitutional right to confront a crucial witness against him, Bryan Soh. This was particularly egregious because, as trial counsel argued at trial, evidence of violent conduct by a defendant while incarcerated is particularly powerful aggravating evidence in a death penalty trial.

The denial of the continuance in this case violated Mr. Leon's federal constitutional rights and is subject to harmless error analysis which means the burden of proving that error did not prejudice Mr. Leon lies with the prosecution. That is, reversal is required unless the State establishes there is no reasonable possibility that the error – the denial of the motion to continue – contributed to the verdict, that is, the death sentence of Mr. Leon. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Because the State cannot meet that burden here, Mr. Leon's death sentence must be reversed.

IX

THE USE OF UNCHARGED JAILHOUSE HOUSE DISPUTES AMONG INMATES AS FACTOR (B) AGGRAVATING EVIDENCE UNCONSTITUTIONALLY SKEWED THE SENTENCE-SELECTION IN FAVOR OF A DEATH

In this case, the prosecution offered in aggravation, under Penal Code section 190.3, subdivision (b) ("factor (b)"), three jailhouse incidents for which Mr. Leon was never charged. One incident involved an altercation between Mr. Leon and another inmate, Christopher Anders, in the Los Angeles County Deputy Sheriff concerning a $20 bill. The deputy sheriff testified that he saw two inmates, Mr. Leon and Anders, in a "fighting stance" in the hallway. When he asked them what happened, Mr. Leon said "nothing" while Anders claimed Mr. Leon snatched a $20 bill from him and refused to return it. (35 RT 2686-2688.)

The second incident in Los Angeles County Jail offered by the prosecution as aggravating evidence involved another dispute among inmates. Deputy Sheriff Hutchinson testified that he saw inmate Brian Soh take something out of his pocket and give it to another inmate, Bryant, who was standing with Mr. Leon; they were in the day room. Hutchison saw no physical contact among these inmates, except touching of hands between Bryant and Soh. (34 RT 2656.) Hutchinson stopped Bryant and Mr. Leon in the hall and asked what was going on. Mr. Leon denied anything was going on. Hutchinson asked Bryant if he had received anything from Soh; Bryant denied that he had. (34 RT 2644.)

Officer Hutchinson went back to the day room to speak with Soh. (34 RT 2644.) Soh's demeanor had changed; he seemed angry when he told Hutchinson that the two inmates had made him give them all his

money. (34 RT 2645.) Hutchinson went back to the hall and saw a crumpled $20 bill near Mr. Leon's foot. Mr. Leon denied knowing its origin. (34 RT 2646-2647.)

The third jailhouse incident offered by the prosecution involved a melee in the main court lockup. Deputy Sheriff Keith Warloe, who was monitoring the lockup, heard and then saw a fight which involved between 10 and 15 inmates. (35 RT 2670.) Mr. Leon was not in that group. (35 RT 2672-2673.) Warloe testified that he saw Mr. Leon leave his position standing by the west side of the cell, go to the east side where the "pack" was and throw a punch into the pack. Warloe thought a punch landed, although he did not see on whom or what. Mr. Leon returned to the west side of the cell momentarily and then returned to the pack to throw another punch. (35 RT 2674-2675.)

A. The Evidence of these Jailhouse Incidents was Constitutionally Irrelevant

This evidence was constitutionally irrelevant to the jury's decision whether Mr. Leon should live or die. Where, as in California, aggravating factors are "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment" (*Walton v. Arizona* (1990) 497 U.S. 693, 648), they must provide a principled basis for doing so (*Arave v. Creech* (1993) 507 U.S. 463, 474). Under the Eighth Amendment and the due process clause of the Fourteenth Amendment, an aggravating factor in a death penalty case must be "particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process"].) As a general matter, relevant evidence at the

selection phase is limited to that which relates to the defendant's character or the circumstances of his crime. (*Zant v. Stephens*, *supra*, at p. 879.)

However, this broad category of generally relevant evidence is not without limits. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-167 [although defendant's membership in Aryan Brotherhood prison gang, which entertains "morally reprehensible" white racist beliefs, was suggestive of bad character, it was "totally irrelevant" to capital-sentencing where there was no evidence connecting racist views to the murder]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433, fn. 16 [although technically a circumstance of the crime, the fact that the murder was accomplished with a shotgun rather than a rifle, which resulted in a "gruesome spectacle," was "constitutionally irrelevant" to the penalty decision]; *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308-1310 [character evidence of non-violent sexual conduct, which included defendant's homosexuality and "abnormal sexual relations," was constitutionally irrelevant to sentencing decision where, for instance, there was no evidence connecting sexual history to charged crime or future dangerousness].) At bottom, to be constitutionally relevant, aggravating evidence must assist the jury in distinguishing "those who deserve capital punishment from those who do not." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474.)

The constitutional relevance of the factor (b) aggravating evidence must be assessed in terms of the Eighth Amendment requirement of heightened reliability, which is the keystone in making "the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[H]eightened reliability controls the quality of the information given to the jury in the sentencing proceeding by assuring that the sentencer receives evidence that, in logic

and law, bears on the selection of who, among those eligible for death, should die and who should live. " (*United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 542.) Thus, as the federal court in *Friend* explained in the context of the federal death penalty statute:

> relevance and heightened reliability . . . are two sides of the same coin. Together, they assure the twin constitutional prerequisites of affording a rational basis for deciding that in a particular case death is the appropriate punishment and of providing measured guidance for making that determination. Those objectives can only be accomplished if the proposed aggravating factor raises an issue which (a) is of sufficient seriousness in the scale of societal values to be weighed in selecting who is to live or die; and (b) is imbued with a sufficient degree of logical and legal probity to permit the weighing process to produce a reliable outcome.

(*United States v. Friend, supra*, 92 F.Supp.2d at p. 543; accord, *United States v. Karake* (D.D.C. 2005) 370 F.Supp.2d 275, 279; *United States v. Johnson* (W.D.Va. 2001) 136 F.Supp.2d 553, 558-559; *United States v. Bin Ladin* (S.D.N.Y. 2001) 126 F.Supp.2d 290, 302.) In other words, "an aggravating factor must have a substantial degree of gravity to be the sort of factor which is appropriate for consideration in deciding who should live and who should die." (*United States v. Friend, supra*, 92 F.Supp.2d at p. 544.)

Based on these principles, several federal courts have recognized that minor incidents of only technically violent or forceful criminal conduct are constitutionally irrelevant under the Eighth Amendment for purposes of capital sentencing. (See, e.g., *United States v. Grande* (E.D.Va. 2005) 353 F.Supp.2d 623, 634 [evidence of unadjudicated "high school fight" that occurred five years earlier and was wholly unrelated to charged murder was "unconstitutionally irrelevant to the determination of 'who should live and

who should die'"]; *United States v. Gilbert* (D.Mass. 2000) 120 F.Supp.2d 147, 153 [conduct amounting to crime that did not result in significant injury was "of insufficient gravity to be relevant to whether the defendant here should live or die"]; *United States v. Friend, supra*, 92 F.Supp.2d at p. 545 [evidence that defendant and codefendant talked about killing potential witness was "not of sufficient relevance and reliability to assume the important role of an aggravating factor which, if proven, may be weighed as a factor to determine whether death is an appropriate penalty"].)[56]

The uncharged jailhouse incidents in this case violated these same Eighth Amendment precepts. Assuming, arguendo, that the admission of other-crimes evidence is not per se unconstitutional, section 190.3, subdivision (b) on its face may not violate the Eighth Amendment, because its purpose is to focus the sentencer on the defendant's violent criminality and thus his propensity for violence, which is a relevant, constitutional consideration in deciding the appropriate sentence in a capital case. (See *People v. Balderas* (1985) 41 Cal.3d 144, 202; *People v. Ray* (1996) 13 Cal.4th 313, 349-350.) But when the evidence admitted under factor (b)

