IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **KEITH TYSON THOMAS,** Defendant and Appellant.	Case Number S067519

Alameda County Superior Court Case No. 118686B

Honorable Alfred A. Delucchi, Judge

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **KEITH TYSON THOMAS**, Defendant and Appellant.	Case Number S067519

INTRODUCTION

On December 9, 1992, a walker out for some early morning exercise discovered a dead body near a hiking trail in a Point Richmond park overlooking the San Francisco Bay. (53 RT 5408, 5413, 5428.) The decedent was identified as Francia Young, a 25-year-old computer analyst who had been kidnapped the previous evening as she walked to her car from the MacArthur BART station in Oakland. (52 RT 5364, 5372, 5383-5384.)

Approximately two weeks after the murder, Keith Thomas and Henry Glover were identified as suspects. The men were charged with murder and other crimes against Young, as well as further offenses arising from a residential robbery and shootout in Hayward, and a robbery in Berkeley. The Alameda district attorney sought the death penalty against both men.

The prosecution of Thomas raised a wide range of case-specific federal constitutional issues that will be described in the pages that follow. Over and above the myriad Fifth, Sixth, Eighth, and Fourteenth Amendment violations unique to the present matter, the opening brief in this case is likely to be among the first

substantive pleadings in a death penalty case filed with this Court in the wake of the high court's landmark decision in *Cunningham v. California* (2007) 549 U.S. ___ [2007 U.S. Lexis 1324]. If this is among the first briefs to discuss *Cunningham*, this pleading can be considered as merely the first wave in a tide of briefing that will swell into a tsunami that will inevitably sweep away this Court's rationalizations for avoiding the consequences of the *Apprendi* revolution for the California way of imposing the death penalty.

In a series of cases beginning in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the high court has condemned various forms of judicial fact finding used to increase an offender's punishment as contrary to the Sixth Amendment right to trial by jury and the right to due process. With each successive decision in this line of cases, death penalty appellants have argued the high court's rulings demonstrate California's death penalty system fails to satisfy the minimum standards imposed by the federal Constitution.

These arguments have been unavailing. This Court has steadfastly refused to acknowledge the implications for the state's death penalty law of *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [106 Cal.Rptr.2d 575, 23 P.3d 347]), *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (*People v. Cox* (2003) 30 Cal.4th 916, 972 [135 Cal.Rptr.2d 272, 70 P.3d 277]), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 531, 159 L.Ed.2d 403] (*People v. Black* (2005) 35 Cal.4th 1238, 1258 [29 Cal.Rptr.3d 740, 113 P.3d 534]), and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct.

738, 160 L.Ed.2d 621] (*People v. Black*, *supra*, 35 Cal.4th 1238, 1256). As will be explained more fully below, the high court's decision in *Cunningham* undermines this Court's attempts to distinguish the high court's decisions and resist the application of the *Apprendi* revolution to this state's way of imposing death. At a minimum, because *Apprendi* and its progeny must be applied to California's death penalty law, this Court has no choice but to set aside the death sentence in this case as invalid for violation of the Sixth Amendment right to trial by jury, Eighth Amendment requirement for heightened reliability in capital cases, and the Fifth and Fourteenth Amendment right to due process.

JURISDICTIONAL STATEMENT

This is an automatic appeal from a judgment of death. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b).[1])

STATEMENT OF THE CASE

In an information filed on December 22, 1993, the district attorney of Alameda County charged Keith Tyson Thomas and Henry Glover Jr. with murder (§ 187, subd. (a)) [count 1], kidnapping for robbery (§ 209, subd. (b)) [count 2], forcible rape (§ 261, subd. (a)(2)) [count 3], forcible sodomy (§ 286, subd. (d)) [count 4], robbery (§ 211) [counts 5, 8, 9], and assault on a peace officer with an assault weapon (§ 245, subd. (d)(3)) [counts 10 and 11]. Thomas was also charged with being a felon in possession of a firearm (§ 12021, subd. (a)) [count 6].

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[1] Statutory references are to the Penal Code unless otherwise indicated.

The charges were augmented by a host of conduct enhancements. As to the murder count, the government alleged four felony-murder special circumstances: robbery-murder (§ 190.2, subd. (a)(17)(i)), kidnap-murder (§ 190.2, subd. (a)(17)(ii)), rape-murder (§ 190.2, subd. (a)(17)(iii)), and sodomy-murder (§ 190.2, subd. (a)(17)(iv)). The murder [count 1], kidnap for robbery [count 2] and one count of robbery [count 5] charges included personal use of a firearm (§§ 1203.06, 12022.5) and armed with a firearm (§ 12022, subd. (a)) enhancements as to both defendants. The rape [count 3] and sodomy [count 4] counts also included firearm enhancements for personal use (§ 12022.3, subd. (a)) and arming (§ 12022.3, subd. (b)) as to both Thomas and Glover. The two sex crimes further included enhancements for acting in concert (§ 264.1) and kidnap for purposes of committing a sex crime (§ 667.8). The assault on a peace officer charges [counts 10 and 11] and one count of robbery [count 9] alleged Glover personally used a firearm (§§ 1203.06, 12022.5) and Thomas was armed with a firearm (§ 12022, subd. (a)). (6 CT 1807-1821.) On December 28, 1993, appellant Thomas pleaded not guilty and denied the various enhancements. (7 CT 1831.)

A joint trial for the two defendants began on September 14, 1995. (1 RT 3; 9 CT 2503.) A motion to sever trial on counts seven and eight, which alleged the robbery and attempted kidnap for robbery of Constance Silvey, was granted by the court. The district attorney therefore amended the statement in aggravation to include the incident. (2 RT 260; CT 2698.) Counts nine to 11 were subsequently renumbered as counts seven to nine. (26 RT 1778-

1781.)

On October 2, 1995, counsel for the codefendant filed a motion to recuse the public defender as defense counsel for Thomas on the ground the agency had represented Glover as a juvenile and therefore had a conflict of interest. (9 CT 2572.) The motion was opposed by the public defender. (9 CT 2531.) On October 16, 1995, the motion to remove defense counsel was granted by the trial court. (4 RT 449-450; 9 CT 2712.) A week later, attorney Alfons Wagner was appointed to represent Mr. Thomas. (6 RT 466; 9 CT 2716.) The case was continued to February 26, 1996, to permit counsel to prepare for trial. (7 RT 489; 10 CT 2778.)

When trial resumed, the court and counsel addressed a number of motions in limine. On March 21, 1996, the court granted Glover's motion for a separate trial on *Aranda-Bruton* grounds.[2] (22 RT 1692; 10 CT 2979.) The district attorney elected to proceed against Glover first, and appellant's trial was continued. Glover was convicted on the murder charge and other substantive offenses, with true findings on the special circumstances. (11 CT 3278-3289.) The jury reached mixed results on the conduct enhancements. Significantly, the jury found it not to be true that Glover personally used a firearm (§ 12022.5) during the murder [count 1], kidnapping [count 2], rape [count 3], sodomy [count 4] and robbery [count 5] of Young—and therefore could not be the shooter—but that he was armed with a firearm (§ 12022, subd. (a)) during the crimes. The

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[2] *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal.Rptr. 353, 407 P.2d 265]; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct.

jury also returned not true findings on the kidnap for purposes of committing a sex crime (§ 667.8) enhancements attached to the rape and sodomy charges. (11 CT 3278-3289.) The penalty phase ended in a mistrial when the jury could not agree upon a sentence recommendation. (12 CT 3419.) A retrial of the penalty phase also ended in a mistrial when the jury could not arrive at a decision. (13 CT 3721.) On April 4, 1997, Glover was sentenced to life imprisonment without the possibility of parole, a consecutive indeterminate term of life, and a determinate term of twenty years. (13 CT 3848-3850.)

Trial for appellant began anew on June 30, 1997. (26 RT 1747; 13 CT 3777.) On September 29, 1997, the jury found him guilty on all counts and returned true findings on the special circumstances. The jury found the personal use of a firearm (§ 12022.5) during the murder [count 1], kidnapping [count 2], rape [count 3], sodomy [count 4] and robbery [count 5] to be not true, and the armed (§ 12022, subd. (a)) allegations to be true. (60 RT 6306-6322; 13 CT 3901-3913.) The penalty phase began on October 6, 1997. After more than four days of deliberations, on October 22, 1997, the jury recommended a death sentence. (66 RT 7097; 14 CT 4069.)

Sentencing occurred on January 16, 1998. The court denied a motion to modify the sentence to life imprisonment without the possibility of parole. (67 RT 7138.) For the murder conviction, the court sentenced Thomas to death. For the kidnapping conviction

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1620, 20 L.Ed.2d 476].

[count 2], the court imposed a concurrent term of life plus one year. Sentence was imposed and stayed for the remaining convictions pursuant to Penal Code section 654. (67 RT 7153-7159.) The counts for which a separate trial had been ordered [original counts 7 and 8], were dismissed on the motion of the district attorney. (67 RT 7161.) The appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS: GUILT PHASE

(1) The Death of Francia Young.

In December 1992, 25-year-old Francia Young lived with her mother and grandmother in Oakland. (52 RT 5383.) She had recently purchased a black Mustang automobile. (52 RT 5385.) Ms. Young worked as a computer analyst in San Francisco and rode the BART to and from work. (52 RT 5384.) Ms. Young would park at the MacArthur Boulevard BART station in Oakland to catch the train into San Francisco. (52 RT 5390.) On December 8, 1992, Ms. Young left for work around seven o'clock in the morning. (52 RT 5385.) As it was raining, she wore a raincoat and borrowed an umbrella from her mother. (52 RT 5385-5386.)

Some time around 6:00 p.m. the same day, William Dials exited the MacArthur BART station. (52 RT 5364.) As he walked towards the intersection of 40th Street and Martin Luther King Jr., Dials heard a woman scream. (52 RT 5364.) Dials noticed a man and a woman in a tan overcoat enter a black Mustang automobile parked on the street. (52 RT 5365-5366.) At trial, Dials testified this man was similar in appearance to Henry Glover. (52 RT 5377.) A second male stood on the sidewalk with his hands on top of the Mustang as he looked up and down the street. (52 RT 5367-5369.)

Dials believed appellant resembled this lookout rather than the man who first entered the Mustang. (52 RT 5369-5370.) Both men and the woman were African-American. (52 RT 5367, 5369.)

A few minutes after getting into the Mustang, Glover and the woman got out of the car and walked to the rear of the vehicle. (52 RT 5369-5370.) The female got into the trunk, and Glover closed the lid. (52 RT 5372-5373.) Glover got into the driver's side of the Mustang, and Thomas sat in the front passenger seat. (52 RT 5373.) After one or two minutes, the vehicle pulled away from the curb and turned onto Martin Luther King Jr. (52 RT 5373.) Dials ran to the BART station, described what he had seen to an attendant, and the police were summoned. (52 RT 5374-5375.)

At 8:30 p.m., Ms. Young's Mustang was found abandoned, blocking the two right-hand traffic lanes on the eastbound 580 freeway near Beaumont Avenue in Oakland. (54 RT 5481-5482.) The vehicle had damage to the passenger door and right front fender, perhaps from striking a guardrail. (54 RT 5482.)

On December 9, 1992, a citizen reported the presence of a dead body at the George Miller Regional Park in Point Richmond overlooking San Francisco Bay. (53 RT 5408, 5428.) Officer Ronald Anderson of the East Bay Regional Parks Police Department [EBRPDP] was sent to the park to confirm the report. (53 RT 5408-5409.) Some 25 feet from the trail head on Crest Avenue, Anderson observed a pile of woman's clothing, including a raincoat, a print blouse, a bra, a white camisole or tank top which was torn down the back, a miniskirt, a pair of panties, and a shoe for the left foot. (53 RT 5409-5410, 5433-5434.) As a result of heavy rainfall, the ground

was saturated with water so the garments were soaked and muddy. (53 RT 5446-5447.) Some 275 feet up the trail, Francia Young's body was face down on the side of the hill, seventeen feet off of the trail. (53 RT 5413, 5448.)

The upper body was clothed in a blazer jacket with the arms tied in back and secured with a scarf. (53 RT 5428.) A pair of white pantyhose had been pulled down, removed from the left leg, and down to the right ankle where it was entangled with a shoe, which was still on the foot. (53 RT 5450.) The loose end of the pantyhose was tied to a dead tree and the ankles were tied together. (53 RT 5450-5451.)

A search of the area produced several items of potential evidence. A piece of copper believed to be a portion of a bullet jacket was found below where the decedent's head had laid against the ground. (53 RT 5463.) Several yards from the body, a condom wrapper was found behind a tree. (53 RT 5447.) On a later date, evidence technician Dale Davidson returned to the scene with a metal detector and located a lead bullet, which had been buried some six to ten inches beneath the surface of the ground where the victim's head had been located. (53 RT 5436.) He also found a single expended shell casing. (53 RT 5437-5438.)

Oakland police sergeant Kevin Traylor was responsible for the agency's missing person investigation into the disappearance of Ms. Young. (54 RT 5511.) Traylor determined that Ms. Young's Wells Fargo ATM card was used in the hours following her disappearance. (54 RT 5491, 5510.) Once the body found at George Miller Regional Park was identified as Ms. Young, Traylor's portion of the Oakland

investigation was closed and David Kozicki in the homicide unit took over. (54 RT 5511.)

Kozicki followed up on the use of the victim's ATM card, and obtained a search warrant for her bank records. (54 RT 5492.) The bank provided Kozicki with a videotape for ATM transactions at the Wells Fargo on 40th Street in Oakland on December 8, 1992. (54 RT 5512.) The bank records showed three successive transactions just after 8:00 p.m. in each of which one hundred dollars was withdrawn from the victim's checking account. (54 RT 5519.) These transactions matched Ms. Young's three hundred dollar daily limit on ATM withdrawals. (54 RT 5519.) The bank also provided Kozicki with a still image for each of 8:00 o'clock transactions. The images were printed from the videotape. (54 RT 5514-5515.) Additional, unsuccessful efforts to withdrawal funds from the victim's account took place shortly before 11:00 o'clock the same evening. (54 RT 5520-5521.) An image developed from the videotape for 10:50 p.m. shows a black male holding an umbrella and a second person leaning over. (54 RT 5522.)

Dr. Charles Kokes performed an autopsy on Ms. Young's remains. (52 RT 5299.) He ascertained the victim had been shot once in the back of the head. The presence of heavy deposits of smoke and powder under the skin surrounding the entrance wound showed the gunshot was a contact wound, meaning the muzzle of the firearm was pressed against the skin when the weapon was discharged. (52 RT 5306-5307.) The only other damage to the body was a soft tissue injury on the left ankle, which was a result of the use of bindings around the ankles. (52 RT 5308, 5324.)

Examination of the anus did not locate any injuries or other evidence suggesting possible sodomy. (52 RT 5353-5354.)

The autopsy included a sexual assault examination and collection of swab samples from the vagina and anus. (52 RT 5309, 5347.) At a later date, the vaginal swab tested positive for the presence of seminal fluid and spermatozoa. (54 RT 5538.) The anal swab was positive for spermatozoa. (54 RT 5538.) Following his arrest, a rape kit—head hair, pubic hair, saliva swab, and blood samples—was collected from appellant. (54 RT 5555.) Comparable samples were also taken from Glover after his arrest. (54 RT 5561-5562.)

The vaginal swab, anal swab, and reference samples for the victim, appellant, and Glover were submitted to Forensic Science Associates [FSA] for DNA testing. For the vaginal swab, Glover was eliminated as a possible sperm donor, but Thomas was not eliminated. (55 RT 5620.) Edward Blake, a forensic serologist at FSA, calculated the DNA profile frequency for the sperm donor at less than one in 100,000 individuals in the general population. (55 RT 5620.) DNA testing for the anal swab could not be completed due to the low number of sperm in the sample. (55 RT 5628-5629.)