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[56] These cases construed the federal death penalty statute, which is similar in many respects, though not identical, to California's scheme. It lists 16 aggravating factors that apply when a defendant has been convicted of a homicide that is eligible for capital punishment. (18 U.S.C. § 3592, subd. (c).) It also contains a "catch-all" clause that allows the jury to consider the existence of "any other aggravating factor for which notice has been given." (*Ibid.*) The intent of this non-statutory aggravating factor is to permit consideration of constitutionally relevant evidence regarding the defendant's character and the circumstances of the crime. (See, e.g., *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1106.) Thus, the cases address whether certain conduct is constitutionally relevant aggravation under this "non-statutory" aggravating factor.

fails to meet its ostensible purpose, there is Eighth Amendment error. That is precisely what happened here. The jailhouse incidents introduced in this case did not involve injury to anyone or the loss of any significant property and could be described as "trivial incidents of misconduct and ill temper" (*People v. Boyd* (1985) 38 Cal.3d 762,774, 776) that were constitutionally irrelevant to the jury's life or death decision and thereby ran afoul of the Eighth and Fourteenth Amendments.

B. The Adjudication of the Other-Crimes Evidence at the Penalty Phase under the Applicable State Procedure Rules Further Violated Mr. Leon's Federal Constitutional Rights

The admission of the other-crimes evidence violated Mr. Leon's rights to due process of law, heightened reliability in capital-sentencing, a fair trial by an impartial jury, and equal protection of the law under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution. This Court repeatedly has rejected constitutional challenges to the use of unadjudicated crimes as aggravating factors at a capital-sentencing trial. (see *People v. Balderas* (1985) 41 Cal.3d 144, 204-206; see also, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 284, fn. 24; *People v. Gallego* (1990) 52 Cal.3d 115, 195.) However, the constitutionality of admitting unadjudicated other-crimes evidence at a capital penalty phase is a "recurring issue" on which the "State's highest courts have reached varying conclusions." (*Robertson v. California* (1989) 493 U.S. 879 [dis. opn. of Marshall, J. from denial of certiorari]; see *Williams v. Lynaugh* (1987) 484 U.S. 935 [dis. opn. of Marshall, J. from denial of certiorari asserting that "whether a State violates the Equal Protection Clause when it permits the sentencer to consider evidence of unadjudicated offenses in capital cases but not in noncapital" was a question worthy of the Court's consideration].)

Accordingly, Mr. Leon presents his federal constitutional claims to preserve them for possible federal habeas corpus review and asks the Court to reconsider its ruling in *Balderas* and subsequent decisions permitting the use of evidence of unadjudicated crimes at the penalty phase. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.) The use of the three jailhouse incidents as aggravating evidence at Mr. Leon's penalty phase resulted in separate but related constitutional violations.

First, the adjudication of the alleged other crimes by the same jury that had found Mr. Leon guilty of capital murder violated his Eighth Amendment right to a reliable determination of penalty, his Fourteenth Amendment due process right to a fair sentencing trial, and his Sixth and Fourteenth Amendment rights to a penalty determination by an impartial jury. Having just convicted Mr. Leon of two counts of first degree murder with special circumstances, it is likely that the jury was biased regarding Mr. Leon's guilt of the unadjudicated crimes. (*Irvin v. Dowd* (1961) 366 U.S. 717, 727-728 [right to an impartial jury was violated in capital case where jurors during voir dire expressed opinion that defendant was guilty]; *Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554 [Sixth Amendment guarantee of an impartial jury is violated if juror who sat in a previous case in which the same defendant was convicted serves on defendant's jury in another similar prosecution close in time], relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

As a result of this bias, the jury was less likely to presume Mr. Leon innocent of the alleged offenses and more likely to find him guilty of those crimes upon proof that was less than the constitutionally-mandated standard

of beyond a reasonable doubt. This problem was particularly acute because the issue was whether the factor (b) offenses, i.e., robbery and battery, involved force or violence. Under these circumstances, the jury would be more likely to view the other crimes as involving force or violence precisely because they just convicted Mr. Leon of two murders. By virtue of those convictions, the jury would be disposed to find Mr. Leon to be a violent person, i.e., a person who would contemplate force or violence in any situation. Thus, the problem of jury bias likely affected the very determination that the factor (b) evidence required them to make.

The lack of an impartial adjudicator with respect to the determination of the factor (b) aggravating factors, which weigh in favor of a death sentence, creates a substantial risk of an erroneous, unfair and unreliable penalty verdict. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [basing death sentence in part on reversed conviction violates Eighth Amendment's requirement of heightened reliability in capital-sentencing]; *Gardner v. Florida* (1977) 430 U.S. 349, 362 [applying fundamental notions of due process to evidence at a capital-sentencing hearing]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-953 [admission of murders for which defendant was not convicted would violate state constitutional rights to a trial by an impartial jury, to an indictment or presentation, to confront witnesses against him, and against self-incrimination and would result in a procedure so unfair and prejudicial as to violate the due process of law" guaranteed by the state Constitution]; *State v. Bartholomew* (Wash. 1984) 683 P.2d 1079, 1082 [admission of evidence of a defendant's prior criminal activity (other than convictions) violates the Eighth Amendment and also state Constitution]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 279-280 [admission of unadjudicated homicide at capital-sentencing trial

violates due process clause of Fourteenth Amendment].)

Second, the cumulative effect of the three separate jailhouse incidents prejudiced the jury's determination as to each of them. By consolidating the jury's adjudication of three incidents in the same proceeding, the evidence of one alleged crime spilled over to, and bolstered the proof of the other. The synergistic effect of multiple other-crimes evidence erroneously inflated the strength of the aggravating factors and again unfairly skewed the penalty phase in favor of death in violation of the Eighth Amendment's mandate of reliable capital sentencing and the Fourteenth Amendment's due process guarantee of a fair trial.

Third, under section 190.3, there is no requirement that the prior criminality be found true by a unanimous jury. (See *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) Moreover, the trial court explicitly told the jury that with regard to the other crimes allegations, "[i]t is *not* necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation." (10 CT 2332, italics added.) The failure to require jury unanimity with respect to the other-crimes allegations violated Mr. Leon's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty. The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 864-865, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any

unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Mr. Leon is aware that this Court has rejected this very claim (see, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 221-222), but he asks the Court to reconsider its holding.

Finally, the disparate treatment of capital and non-capital defendants with regard to other-crimes evidence violates the federal Constitution. Because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated Mr. Leon's equal protection rights under the Fourteenth Amendment. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated Mr. Leon's right to due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

For all these reasons, this Court should reconsider its position regarding the constitutionality of admitting other-crimes evidence at the penalty phase of a capital trial.

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THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY THAT MERCY COULD BE CONSIDERED AS A BASIS FOR RETURNING A VERDICT OF LIFE WITHOUT POSSIBILITY OF PAROLE

A. Introduction

The trial judge instructed the jury in the penalty phase that: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial that it warrants death instead of life without parole." (10 CT 2341, 41 RT 3354, CALJIC No. 8.88.) Pursuant to CALJIC No. 8.85, the trial judge also described the factors in aggravation and mitigation which the jury should consider in its penalty determination. This instruction included a description of factor (k): "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (10 CT 2330, 41 RT 3347, see Pen. Code, § 190.3, subd. (k).)

Recognizing that this standard instruction covers only sympathy for the defendant, but not the separate concept of mercy, defense counsel proposed several jury instructions about the place of mercy in the jury's deliberations at the penalty phase. One proposed instruction stated:

> An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion or mercy for the defendant that has been raised by any aspect of the offense or of the defendant's background or character in determining the appropriate punishment.
>
> You are not to be governed by conjecture, prejudice, public opinion, or public feeling.

> You may decide that a sentence of life without possibility of parole is appropriate for the defendant based upon the sympathy, pity, compassion, and mercy you felt as a result of the evidence adduced during the penalty phase.

(10 CT 2352.)

> The other instruction proposed by defense counsel stated:
>
> In determining whether to sentence the defendant to life without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."

(10 CT 2363.)

The trial court refused to give these instructions. (40 RT 3224, 3226.)

The trial court erred. The requested instructions, which constituted an accurate statement of the law, sought to inform the jury that mercy could be considered in determining whether or not to impose the death penalty. It is well established that mercy is a proper consideration for the penalty determination in a capital case. This error by the trial judge violated Mr. Leon's rights to a fair jury trial, to present a defense, to a reliable penalty determination and to due process as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, and 17 of the California Constitution.

B. The Trial Court Erred by Refusing to Instruct on Mercy[57]

A defendant in a capital case is entitled to due process, a fair jury

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[57] This Court has repeatedly rejected this claim. (See *People v. Ervine* (2009) 47 Cal.4th 745, 801-803; *People v. Griffin* (2004) 33 Cal.4th 536, 590-591; *People v. Lewis* (2001) 26 Cal.4th 334, 393; *People v. Benson* (1990) 52 Cal.3d 754, 808-809; *People v. Andrews* (1989) 49 Cal.3d 200, 227-228.) Mr. Leon requests that the Court reconsider its prior decisions on this issue.

trial and procedural safeguards guiding the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S.153, 189.) The Eighth Amendment requires that capital sentencing "reflect a reasoned moral response to the defendant's background, character and crime." (*Roper v. Simmons* (2005) 543 U.S. 551, 602-603.)

The Eighth and Fourteenth Amendments to the United States Constitution mandate that a capital case jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant offers as a basis of a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.) These cases guarantee not only the right of a capital defendant to offer any mitigating evidence, they also require appropriate instructions to the jury that "give effect to the mitigating evidence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 314, 319; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 395-399.)

A criminal defendant is also entitled upon request to instructions which either relate the particular facts of his case to any legal issue or pinpoint the crux of his defense. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Hall* (1980) 28 Cal.3d 143, 158-59; *People v. Sears* (1990) 2 Cal.3d 180, 190; see *Penry v. Johnson* (2001) 532 U.S. 782, 797.) The special instructions at issue in this case were not cumulative or argumentative, nor do they contain incorrect statements of law. (See *People v. Mickey* (1991) 54 Cal.3d 612, 697.) Moreover, the instructions were needed in this case because the prosecutor specifically argued against mercy for Mr. Leon. She told the juror that because, in her view, Mr. Leon had not shown any remorse for his conduct, they should not show him any

mercy:

> I am troubled by the fact that nowhere throughout this trial has the defendant any remorse for the crimes he committed. Because I think unless the ability or the capacity to have remorse for the evil you have done to someone, *how can we truly say that you will be rehabilitated or we should give you mercy? How can you expect a jury to give mercy when you have no remorse?*

(41 RT 3273, italics added.)

The trial judge's refusal to give Mr. Leon's requested instructions violated his right to present a defense (U.S. Const., Amends. VIII, XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const. art. 1, § 17; *Beck v. Alabama* (1980) 447 U.S. 635, 638), and a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In addition, the errors violated Mr. Leon's right to trial by a properly instructed jury (U.S. Const., Amends. VI, XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky* (1981)450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145) and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence. (U.S. Const., Amend. XIV; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

This Court has acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. In *People v. Lewis* (1990) 50 Cal.3d 262, 284, the Court advised that in death penalty cases trial courts "should allow evidence

and argument on emotional albeit relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." This statement expressly recognizes that mercy plays a legitimate role in a jury's decision not to impose the ultimate penalty. The United States Supreme Court has also acknowledged the role of mercy in death penalty systems which comply with federal constitutional requirements. The capacity to show mercy is personal to the jurors; it is part of their "reasoned moral response" to mitigating evidence. (*Penry v. Lynaugh, supra,* 492 U.S. at p. 328.)

In this sense, mercy is a consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder and not withstanding what jurors think the defendant deserves. (See *People v. Lanphear* (1984) 36 Cal.3d 164, 169 [trial counsel's plea for "mercy" and "compassion" relevant only to whether death was an appropriate penalty for this individual notwithstanding his culpability in the commission of the murder].)

Without instructional guidance, however, there is a substantial likelihood in this case that the jury failed to consider mercy – even when the concept was implicated by the evidence and arguments of counsel. The jury could have been misled into believing mitigating evidence relating to mercy must be ignored, a belief which conflicts with a capital jury's "obligation to consider all of the mitigating evidence introduced by the defendant." (See *California v. Brown* (1987) 479 U.S. 538, 542-43, 546.) Jurors must be permitted to take into account all evidence the defense offers in support of the argument that death is not appropriate. (*Woodson v. North Carolina*

(1976) 428 U.S. 280, 304-305.)

Although the jury did receive an instruction based on factor (k) that any sympathetic aspects of defendant's character could be considered, none of the instructions given in this case told the jurors that mercy could be considered. The passing reference to "sympathetic value" given in CALJIC No. 8.85 did not provide sufficient guidance to Mr. Leon's jury. Guidance is necessary for a jury in a capital case to consider and dispense mercy, a framework critical to their determination whether death was an appropriate sentence. If jurors are not told that they have the power to consider and dispense mercy, they may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them an inadequate means of effecting a moral response to evidence falling outside the enumerated factors.

C. The Refusal to Instruct on Mercy Resulted in Prejudice

The refusal to give the instructions on mercy offered by the defense in this case constituted state and federal constitutional error. Clear, accurate, easily understood jury instructions are "vitally important in assuring that jurors grasp subtle or highly nuanced legal concepts." (*United States v. DeStefano* (1st Cir. 1995) 59 F.3d 1, 4.) Nowhere is this more important than at the penalty phase of a capital trial. Though instructions are essential for the fact-finding and law-applying functions of a jury in every criminal case, the uniqueness of the sentencing jury's task makes it even more important that the jury be instructed at the penalty phase "with entire accuracy."

Further, when the jury is the sentencing authority, only accurate and unambiguous instructions will insure the achievement of the Eighth

Amendment's twin goals of preventing the death penalty from being administered in an arbitrary and unpredictable manner and mandating that the sentencing authority be allowed to consider any relevant mitigating evidence. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-111.) The instructions must inform the sentencing jury of the factors it must take into account in the sentencing decision, and the process it must employ in exacting this awesome penalty. Mr. Leon's requested instructions would have clarified the standard CALJIC instructions, and provided needed guidance to the jury regarding its consideration of mitigating and aggravating factors, its weighing of those factors, and its ability to consider mercy and sympathy. Accordingly, they were vital to the jury's understanding of its duties in making the life-or-death decision.

Mr. Leon's proposed instructions regarding the importance of mercy in the sentencing decision in a capital case were both necessary and appropriate to guide the jury's consideration of penalty. As noted previously, the prosecutor in this case argued to the jury that because, in the prosecutor's view, Mr. Leon had not expressed remorse, he was not entitled to mercy. Not only was this statement an improper comment on Mr. Leon's failure to testify at either the guilt or penalty phase — after all, without his testimony, how could the jury determine if he were remorseful, it improperly directed Mr. Leon's jury to not consider mercy in its determination of the appropriate sentence. Because there is a reasonable likelihood that the jury applied the penalty-phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California* (1990) 494 U.S. 370, 380), and because the instructions given contained ambiguities "concerning the factors actually considered by [the sentencing body in imposing a judgment of death]" (*Eddings v. Oklahoma,*

supra, 455 U.S. at p. 119 (conc. opn. of O'Connor, J.), to uphold the death sentence on the instructions given would "risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty" (*Lockett v. Ohio, supra*, 438 U.S. at p. 605; see also *Penry v. Lynaugh, supra*, 492 U.S. at p. 328 [concluding that "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision"]). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett, supra*, at p. 605.) Accordingly, the judgment of death must be reversed.