(2) Sebrena Flennaugh Robbery.

In December 1992, Sebrena Flennaugh lived in an upstairs apartment in Hayward. She was pregnant, on welfare, and had a long history of selling crack cocaine. (55 RT 5643, 5688-5689, 5697, 5724.) Flennaugh was on probation, had two prior felony convictions, and had served a term in prison. (55 RT 5688.)

Shortly before midnight on December 20, 1992, Flennaugh

was talking on the telephone and cooking in her apartment when someone knocked at the door. (55 RT 5641-5642.) A voice outside the door asked if someone—Flennaugh could not remember the name—lived there. (55 RT 5542.) Flennaugh gave a negative answer and terminated her phone conversation. (55 RT 5543.)

There was a loud noise from the door, which sounded like it was being kicked. (55 RT 5543.) The door broke at the hinge and collapsed inside the apartment. (55 RT 5543-5545.) Flennaugh picked up the phone and dialed 911. (55 RT 5644.) Two men entered the apartment and Flennaugh dropped the telephone before she could talk to the 911 operator. (55 RT 5647.) Flennaugh identified the first man to come inside as Henry Glover. (55 RT 5651-5652.) Glover had a firearm, which resembled an AK-47 assault rifle. (55 RT 5647-5648.) Appellant Thomas, who was unarmed, came inside after Glover. (55 RT 5649, 5678.)

Glover demanded to know where the money was. (55 RT 5649.) Thomas struck Flennaugh in the back of the head. (55 RT 5655.) Flennaugh said there was money in her coat, which was on the couch. (55 RT 5679-5680.) She pulled some six hundred dollars in cash from the pocket and handed it to Glover. (55 RT 5653, 5680.) Glover punched her in the nose, and the blow knocked Flennaugh to the floor. (55 RT 5655.) Flennaugh told the men that she was pregnant, and asked them not to hurt her. (55 RT 5658.) Thomas looked like he did not want to be there, and told Flennaugh everything would be all right. (55 RT 5687.) Glover demanded more money, and Flennaugh told him to take her gold jewelry. (55 RT 5687.) Thomas told Flennaugh that she should keep her gold.

(55 RT 5688.)

There was a knock at the door, and Flennaugh was instructed to answer it. (55 RT 5659.) She asked who was there, and the response was Hayward police officers. (55 RT 5659.) Thomas stood still, but Glover ran to the balcony door. (55 RT 5660-5661.) Flennaugh heard a series of gunshots from the balcony. (55 RT 5662.)

The officers outside the apartment door were Mark Ducker and Christopher Davis. (56 RT 5736, 5766.) They were dispatched as a result of a 911 hang-up call. (*Ibid.*) Ducker arrived first, knocked at the apartment door, and identified himself as a Hayward police officer. (56 RT 5738-5740.) The announcement caused some movement inside the apartment, and Ducker believed someone had opened the balcony door. (56 RT 5740.)

Ducker went down the stairs to ground level, and could see the top of a black male's head and a rifle barrel pointing over the edge of the apartment balcony. (56 RT 5741.) Ducker broadcast a radio warning to Davis about the man with a gun. (56 RT 5742.) Ducker pulled out his handgun, and exchanged gunfire with the black male. (56 RT 5742.) The male jumped from the balcony, and Ducker could see the firearm was an AK-47 assault rifle. (56 RT 5744.) Ducker fired ten shots and the gunman shot eight or nine rounds at him while the antagonists ran in opposite directions. (56 RT 5747, 5749.) Ducker was not hurt in the firefight. (56 RT 5752.)

When Davis saw the first muzzle flash from the apartment balcony, he was on the ground level near Ducker. (56 RT 5770.) As Ducker ran around the apartment building, Davis fired a single

gunshot, and went back up the stairs to the Flennaugh apartment. (56 RT 5770-5772.) He did not see the gunman again. (56 RT 5772.)

While the police were occupied with Glover, Flennaugh, who did not know either intruder, asked Thomas to identify himself and Glover. (55 RT 5662, 5698.) Thomas said his companion was Rooter and did not give a name for himself. (55 RT 5663.) Thomas asked Flennaugh if she was going to snitch on him. (55 RT 5664, 5708.) He also asked if there would be "funk on the street," meaning appellant was concerned Flennaugh might solicit people to hurt him. (55 RT 5709.)

Some time after the gunshots, police officers returned to the apartment and came inside. (55 RT 5663.) Flennaugh told the officers that she was about to eat when someone kicked in the door and demanded money. (55 RT 5665.) She said the gunman was known as Hooter or Rooter and he had a gold tooth. (56 RT 5800.) At some point, appellant was taken from the apartment, perhaps to make an identification. (55 RT 5667.) He later returned and was eventually permitted to leave on his own. (55 RT 5668.) Flennaugh did not use either absence to warn the officers that appellant was a perpetrator rather than a victim. (55 RT 5722.) Instead, she denied appellant was involved in the robbery and identified Thomas as a friend. (55 RT 5674; 56 RT 5825.)

Appellant was questioned by a patrol officer, and then by detective Frank Daley. (56 RT 5782, 5793.) Thomas said he while he was visiting Flennaugh there was a knock at the door. A black man armed with an assault rifle came inside, struck Flennaugh, and

told appellant to disconnect the phone. (56 RT 5793.) When the police showed up, the gunman went out on the balcony and there was gunfire. (56 RT 5794.) After taking appellant's statement, the detective walked Thomas to his car, an orange Pinto. (56 RT 5794-5795.) Appellant admitted he was really at the apartment for sex, and did not want Flennaugh's boyfriend to find out. (56 RT 5795.) Daley gave appellant a business card, and urged him to call if he thought of anything else. (56 RT 5797.)

The following morning, Daley called Flennaugh and asked if she had any additional information. She denied knowing anything more. (56 RT 5827.) Daley learned Flennaugh and her boyfriend, Dennis Johnson, had been involved in drugs. (56 RT 5829.) He therefore suspected the robbery could have been a drug rip-off. (56 RT 5830.) Daley returned to Flennaugh's apartment to question her again. (56 RT 5828.) Johnson was with Flennaugh during the interview. (56 RT 5830-5831.) Only then did Flennaugh change her story and allege Thomas was a perpetrator. (55 RT 5669.)

Based upon the information provided by Flennaugh, Daley was able to determine the gunman was Henry Glover. (56 RT 5810.) On December 23, 1992, Daley located Glover at an Oakland motel and took him into custody. (56 RT 5811, 5813.) Glover had one of Daley's business cards, and explained it had been given to him by appellant, who told him to call Daley. (56 RT 5812.) Later the same day, Flennaugh identified Glover in a photo lineup. (56 RT 5814-5815.)

At the time of his arrest, Glover was with his girlfriend, Camille Green. (56 RT 5811.) Green admitted he had given her a purse

and later told her to get rid of it as the purse had been stolen. (56 RT 5846-5847.) Green followed his direction and threw it away. (56 RT 5848.) Appellant gave her an umbrella, which the victim's mother identified as being used by Ms. Young on the date she disappeared. (52 RT 5836; 56 RT 5848.) In her trial testimony, Green claimed she told the police that Glover had given her the purse and appellant had provided the umbrella. (56 RT 5850.) This testimony was impeached with her prior statement naming three different sources for the umbrella: her mother, appellant, and, finally, Glover. (57 RT 5953.) Green's last statement to law enforcement was that Glover had given her the purse and umbrella. (57 RT 5953.)

(3) Appellant's Arrest and Interrogation.

On December 24, 1992, appellant turned himself in at the Oakland Police Department. (55 RT 5581-5582.) Appellant told the desk officer that he was wanted for the BART station murder. (55 RT 5582.) Thomas explained he had seen his photograph in the newspaper and wanted to get this out of the way. (55 RT 5583.) Appellant was taken into custody without incident, and later turned over to a Hayward police officer. (55 RT 5584, 5586.)

On December 26, 1992, Thomas was questioned by Oakland Police Department detective Kozicki about Young's abduction and murder. (57 RT 5914.) Appellant was inadvertently able to see in the detective's file folder a copy of a print developed from the ATM video. (57 RT 5916.) As a result, the interview turned to how the ATM photo had been taken. (*Ibid.*)

Appellant stated he was at a friend's house when Glover

showed up and asked if he knew how to use an ATM card. (57 RT 5917.) Thomas went with Glover, and discovered he was driving a black Mustang. (57 RT 5918.) Appellant noticed an umbrella in the car. (*Ibid.*) Glover said the ATM card belonged to his sister, who was in jail. (*Ibid.*) Cash was needed to get her out of custody. (*Ibid.*) At the ATM, they tried to withdraw five hundred dollars without success. (*Ibid.*) They hit the express one hundred button three times and obtained three hundred dollars. (*Ibid.*)

A couple of hours later, Glover asked appellant to go to the ATM again, but they were unable to get any cash. (57 RT 5919.) They went to a motel, and appellant noticed a black rifle on the bed. (*Ibid.*) On December 20, 1992, Glover asked appellant to "watch his back" in Hayward while he did a robbery to get even with someone named Dennis who had ripped him off. (57 RT 5920.) Just before a break in the interrogation, Thomas explained he had turned himself in because he did not kill anyone and wanted to clear it up. (57 RT 5937.)

Following a break, appellant told a different story. Glover wanted to do a grocery store robbery but needed a car. (57 RT 5920.) He said there was a black Mustang parked at the BART station. (*Ibid.*) They could go to the station, wait for the owner, and take the vehicle. (57 RT 5920-5921.) Glover sent appellant to retrieve a hidden firearm. (57 RT 5921.) When Thomas returned with the weapon, Glover was closing someone in the car trunk. (*Ibid.*) Appellant told Glover to drop off the vehicle owner and keep the car. (57 RT 5922.) They drove to Richmond, and Glover got out of the car with the person from the trunk. (57 RT 5921.) While they

were gone, appellant played with the radio. (*Ibid.*)

After a time, appellant walked 20 to 30 yards uphill and came upon Glover with the young woman. (57 RT 5922.) Her feet were tied up using her stockings, and the victim's hands were tied behind her back. She was dressed only in a shirt and was otherwise nude. (57 RT 5923.) Thomas walked back to the car. (*Ibid.*) Three minutes later, Glover returned carrying the rifle. (*Ibid.*) They drove off and went to the ATM to obtain some cash. (*Ibid.*) The Mustang struck a wall on the freeway and was abandoned. (*Ibid.*) Glover and appellant ran away and met up again at Glover's motel room. (*Ibid.*)

Appellant admitted they made two trips to the ATM. (57 RT 5924.) Efforts to get money with the victim's credit cards failed, so they were thrown away. (*Ibid.*) Thomas denied keeping any of the cash obtained from the ATM. (57 RT 5925.) Appellant said he did not have sex with victim, and he did not know if Glover had raped her. (57 RT 5924.) He stated the same firearm was used in both incidents. (*Ibid.*) Glover kept the victim's umbrella. (*Ibid.*) Appellant did not know anything about the victim's purse. (57 RT 5925.)

On further questioning, appellant changed his description of events. (57 RT 5926.) Thomas said that when he went up the hill, he found Glover having sex with the victim. (57 RT 5927.) When Glover was finished, appellant had intercourse with her. (*Ibid.*) He did not wear a condom, and he did ejaculate. (*Ibid.*) After the sex, Glover tied up the woman. (*Ibid.*) Glover then went further up the hill with the victim, and Thomas went back to the car. (*Ibid.*)

Appellant repeatedly stated he had told Glover to tie up the

woman and leave her. (57 RT 5943, 5945.) Thomas did not want the victim to be harmed. (57 RT 5942.) At the conclusion of the interrogation, Thomas repeated that he did not kill the victim. (57 RT 5938.) Asked if he was sorry for what he had done, appellant said that he was. (57 RT 5945.)

(4) Ballistics Evidence.

Ronald Nichols, a firearms and tool markings expert with the Oakland Police Department, examined the copper bullet fragment and shell casing from the Richmond park crime scene along with a number of casings from the Hayward apartment scene. In his opinion, all of the ballistics evidence was consistent with AK-47 style firearms. (57 RT 5961, 5964, 5966.) In his opinion, the shell casings from the two incidents were likely to have been fired by different weapons within the class of AK-47 assault rifles. (57 RT 5968, 5971.)

STATEMENT OF FACTS: PENALTY PHASE

(1) The Case-in-Aggravation

(A) *Robbery of Constance Silvey-White.*

On December 11, 1992, Richard Warren parked his 1985 Dodge Colt at the MacArthur BART station and took the train to work in San Francisco. (61 RT 6402-6403.) When he returned from work around 6:00 p.m., the Colt was gone and there was broken glass in street where the vehicle had been parked.[3] (61 RT 6404.)

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[3] On December 14, 1992, Warren recovered the Colt from a Berkeley impound lot. (61 RT 6405.) A wing window was broken, the ignition had been punched, and his stereo equalizer was missing. (*Ibid.*)

Some time around 8:00 o'clock that same evening, Constance Silvey-White [Silvey] parked in the driveway of her house in Berkeley. (61 RT 6435-6436.) Ms. Silvey got out of the car and walked towards the street to retrieve her trashcan. (61 RT 6438.) Before she reached the street, two men came up the driveway towards her. (61 RT 6438.) Ms. Silvey noticed the shorter man was heavier than his companion. (61 RT 6442.) Ms. Silvey changed direction and turned back towards her house. (61 RT 6441.)

The heavy man came towards Ms. Silvery while his companion went towards her car. (61 RT 6443.) The heavy man said, "Shh, be quiet. Don't say a word. Don't do anything." (61 RT 6443.) He then punched Ms. Silvey with his fist. (61 RT 6444.) She fought back, and the pair struggled down the driveway towards the sidewalk and back up towards Silvey's house. (61 RT 6445-6446.) The second perpetrator got inside Silvey's car and released the trunk lid. (61 RT 6447.) As she fought the heavy man, Ms. Silvey said, "There's nothing in there." (61 RT 6448.) When the struggle passed near the back of the car, the offender told her to get inside and tried to push Ms. Silvey into the open trunk. (61 RT 6449-6450.)

The scuffle ended when a neighbor called out and asked whether Silvey was okay. (61 RT 6451.) The question prompted Silvey's assailant to let go of her and the two men hurried away. (61 RT 6451.) The neighbor who came to Silvey's rescue was Irene Cole. (61 RT 6413.) She had called out to Silvey from her front steps. (61 RT 6412.) When Cole saw her neighbor, Silvey was bleeding and there was blood on her face and sweater. (61 RT 6414.) Cole noticed two men running towards a silver Dodge Colt

parked under a streetlight. (61 RT 6415-6416.) Cole wrote down the license plate number, which matched the number on Warren's vehicle. (61 RT 6403, 6417.)

After the assailant ran away, Ms. Silvey found her purse was still inside the car but her wallet was missing. (61 RT 6456.) Her car keys were on the sidewalk in front of her next-door neighbor's house. (61 RT 6456.) The wallet was eventually recovered with credit cards in place but the cash was gone. (61 RT 6460-6461.)