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XI

THE TRIAL JUDGE ERRED IN ALLOWING OFFICER HUTCHINSON TO TESTIFY ABOUT HEARSAY STATEMENTS MADE BY BRYAN SOH REGARDING AN INCIDENT IN THE COUNTY JAIL INVOLVING APPELLANT

Before the penalty phase in this case began, defense counsel moved to continue the case for two to three weeks so that he could prepare to cross-examine two prosecution witnesses against Mr. Leon, Bryan Soh and Christopher Anders. As discussed *ante* in Argument VIII, this continuance was necessary because the prosecution had not given the defense timely notice of these witnesses or of their criminal backgrounds. It was not until July 2, 1996, on the eve of the penalty trial, that the defense learned that Anders had a felony conviction and that the lawyers representing Mr. Leon, the Los Angeles Public Defender's Office, had previously represented Mr. Anders. Also, it not until July 2, 1996, that defense counsel learned about Soh's history of serious mental illness, including the fact that he had had a frontal lobotomy and that mental records showed that his competency to testify was at issue as well as his reputation for truthfulness.

On July 8, 1996, the trial judge denied Mr. Leon's motion for a continuance. During a hearing on the motion, the trial judge announced that although he would not allow Bryan Soh to testify, he would allow the prosecutor to introduce evidence of the incident because the incident met "the *Frank* and *Phillips* criteria."[58] (33 RT 2445.) Defense counsel objected

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[58] *People v. Frank* (1990) 51 Cal.3d 718 and *People v. Phillips* (1985) 41 Cal.3d 29, 73, n.25. The trial judge explained his decision as follows:

(continued...)

to any testimony by Deputy Sheriff Jeffrey Hutchinson about what Soh had said to him.(*Ibid.*) The prosecutor claimed that this testimony was admissible because Soh's statement to Hutchinson was a "spontaneous statement," an exception to the hearsay rule under California law. The prosecutor further argued that she did have evidence to show that the encounter between Soh and Mr. Leon involved violence or the threat of violence, as required under section 190.3, subdivision (b), and thus was relevant aggravating evidence. According to the prosecutor, Deputy Hutchinson should be allowed to testify about Bryan Soh's statement that "I gave them [Mr. Leon and Bryant] the money because I thought they were going to beat the crap out of me." (33 RT 2446.)

A. Deputy Hutchinson's Testimony

At the hearing about the defense objection to this proposed testimony, Deputy Hutchinson gave the following account of the incident in question. On June 27, 1994, Deputy Hutchinson was assigned to supervise inmates at the North County (Los Angeles) Correctional Facility. He was sitting at the A-10 Staff Station, watching the inmate day room. (33 RT 2485-2486.) At one point, Hutchinson saw Mr. Leon and another inmate named Bryant enter the A-10 day room. Another inmate, Bryan Soh, was also entering the day room but was ahead of Bryant and Mr. Leon. (33 RT

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[58](...continued)

"[*Frank*] did hold that I should conduct a preliminary inquiry for the penalty phase to determine whether there is substantial evidence to prove each element of this other criminal activity. This was in accord with *People versus Phillips* [citation omitted]. At footnote 25 *Phillips* said, this determination can be routinely made on the pretrial notice of the prosecution of the evidence that he intends to introduce in aggravation."

(33 RT 2436-2437.)

2487.) The latter called to Soh who then turned around to face them. Hutchinson saw the three men talk, and then Soh reached into his pocket and handed something to Bryant. (33 RT 2488, 2494.) [59] Hutchinson testified that Soh looked frightened. Mr. Leon and Bryant then left the day room, walking towards the corridor which leads to the upstairs of the facility. (33 RT 2488.)

Hutchinson confronted Mr. Leon and Bryant when they were about five feet outside the day room. He ordered them to stand ten feet apart and face the wall with their hands behind their backs. (33 RT 2489.) Hutchinson asked them what had happened in the day room, and both said nothing had happened. (*Ibid.*)

After directing them not to move, Hutchinson returned to the day room to talk to Bryan Soh, who told him that Mr. Leon and Bryant had made him give them all of his money. When asked why he relinquished the money, a $20 bill, Soh claimed that "it felt like they were going to beat the crap out of [me]." (33 RT 2490.) Hutchinson returned to the area where Mr. Leon and Bryant were still standing, arms behind their backs and faces to the wall. Hutchinson testified that he found a crumpled-up $20 bill on the floor between the two men and near one of Mr. Leon's feet. (33 RT 2491.) He asked both of them if they had taken anything from Soh, and both denied that they had. (33 RT 2497.) Deputy Hutchinson testified that this process took about one minute. (33 RT 2498.) On cross-examination, Hutchinson acknowledged that Soh could have been disciplined under jail

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[59] Initially, Hutchinson testified that he could not remember whether Soh had handed something to Mr. Leon or to Bryant. However, he later conceded that the report he had prepared on the date of the incident stated that Soh handed the item to Bryant. (33 RT 2494.)

rules for exchanging property with other inmates. (33 RT 2502.)

B. Ruling Allowing Admission of Hutchinson's Testimony about Soh's Statements

The prosecutor argued that Deputy Hutchinson should be allowed to testify about his conversation with Soh because Soh's statement about his fear of being beaten up by Mr. Leon constituted a "spontaneous statement" under Evidence Code section 1240. According to her, the statement "was made at or about when the event occurred and that it was made spontaneously while Mr. Soh was still under the stress of what happened in this particular incident." (33 RT 2597.)

Defense counsel countered that looking at the totality of what occurred, Soh's statement did not qualify as a spontaneous declaration because the evidence did not show that Soh had not had an opportunity, after the allegedly stressful encounter with Mr. Leon and Bryant, to reflect upon and fabricate a statement. A spontaneous statement is admitted as an exception to the rule against hearsay only if the circumstances show that it is inherently trustworthy. Defense counsel also argued that not only would the admission of this evidence have violated California's evidentiary rules, it would violate Mr. Leon's federal constitutional rights, under the Fourth, Fifth, Sixth and Fourteenth Amendments, to confront witnesses against him and to due process of law. (33 RT 2509.)

Defense counsel also pointed out the incongruity of the trial judge finding that the prosecutor could not put Soh on as witness but that she could call Deputy Hutchinson to testify about Soh's out-of-court statements. (33 RT 2513-2515.)

The trial judge stated that he had ruled that Bryan Soh could not testify because defense counsel had asked for a continuance on the ground he had not had time to prepare to cross-examine Soh. (33 RT 2515.) Thus, the trial judge kept Soh off the stand so that he could deny defense counsel's motion for a continuance of the penalty phase trial.

In denying the defense's motion to exclude this evidence, the trial judge said that the defense could use case and mental health records, admitted as business records, to impeach these statements of Soh.[60] (33 RT 2515.) The trial court ruled that the statements were admitted as spontaneous under California rules of evidence. (33 RT 2515-2516.) Citing the United States Supreme Court decisions in *White v. Illinois* and *People v. Farmer*, the court concluded that the Confrontation Clause of the Sixth Amendment was not violated by the admission of a spontaneous statement. (33 RT 2516.) The trial judge ruled that "the entire statement [of Soh] as elicited or as testified to by Deputy Hutchinson" would be admitted. (33 RT 2518.)

C. The Trial Judge Committed Reversible Error When He Allowed Hutchinson to Testify about Out-of-Court Statements of Bryan Soh

1. This Hearsay did not Qualify as a Spontaneous Declaration

Section 1240 of the California Evidence Code provides that a statement may be admitted, though hearsay, if it describes an act witnessed by the declarant and "[w]as made spontaneously while the declarant was

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[60] The defense did introduce into evidence Soh's medical records from Metropolitan State Hospital and from Camarillo State Hospital. (36 RT 2776.)

under the stress of excitement caused by" witnessing the event. In *People v. Poggi* (1988) 45 Cal.3d 306, 318, this Court wrote:

> To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.[Citations].

As explained in *People v. Gutierrez* (2009) 45 Cal.4th 789, 811, "[t]he word 'spontaneous' as used in Evidence Code section 1240 means actions undertaken without deliberation or reflection.... [T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." In the *Gutierrez* decision, the Court observed: "The crucial element in determining whether an out-of-court statement is admissible as a spontaneous statement is the mental state of the speaker." (*Id.,* at p. 811.)

In *Gutierrez*, this Court found that the trial court had abused its discretion when it admitted the out-of-court statements by the victim's son as a spontaneous declaration. The *Gutierrez* decision quoted the following language from *People v. Farmer* (1989) 47 Cal.3d 889, 903: "The nature of the utterance-how long it was made after the startling incident and whether the speaker blurted it out, for example-may be important, but solely as an indicator of the mental state of the declarant." (*People v. Gutierrez, supra*, 45 Cal.4th at p. 811.) While the lapse of time between the

"startling" event and the declaration are one factor to consider, it is not dispositive. (See, e.g., *People v. Trimble* (1992) 5 Cal.App.4th 1225 [where the court found that a two day interval between the startling event – the murder of the child witness' mother by her father – and her statements to her aunt, made after her father left her alone in the company of the aunt, did not preclude a finding of a spontaneous declaration because the child had been in the exclusive custody of his father during that time period and was acting under the continuing stress of the event].) In *Gutierrez*, however, the Court found that the fact the child witness had waited two months to tell anyone that he had witnessed his father kill his mother, showed that his statements were not spontaneous within the meaning of Evidence Code section 1240.

In the instant case, the statements made by Soh to Deputy Hutchinson were not made at a time when he was under the stress of his encounter with Mr. Leon and Bryant. It is not entirely clear that this encounter, as described by Deputy Hutchinson, amounted to an "occurrence startling enough to produce nervous excitement." (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) That is, there was no evidence that the encounter with Mr. Leon and the other inmate involved violence. According to Deputy Hutchinson, the encounter took seconds, and it did not involve any physical contact. (33 RT 2488.) Second and more importantly, there was no evidence that by the time Deputy Hutchinson questioned Mr. Soh that he was still under the stress of the event or that Soh's answers to the deputy's questions were made "before there [had] been to contrive or misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." (*Poggi, supra,* 45 Cal.3d at p.318.) After all, during the intervening time between the encounter and Deputy

Hutchinson's questioning of Mr. Soh, enough time had elapsed for Hutchinson to follow Mr. Leon and Bryant out of the day room, order them to stand ten feet apart and face the wall with their hands behind their backs, question them about the incident and then return to where Soh was sitting. (33 RT 2489.) Such a lapse of time was sufficient to dissipate the stress of the event.

Given these facts, the trial judge abused his discretion in admitting the out-of-court statements of Bryan Soh into evidence as section 190.3, subdivision (b) aggravating evidence against Mr. Leon, because the prosecutor did not carry his burden to establish that these statements constituted spontaneous declarations under Evidence Code section 1240.

2. This Hearsay Violated Mr. Leon's Sixth Amendment Rights

As noted above, defense counsel objected on federal constitutional grounds to the admission of out-of-court statements of Bryan Soh introduced through the testimony of Deputy Hutchinson. The Sixth and Fourteenth Amendments to the federal constitution guarantee an accused the right to be confronted with the witnesses against him. (U.S. Const., 6th and 14th Amends.; *Pointer v. Texas* (1965) 380 U.S. 400, 401.) Prior to the Supreme Court decision in *Crawford v. Washington* (2004) 541 U.S. 36, hearsay was admissible against an accused if it fell under a "firmly rooted exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.)

The *Crawford* decision rejected this doctrine and held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *(Crawford, supra*, 541 U.S. at p. 68.) *Crawford* established

the right to confront "those 'who bear testimony' against the defendant. (*Ibid.*) Although the *Crawford* case was not decided until after Mr. Leon's trial, the rule announced in *Crawford* is applicable to all criminal cases pending on appeal, including the present case. (*Schriro v. Summerlin* (2004) 542 U S. 348, 351; *People v Cage* (2007) 40 Cal.4th 965, 974, fn. 4.)

The decision in *Crawford* held that the Sixth Amendment Confrontation Clause applied only to hearsay that was "testimonial." In *Davis v. Washington* (2006) 547 U.S. 813, a decision deciding two separate domestic violence cases,[61] the Supreme Court further illuminated the difference between testimonial and non-testimonial hearsay statements. The statements in the *Davis* case came from the victim (Davis' former girlfriend), who made a 911 call and told the operator that Davis had been hitting her with his fists and had just run out the door. (*Davis, supra*, 547 U.S. at pp. 817-18.) The operator asked the victim some questions and obtained some information about Davis. (*Ibid.*) After the victim described the assault, the operator told her the police were on the way. (*Id.*) Over Davis' objection, the 911 recording was admitted at his trial. (*Ibid.* at p. 819.)

In the other case, *Hammon v. Indiana*, which was consolidated by the United States Supreme Court in the opinion, *Davis v. Washington, supra*, police responding to a report of domestic violence spoke to Hammon's wife, who appeared frightened but told the police nothing was wrong. (*Id.* at p. 819.) When police entered the house with her consent, they saw a gas heating unit with pieces of glass in front of it and flames coming out of the partial glass front. (*Ibid.*) Hammon told the officers that

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[61] The two cases decided in this decision were *Davis v. Washington* and *Hammon v. Indiana*.

he and his wife had argued, but everything was fine. (*Ibid.*) An officer then spoke separately with Hammon's wife, who reported that, during an argument, Hammon had pushed her to the ground, punched her, and shoved her head into the broken glass of the heater. (*Id.* at pp. 819-20.) The officer then had her fill out and sign an affidavit describing the assault. (*Id.* at p. 820.) Over Hammon's objection, the trial court admitted, under the hearsay exception for "excited utterances," the officer's testimony concerning the statement and affidavit of Hammon's wife. (*Ibid.*) The Supreme Court held

> [s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(Id. at p. 822.)

Applying these principles, the Supreme Court ruled the statements in the 911 call in the *Davis* case were not testimonial. *(Id.* at pp. 826-28.) The Court compared the statements at issue in *Crawford* to the 911 call in *Davis*. In the former case, interrogation took place long after the events described, whereas in *Davis* the caller was speaking about events as they were "actually happening," rather than "describing past events. (*Id.* at p. 827.).

Thus, in the *Davis* case, a reasonable listener would have recognized the 911 caller was "facing an ongoing emergency." (*Ibid.*) Moreover, the caller's statements concerning the identity of the assailant, were necessary to resolve the present emergency, that is, to assist the dispatched officers to determine "whether they would be encountering a violent felon." By

contrast, in the *Crawford* case, the officers elicited statements from the complaining witness about what had happened in the past. (*Ibid.*) Finally, the "frantic" answers of the caller in the Davis case were made in an environment that was not tranquil, or even safe. (*Id.*)

In contrast, the Supreme Court ruled in the *Hammon* case that it was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct...." (*Id.* at p. 829.) There was no emergency in progress. As the Court observed, "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime...." (*Ibid.*) Because the witness' statements in the *Hammon* case "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." (*Id.* at p. 832.)