Questioned by police, Silvey stated she did not get a very good look at the thin man. (61 RT 6484.) During the incident, the slender male never touched Silvey or spoke to her. (61 RT 6517.) On January 7, 1993, Ms. Silvey viewed a live lineup consisting of eight African-American males. (61 RT 6464; 62 RT 6540.) She identified the man in position three as the heavy offender. (61 RT 6465-6466.) This was Henry Glover. (61 RT 6486; 62 RT 6544.) Ms. Silvey initially thought the person in position two could be the thin perpetrator. (62 RT 6549.) She changed her mind and placed a question mark on her lineup card for the male in position seven as possibly being the slender perpetrator. (61 RT 6466-6467; 62 RT 6549.) Silvey made the change because position seven seemed more like the slender male than position two. (62 RT 6558.) This was Keith Thomas. (62 RT 6544.) At trial, Ms. Silvey identified appellant as the slender man who got into her car. (61 RT 6470.)

(B) *Domestic Violence on Cathy Brown.*

On October 19, 1989, appellant was 16-years-old and had a dating relationship with Cathy Brown, who was 24-years-old. (62 RT 6598.) On that date, Brown was outside talking to another man. (62

RT 6592.) Thomas walked up and slapped Brown two or three times. (62 RT 6593.) Brown told him to stop, and appellant obeyed her. (*Ibid.*) Brown called the police, and Thomas left. (*Ibid.*) Some time later, Brown and appellant had a child together. (62 RT 6594.)

A second incident took place on February 11, 1992. (62 RT 6593-6594.) Brown took issue with appellant yelling at their son and they had a fight. Appellant slapped Brown, grabbed her face, and pulled Brown's hair. (62 RT 6595-6596.) She fought back, and the altercation did not end until the police arrived and arrested Thomas. (62 RT 6596.)

(C) *Battery on Timothy McNulty.*

At approximately 11:00 p.m. on July 28, 1992, Timothy McNulty and two companions were walking on Durant Street in Berkeley when they encountered a group of three or four males and a like number of females going in the opposite direction. (62 RT 6581-6582.) A female in the group attempted to reach in McNulty's back pocket where he had a wallet. (62 RT 6582-6583, 6588.) McNulty brushed the person's hand away from his pocket and demanded to know what they were doing. (62 RT 6583.) The females yelled at McNulty, and one of the men punched McNulty. (62 RT 6584.) The blow knocked him to the ground. (*Ibid.*) When McNulty tried to stand, appellant pushed him back down. (62 RT 6584-6585.) McNulty got up and the two groups went their separate ways. (62 RT 6585.) The police showed up, the larger group was detained, and McNulty identified Thomas as the person who pushed him. (62 RT 6586.)

(D) *Possession of a Loaded Handgun as a Minor.*

On June 20, 1988, Oakland officer Sherman Bennett stopped three young males, one of whom was 14-year-old Keith Thomas. (61 RT 6522, 6526.) Appellant consented to a pat search, and Bennett found a loaded .25 caliber handgun. (61 RT 6524.) Thomas was arrested and taken to juvenile hall. (61 RT 6525.)

(E) *Victim-Impact Evidence.*

Mary Young, the victim's mother, described her youngest daughter as kind, helpful, and a religious person who was a volunteer at their church, the African Methodist Episcopalian Church of Oakland. (62 RT 6604.) Mary and Francia were very close. (62 RT 6605.) Mary could not believe her daughter was dead until she saw the body at a funeral home. (62 RT 6605-6606.) After the murder, Mary could no longer operate her business, an in-home daycare. (52 RT 5383; 62 RT 6607.) She was also unable to provide care for her own sick mother and had to entrust her care to a family member in Louisiana. (62 RT 6607.) Mary was unable to sleep for three months after the murder and had to seek grief counseling. (62 RT 6607-6608.) Since Francia's death, Mary can no longer celebrate Christmas. (62 RT 6608-6609.)

Ely Cassoway, a close friend of Mary Young, testified that Mary's daughters adopted him as a stepfather. (62 RT 6610.) He looked at Francia as a daughter. (*Ibid.*) Cassoway was "destroyed" by the news of her death. (62 RT 6611.)

(2) The Case-in-Mitigation.

(A) *Robbery of Constance Silvey-White.*

Silvey's testimony was impeached with prior inconsistent statements made near the time of the incident. Officer Pete Gomez was sent to the Silvey residence in response to a report of a woman screaming for help. (63 RT 6660.) When he arrived, Silvey was crying, upset, and appeared to be confused. (63 RT 6661, 6665.) Silvey provided a detailed description of the suspect who struck her. She stated he was five feet, ten inches tall, and had a round face. (63 RT 6662.) Silvey described his clothing as casual, and included a dark leather jacket and a knit cap. (63 RT 6662-6663.) Ms. Silvey admitted she could not see the other suspect very well. (63 RT 6664, 6671.) She said he was a tall black male in his early twenties dressed in dark clothing and a dark knit hat. (63 RT 6663, 6673.)

In the initial interview, Silvey stated she did not believe the suspects attempted to place her in the trunk. (63 RT 6663-6664.) Gomez was subsequently directed to contact Silvey again to find out more about whether the suspected tried to put her in the trunk. (63 RT 6666.) Gomez returned to the residence and spoke with Silvey. (*Ibid.*) The victim changed her mind, and said the perpetrators had made comments about putting her in the trunk. (*Ibid.*)

(B) *Appellant's Personal History.*

Appellant is the child of Keith Thomas, Sr. [Keith Sr.] and Veronica Johnson. Johnson had a troubled background. She was a victim of sexual abuse between the ages of nine and twelve. (64 RT 6751.) Johnson's stepmother was physically abusive and struck her with two by four sections of lumber. (64 RT 6751-6752.) Johnson's

stepbrother was also physically and emotionally abusive. (63 RT 6718.) When she was fourteen, Johnson was sent to live with an aunt. (63 RT 6718-6719.) The aunt used physical discipline on her, and Johnson ran away when she was 16-years-old after being struck with an umbrella. (63 RT 6719.) When she was 17-years-old, Johnson became pregnant with appellant by Keith Sr. (*Ibid.*)

Keith Sr. has an extensive criminal history, including "quite a few" felony convictions and two terms in prison. (64 RT 6802.) As a young man, Keith Sr. used a cornucopia of illegal drugs, including heroin, cocaine, LSD, and marijuana. (64 RT 6803.) When he met Johnson, Keith Sr. was 17 or 18-years-old. (64 RT 6800.) During their relationship, Keith Sr. was also seeing other women. (*Ibid.*) Appellant's parents never married, or even lived together. (*Ibid.*)

On September 26, 1980, John Kursenhauser a child welfare investigator, interviewed 7-year-old Keith Thomas and his mother. (63 RT 6683, 6704.) Johnson had a small one-bedroom apartment. She slept in the bedroom and Thomas was left to sleep on the couch. (63 RT 6695.) The kitchen did not appear to have been cleaned for some time. (*Ibid.*)

Johnson was angry and wanted the child out of her apartment. (63 RT 6384.) She complained that Thomas had been rebellious since age two, meaning he resisted when Johnson disciplined him using a belt. (63 RT 6684.) Johnson was five months pregnant and feared Thomas would physically abuse her and jeopardize the pregnancy. (63 RT 6685.) According to Johnson, when appellant was 5-years-old he had wrestled with her, causing Johnson to miscarry and lose a pregnancy. (63 RT 6685-6686.)

Johnson complained that appellant had twice run away the previous day. (63 RT 6687.) In order for her to discipline Thomas by beating him on the back with a belt, it had been necessary to have three people hold him. (*Ibid.*) Johnson said appellant was "girl crazy" and had been sexually active since he was 2-years-old, when he had sex underneath the house with a 12-year-old girl. (63 RT 6687-6689.)

Kursenhauser explained placement options with Johnson, and she readily agreed to have appellant go to Snedigar Cottage, a receiving home for victims of abuse, neglect, or abandonment. (63 RT 6689-6691.) Kursenhauser drove mother and child to Snedigar Cottage and, despite the passage of a dozen years, Kursenhauser could distinctly recall that Johnson showed no emotion when the 7-year-old put his arms around her and kissed Johnson on the neck. (63 RT 6692.) Johnson walked away from Thomas without embracing him or saying anything to the child. (*Ibid.*)

Kursenhauser turned the case over to Catherine Sykora, a dependency investigator. (63 RT 6708.) Ms. Sykora spoke with appellant's mother, who said she wanted to keep Thomas at home. (63 RT 6716.) Johnson said she tried to follow a recommendation from appellant's psychologist, Judith Libow, to refrain from physical punishment. (63 RT 6693, 6717.) However, Johnson said Thomas continued to misbehave, so she had to beat him. (63 RT 6717.) As an example, Johnson described how she found appellant picking apart the couch upholstery. (*Ibid.*) Johnson had two people hold appellant down and she beat him. (*Ibid.*)

Sykora learned that Johnson had had not seen appellant's

father for four or five years. (63 RT 6719.) Johnson's only source of income was AFDC. (63 RT 6721.) Based upon her investigation, Sykora concluded appellant was at risk of child abuse and reunification with Johnson was not in his best interest. (63 RT 6722.) Keith Sr. took no part in the juvenile dependency proceedings as he was on the run from the police. (64 RT 6801-6802.)

While appellant was in foster care, Pauline Thomas, his paternal grandmother, offered to adopt him. (64 RT 6768, 6770.) Weekend visits were arranged, and Thomas eventually went to live with his grandmother for several months. (64 RT 6768, 6771, 6773.) When Thomas turned eight, his grandmother had a birthday party for him. (64 RT 6771.) Appellant told her it was the first time anyone had troubled to arrange a party for him. (*Ibid.*)

During his time with Pauline, appellant was well-behaved. (64 RT 6776, 6785.) Johnson never called to speak to her son. (64 RT 6774.) Some time when he was 8-years-old, appellant told his grandmother that he wished he was dead. (64 RT 6775-6776.) Pauline had extensive experience with children, and had never heard such a remark from someone so young. (64 RT 6792-6793.) After appellant had lived with his grandmother for a few months, Johnson showed up and took him away. (64 RT 6776.)

Following the reunification, appellant's mother remained a threat to his emotional and physical health. On November 30, 1982, Johnson called child welfare worker Lucille Serwa and asked her to remove Thomas from the home. (64 RT 6745-6746.) Serwa went to the home and questioned 9-year-old Thomas. (64 RT 6746, 6762.)

Appellant cried and appeared to be tired. (64 RT 6747.) He explained that the previous evening he and his sister had messed up a bed and he feared being punished when Johnson returned home. (64 RT 6748.) When his mother got home, Thomas went out the bedroom window and spent the night hiding under a stairwell in the rain. (64 RT 6747-6748.) Appellant said he was afraid of his mother and did not want to be in the home any longer. (64 RT 6747.)

Serwa interviewed Johnson, and learned that she was unemployed. (64 RT 6752.) Johnson claimed she had been injured while doing construction work. (*Ibid.*) The disability made her less likely to beat appellant, for the beatings left her exhausted. (*Ibid.*) Johnson claimed that said she did use loss of privileges as a means of discipline. (64 RT 6750.) However, she believed that beatings were the only way to control Thomas. (64 RT 6746.) Johnson described a recent incident in which her sister had to hold down Thomas, who had threatened to strike his mother with a towel rack. (*Ibid.*) Johnson knocked him unconscious. (*Ibid.*) When appellant woke up, she could not control him and Thomas tried to run away. (*Ibid.*)

In a meeting on November 30, 1982, Johnson told the social worker about another incident. She found flour on the kitchen floor even though appellant was not allowed to open the kitchen cabinets. (64 RT 6755.) Thomas told his mother that he wanted to put sugar on some bread and he had accidentally knocked the flour on the floor. (64 RT 6756.) Johnson saw the incident as the "last straw" and intended to beat appellant with a belt. (*Ibid.*) Appellant's mother wanted him to either learn to stop making her angry or to

accept his punishment. (64 RT 6753.)

In two hours of conversation, Serwa was unable to dissuade Johnson from her plan to beat Thomas with a belt. (64 RT 6756.) The social worker therefore concluded appellant was not safe in the home, and she called a police officer to remove him from the residence. (64 RT 6756, 6758.) Serwa warned Johnson that she would have to change her attitude before appellant could be returned to her care. Johnson rejected the advice, and said it was Thomas who needed to change rather than her. (64 RT 6758.)

Some time in 1985, Keith Sr., was released from prison. (64 RT 6803.) Johnson asked him to take custody of appellant. (64 RT 6804.) Johnson wanted Thomas out of the house as he had spent twenty dollars on a Michael Jackson poster. (*Ibid.*) Keith Sr. picked up appellant and left him with his grandmother. (64 RT 6805, 6807.) At some point, Thomas went to Sacramento to live with his father, who shared a house with his girlfriend, Joyce Smith. (64 RT 6806.) Appellant remained in the Smith household for two or three years. (65 RT 6819.)

The residence was crowded with freakish characters and was a hotbed of criminal activity. Smith had four or five children in the home. (64 RT 6806; 65 RT 6827.) Smith's mother lived there at times along with someone named Shawn. (65 RT 6828.) The mother sold drugs for a living. (*Ibid.*) Shawn was a drinker and drug user who indulged his addictions in the home. (*Ibid.*) Smith's brother Kevin—a homosexual who liked to wear women's clothing—also lived with the family. (64 RT 6806; 65 RT 6831.) Smith's friend Vera was a resident even though she had mental health problems,

talked to herself, said crazy things, and liked to walk backwards. (65 RT 6830-6831.) Finally, a Robert Size, described only as a state employee who was violent and a heavy drinker, lived in the home. (65 RT 6829.) When he was drunk, Size liked to pick on the children. (65 RT 6841, 6844.)

Smith's mother had significant in-house competition in the drug business. Smith sold crack cocaine. (64 RT 6806.) She also used crack and drank alcohol. (65 RT 6841.) Keith Sr. sold drugs, used drugs, and, for good measure, acted as a pimp. (*Ibid.*) Smith and Keith Sr. fought constantly, and Keith Sr. could be violent. (65 RT 6825-6826, 6840-6841.) On one occasion, during a fistfight he hit Smith in the eye with a statue. (65 RT 6826.) As a result of the blow, Smith went blind in the affected eye. (*Ibid.*) Appellant witnessed the violence between his father and Smith. (65 RT 6826-6827.)

Appellant shared a room with Smith's one-year-old son, James, who was severely handicapped. (64 RT 6808-6809; 65 RT 6822.) Thomas voluntarily took care of James, and said that he loved the baby. (64 RT 6779-6780.) The infant's responses to appellant showed that he returned the affection. (65 RT 6823-6824.) Despite the chaos around him, appellant was a good boy and always respectful to Smith. (65 RT 6820, 6842.) Thomas was never a discipline problem for her. (65 RT 6820.) Smith was so enamored with appellant that when her relationship with Keith Sr. ended she wanted to keep Thomas. (65 RT 6821.)

When he was 13 or 14-years-old, appellant moved back to Oakland. (64 RT 6781.) Following the move, Thomas never had a

stable residence. (64 RT 6782.) He would stay with his paternal grandmother, Pauline Thomas, or with friends. (64 RT 6787.) This casual arrangement lasted until appellant was 16 or 17-years-old. (64 RT 6789-6790.) Thomas told his grandmother that he went to school, but she knew better. (64 RT 6787-6788.) Pauline urged appellant to be careful about the company he kept. (64 RT 6791.) The advice was not effective, and when he was with the wrong people, Thomas would get in trouble. (64 RT 6781.)

Psychologist Ranald Bruce reviewed materials provided by defense counsel and prepared a psychosocial history of appellant. (65 RT 6865-6867.) In his opinion, Johnson used extreme physical violence on Thomas from an early age. (65 RT 6871.) Appellant was beaten for small infractions, and the violence against Thomas escalated any time Johnson was under stress. (65 RT 6873-6874.) Appellant tried to avoid the violence by running away or self-defense. (65 RT 6876.) Johnson viewed anything other than passive acceptance of the beatings as fighting her. (*Ibid.*)

Before appellant's first exposure to foster care, Johnson had choked him several times. (65 RT 6877.) Johnson admitted she would have killed Thomas had a family member not stopped her. (*Ibid.*) Thomas was a victim of child molestation at ages two to four and four to five. (65 RT 6876.) During a videotaped interview, Johnson laughed at the molestation, and did not view it as inappropriate. (*Ibid.*) The psychologist viewed the home, which Ms. Smith and Keith Sr. provided to appellant as dysfunctional. (65 RT 6880.)

Given his history of abuse, neglect, and abandonment, the

psychologist believed it was very likely that appellant reached early adulthood with "severely compromised psychological functioning." (65 RT 6881.) Bruce testified that Thomas's history seriously compromised his ability to function. (65 RT 6891-6892.) Because of his background, appellant would have suffered from low self-esteem, lack of direction, and chaotic interpersonal relations. (65 RT 6892.) Bruce viewed appellant as something of a time bomb, for rejection and abuse must be resolved or acted out. (65 RT 6892, 6907.)

GUILT PHASE ERROR

I.

THE TRIAL COURT'S DECISION TO REMOVE APPELLANT'S APPOINTED LAWYERS BECAUSE OF A PURPORTED CONFLICT OF INTEREST WITH CODEFENDANT GLOVER WAS SIXTH AMENDMENT STRUCTURAL ERROR THAT REQUIRES REVERSAL OF THE JUDGMENT.

On October 16, 1995, the trial court granted a motion by codefendant Henry Glover to relieve appellant's attorney of record, Jay B. Gaskill, the Public Defender for Alameda County, and his deputies assigned to represent appellant, Judith Browne and Alex Green, due to an alleged conflict of interest stemming from the agency's representation of Glover in a series of juvenile cases between 1987 and 1990. (10 CT 2712.) As a result of this mistaken decision, appellant was deprived of the expertise of lawyers with whom he had a longstanding attorney-client relationship and forced to stand trial for his life with conflict attorneys who proved to be far less aggressive and effective. The disqualification of counsel was structural error, which requires reversal of the judgment.

(A) The Written Motions and Declarations.

The Glover motion to recuse the public defender was a tactical response to forceful lawyering on the part of appellant's attorneys. On September 21, 1995, appellant's counsel made a motion for discovery of Glover's juvenile court records. (9 CT 2531.) The motion stated the records were sought for possible impeachment of Glover in the event he testified as a trial witness. It was further alleged Glover was the actual killer, and the information sought

could be useful to a third-party culpability defense. (9 CT 2573.)

The motion to recuse was filed on October 2, 1995. Counsel for Glover alleged some 13 or more lawyers from the public defender's office had at various times represented their client in juvenile court. Because the public defender had files from these matters, which contained confidential information the agency now sought to use against a former client, the public defender had a conflict of interest and could no longer represent appellant. (9 CT 2572-2579.)

The public defender filed an opposition to the motion, which contained declarations by Browne and Green. In her declaration, Browne explained she had never been assigned to juvenile court, represented Glover, or made any court appearances on his behalf. Browne stated she had never spoken to any deputy public defender or attorney in private practice who had handled a juvenile court matter on behalf of Glover. Browne declared she had never seen any files her agency might have on Glover. She further declared that any files were in storage off-site, and were not accessible to her. (9 CT 2537-2539.)

In his declaration, Green stated he had been assigned to juvenile court for one month in September 1994. During that time he did not represent Glover, and did not participate in any case in which Glover was a party. Green declared he had never spoken to the codefendant or any attorney who had represented Glover in juvenile court. Green stated he had never seen any files the public defender might have for Glover. (9 CT 2540-2542.)

Public Defender Gaskill supported the assertions made by his

deputies. In a declaration, Gaskill explained the office had a policy in place since 1973, which prohibited any employee of the agency from examining the closed files of a former client. The only exception permitted was with a signed client release in cases where the attorney seeking access to the files represented the client in a current case. (9 CT 2543-244.) A copy of the "no peek rule" from the agency's manual was attached to Gaskill's declaration. (9 CT 2545-2546.)

Finally, Jean M. Duenas, a supervising clerk with the public defender's office, filed a declaration in which she confirmed the agency had eight closed files in Glover's name dating from 1987 to 1990. The files had been closed during the same timeframe. All the public defender files were off-site at a facility called Filesafe, and had been since no later than July 26, 1991. None of the files had ever been retrieved from storage. (9 CT 2547.)

Counsel for Glover filed a rebuttal brief which alleged confidential information from the public defender's files for Glover had been used to contact members of Glover's family. (9 CT 2613.) Green responded to this allegation by explaining discovery provided by the government had been used to have an investigator contact persons who were present at the time of Glover's arrest. None of the persons mentioned in the police report had the same last name as Glover.[4] (9 CT 2621-2622.)

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[4] On October 5, 1995, Glover's counsel filed a brief discussing two cases the district attorney had mentioned at a court hearing on the recusal issue. (9 CT 2624-2634.) This motion made no new points concerning the alleged conflict of interest.

(B) **The Court Hearings.**

The court heard argument on the motion to recuse on October 5, 1995. Browne and Green reiterated the assertions contained in their declarations: neither attorney had represented Glover in juvenile court, spoken to other lawyers in their office about the juvenile matters, or seen the public defender files generated as a result of the juvenile court proceedings. As a result, neither Browne or Green was aware of any attorney-client information about Glover. (1 RT 101-104, 123-124, 130, 139.) Browne therefore denied there was any conflict of interest. (1 RT 103.)

Questioned by the court, Browne explained a conflict check had been performed before anyone from the public defender's office talked to Thomas or Glover. Computer records showed the agency had represented Glover in eight juvenile court matters between 1987 and 1990. (1 RT 100-101.) Browne stated she and Green never had any connection to Glover. (1 RT 124.)

The district attorney largely stood aside while the defense lawyers argued amongst themselves. The prosecutor did, however, point out to the court a Penal Code section 190.3 statement in aggravation had been filed as to Glover. Some of the incidents to be relied upon by the government in aggravation occurred when Glover was a juvenile. The public defender therefore had notice of these matters from normal discovery. Furthermore, the police reports and other relevant information concerning Glover's juvenile history were also subject to disclosure by the government. (1 RT 130-131.)

The court questioned whether there was any reason to disbelieve the Browne and Green declarations. (1 RT 126, 129.)

After hearing argument, the court concluded there were no grounds to question their veracity. The court therefore found there was no conflict of interest and denied the motion to remove the public defender. (1 RT 140.)

On October 10, 1995, defense counsel for Glover provided the court with a copy of *Damron v. Herzog* (9th Cir. 1995) 67 F.3d 211, a then-recent decision by the Court of Appeals for the Ninth Circuit. The court agreed to review the case and revisit the conflict issue. (2 RT 232.)

Six days later, on October 16, 1995, the court conducted a new hearing on the recusal motion. Public Defender Gaskill was in court along with appellant's two assigned lawyers. (4 RT 409.) Gaskill provided to the court the agency's juvenile files for Glover, which were the subject of a subpoena duces tecum from Glover's lawyers. A release form signed by Glover had accompanied the subpoena. The Public Defender represented to the court that he had not read the files, and neither had Browne or Green. (4 RT 409-410.)

At Gaskill's request, the district attorney was excused and the hearing continued in camera.[5] Gaskill advised the court that, consistent with longstanding office practice, the potential conflict issue had been referred to a three-lawyer committee. (4 RT 412.) Following a review of the question and some legal research, a memorandum was prepared for Gaskill's review. A copy of the

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[5] By court order, the reporter's transcript of the hearing was sealed. (4 RT 411.)

memo was provided to the court.[6] Gaskill acknowledged he was troubled by the Ninth Circuit's decision in *Damron v. Herzog*, *supra*, 67 F.3d 211, which seemed to take an expansive view of conflicts of interest, one which was at odds with the law at the time the agency's conflict check had been performed. (4 RT 412, 436.)

For the record, Gaskill asked appellant if he wanted to continue with Browne as his attorney. Thomas assured the court that he had a good relationship with counsel and wanted her to represent him. (4 RT 414.) Gaskill believed the safest course in light of the new Ninth Circuit decision was to grant a severance. Gaskill explained, "And I fear greatly, Your Honor, that if Mr. Thomas is to proceed with new counsel at a later time and he is convicted and sentenced to die that that case shall be retried, and all the savings from the severance would be eliminated because I think the severance is the one way in which this problem can, in fact, be made to go away. So I appeal to the Court's sense of pragmatism, and I urge the Court to consider that solution to the problem." (4 RT 417.)

Browne argued there was no conflict of interest according to the case law. (*Ibid.*) Browne maintained appellant had a Sixth Amendment right to competent counsel, an attorney who was prepared to go forward with the case. As Browne had represented appellant since January 1993, she was ready for trial. Furthermore, she had developed a relationship with appellant and his family

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[6] A copy of the memorandum was marked as court exhibit 2. (4 RT 445.)

members. (4 RT 415, 425.)

Browne reminded the court that she had represented appellant at the preliminary hearing. In her view, the hearing was unusually lengthy and complex. As a tactical matter, Browne had used the hearing to prepare for trial. Because it was a potential death penalty case, she argued the Sixth Amendment right to competent counsel was more urgent than in a less serious matter. (4 RT 415-416.)

Given the seriousness and complexity of the case, appellant's Sixth Amendment right to counsel, and his desire to keep Ms. Browne as his attorney, the Public Defender declined to declare a conflict of interest. (4 RT 417, 419.) As a practical solution, given that jeopardy had not yet attached, Gaskill urged the court to sever the trials of Glover and Thomas. (4 RT 417.) Counsel for Glover did not oppose severance as a solution to the perceived conflict problem. (4 RT 422.) The prosecutor returned to the courtroom and was informed counsel for the two defendants viewed severance as a solution to the conundrum. (4 RT 423-424.) The district attorney objected to separate trials. (4 RT 424.)

Glover's attorney pointed out the government did not have clean hands in objecting to severance. The district attorney had files for Glover's juvenile cases, and knew the codefendant had been represented by the public defender. The government knew what evidence would be proffered against Glover in aggravation, yet never raised the possibility of a conflict of interest. (4 RT 434-436.)

Given this state of affairs—with the government and the two defendants at loggerheads on severance, Glover seeking removal of

the public defender, and appellant's counsel unwilling to declare a conflict—the court gave vent to some judicial frustration. The court questioned why the public defender was not more "circumspect" as to the potential conflict of interest. (4 RT 428.) In context, the question seemed to be directed to why defense counsel had not raised the issue before the case was sent out for trial.

Browne explained there was no conflict under California law. Any conflict was a consequence of *Damron*, which had been published on September 26, 1995. (4 RT 429.) The court denied the motion to sever, and disqualified the public defender as a result of an alleged conflict between appointed counsel and Glover. (4 RT 450.)

(C) **The Public Defender Did Not Have a Conflict of Interest Based Upon Client Confidentiality (Rules of Professional Conduct, Rule 3- 310(E)).**

"Under both the Sixth Amendment to the United States Constitution as applied to the states through the due process clause of the Fourteenth Amendment [citations] and article I, section 15 of the California Constitution [citations], a defendant in a criminal case has a right to the assistance of counsel." (*People v. Bonin* (1989) 47 Cal.3d 808, 833 [254 Cal.Rptr. 298, 765 P.2d 460].) As the right to counsel entitles the accused to effective assistance, there is a correlative right to representation that is free of conflicts of interest. (*Id.* at p. 834.)

Conflicts of interest come in all shapes and sizes (*Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 590 [59 Cal.Rptr.2d 280]), and include all situations in which counsel's loyalty or efforts

on behalf of a client are threatened by responsibility to another client, a third-party, or himself (*People v. Bonin*, *supra*, 47 Cal.3d 808, 835). As a general matter, the courts distinguish two types of attorney conflicts that can require recusal: successive representation, where the problem is client confidentiality; and simultaneous representation of adverse interests, where the duty of loyalty is at issue. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283-284 [36 Cal.Rptr.2d 537, 885 P.2d 950].) In this case, the issue was successive rather than simultaneous representation.

The prohibition on sequential representation of adverse interests is contained in the Rules of Professional Conduct, rule 3-310(E), which provides: "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."[7] The rule serves two purposes: to protect the interests of clients, and to keep members of the bar from being forced to choose between conflicting duties to clients and former clients or attempting to reconcile conflicting interests when counsel should seek to enforce the rights of a single client. (*Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1574 [45 Cal.Rptr.3d 464].)

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[7] California Rules of Professional Conduct, Rule 3-310 is the current version of former rule 4-101, which was relied upon by Glover's attorney in seeking removal of the public defender. (9 CT 2574-2575.)

In any case of successive representation, a former client can seek removal of his one-time attorney from representation of an adverse party by showing counsel has actual knowledge of confidential information adverse to his former client. (*Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452 [280 Cal.Rptr. 614].) When actual knowledge of confidential information harmful to the former client cannot be shown, the courts employ distinct approaches in civil and criminal cases. Because it is difficult to prove actual knowledge, in a civil case if the former client can establish the existence of a substantial relationship between the subject matter of the of the past representation and the current litigation, the court will conclusively presume the attorney possesses confidential information adverse to the one-time client.[8] (*Ibid.*) In a civil case, counsel's protests that he does not have confidential information are unavailing. (*Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, 1578.)

By contrast, in criminal cases the courts take a more pragmatic approach, and disqualification is not ordered if the challenged lawyer is unlikely to have acquired confidential information from the former client. (*Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, 1575.) Rather than apply an inflexible substantial relationship test, the court in a criminal case needs to

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[8] See e.g., *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483 [192 Cal.Rptr. 609] [removal of former general counsel for Global Van Lines from action in which he sued his former employer and client on behalf of a company agent whose contract was negotiated under his supervision was appropriate based upon

examine the totality of the circumstances to determine whether there is a reasonable possibility that the individual attorney representing the defendant has obtained confidential information about the former client or may acquire such information. (*Id.* at p. 1581.)

There is ample justification for the distinct methods of review in civil and criminal cases. In *People v. Christian* (1996) 41 Cal.App.4th 986, 997 [48 Cal.Rptr.2d 867], the court concluded the conflict of interest rules appeared to have been drafted with private counsel in mind. However, an important distinction between the two groups is the financial incentive prevalent in private practice is absent in a public defender's office. (*Ibid.*) As a result, courts should not assume the existence of conflicts of interest in public sector agencies without evidence of a conflict, "and should attempt to limit the reach of disqualification whenever possible." (*Id.* at p. 998.) Because the public defender has a lessened potential for a conflict of interest, and any conflicts result in higher costs, the use of internal screening procedures or ethical walls to avoid conflicts is acceptable to the courts. (*Ibid.*)

In *Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, the court considered the reasons why different standards are used in civil and criminal cases. First, public sector lawyers—the predominant defense bar—do not have a financial interest in their cases. "As a result, they may have less, if any, incentive to breach client confidences." (*Id.* at p. 1579.) Second, public agencies, particularly the public defender, handle a high volume of cases. As

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the substantial relationship test].

a result, there is little reason to believe confidential information obtained from a past client would be remembered by the lawyer who handled the case or any other deputy. (*Ibid.*) Third, disqualification of the public defender is expensive and substantially increases the cost of legal services for public entities. (*Id.* at p. 1580.)