The hearsay at issue in the present case is analogous to that involved in the *Hammon* case. First, the questioning of Soh by Deputy Hutchinson was not done on an emergency basis. Hutchinson already had stopped and contained the movement of Mr. Leon and Bryant before he went to question Soh about what had happened. Unlike the 911 caller in *Davis*, Bryan Soh was not facing an ongoing emergency or any imminent danger. Given these factors, his out-of-court statements to Deputy Hutchinson were testimonial in nature and thus should not have been admitted at Mr. Leon's trial because they violated his right to confront witnesses against him as provided in the Sixth Amendment to the United States Constitution.

D. The Admission of this Evidence Prejudiced Mr. Leon

During his argument in support of the motion to continue the penalty

phase trial, defense counsel observed that "nothing is more serious than a witness coming up here and saying [Mr. Leon] was violent in custody." (33 RT 2433.) The saliency of this point was demonstrated by the prosecutor's statements about the alleged jailhouse incidents in her closing argument to the jury.

The prosecutor told the jurors that Mr. Leon "has been violent all of his life or almost all of his life." (41 RT 3277.) In support of that claim and as part of her argument that Mr. Leon should be sentenced to death, the prosecutor emphasized Mr. Leon's conduct in jail while he was awaiting trial. She claimed: "This is a man who in prison is not deterred." (41 RT 3277.) The prosecutor specifically argued that these incidents in jail required that the jury reject a sentence of life without the possibility of parole ("LWOP") and condemn Mr. Leon to death:

> So if you are going to talk about giving him LWOP, you need to understand this is going to continue. He is always going to be taking something from someone. He is always going to be throwing a punch in here or throwing a punch in there. It makes no sense to keep this man in prison when he is so at home there such that he is still committing crimes.

(41 RT 3277.)

In support of this argument, the prosecutor cited the incident with Mr. Soh, stating:

> Now, we didn't bring Mr. Soh in. You've got the medical reports. You are going to see that Mr. Soh had a lobotomy when he was, I think he was 15 years old. Mr. Soh gives the appearance of being a mentally handicapped person. The deputy thought he was mentally handicapped or mentally retarded. Mr. Soh fit [sic] the type of victim that the defendant likes to pick on, those who are vulnerable, handicapped, some people who don't have it altogether.

(41 RT 3278.)

The prosecutor could not have made this argument if the trial court had not erroneously allowed Deputy Hutchinson testify that Soh had told him that he gave money to Mr. Leon and another inmate because he had the feeling that they were "going to beat the crap out of him."

Because this error involved the violation of Mr. Leon's Eighth and Fourteenth Amendment rights, reversal is required unless the prosecutor can prove beyond a reasonable doubt that it did not prejudice Mr. Leon. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case the California Supreme Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. *(Gamache v. California* (2010) ___U.S. ___, 131 S.Ct. 591, 592.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Id.* at p. 593.) Justice Sotomayor cautioned that "in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman.*" (*Ibid.*)

In this case, the State cannot meet that burden to establish that, absent the testimony of Deputy Hutchinson about Soh's statements, the jury would not have returned a sentence of life without the possibility of parole rather than a death sentence.

XII

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY IN THE PENALTY PHASE WITH CRITICAL GUIDELINES ON HOW THE JURY SHOULD EVALUATE THE EVIDENCE

A. Introduction.

At the penalty trial, the trial court gave a very limited set of jury instructions. (10 CT 2316-2341; 41 RT 3335-3356.) At the conclusion of the penalty phase evidence, the trial judge gave the standard penalty phase instructions. (41 RT 3336-3337, CALJIC No. 8.84.1 [duty of jury – penalty proceedings]; 41 RT 3345-3346. CALJIC No. 8.85 [penalty trial – factors for consideration]; 41 RT 3347-3348, CALJIC No. 8.86 [penalty trial – conviction of other crimes – proof beyond a reasonable doubt]; 41 RT 3348-3349, CALJIC No. 8.87 [penalty trial – other crime activity – proof beyond a reasonable doubt]; 41 RT 3352-3356, CALJIC No. 8.88 [penalty trial – concluding instruction].)

Reading CALJIC 8.84.1, the trial court expressly told the jury: "You will now be instructed as to all of the law that applies to the penalty phase of this trial," and "*disregard all other instructions given to you in other phases of this trial.*" (41 RT 3336-3337, italics added..) We must presume that the jurors followed that directive and applied only those limited instructions during their penalty phase deliberations. (*Richardson v. Marsh* (1987) 481 U.S. 200, 211; *People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

As a result, instructions regarding such critical issues as the presumption of innocence, the allocation of the burden of proof and the

definition of reasonable doubt [62]were not given in the penalty phase. These omissions left the jury without any legal guidance in making key determinations.

The omission of critical instructions in the penalty phase resulted in an unfair, arbitrary and unreliable determination of the appropriate punishment in violation of Mr. Leon's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the presumption of innocence, a fair jury trial, a reliable penalty determination and due process of law. This omission also violated Mr. Leon's rights under article I, sections 7, 15 and 17 of the California Constitution.

1. Failing to Instruct the Jury Adequately

The United States Supreme Court has stated repeatedly the importance of ensuring that jurors in criminal cases are instructed adequately on the applicable law. "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 [opn. of Stewart, Powell, and Stevens, JJ.].) "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

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[62] At issue is CALJIC No. 2.90, which combines both the presumption of innocence and the definition of reasonable doubt. This instruction was given during the guilt phase (9 CT 2020); however, in the penalty phase the trial court directed the jurors to disregard the guilt phase instructions. (10 CT 2317.)

This Court has also recognized the necessity of complete instructions on the applicable law. A trial court must instruct sua sponte on those general principles of law which are " . . . closely and openly connected with the facts before the court, and which are necessary for a jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.) A trial court has a sua sponte duty to instruct on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885.)

Normally, in the penalty phase of a capital case, the trial court can fulfill its duty either by instructing which guilt phase instructions apply at the penalty phase (see, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1256-1257) or by re-instructing the jury on all applicable principles of law. In *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26, this Court stated that "[t]o avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." As indicated in the Use Note, CALJIC No. 8.84.1 was adopted in response to the *Babbitt* decision and utilizes a different procedure "less likely to result in confusion to the jury." That is, this instruction directs the jurors to disregard all instructions given in other phases of the trial, but it is contemplated that CALJIC No. 8.84.1 will be "followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." (CALJIC No. 8.84.1, Use Note.)

As noted previously, pursuant to CALJIC 8.84.1, the trial court instructed the jury in Mr. Leon's case at the penalty phase "to disregard all instructions given in other phases of the trial." (41 RT 3337.) Accordingly, the trial judge then had a duty to re-instruct the jury at the penalty phase about such fundamental legal principles as the definitions of direct and

circumstantial evidence (CALJIC No. 2.00), the sufficiency of circumstantial evidence (CALJIC 2.01) and the presumption of innocence, reasonable doubt and the burden of proof. (CALJIC No. 2.90.) While these important principles of law were contained in the guilt phase jury instructions in this case, as noted above, the jury was specifically instructed to disregard all instructions previously given in the trial. (41 RT 3337.) These instructions on fundamental principles of law are as important in the penalty phase as they are in the guilt phase of criminal trials.