The reported cases provide myriad examples of courts adopting a flexible, common sense approach when a former client seeks disqualification of appointed counsel. In *People v. Cox*, *supra*, 30 Cal.4th 916, a death penalty case, defense counsel, Patrick Forester, an assistant public defender, and appointed second counsel, Stephen Tapson, disclosed four potential conflicts to the court. The public defender had represented the mother of Darlene S., the defendant's wife and a crucial prosecution witness, in a dependency case. In a second matter, the public defender declared a conflict of interest as to James Carter, a potential government witness. Tapson was appointed to represent Carter, but he passed the case on to another lawyer. Another attorney in Tapson's law firm had represented a third witness, Darin McArthur. Tapson notified the court he had never had any contact with McArthur. Finally, Lisa D. was called as a government trial witness. Tapson disclosed another member of his firm had represented Lisa in juvenile court. Forester confirmed the defense would impeach Lisa with her juvenile theft prior. By agreement, the district attorney raised the matter on direct examination.

This Court found no disabling conflict of interest for either defense attorney: "A conflict of interest *may* arise if a former client is a witness in a new case because the attorney is forbidden to use

against a former client any confidential information acquired during that attorney-client relationship. [Citations.] [¶] But if the attorney possesses no such confidential information, courts have routinely held that no actual or potential conflict of interest exists." (*People v. Cox*, *supra*, 30 Cal.4th 916, 949, emphasis in original.)

A similar result followed in *People v. Clark* (1993) 5 Cal.4th 950 [22 Cal.Rptr.2d 689, 857 P.2d 1099], another death penalty case. Susan Massini, the Mendocino County Public Defender, and a second attorney, Joseph Allen, initially represented the defendant. After Massini was elected district attorney, her office was recused from prosecuting the case, and the new public defender, Ronald Brown, joined Allen as co-counsel. Three government witnesses were former public defender clients and a fourth witness was a current client of the agency who was represented by Brown. As to the former clients, Brown informed the court that he had no confidential information. Brown and Allen assured the court that cross-examination of the witnesses would not be affected. Concerning the current public defender client, the court ordered Brown to reassign the case, and he did so. Cross-examination of the current client that was assigned to Allen. Both defense lawyers represented no confidential information was given to Allen.

This Court found the defense attorneys, as officers of the court, were in the best position to determine whether there was an actual or potential conflict of interest. (*People v. Clark*, *supra*, 5 Cal.4th 950, 1001.) While the court regarded cross-examination of a current client as being somewhat problematic, the court held the sworn representations of the defense attorneys were sufficient. (*Id.*

at p. 1002.) Hence, the defendant's right to conflict-free counsel was not violated.

In the present case, the trial court should have followed California law, concluded there was no conflict of interest, and confirmed its original decision to deny the motion to disqualify the public defender. Browne and Green did not have access to the agency's files for Glover, which had been closed and off-site since at least 1991. (9 CT 2547.) Neither defense attorney had ever represented Glover or spoken with any attorney who had represented the codefendant in juvenile court. (9 CT 2538, 2541.) These representations by defense counsel were made under penalty of perjury and entitled to great weight in the court's decision. (See *Holloway v. Arkansas* (1978) 435 U.S. 475, 486 [98 S.Ct. 1173, 55 L.Ed.2d 426] ["attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court their declarations are virtually made under oath' [citation]"].) This Court has cited *Holloway* with approval. (*Leversen v. Superior Court* (1983) 34 Cal.3d 530, 537 [194 Cal.Rptr. 448, 668 P.2d 755].) Even before *Holloway*, the court had held that great weight must be given to defense counsel's assertions regarding a conflict of interest.[9] (*Id.* at pp. 537-538.)

Given the representations made by defense counsel and the failure of Glover's lawyers to disprove any of their assertions, there

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[9] See also *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 535 [112 Cal.Rptr. 478] [when appointed counsel declares a conflict of interest, the court should generally accept the proffer and appoint another lawyer to represent the defendant].

was no disqualifying conflict of interest based upon actual knowledge of adverse confidential information. Neither was there any threat the attorneys would acquire such information. The agency's "no peek" rule barred them from obtaining the Glover files from off-site storage. (9 CT 2545-2546.) Indeed, the fact the defense lawyers had to file a motion in the juvenile court to obtain Glover's records confirms both their lack of confidential information and the effective of the agency's "no peek" policy. As a minimum of five years had passed since the public defender represented Glover, it was highly unlikely any assistant public defender had a recollection of client confidential information. (*Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, 1579.) As Gaskill advised the court, his agency handled many thousands of juvenile matters annually, including 12,000 juvenile cases in 1994, the year immediately preceding litigation of the conflict issue. (4 RT 437.) The vast majority of the cases were routine and ended with a stipulation. (*Ibid.*) There was no realistic danger defense counsel would obtain confidential client information. Removal of the public defender, then, was unjustified and an abuse of discretion.

Rather than base its decision on whether or not the attorneys assigned to the case by the public defender had confidential client information about Glover, the court based its ruling upon the past attorney-client relationship. In other words, the court disqualified the public defender on the basis of client loyalty—the issue in cases in concurrent representation—rather than the controlling question of

client confidentiality.[10] (*Flatt v. Superior Court*, *supra*, 9 Cal.4th 275, 283.) In effect, the court removed the public defender from the case because Glover did not want the agency to represent appellant. However, it is long settled that an adverse witness cannot force the removal of the public defender because he does not want to be questioned by a different lawyer from the agency, which once represented him. (*Vangsness v. Superior Court* (1984) 159 Cal.App.3d 1087, 1091 [206 Cal.Rptr. 45].) Instead, when defense counsel does not have any relevant confidential information, there is no actual or potential conflict of interest with the witness which merits recusal. (*People v. Cornwell* (2005) 37 Cal.4th 50, 75 [33 Cal.Rptr.3d 1, 117 P.3d 622].)

As the trial court removed the public defender as defense counsel on the inapplicable basis of client loyalty and failed to follow California law in favor of a Ninth Circuit civil case, the ruling was erroneous and an abuse of discretion.

(D) **The Public Defender Did Not Have a Conflict of Interest Based Upon Any Relationship With the Former Client (Rules of Professional Conduct, Rule 3-310(B)).**

The Rules of Professional Conduct, rule 3-310(B) prohibits attorneys from accepting employment where a relationship with a current or former client will have an adverse affect on the lawyer's representation of the new client. Here, the attorneys assigned to defend appellant had no relationship with Glover. Browne advised

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[10] The client loyalty basis for the court's decision is explored further below in section (E) of the present assignment of error.

the court that she and Green had never had any connection to the codefendant. (1 RT 124.)

Moreover, there was no basis for any concern the lawyers would "pull their punches" (*People v. Easley* (1988) 46 Cal.3d 712, 725 [250 Cal.Rptr. 855, 759 P.2d 490]) at trial. During the in camera hearing, Public Defender Gaskill informed the court a vigorous defense case had been prepared on behalf of appellant, and Browne was "not planning on pulling any punches." (4 RT 413.) Given the state of the record—the fact the two assigned lawyers had no prior contact with Glover, knew no confidential information from his juvenile court matters, and planned a hard-hitting defense—the trial court had no reason to believe there was any risk of an adverse effect on counsel's ability to represent appellant. Recusal, then, was not required for any potential adverse impact on counsel's ability to represent appellant.

(E) ***Damron v. Herzog* Did Not Require Removal of the Public Defender Over Appellant's Objection.**

The trial court reconsidered and granted the Glover motion to disqualify the public defender based upon *Damron v. Herzog*, *supra*, 67 F.3d 211, a then-recent decision by the Ninth Circuit. However, the case did not require or warrant the recusal.

First, the Ninth Circuit case was not binding authority that the trial court was obligated to follow. Decisions of the federal appellate courts can be persuasive authority, but it is not incumbent on California courts to adhere to them. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292 [65 Cal.Rptr.2d 145, 939 P.2d 259].)

Second, *Damron* is far removed from the facts of the present

matter; indeed, it is so unlike this case that it is difficult to understand why the trial court believed it necessary to remove the public defender on the authority of the decision. In that case, the plaintiff, Paul Damron was a former client of the defendant, Vern Herzog, an Idaho attorney. Herog represented Damron in a business transaction, the sale of a funeral and cemetery business. Several years after the sale, Herzog was consulted by the buyers, and advised them to stop making payments as required by the terms of the contract Herzog had negotiated on behalf of Damron. When the buyers stopped making payments, Damron instituted foreclosure proceedings, the buyers sued, and a settlement was eventually reached which modified the purchase agreement and returned a portion of the business to Damron. The aggrieved former client brought a malpractice action against Herzog in federal district court on the basis of diversity jurisdiction. The court granted Herzog's motion for summary judgment on the ground Idaho rules of professional conduct did not impose on Herzog a duty of loyalty to a former client.

The Ninth Circuit reversed and remanded the case for trial. The court held Herzog had breached a duty of loyalty to his former client. (*Damron v. Herzog*, *supra*, 67 F.3d 211, 213.) The court went on to hold the common law imposed on Herzog a continuing duty of loyalty not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement. (*Id.* at pp. 213-214.) The court cautioned that its holding was a narrow one: "Although we find that, in the narrow realm of the duty of loyalty, an attorney-client relationship continues after formal

representation ends, our finding is for the limited purpose of malpractice analysis." (*Id.* at p. 215.) Needless to say, the present matter has no nexus to a federal court's understanding of the common law duty of loyalty in an Idaho civil case for attorney malpractice.

In short, *Damron* is nothing more than a curiosity, a narrow ruling on an esoteric issue by an intermediate appellate court whose decisions were not binding on the trial judge. The lower court was wrong to rely upon the case as a basis for removing the public defender as appellant's counsel.

(F) **The Motion to Recuse the Public Defender Was a Trial Tactic Rather Than an Effort to Remedy a Conflict.**

The courts recognize that recusal motions are "commonly used for purely strategic purposes to delay the litigation, harass the opposing party, or pressure for a more favorable settlement." (*Ahmanson & Co. v. Salomon Brothers, Inc.*, *supra*, 229 Cal.App.3d 1445, 1454; see also *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 562 [20 Cal.Rptr.2d 132].) In this case, the Glover motion was a transparent trial tactic, a misuse of recusal so as to prevent defense counsel from obtaining Glover's juvenile records, and be rid of zealous attorneys who intended to blame Glover for Young's death. (9 CT 2573.)

The timing of the motion to disqualify the public defender supports an inference the motion was nothing more than a trial tactic. From the time of his initial plea in municipal court on March 26, 1993, Thomas was represented by the public defender, with Browne designated as his assigned attorney of record. (2 CT 372.)

Attorney James Giller, Glover's lead counsel for trial, was appointed at the superior court arraignment on January 4, 1994. (7 CT 1840-1841.) Approximately 20 months after accepting the appointment, Giller filed a motion to have the public defender removed as appellant's counsel. (9 CT 2572.) This lengthy delay in filing the motion to recuse can be attributed to the fact that it was only after that interval the public defender filed a motion in juvenile court to obtain Glover's records. The motion to remove the public defender was a tactical maneuver to frustrate the effort to gain access to Glover's juvenile records.

Additionally, the motion to recuse was a tactical decision to avoid a joint trial in which appellant's lawyers would blame Glover for Young's death. In the motion to obtain Glover's juvenile information, the public defender explained one reason for the request was counsel expected to name Glover as the shooter and, to the extent possible, pursue a third-party culpability defense in which Glover was the leader and primary actor. (9 CT 2573.) During the in camera hearing on October 16, 1995, Gaskill reiterated the assigned attorneys planned an aggressive defense strategy and would not pull any punches. (4 RT 413.) The motion to disqualify the public defender was a strategic maneuver to avoid being the public defender's whipping boy.[11]

Finally, the cases recognize that individual public defender agencies can develop areas of expertise in particular areas of law,

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[11] Historically, a whipping boy was a commoner educated with a prince and punished in his place. (The New Oxford American

and disqualification deprives the public—including the defendant—of this expertise. (*Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, 1580.) Here, it is evident the public defender had substantial experience and competence in death penalty litigation. The public defender's motion practice is one sign of this expertise. During the preliminary hearing, the public defender filed motions to suppress statements by Thomas (6 CT 1580) and to dismiss the lying-in-wait special circumstance (6 CT 1589). After the hearing, defense counsel filed a Penal Code section 995 motion. (7 CT 1850.) Prior to the start of trial, the public defender filed twenty motions in limine.[12] Counsel also filed a proposed questionnaire with the court. (9 CT 2580.) The public defender's motion practice demonstrated

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Dictionary (2001) p. 1923, col. 1.)

[12] The motions were as follows: notify jurors of the meaning of LWOP (7 CT 2054), dismiss the special circumstances (8 CT 2132), limit victim-impact evidence (8 CT 2162), pre-instruct the jury that cost is not a factor (8 CT 2180), make in limine rulings binding (8 CT 2186), apply the *Witherspoon* standard to jurors with scruples concerning the death penalty (8 CT 2190), federalize objections (8 CT 2196), ensure a fair jury panel (8 CT 2198), sever counts 1 to 5 from counts 7 and 8 (8 CT 2203), request for discovery of expert witness qualifications (8 CT 2297), request a *Phillips* hearing on penalty phase aggravation (8 CT 2304), bifurcate prior conviction enhancements (8 CT 2311), strike special circumstances for failure to narrow (8 CT 2314), challenge pretrial identification procedures (8 CT 2359), suppress appellant's post-arrest statements (8 CT 2361), limit photographic evidence (8 CT 2412), request for discovery of prosecution juror information (8 CT 2420), a motion to suppress additional post-arrest statements (9 CT 2444), exclude videotaped statements by Thomas after his post-arrest request for counsel (9 CT 2458), and a motion to obtain evaluations of Glover in Penal Code section 1368 proceedings (9 CT 2515).

impressive mastery of capital case litigation.

The expertise of lead counsel, Judith Browne, is also apparent from the record. Browne was admitted to the bar in 1975 (State Bar of California, Attorney Search, Judith Anne Browne – 65333 <http://Members.calbar.ca.gov/search/member_detail.aspx?x=65333> [as of October 1, 2006].), and therefore had 20 years experience at the time of trial. Her representation of appellant at the preliminary hearing was vigorous and meticulous.[13] Judge Delucci was long familiar with Browne, and commented she had served as defense counsel in four potential death cases in his courtroom. (1 RT 57.) The court remarked Browne had done so many trials in his courtroom that she could read his mind. (1 RT 93.) Counsel for Glover did not want anything to do with Browne, her vast experience, and the institutional expertise and resources of the public defender. The motion to recuse the public defender was a trial tactic born of concerns unrelated to whether or not Browne and Green may have been in possession of any confidential information about Glover.

(G) **The Violation of the Sixth Amendment Right to Counsel Requires Reversal of the Judgment.**

The trial court's mistaken decision to remove the public defender over appellant's personal objection requires reversal of the judgment without the need to engage in an analysis of prejudice. In

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[13] The hearing required eleven days of testimony and argument over a six-month period. (2 CT 409-586; 3 CT 590-778, 781-926; 4 CT 929-1095, 1098-1149, 1160-1227; 5 CT 1232-1372, 1376-1441, 1444-1527; 6 CT 1654-1732, 1738-1802.)

United States v. Gonzalez-Lopez (2006) 548 U.S. ___ [126 S.Ct. 2557, 2564, 165 L.Ed.2d 409] the high court held a district court's denial of a *pro hac vice* motion by a defendant's retained counsel of choice because of a mistaken belief that the attorney had violated a state ethics rule was structural error which required automatic reversal of the judgment. The court explained, "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings . . . Harmless error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*Id.* at p. 2565.)

A like analysis should be employed in the present matter. Because the trial court removed the public defender from the case, there is no reliable procedure for assessing the harm to Thomas from the lower court's error. What Browne and Green might have done differently from Wagner and Cole can never be known. What is apparent is appellant's desire to have the public defender remain on the case. Questioned on the record by Mr. Gaskill, appellant expressly stated his desire to have Browne remain as his lead attorney. (4 RT 414.)

Even though the trial court's mistaken decision was structural error, the record confirms Thomas was prejudiced by the court's removal of his attorneys. First, as argued above, the public defender's office in general, and assistant public defender Browne in particular, had important expertise in capital case litigation. Because the court removed counsel over appellant's objection, he was deprived of this individual and institutional know-how when on trial

for his life.

Second, the public defender was appellant's counsel of choice. At the October 16, 1995, hearing, Thomas affirmed on the record that he wanted Browne as his attorney. (4 RT 414.) Although appellant was not entitled to appointment of counsel of choice (*Williams v. Superior Court* (1996) 45 Cal.App.4th 320, 327 [53 Cal.Rptr.2d 832]), once counsel was appointed and an attorney-client relationship established, Thomas certainly had a right to have his lawyers remain on the case in the absence of a disabling conflict. The erroneous ruling interfered with the attorney-client relationship and forced Thomas to go to trial with conflict counsel.

Third, the cases recognize that recusal of counsel at a late stage of the proceedings can result in an undue hardship on the affected party. (*In re Marriage of Zimmerman*, *supra*, 16 Cal.App.4th 556, 565.) Here, appellant's lawyers were taken away over his objection during a late stage of the case: trial motions in limine. Because the public defender was removed from the case, Thomas was forced to wait for trial while successor counsel reviewed the case. The public defender was relieved on October 16, 1995. Trial resumed with new counsel on February 26, 1996. (10 RT 2849.) The resumption was short-lived, for Glover's motion to sever was granted on March 21, 1996. (10 CT 2979.) Appellant's trial did not restart until June 30, 1997. (13 CT 3777.) Thomas, then, was prejudiced by a substantial delay while awaiting trial.

Fourth, because Glover's case went to trial ahead of appellant's case, Thomas was the victim of inconsistent theories

advanced by the government.[14] Without the delay necessitated by the removal of defense counsel, the district attorney would not have had the opportunity to name Glover as the shooter and, when a jury was not persuaded, reverse the theory and maintain Thomas pulled the trigger.

For all of the foregoing reasons, the removal of defense counsel over appellant's objection violated his rights to counsel (U.S. Const., 6th Amend.; *Powell v. Alabama* (1932) 287 U.S. 45, 68 [53 S.Ct. 55, 77 L.Ed. 158]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 345 [83 S.Ct. 792, 9 L.Ed.2d 799]), a fair trial (*ibid.*), due process (U.S. Const., 5th & 14th Amends.), and a reliable penalty determination (U.S. Const., 8th Amend.; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944]). The judgment should be reversed.

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[14] The government's use of inconsistent theories is discussed below as assignment of error number four.

II.

THE INTERROGATION OF APPELLANT BY OAKLAND DETECTIVE KOZICKI AFTER THOMAS INVOKED HIS FIFTH AMENDMENT RIGHT TO COUNSEL WAS IN VIOLATION OF *EDWARDS V. ARIZONA*.

On August 31, 1995, the public defender filed trial motion number 13 to exclude from evidence appellant's post-arrest admissions to Oakland police detective David Kozicki and EBRPD detective Kiefer. (9 CT 2444-2455.) In the motion, counsel pointed out that during an interrogation by Hayward detective Frank Daley appellant had invoked his Fifth Amendment right to the assistance of counsel during questioning. (9 CT 2447.) Appellant subsequently reinitiated contact with Hayward detectives concerning the Flennaugh robbery and shots fired at police officers. (*Ibid.*) Thomas was questioned by Hayward detective Richard Allen and explained how he assisted Glover with the robbery but had nothing to do with Glover's firefight with Hayward officers. (9 CT 2447-2448.) Two days after the Allen interview, Oakland detective Kozicki questioned Thomas about the Young murder. (9 CT 2448-2449.) Defense counsel maintained appellant's waiver of counsel's presence was restricted to the Hayward incident. (9 CT 2453-2454.) The Kozicki and Kiefer interrogation was therefore in violation of the Fifth Amendment. (*Ibid.*) The district attorney did not file any points and authorities in response to the motion. (14 RT 1001.)

A hearing on the motion occurred after the public defender was removed as defense counsel and before the court granted a motion to sever the trials of Thomas and Glover. During the hearing,

the court heard testimony from five witnesses and the parties introduced a variety of exhibits. Defense counsel argued the Fifth Amendment right to counsel is not offense-specific. Hence, when Thomas reinitiated contact with Hayward detectives, this action did not waive counsel as to the Oakland murder investigation, and he should not have been approached on that case. (14 RT 998.) The prosecutor opposed the motion on the ground any waiver of rights is general and not limited to a specific law enforcement agency. (14 RT 1008.)

On March 6, 1995, the court denied the motion. (15 RT 1186-1189.) As a result, Kozicki testified at trial to appellant's incriminating statements. (57 RT 5914-5954.) The trial court's decision was an abuse of discretion, for the interrogation about the Oakland murder was beyond the scope of appellant's Fifth Amendment waiver and forbidden by *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378].

(A) **Testimony at the Evidence Code Section 402 Hearing.**

Frank Daley, a Hayward robbery-homicide detective, was the lead investigator for the Flennaugh incident. (12 RT 778.) On December 24, 1992, Thomas turned himself in at the Oakland police station. (12 RT 778-779.) Appellant was transported to Hayward, and Daley questioned Thomas some time around 2:00 or 3:00 in the morning. (12 RT 778-780.) Before questioning appellant, Daley read him a standard *Miranda* admonition. (12 RT 782.) Thomas acknowledged he understood his rights, agreed to talk to Daley, and signed the admonition form. (12 RT 783.) About thirty minutes into the interview, Thomas said, "I'm not going to say anything else until I

talk to a lawyer because I'm telling you what I know. I can't do no more than that. I can't do better than that."[15] (12 RT 791.) Daley informed appellant that he could no longer ask him any questions. In the event Thomas wanted to speak to him, appellant would have to initiate the contact. (12 RT 784.) Daley then terminated the interview. (*Ibid.*)

Some time after 4:00 p.m. that same day, Thomas contacted Anna Christensen, a community service officer in the Hayward jail, and asked to talk to a detective. (12 RT 799-800.) In her hearing testimony, Christensen could not recall appellant's exact words. (12 RT 800.) Christensen placed a phone call to the detective bureau but no one picked up the phone. (12 RT 796-797.) Detective Allen came into the jail area, and Christensen advised him that Thomas wanted to talk to a detective. (12 RT 797.)

Allen testified that the jailer told him that appellant wanted to talk to Daley. (12 RT 878.) Christensen also said appellant wanted to talk to Daley or Allen about his case. (*Ibid.*) Allen explained Daley had left for the Christmas holiday. (*Ibid.*) Christensen opened the cell door and Allen had a brief conversation with appellant. (12 RT 879.) Based upon a prior conversation with Daley, Allen knew that appellant had invoked his rights. (12 RT 880.) Allen asked Thomas if he had invoked, and appellant confirmed he had. (*Ibid.*)

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[15] A transcript of the invocation of rights was marked as defense exhibit A. Appellant's exact statement was, "I'm not got [sic] to say anything else until I talk to a lawyer. Because I'm telling you what I know. I can't, I can't do no more than that. I can't do better than that." (12 RT 791.)

Thomas said he had talked to a lawyer and wanted to make this right and talk about it. (*Ibid.*) Thomas stated he did not want to take the fall for shooting at a police officer or a robbery. (12 RT 884.) Allen was not prepared to conduct an interview and left to think about it. (12 RT 880-881.)

Allen decided to question Thomas and moved him from the jail to an interview room. (12 RT 881.) Allen read a standard *Miranda* admonition of rights form to appellant. (12 RT 881-882.) Thomas signed the form and acknowledged he wished to talk to the detective. (12 RT 883.) Concerning the Flennaugh incident, appellant explained he had backed up Glover, but he did not shoot at any police officers. (12 RT 888.) During the interview, Allen questioned Thomas about the Hayward case and nothing else. (12 RT 894.) Allen did not question Thomas about the Oakland homicide, and appellant said nothing about that matter. (12 RT 891.) Appellant did not ask to talk to anyone about the murder, and he never asked to talk to Oakland detectives. (12 RT 891, 896-897.)

On December 26, 1992, Oakland detective Kozicki learned that Thomas had made a statement to Hayward detectives. 99 RT 544.) He also knew appellant had invoked his right to counsel or the right to remain silent. (9 RT 549, 554.) Kozicki did not have any information appellant wished to talk to Oakland detectives about the Young homicide. (9 RT 551.) As the Young case was a joint investigation with the EBRPDP, Kozicki went to the Hayward station along with park department detective Laurence Kiefer. (9 RT 526-527.)

In Hayward, Kozicki and Kiefer met with detective Allen. (9

RT 527.) The homicide investigators talked to Allen about appellant's invocation of rights. (9 RT 547.) Kozicki conferred with two prosecutors about whether he should interview Thomas. (9 RT 556.) A recording of the interrogation in which Thomas invoked his rights was provided to the district attorney. (9 RT 555.) A deputy district attorney told Kozicki to go ahead and attempt to question appellant. (9 RT 556-557.)

Thomas was brought to an interview room, and Allen introduced him to the homicide investigators. (9 RT 528.) After Allen left the room, Kozicki explained he was an Oakland homicide investigator and wanted to ask him some questions about an investigation he was conducting. (9 RT 528-529.) Kozicki advised Thomas of his *Miranda* rights by reading the information from a standard form.[16] (9 RT 529-530.) Appellant acknowledged he understood his rights and agreed to talk to the detectives. (9 RT 531.) Thomas then made the admissions described above in the statement of facts, which were the subject of the motion.[17]

(B) **Standard of Review.**

In reviewing a trial court's ruling on Fifth Amendment issues, the appellate court makes an independent determination of the legal question. (*People v. Wash* (1993) 6 Cal.4th 215, 236 [24 Cal.Rptr.2d 421, 861 P.2d 1107].) A reviewing court will examine the uncontroverted facts in order to make an independent

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[16] A copy of the admonition form signed by appellant was identified as exhibit 1. (9 RT 530; 1 CT 297.)

[17] See Statement of Facts: Guilt Phase, (3) Appellant's Arrest and Interrogation.

determination. (*People v. Whitson* (1998) 17 Cal.4th 229, 248 [70 Cal.Rptr.2d 321, 949 P.2d 18].)

(C) **Appellant Invoked the Fifth Amendment Right to Counsel Without Limitation, So Any Questioning Initiated by Law Enforcement Violated *Edwards v. Arizona*.**

In *Edwards v. Arizona*, *supra*, 451 U.S. 477, a murder suspect informed his interrogator that he wanted a lawyer and the interview was terminated. The following day, additional officers questioned Edwards, and he implicated himself in the crime. The high court ruled the statement was obtained in violation of the Fifth Amendment right to counsel. According to the court, when a suspect has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at pp. 484-485.)

The *Edwards* rule is designed to prevent police from badgering a suspect into waiving his previously asserted *Miranda* rights. (*Michigan v. Harvey* (1990) 494 U.S. 344, 350 [110 S.Ct. 1176, 108 L.Ed.2d 293].) It insures that any statement made in subsequent interrogation is not a consequence of coercion. (*Minnick v. Mississippi* (1990) 498 U.S. 146, 151 [111 S.Ct. 486, 112 L.Ed.2d 489].) The rule is a bright-line test calculated to provide "clear and unequivocal" guidelines to law enforcement. (*Arizona v. Roberson* (1988) 486 U.S. 675, 682 [108 S.Ct. 2093, 100 L.Ed.2d 704].) The *Edwards* rule is not offense specific. (*Id.* at p. 684.) Instead, "[o]nce a suspect invokes the *Miranda* right to counsel for

interrogation regarding one offense, he many not be reapproached regarding *any* offense unless counsel is present." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 [111 S.Ct. 2204, 115 L.Ed.2d 158].)

Here, Thomas unequivocally invoked his Fifth Amendment right to the assistance of counsel. (12 RT 791.) Appellant's invocation was phrased in general terms. Hence, law enforcement was barred from initiating any further questioning of Thomas. (*Edwards v. Arizona*, *supra*, 451 U.S. 477, 484-485.) It makes no difference that Kozicki approached appellant in connection with a different investigation from the case in which Thomas invoked the right to counsel. (*McNeil v. Wisconsin*, *supra*, 501 U.S. 171, 177.)

The importance of appellant's unqualified decision to halt the interrogation and rely upon the assistance of counsel is demonstrated by the contrasting results in two cases, *Colorado v. Spring* (1987) 479 U.S. 564 [107 S.Ct. 851, 93 L.Ed.2d 954], and *Arizona v. Roberson*, *supra*, 486 U.S. 675. In *Spring*, an informant told federal Alcohol, Tobacco, and Firearms [ATF] agents that Spring had admitted shooting a man in Colorado and was involved in interstate transportation of stolen firearms. At the time the information was provided, the murder victim had not been reported missing and his remains had not been discovered. An undercover agent arranged a firearms transaction with Spring, and the suspect was arrested.

Following his arrest, Spring was advised of his *Miranda* rights and agreed to talk. After questioning about the incident that led to the arrest, ATF agents asked Spring about his criminal history.

Spring admitted he shot an aunt when he was 10-years-old. Asked if he had shot anyone else, the suspect admitted he had shot some guy once. Spring denied ever being in Colorado.

Nearly two months later, while Spring was still incarcerated for the firearms offense, Colorado officers visited him. They notified Spring the subject of their visit was a murder. Spring was advised of his Fifth Amendment rights and consented to an interview in which he confessed to the murder. The Colorado Supreme Court found the confession was tainted by the initial ATF interrogation as the defendant was not informed he would be questioned about crimes in addition to the firearms sale.

The high court reversed the decision. The court held the initial *Miranda* admonition correctly stated the defendant's Fifth Amendment rights and was in no way limited or qualified. Instead, the advisement of rights told the suspect anything he said could be used against him. The defendant did not need to be informed in advance of all possible subjects of the interrogation. (*Colorado v. Spring*, *supra*, 479 U.S. 564, 576-577.) Because the defendant's waiver of rights was also unqualified, the failure to advise him in advance of every potential area of questioning did not affect the validity of the waiver. (*Ibid.*)

The court reached a very different conclusion in *Arizona v. Roberson*, *supra*, 486 U.S. 675. In that case, a burglary suspect was advised of his Fifth Amendment rights and stated he wanted a lawyer before answering any questions. Three days later, an officer who was unaware of the suspect's invocation of rights questioned him about a different burglary. This time the suspect waived his

rights and confessed to the crime. The trial court suppressed the confession on the ground it had been obtained in violation of the *Edwards* rule. The state supreme court affirmed the ruling and the government asked the federal high court to craft an exception to *Edwards* for cases where the second interrogation was unrelated to the case in which the right to counsel had been invoked.

The high court declined to fashion the exemption sought by the state. The court explained that a suspect who asks for an attorney has put into words a belief that he is not capable of withstanding the inherently coercive atmosphere of in-custody interrogation without the benefit of counsel. (*Arizona v. Roberson*, *supra* 486 U.S. 675, 681.) If the police later approach the suspect again, it is presumed any waiver of rights is at the behest of law enforcement rather than a free decision by the individual under arrest. (*Ibid.*) These presumptions are not dispelled if the police approach the suspect about a separate investigation. (*Id.* at p. 683.)