While this Court has held that no prejudicial error occurs where trial courts failed to re-instruct on general principles of law necessary for a reliable penalty phase determination where the same jury served in both the guilt and penalty phases, that is true only if the trial judge has not directed the jury to disregard the instructions given in the guilt phase. (See *People v. Sanders* (1995) 11 Cal.4th 475, 561; *People v. Wharton* (1991) 53 Cal.3d 522, 600; *People v. Williams* (1988) 45 Cal.3d 1268, 1321.) This failure to re-instruct left the penalty phase jury in Mr. Leon's case without proper guidance on the applicable legal principles for evaluating the evidence and resulted, contrary to due process, in a "reasonable likelihood" that the jurors evaluated the penalty evidence in whatever fashion and for whatever purpose the individual jurors desired. (*Boyde v. California* (1990) 494 U.S. 370, 380 [due process violated if reasonable likelihood that jury applied instructions erroneously].)

This Court has also held that failure to instruct on the general principles for evaluating evidence is harmless where no prejudice is shown. (*People v. Carter* (2003) 30 Cal.4th 1166, 1218-1222.) The *Carter* decision involved a different factual scenario than Mr. Leon's case, the chief difference being that in *Carter* the trial court did instruct in the

penalty phase on the presumption of innocence and defined the burden of proof beyond a reasonable doubt. (*Id.* at p. 1219.) In finding the error harmless in *Carter*, this Court held that the lack of evidentiary instructions did not constitute structural error because it did not deprive the defendant of "'basic protections' ... without which 'a criminal trial cannot reliably serve its function as vehicle for determination of guilt or innocence [or punishment] . . . and no criminal punishment may be regarded as fundamentally fair.'" (*People v. Carter, supra,* 30 Cal.4th at p. 1221, quoting *Neder v. United States* (1999) 527 U.S. 1, 8-9, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578.) The instructional error at issue in *Carter* did not include the failure to instruct on the presumption of innocence or allocation of the burden of proof. By contrast, at the penalty phase in Mr. Leon's case, the trial judge failed to instruct at all on these core principles which are essential to assuring due process in a criminal trial.

Similarly, in *People v. Moon* (2005) 37 Cal.4th 1, 37, this Court found that the failure to re-instruct the jury at the penalty phase about the consideration and evaluation of evidence, after specifically telling the jurors to not refer to the written guilt phase instructions because they were going to get a new set of instructions, was error. Nonetheless, the *Moon* decision found the error not to be prejudicial because the prosecution at the penalty phase had not called any witnesses and relied on the circumstances of the crime, as presented in the guilt phase, to make the case for the death penalty. (*Id.* at p. 38.) By contrast, in the instant case, the prosecutor called a number of witnesses to testify about the prior convictions and the prior alleged violent criminal activity of Mr. Leon. This evidence required the jury to consider and evaluate, inter alia, circumstantial evidence, but the

jurors were not instructed on how to assess this evidence. Therefore, the instructional error here cannot be deemed harmless.

This instructional error – the failure to instruct on the presumption of innocence, the prosecution's burden of proof and the definition of reasonable doubt – was particularly important because the prosecution introduced "other crimes" evidence as aggravation under Penal Code section 190.3, subdivision (b). Mr. Leon was entitled to a presumption of innocence on those charges because such a presumption is a basic component of a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) Also, the failure to re-instruct the jury at the penalty trial on the the burden of proof constituted prejudicial error. Under California law, a judge has a specific duty to instruct on the burden of proof. (Cal.Evid. Code § 502.) [63] The failure to instruct on the presumption of innocence, the burden of proof and the definition of reasonable doubt at the penalty phase was exacerbated by the fact that in her closing argument to the jury at the penalty phase, the prosecutor made an inadequate statement about the burden on the prosecution at that stage of the trial. She argued:

> Now, a penalty trial is different from a regular guilt phase trial. You are going to see that the burden of proof is different. So I only have to argue to you or get to argue to you one time. And then the defense

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[63] Section 502 of the California Evidence Code provides:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

> will have a chance to submit their argument. I will not get up and rebut because it's no longer my burden to prove beyond a reasonable doubt that the death penalty should be imposed in this case. Rather, I must present to you aggravating factors in Mr. Leon's life and about the crime. And the defense must present to you, or they don't have to, but they presented to you mitigating factors. And what you are going to be doing is weighing and considering those factors and determining what the appropriate punishment is in this particular case.

(41 RT 3269-3270.)

While it is true that this Court has held that neither the prosecution nor the defense carries the burden of proof on the issue of the death penalty,[64] if the prosecutor offers factor b or factor c [65]evidence in aggravation, such uncharged criminal activity and prior convictions must be proved beyond a reasonable doubt. (*People v. Williams* (2010) 49 Cal.4th 405, 636.) Accordingly, the prosecutor's statements, quoted above, about her burden at the penalty phase were inadequate and somewhat misleading; therefore, the failure of the trial judge to re-instruct on the principles of presumption of innocence, the burden of proof and the definition of reasonable doubt was prejudicial.

The "jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) A verdict based on a defective definition of reasonable

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[64] California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].)

[65] See Penal Code section 190.3, subdivisions (b) and (c).

doubt cannot stand. (*Id.* at p. 281.) Neither can verdicts obtained without specifying that the defendant is presumed innocent and that the prosecution bears the burden of proof on the other crimes evidence. The instructional error also extended to the evaluation of other evidence presented during the penalty phase.

It has also long been established that CALJIC No. 2.01 or a similar instruction on the sufficiency of circumstantial evidence must be given sua sponte where the prosecution's case rests substantially on circumstantial evidence. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 175.) No such instruction was given in the penalty phase of this case.

Mr. Leon had a federal constitutional right to a properly instructed jury in the penalty phase. Federal due process principles also prohibit depriving Mr. Leon of crucial protections afforded under California law such as full and complete jury instructions. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The trial court's failure to instruct from on essential legal principles necessary for a fair and reliable penalty determination constituted error.

A jury properly instructed on the presumption of innocence and the legal definition of proof beyond a reasonable doubt might have rejected alleged aggravating evidence. In addition to the omissions on the burden of proof, the jury also did not receive any instructions about how to weigh the sufficiency of the circumstantial evidence presented on these allegations. For example, CALJIC No. 2.01, relating to the sufficiency of circumstantial evidence, tells jurors that if there are two reasonable interpretations of the evidence, one of which points to the defendant's innocence, jurors must adopt that interpretation. Mr. Leon was deprived of that potential benefit

because at the penalty phase the jurors did not receive this instruction. Even more damaging was the fact that at the penalty phase the jury was specifically instructed to disregard all instructions, including CALJIC No. 2.01, given in previous parts of the trial. (41 RT 3336-3337.)

Findings critical to the penalty determination were made without adequate legal guidance. There is a reasonable likelihood that at least some of the jurors accepted alleged aggravating evidence and may have rejected mitigation evidence because of the lack of complete and adequate instructions. Under these circumstances, Mr. Leon was deprived of his federal constitutional right to a jury fully instructed on the applicable legal principles and prejudice from that error is likely. Even assuming that the failure to define reasonable doubt is not structural error, the omission of several crucial instructions from the penalty phase cannot be considered harmless error. The prosecution cannot show, beyond a reasonable doubt, that these instructional errors did not contribute to the jury's choice of the death penalty for Mr. Leon. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at p. 448.) Confidence in the reliability of the outcome is sufficiently undermined that reversal is required.

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XIII

CUMULATIVE ERROR UNDERMINED FUNDAMENTAL FAIRNESS AND VIOLATED EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN THIS CASE

Even assuming that none of the errors identified by Mr. Leon are prejudicial by themselves, the cumulative effect of these errors undermines the confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

This Court must reverse unless it is satisfied that the combined effect of all the errors in this case, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to the totality of the errors].)

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (*See Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*), *cert. denied*, 440 U.S. 974 (1979) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-43 [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.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the

evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if Mr. Leon received a fair guilt trial.

Mr. Leon has argued that a number of serious constitutional errors occurred during the guilt phase of trial and that each of these errors, alone, was sufficiently prejudicial to warrant reversal of his guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to Mr. Leon can be found.