The court contrasted the facts in *Roberson* with the scenario in *Spring*. In the latter case, the waiver of rights was not limited, so it was presumed the defendant was comfortable enough with custodial interrogation to answer questions about any matter without the assistance of counsel. In other words, a waiver of rights the suspect does not limit in any way is understood to be a general waiver. (*Arizona v. Roberson*, *supra*, 486 U.S. 675, 684.) In *Roberson*, the suspect's decision to take refuge in his Fifth Amendment rights was likewise not limited to a specific investigation and was considered a general invocation of the right to counsel. As a result, it made no difference to the result that the police approached him about a

different investigation. (*Ibid.*)

Here, appellant did not in any manner restrict or limit his invocation of the Fifth Amendment right to counsel. Thomas did not refuse to talk about some subjects but agree to be questioned about others. Instead, he cut off all questioning. (12 RT 791.) The police were therefore prohibited from approaching appellant about the Flennaugh matter or any other investigation.

(D) **Appellant's Initiation of Contact With the Police and Waiver of Rights Was Limited to the Hayward Robbery Investigation**

Unfortunately, appellant's decision to rely upon the Fifth Amendment in the early morning hours of December 24, 1992, is not the end of the matter. As explained above, in the late afternoon on December 24, 1992, Thomas contacted a jailer and asked to talk to a Hayward detective. (12 RT 799-800.) Allen spoke to appellant to clarify the request. (12 RT 880.) Thomas explained he had talked to a lawyer, and he did not want to take the fall for shooting at police officers or a robbery. (12 RT 884.) In other words, appellant wanted to talk about the Flennaugh incident. This request defined the scope of appellant's waiver of Fifth Amendment rights.

The high court considered questioning initiated by the suspect in *Oregon v. Bradshaw* (1983) 1039 [103 S.Ct. 2830, 77 L.Ed.2d 405]. In that case, the body of a young man was discovered in the passenger seat of his own pickup truck. The vehicle had left the road, struck a tree, and came to rest on its passenger side in a creek. The victim died from injuries sustained in the accident and asphyxiation from drowning. Bradshaw denied involvement in the

death, but acknowledged he had provided alcohol to the decedent. Bradshaw was placed under arrest for furnishing alcohol to a minor and advised of his Fifth Amendment rights. A police officer described for Bradshaw a theory of the case that placed him behind the wheel of the wrecked truck. Bradshaw denied involvement and asked for an attorney. The interrogation was terminated.

During his transfer from the police station to county jail, Bradshaw initiated a general discussion by asking, "Well, what is going to happen to me now?" In the conversation that followed, the officer suggested Bradshaw could help himself by taking a polygraph test. Bradshaw agreed and was given the test the next day. After the test, the examiner told Bradshaw that he had not been truthful. Bradshaw admitted he was the driver of the truck and had passed out before the accident.

The court held the confession was admissible. The court reasoned the suspect's question had "evidenced a willingness and a desire for a generalized discussion about the investigation . . ." (*Oregon v. Bradshaw*, *supra*, 462 U.S. 1039, 1045-1046.) The majority went on to explain that when a suspect initiates further interaction with law enforcement, the government still has the burden to demonstrate a knowing and intelligent waiver of the Fifth Amendment right to have counsel present during interrogation. (*Id.* at p. 1044.)

The testimony presented at the hearing on appellant's motion showed he initiated further contact with the Hayward detectives. The community service officer on duty in the jail could not recall appellant's exact words. (12 RT 800.) However, she did recall that

appellant asked to talk to a detective. (12 RT 797.) Detective Allen testified the jailer informed him that Thomas had asked to speak to Daley, the detective who had questioned him about the Hayward incident. (12 RT 778-780, 878.) Allen talked to appellant in the jail, and confirmed he wanted to talk about the Hayward incident. (12 RT 884.) The detective subsequently questioned Thomas about the Hayward matter and nothing else. (12 RT 894.) Allen did not question Thomas about the Oakland murder, and appellant did not ask to talk to anyone about that case. (12 RT 891, 896-897.)

Given these facts, the present case is distinguishable from *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039. Viewed in context, appellant's waiver of the right to counsel was limited to the Hayward case. Unlike *Bradshaw*, where the suspect's open-ended question was held to be a general waiver of rights, appellant make it clear to the detective that he only wanted to talk about the Hayward incident. Like the suspect in *Arizona v. Roberson*, *supra*, 486 U.S. 675, the court rejected the state's argument the suspect's invocation of the right to counsel was limited to the matter in which the Fifth Amendment was invoked. The court commented, "unless he otherwise states [citation], there is no reason to assume that a suspect's state of mind is in any way offense-specific [citation]." (*Id.* at p. 684.)

In the present case, appellant's waiver of Fifth Amendment rights was limited to the Hayward investigation. When Allen attempted to clarify appellant's request, Thomas told him "that he didn't want to take any fall in regards to shooting at a police officer or the robbery portion of it, and he wanted to make that right and he

wanted to talk to me." (12 RT 884.) From Allen's testimony, then, it is apparent Thomas was willing to waive his Fifth Amendment privileges only as to the Hayward incident. His willingness to be questioned about the Hayward matter was not a general waiver of the Fifth Amendment right to counsel. The interrogation about the Oakland murder investigation was therefore contrary to the Fifth Amendment and *Edwards v. Arizona*, *supra*, 451 U.S. 477.

That Kozicki advised Thomas of his *Miranda* rights and obtained a waiver from him does not cure the Fifth Amendment violation. Any statement obtained in violation of the Fifth Amendment right to counsel is involuntary and inadmissible "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." (*McNeil v. Wisconsin*, *supra*, 501 U.S. 171, 177.) Especially in a case like this in which three days elapsed between the request for counsel and the interrogation about the Oakland murder case, the mere repetition of *Miranda* warnings cannot overcome the presumption of coercion that results from prolonged incarceration. (See *Arizona v. Roberson*, *supra*, 486 U.S. 675, 686.)

The Fifth Amendment violation was not cured by appellant's statement to Allen that he had talked to a lawyer and wanted to talk about the Hayward investigation. The *Edwards* rule prohibits police-initiated interrogation unless counsel is physically present whether or not the suspect has consulted with an attorney. (*Minnick v. Mississippi*, *supra*, 498 U.S. 146, 153.) The trial court committed error in denying the motion to exclude appellant's admissions to Kozicki.

(E) **The Constitutional Error Requires Reversal of the Judgment.**

Prejudice from erroneous admission of statements obtained in violation of the Fifth Amendment is measured according to the standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) This test for prejudice is readily satisfied in the present case.

Appellant's admissions to Kozicki were devastating. First, Thomas changed his account several times, beginning with a rather innocuous story about merely helping Glover use a relative's ATM card (57 RT 5917), to retrieving an AK-47 for Glover's use in connection with a car theft to facilitate commission of a Safeway robbery (57 RT 5921), to admitting he went to Point Richmond with Glover in the Mustang but denying sexual intercourse with Young (57 RT 5924), to acknowledging that he raped the victim (57 RT 5927). The shifting versions of events provided the jury with ample reason to doubt his veracity and conclude he was instead lying due to consciousness of guilt. During the guilt phase, the jury was given CALJIC No. 2.03, the standard instruction on false statements and consciousness of guilt. (60 RT 6214; 14 CT 3929.) The prosecutor called the jury's attention to this instruction. (59 RT 6105-6106.)

In his guilt phase closing argument, the prosecutor savaged appellant and made liberal use of the admissions to Kozicki to

defame him. The district attorney parsed the Kozicki interview into four different versions of events. (59 RT 6101-6105.) In his view, the statements were intended to shift the blame to Glover. (59 RT 6105.) The prosecutor argued Thomas told the truth in admitting he had handled the AK-47, but everything else he said was a lie. (59 RT 6096.)

The admissions to Kozicki could not be harmless beyond a reasonable doubt. Instead, the statements linked Thomas to the crimes and thereby corroborated the testimony of William Dials, who testified appellant resembled one of the perpetrators of the Young kidnapping. (52 RT 5369-5370.) By acknowledging he had handled the AK-47 at the Oakland crime scene, Thomas provided the government with an opening to argue in guilt phase that he was the actual killer. (59 RT 6096.)

On the first day of guilt phase deliberations, the jury asked for a transcript of appellant's admissions to Kozicki. (13 CT 3872.) In response to this question, the court had the jury brought into the courtroom, transcripts were passed out, and exhibit 50—the audiotape of appellant's initial taped statement—was played in open court. (60 RT 6276-6277.) Again during penalty deliberations, the jury asked to listen to the tape. (14 CT 4053.) The request was granted and—for the third time—the jury listened to the audiotaped admissions in open court. (66 RT 7094.) The jury, then, plainly viewed the interrogation as a vital element of the case against Thomas.

The Fifth Amendment error in overruling the motion to exclude appellant's statements to Kozicki was not harmless beyond a

reasonable doubt. The judgment must be reversed, for the convictions and sentence are contrary to the Fifth Amendment right to counsel (*Edwards v. Arizona*, *supra*, 451 U.S. 477), right to a fair trial (U.S. Const., 6th Amend.), due process (U.S. Const., 5th & 14th Amends.), and right to a reliable penalty determination (U.S. Const., 8th Amend., *Woodson v. North Carolina*, *supra*, 428 U.S. 280).

III.

THE FAILURE OF LAW ENFORCEMENT TO RECORD THE ENTIRE INTERROGATION OF APPELLANT RATHER THAN A SMALL FRACTION OF THE SESSION VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In conjunction with the *Edwards* motion, the public defender filed trial motion number 14 to exclude appellant's December 26, 1992, admissions to detectives Kozicki and Kiefer for additional constitutional violations attributable to the failure to record the complete interrogation. According to the available evidence, the detectives had questioned appellant about the Young homicide for slightly more than four hours; however, only 54 minutes of the interrogation was recorded on audiotape.[18] Defense counsel maintained the failure to make an unabridged record of the interrogation resulted in a due process violation due to the irretrievable loss of crucial evidence in a death penalty case which was favorable to the accused, including appellant's original, unexpurgated expressions of remorse and insistence that he did not want the victim harmed. (*Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281].) Finally, the motion argued appellant's admissions should be excluded because his waiver of

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[18] The recording was done in two stages. In the first recorded interrogation, which was admitted at trial as exhibit 50, Thomas was asked questions about the actions of Glover and himself during the Young incident. In the second or so-called *Aranda* interrogation, appellant was asked about his own actions without mention of

rights was a result of compulsion. (8 CT 2361-2384.)

A hearing on the motion was conducted at the same time as the *Edwards* motion. (9 RT 514.) On March 6, 1996, the court denied the motion. (15 RT 1182.) The ruling was an abuse of discretion.

(A) **Failure to Make a Verbatim Recording of the Complete Interrogation.**

In *Stephan v. State* (Alaska 1985) 711 P.2d 1156, 1157, the Alaska Supreme Court held the due process clause of the state constitution required law enforcement to tape record the questioning of criminal suspects. The court stressed the recording must include the complete interrogation, including the advisement of Fifth Amendment rights. (*Id.* at p. 1162.) To ensure police compliance, the court held the unexcused failure to make an electronic recording would render any statement by the accused inadmissible. (*Id.* at p. 1163.)

The court explained its decision was "a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination, and, ultimately, his right to a fair trial." (*Stephan v. State*, *supra*, 711 P.2d 1156, 1159-1160.) In addition to protecting the rights of the criminal suspect, a verbatim recording "protects the public's interest in honest and effective law enforcement, and the individual interests of police officers wrongfully accused of improper tactics." (*Id.* at p. 1161.) Finally, the recording requirement protected the integrity of the

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Glover.

judiciary, for judges would no longer have to rule on the admissibility of a challenged confession on the basis of the testimony of an interested witness. (*Id.* at p. 1164.)

In *State v. Scales* (Minn. 1995) 518 N.W.2d 587, 592, the Minnesota Supreme Court agreed with the reasoning of *Stephan* and held as a judicially declared rule of criminal procedure that "a custodial interrogation, including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."

In *Commonwealth v. DiGiambattista* (2004) 442 Mass. 423 [813 N.E.2d 516] the Supreme Judicial Court of Massachusetts described the many benefits which flow from making a complete recording of interrogations, most of which inure to the government rather than the accused. (*Id.* at pp. 442-443.) These benefits include a deterrent effect on police misconduct, reduction in the number and length of motions to suppress custodial interrogations, and an accurate record for the fact finder at trial. (*Id.* at p. 442.) Rather than adopt a rule of exclusion, the court determined to encourage verbatim recording of complete interrogations by holding the defendant is entitled to a cautionary instruction whenever the government fails to make an electronic recording of his interrogation. (*Id.* at pp. 447-448.)

In addition to court decisions, the national trend towards mandatory recording of interrogations can be seen in the actions of legislatures. Illinois, Texas, Maine, and the District of Columbia have all passed statutes requiring the recording of interrogations

under certain circumstances. (Iraola, *The Electronic Recording of Criminal Interrogations* (2006) 40 U. Rich. L.Rev. 463, 475.) The Uniform Rules of Criminal Procedure and the Model Code of Pre-Arraignment Procedures both contain a recording requirement. (*State v. Scales*, *supra*, 518 N.W.2d 587, 591.) Finally, the common law nations of Great Britain, Canada, and Australia require a verbatim record of custodial interrogations. (Donovan & Rhodes, *The Case for Recording Interrogations* (2002) 26 Champion 12, 13-14.)

Appellant recognizes this Court has in the past rejected a similar argument grounded upon the *Stephan* decision. (*People v. Holt* (1997) 15 Cal.4th 619, 664 [63 Cal.Rptr.2d 782, 937 P.2d 213].) Events in the decade since *Holt* justify a reexamination of the issue. On March 4, 2000, former Illinois Governor George H. Ryan appointed a commission to study how the state's capital punishment system could be reformed. (Report of the Governor's Commission on Capital Punishment, Chapter 1—Introduction and Background at p. 1, <http://www/idoc.state.il.us/Ccp/ccp/reports/commission_report/chapter_01.pdf> [as of December 6, 2006] [hereafter Commission Report].) Two years later, the commission issued a report containing 85 recommendations for corrections to how the death penalty was enforced in the state. (Sanger, *Comparison of the Illinois Commission Report on Capital Punishment With The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101, 104 [hereafter Comparison].) Recommendation number four stated, "Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not

include merely the statement made by the suspect after the interrogation, but the entire interrogation process." (Commission Report, *supra*, Chapter 2—Police And Pretrial Investigation at p. 24.)

As of the present writing, California law does not mandate the recording of post-arrest interrogations in homicide cases. (Comparison, *supra*, 44 Santa Clara L.Rev. 101, 124-125.) However, this may change in the near future. On July 25, 2006, the California Commission on the Fair Administration of Justice—an independent study group established by a resolution of the state Senate—published a report recommending the Legislature adopt a statute requiring the electronic recording of the entirety of any custodial interrogation of a suspect in a serious felony when the questioning occurs at a place of detention. (California Commission on the Fair Administration of Justice, Report and Recommendations Regarding False Confessions, <http://www.ccfaj.org/rr-false-official.html> [as of December 6, 2006].) The proposal was quickly accepted and passed by the Legislature in a slightly modified form that limited the recording requirement to homicides and violent felonies. (Sen. Bill No. 171 (2005-2006 Reg. Sess.).) The measure was, however, vetoed by the Governor on September 30, 2006. In his veto message, the Governor stated he supported the underlying concept, and encouraged the Legislature to remedy perceived flaws in the legislation. (Veto Message of Governor Arnold Schwarzenegger, <http://Info.sen.ca.gov/pub/05-06/bill/sen/sb_0151_200/sb_171_vt_20060930.html> [as of December 6, 2006].) The measure will be introduced anew in the 2006-2007 session of the Legislature. (California Commission on the Fair Administration of

Justice, Commission Chair John Van de Camp Responds to Governor Arnold Schwarzenegger's Vetoes of Measures Recommended by California Administration on the Fair Administration of Justice to Prevent Wrongful Convictions, <http://ccfaj.org/documents/press/Press05.pdf> [as of December 6, 2006].)