As argued previously in this brief, Mr. Leon was denied his constitutional right to an impartial jury and a fair trial because of serious and prejudicial inadequacies and improprieties in the jury selection process. Further, the admission of improper hearsay evidence and evidence of an alleged crime which had originally been charged against Mr. Leon but then dismissed because of insufficient evidence violated his due process rights. Mr. Leon was denied his federal constitutional right to confront and cross-examine the author of the autopsy of one of the victims in this case. In addition, the highly improper argument by the prosecutor asking the jurors to apply their emotions, rather than their logic, to the task of determining Mr. Leon's guilt violated appellant's due process rights to a fair trial. The combination of these errors was greater than the sum of its parts and resulted in egregious error mandating reversal. The cumulative effect of the errors must be found to have been prejudicial, and Mr. Leon's convictions must be reversed.

The death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers

prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial. In *People v. Hamilton* (1968) 60 Cal.2d 105, this Court wrote:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(Id. at pp. 136-37.)

(See also *People v. Brown* (1988) 46 Cal.3d 432, 466 [state law 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].) Error of a federal constitutional nature requires an even stricter standard of review. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California, supra*, 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) The errors at the penalty phase

trial in this case included the denial of a reasonable request for a continuance and the consequent admission of hearsay testimony about statements by an alleged victim of a scuffle among inmates as well as the admission of evidence of unadjudicated criminal activity. In addition, the instructions given at the penalty phase did not adequately guide the jurors in making the decision of whether or not to sentence Mr. Leon to death.

Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina*, (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

For all the reasons stated above, the guilt and penalty verdicts in this case must be reversed.

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XIV

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (Id. at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Mr. Leon briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, Mr. Leon requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers

eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against Mr. Leon, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider Stanley and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Mr. Leon's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 4 CT 918-920; 16 RT 3672-3673. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the

killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Mr. Leon is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Mr. Leon urges the court to reconsider this holding.

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C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Mr. Leon's Death Sentence is Unconstitutional Because It is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard and as discussed ante in Argument XII, Mr. Leon's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, Mr. Leon's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. Because these additional findings were required before the jury could impose the death sentence, Ring, Apprendi, Blakely, and Cunningham require that each of these findings be made beyond a reasonable doubt. The court failed to so

instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (People v. Sedeno (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Mr. Leon is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of Apprendi (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that Apprendi, Blakely, and Ring impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Mr. Leon urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Mr. Leon contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected Mr. Leon's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Mr. Leon requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and Mr. Leon is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Mr. Leon's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here, (10 CT 2329-2330, 2340-2341; 41 RT 3347-3348, 3355-3356), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Mr. Leon is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in Lenart and Arias.

Even presuming it were permissible not to have any burden of proof, the trial court committed prejudicial error by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Mr. Leon's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (People v. *Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Mr. Leon asserts that Prieto was incorrectly decided, and application of the Ring reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Mr. Leon asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Mr. Leon's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally

provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (10 CT 2332 [CALJIC No. 8.87, modified]; 41 RT 3348-3349.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecutor presented extensive evidence of Mr. Leon's alleged prior criminal activity under factor (b) and substantially relied on this evidence in her closing argument (See Argument VIII, *ante*.)

The United States Supreme Court's recent decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Mr. Leon is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in Anderson and Ward.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon Mr. Leon hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (10 CT 2341.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (People v. Breaux (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Mr. Leon's case. (CALJIC 8.85(e), (f), (g), (i), and (j).) The trial court failed to omit those factors from the jury instructions (10 CT 2329-2330; 41 RT 3345-3347) likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

Mr. Leon asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

6. The Instructions Failed to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (10 CT 2329-2330.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Mr. Leon requested that the jury be instructed that "[t]he absence of any mitigating factor listed above may not be considered aggravating." (10 CT 2345.) The trial judge did not include this instruction in those given to Mr. Leon's jury. The jury in this case, therefore, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate Mr. Leon's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, Mr. Leon asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

7. The Instructions Failed to Inform the Jury That Lingering Doubt Could Be Considered a Mitigating Factor

The instructions failed to inform the jury that it could consider lingering doubt as to Mr. Leon's guilt as a mitigating factor in determining the appropriate punishment. He requested such an instruction on lingering doubt (10 CT 2350), but the trial court denied his request (41 RT 3324.) This Court has held that evidence and argument about lingering doubt can be presented as a mitigating circumstance (*People v. Gay* (2008) 42 Cal.4th 1195, 1218; (*People v. Terry* (1964) 61 Cal.2d 137, 145-147), but nonetheless repeatedly has held that a lingering doubt instruction is not required by state or federal law, and that the concept is sufficiently covered in CALJIC No. 8.85 (*People v. Zamudio* (2008) 43 Cal.4th at p. 370; (*People v. Cox* (1991) 53 Cal.3d 618, 675-679.) Contrary to these rulings, the trial court's refusal to give the instruction on lingering doubt violated Mr. Leon's federal constitutional rights to due process, equal protection, the full consideration of her mitigating evidence and a reliable and non-arbitrary penalty determination. (U.S. Const., 8th and 14th Amends.; (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [right to present mitigation]; (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [having jury consider lingering doubt as a mitigating factor is a state created-liberty interest protected by Due Process Clause]; *Mills v. Maryland, supra*, 486 U.S. at pp. 383-384 [requirement of heightened reliability in capital sentencing].) Mr. Leon asks the Court to reconsider its previous decision

8. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear

to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Mr. Leon urges this Court to reconsider that ruling.

9. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole ("LWOP") when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) The trial judge refused Mr. Leon's request to instruct the jurors that if they found that any mitigating circumstance outweighed the aggravating circumstances, they shall to return

a verdict of life without parole. (10 CT 2365.) Instead, the trial court instructed the jury with CALJIC No. 8.88, which does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. (10 CT 2340-2341; 41 RT 3352-3354.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Mr. Leon's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Mr. Leon submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

10. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard of Proof And Lack of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence

required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; Lockett v. Ohio (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, supra, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Mr. Leon's jury was told in the guilt phase that unanimity was required in order to acquit Mr. Leon of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, supra, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Mr. Leon's death sentence since he was deprived of his rights to due process, equal protection and a reliable

capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution.

11. The Penalty Jury Should Be Instructed on The Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Mr. Leon's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the

consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Mr. Leon's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Mr. Leon's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Mr. Leon of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Mr. Leon urges the court to reconsider its decisions on the necessity of written findings.

E. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Mr. Leon urges the court to reconsider its failure to require inter-case

proportionality review in capital cases.

F. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Mr. Leon acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, (supra,) 39 Cal.4th at pp.618-619; *People v. Snow*

(2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Mr. Leon urges the court to reconsider its previous decisions.

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CONCLUSION

For all of the reasons stated above, the entire judgment – the convictions, the special circumstance findings, and the sentence of death – must be reversed.

DATED: January 27, 2011

Respectfully Submitted,

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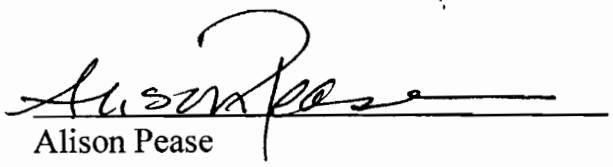
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, Alison Pease, am the Deputy State Public Defender assigned to represent appellant Richard Leon, in this automatic appeal and conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 69,662 words in length excluding the tables and this certificate.

DATED: January 27, 2011



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DECLARATION OF SERVICE BY MAIL

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Case Number: **Superior Court No. Crim. PA012903**
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I, the undersigned, declare as follows:
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 27, 2011, at Sacramento, California.

Saundra Alvarez