In summary, there is a nationwide movement towards a general requirement for verbatim recordings of interrogations in homicide cases. This trend, beginning with *Stephan v. State*, *supra*, 711 P.2d 1156, has reached California and been endorsed by the California Commission on the Fair Administration of Justice, the Legislature, and, in general terms, the governor.

An exact record of interrogations is desirable for myriad reasons. As seen above, an electronic record of interrogations protects the suspect's Fifth Amendment rights against self-incrimination and to the assistance of counsel, as well as the Sixth Amendment right to a fair trial. (*Stephan v. State*, *supra*, 711 P.2d 1156, 1159-1160.) A verbatim recording protects police officers against unfounded claims of misconduct. (*Commonwealth v. DiGiambattista*, *supra*, 813 N.E.2d 516, 530.) An electronic recording benefits the courts by reducing the number and length of motions to exclude confessions (*ibid.*), and permits judges to decide admissibility issues on the basis of an accurate record rather than a "swearing contest" between the police and the defendant (*The Electronic Recording of Criminal Interrogations*, *supra*, 40 U. Rich. L.Rev. 463, 477). Perhaps most importantly, an accurate record assists the fact finder at trial. (*Commonwealth v. DiGiambattista*, *supra*, 813 N.E.2d 516, 530.)

In his testimony at the 402 hearing, Kozicki acknowledged the failure to record the complete interrogation of appellant. He explained the Oakland Police Department had a written policy to not tape an initial interrogation. (9 RT 561.) Instead, policy called for making a recording at the conclusion of the interview, after all information had been gathered. (*Ibid.*) Kozicki estimated Thomas was questioned for two and a half hours before taping started. (9 RT 559.)

Kozicki testified the detectives questioned Thomas from 3:50 to 6:34 p.m. before starting the audio recording. (9 RT 531.) According to his notes, the questioning was interrupted for breaks between 4:35 and 4:50, and again from 6:15 from 6:30. (9 RT 560.) Appellant was questioned on tape from 6:34 to 7:10. (9 RT 533.) Following a break, Thomas was questioned for a so-called *Aranda* statement from 7:34 to 7:52 in the evening.[19] (*Ibid.*)

The detectives, then, could easily have made a complete verbatim record of the interrogation. Kozicki had a tape recorder with him, but chose not to use it from the outset of the interrogation. (9 RT 558-559.) He failed to use the tape recorder until the real interrogation was over and he was satisfied he could memorialize damaging admissions by Thomas. A verbatim record was not made simply because Kozicki chose not to make one.

Moreover, the interview room where Thomas was questioned at the Hayward station was equipped to videotape interrogations. (9 RT 561.) Indeed, Allen had used the equipment to record his

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[19] *People v. Aranda*, *supra*, 63 Cal.2d 518.

interrogation of appellant—including the advisement of rights—on December 24, 1992. (12 RT 881, 883.)

The Oakland police department policy against making a complete record of interrogation worked to the government's benefit. Without a literal record, Kozicki and Kiefer were able to deny making any threats or promises to appellant without fear of possible contradiction by a disinterested record. (9 RT 543; 11 RT 706) Without a complete recording, the district attorney could disparage as false anything appellant said which did not conform to the government's theory of the case. (59 RT 6096.) Finally, lacking a record of appellant's demeanor during interrogation, the prosecutor was able to sneer at his statement he did not want anything to happen to Young and scoff at appellant's expressions of remorse as phony and self-serving. (66 RT 6973.) The government, then, had everything to gain from stage-managing the interrogation and—without any threat of sanction from the court—nothing to lose by failure to make a verbatim record of the proceeding.

For generations the high court has held that a jury trial is a search for the truth. (*Banks v. Dretke* (2004) 540 U.S. 668, 696 [124 S.Ct. 1256, 157 L.Ed.2d 1166].) By means of trial motion 14, the defense provided the court with an opportunity to redress the due process violation that was a consequence of the government's manipulation of the interrogation. Denial of the motion permitted the district attorney to introduce selected statements by appellant ripped out of context and stripped of emotional content. Unable to see or, at a minimum, hear the complete interrogation, the jury was left to determine important facts in a vacuum. The lower court's decision

was an abuse of discretion.

(B) **The Deliberate Destruction of Exculpatory Evidence Violated the Fifth and Fourteen Amendments Right to Due Process.**

The deliberate, bad faith failure to record the interrogation resulted in the irretrievable loss of exculpatory evidence. The high court first considered the government's duty to preserve evidence on behalf of the accused in *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413]. The court held the duty to preserve evidence was "limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at pp. 488-489 (footnote omitted).)

The court further narrowed the duty to preserve evidence in *Arizona v. Youngblood*, *supra*, 488 U.S. 51 by holding the failure to maintain potentially useful evidence does not violate due process in the absence of a showing of bad faith on the part of law enforcement. "Under these federal decisions, a defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. [Citation.] The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. [Citation.]" (*People v.*

Frye (1998) 18 Cal.4th 894, 942-943 [77 Cal.Rptr.2d 25, 959 P.2d 183].)

Here, the deliberate failure to record the entire interrogation resulted in the irretrievable loss of favorable material evidence. As to the guilt phase, the failure to make an electronic record resulted in the loss of material evidence relevant to the special circumstances. For a non-killer to be eligible for capital punishment, the individual must have either a specific intent to kill or be a major participant who acts with reckless indifference to human life. (*Tison v. Arizona* (1987) 481 U.S. 137, 158 [107 S.Ct. 1676, 95 L.Ed.2d 127].) In this case, in the unrecorded majority of the interrogation, Thomas denied an intent to kill and his account of his actions suggested appellant was nothing more than a minor player in the crime. A verbatim record of this critical portion of the interrogation would have been exculpatory on the felony-murder special circumstances that made Thomas eligible for the death penalty.

As for penalty, remorse is universally acknowledged as mitigation relevant to the sentencing decision. (*People v. Ervin* (2000) 22 Cal.4th 48, 103 [91 Cal.Rptr.2d 623, 990 P.2d 506].) Preservation of a suspect's expressions of remorse in a potential death penalty case is therefore material exculpatory evidence as to penalty.

In this case, for the statements made before taping started, there is no physical record other than the notes taken by Kozicki and Kiefer. However, these notes are not verbatim, so appellant's precise statements have been lost. Furthermore, the notes fail to make any record of the questions that prompted appellant's

responses. (9 RT 570.) As counsel noted in the written motion, failure to make a verbatim record resulted in the permanent loss of context for appellant's admissions. (8 CT 2365.) Context is not restored by a partial recording of the session made only after completion of the "real" interrogation. (8 CT 2369.)

Before any recording was done, Thomas told the detectives he did not want the victim harmed. (8 CT 2398 [Kozicki notes], 2410 [Kiefer notes].) Appellant described how he had urged Glover to tie up Young and leave her on the hill. (8 CT 2394 [Kozicki notes], 2407 [Kiefer notes].) Thomas bemoaned the fact he had a hard life and experienced nothing but problems. (8 CT 2397 [Kozicki notes].) Appellant affirmed his belief in God. (8 CT 2410 [Kiefer notes].)

After the true interrogation was completed, Kozicki stage-managed appellant's first audiotaped statement.[20] Kozicki asked leading questions, and appellant's answers were frequently nothing more than a monosyllable: yes or no. On the tape, Thomas stated he told Glover to simply leave the victim. (Exhibit 50-A at pp. 12, 21.) Asked if he was sorry about what happened to Young and his role and the crimes, appellant answered yes. (Exhibit 50-A at p. 19.) The second tape, the so-called *Aranda* interview, was nothing more than a series of leading questions intended to elicit incriminating statements. (9 CT 2663-2674.)

These facts demonstrate a due process violation consistent with the requirements of *California v. Trombetta*, *supra*, 467 U.S.

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[20] As seen above, the first audiotape was identified as exhibit 50 and played for the jury. References to a transcript of the tape are

479, and *Arizona v. Youngblood*, *supra*, 488 U.S. 51. The loss of context, questions, and appellant's exact statements deprived Thomas of material exculpatory evidence as to both guilt and penalty. The exculpatory value of this information was known to law enforcement before it was allowed to disappear. Particularly after questioning Glover on December 24, 1992, it should have been apparent to the detectives that the homicide was murder and a potential death penalty case.[21] As the public defender pointed out in the trial motion, the investigation was a high profile matter, with the victim's pastor publicly demanding the death penalty for her killers. (8 CT 2378.) The intentional failure to make a verbatim record of the interrogation was unconscionable and prejudicial. The lower court committed error in denying the motion to exclude appellant's admissions due to the failure to make an electronic record of the entire interrogation.

(C) **Appellant's Waiver of Fifth Amendment Rights Was Not Knowing, Intelligent, and Voluntary.**

In *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974] the court held the prosecution cannot introduce the statements of a criminal defendant which are a result of custodial interrogation without demonstrating the employment of procedural safeguards adequate to secure the privilege against self-incrimination. (*Id.* at pp. 444-445, 468-470.) For any post-arrest statement to be admissible, the suspect must make a knowing and

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to exhibit 51-A.

[21] Kozicki and Kiefer testified they had interrogated Glover on

intelligent waiver of the rights to silence and counsel. (*Id.* at p. 475.)

The issue of whether an accused has made a knowing and intelligent waiver of Fifth Amendment rights is determined by an examination of the totality of the circumstances surrounding the interrogation. (*Fare v. Michael C.* (1979) 442 U.S. 707, 724-725 [99 S.Ct. 2560, 61 L.Ed.2d 197].) The circumstances include the suspect's age, experience, education, background, intelligence, and capacity to understand the protections of the Fifth Amendment and the consequences of giving up those rights. (*Id.* at p. 725; *North Carolina v. Butler* (1979) 441 U.S. 369, 375 [99 S.Ct. 1755, 60 L.Ed.2d 286].) The court has explained the issue has two components: first, whether the waiver is voluntary rather than a consequence of intimidation, coercion, or deception; second, whether the waiver was made with full awareness of the rights being abandoned and the consequences of waiving Fifth Amendment privileges. (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].)

In this case, the detectives used coercive and deceptive methods to persuade Thomas to talk to them. As explained above, the detectives contacted appellant despite the fact they knew he had invoked his Fifth Amendment rights. (9 RT 527, 554.) Kozicki was also aware Thomas had subsequently been questioned by a Hayward detective about an incident in that city. (9 RT 544.) Kozicki had no information that appellant wanted to talk about the Young homicide. (9 RT 551.) As argued above, *Edwards v.*

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that date. (9 RT 583; 11 RT 718.)

Arizona, *supra*, 451 U.S. 477, and *Arizona v. Roberson*, *supra*, 486 U.S. 675, prohibited Kozicki and Kiefer from having any contact with appellant.

The circumstances surrounding the interrogation also indicate the waiver of rights was not voluntary. At the time of the interrogation, Thomas had been held incommunicado for about two and a half days. Appellant turned himself in at the Oakland Police Department in the early hours of December 24, 1992. (12 RT 778-780.) Thomas was taken to Hayward for questioning and was being held in the police department lockup when Kozicki and Kiefer showed up at 3:30 in the afternoon on December 26, 1992. (9 RT 552; 12 RT 779-780.) Such prolonged isolation is a factor to be considered in the totality of the circumstances analysis. (*People v. Neal* (2003) 31 Cal.4th 63, 68 [1 Cal.Rptr.3d 650, 72 P.3d 280].) Appellant's youth—he was 19-years-old at the time of the interrogation—also weighs against finding the waiver of rights of knowing, intelligent, and voluntary. (*Id.* at p. 84.)

The detectives also made use of crude trickery. According to Kozicki, after introductions were made he informed Thomas that he wanted to ask some questions in connection with an investigation he was conducting. (9 RT 528-529.) Kozicki pulled out a standard form to advise appellant of his *Miranda* rights. At the preliminary hearing, Kozicki admitted that he pulled out a form completed and signed by Henry Glover. (4 CT 1105.) After advising Thomas of his rights, the detective substituted a clean form for the one signed by Glover. (*Ibid.*) At the motion in limine, Kozicki was uncertain whether he read the admonition to appellant from the Glover form or an unused

one. (9 RT 567.) Kozicki recalled appellant was sitting next to him when the detective pulled out the Glover admonition. (*Ibid.*) He easily could have read the paper, but Kozicki did not know whether or not Thomas had done so. (9 RT 568-569.)

In addition to "accidentally" showing Thomas the Glover admonition form, the detectives "inadvertently" displayed an ATM photo of appellant. According to the interview notes of Kozicki and Kiefer, at the beginning of the interrogation Thomas stated he had "turned himself in because of that picture you got right there." (8 CT 2386, 2402.) In his trial testimony, Kozicki explained appellant had inadvertently seen an ATM photo of himself in the detective's case folder. (57 RT 5916.)

In his testimony at the admissibility hearing, Kozicki testified that after he admonished Thomas concerning his Fifth Amendment rights, he informed appellant that he had previously questioned Glover and he had laid the blame on Thomas. (9 RT 562.) Appellant then submitted to questioning about the Young homicide.

The totality of the circumstances, then, showed a 19-year-old teenager was held in isolation for two and a half days, his general invocation of Fifth Amendment rights was not respected by homicide detectives, who compelled Thomas to talk by displaying an ATM photograph of appellant, advising him of Fifth Amendment rights with a form signed by Glover, and advising appellant that Glover had laid the blame on him. This combination of circumstances would coerce even a hardened criminal to talk. Appellant's waiver of Fifth Amendment rights was compelled rather than voluntary, and the lower court abused its discretion in denying the motion to exclude

his post-arrest admissions.

(D) **The Constitutional Violation Requires Reversal of the Judgment.**

Because the trial court's denial of appellant's motion to exclude his post-arrest admissions was constitutional error, reversal of the judgment is required unless the government can demonstrate the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) The attorney general cannot satisfy this burden.

Appellant's admissions were critical to the outcome of the guilt and penalty phases of the trial. As seen above, during guilt phase deliberations the jury requested a transcript of the audiotaped portion of the interrogation. (13 CT 3872.) The jury request was granted, and the panel heard exhibit 50 played anew in the midst of determining appellant's guilt. (60 RT 6276-6277.)

The statements contained in the taped portion of the interrogation were essential to the convictions and to the true findings on the felony-murder special circumstances. Failure to make a verbatim record of the interrogation robbed Thomas of mitigating evidence vital to the penalty phase defense case. In short, the judgment must be reversed, for the convictions and sentence are contrary to the right against self-incrimination (*Miranda v. Arizona*, *supra*, 384 U.S. 436), right to a fair trial (U.S. Const., 6th Amend.), due process (U.S. Const., 5th & 14th Amends.), and right to a reliable penalty determination (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, U.S. Const., 8th Amend.).

IV.

THE GOVERNMENT'S USE OF INCONSISTENT THEORIES ON THE IDENTITY OF THE ACTUAL KILLER AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT DENIED APPELLANT DUE PROCESS, A FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION.

Francia Young was killed by a single gunshot to the back of the head. (52 RT 3503, 5306-5307.) Unable or unwilling to identify the shooter, the district attorney filed an information, which included personal use of a firearm and armed with a firearm enhancements as to both Thomas and Glover. (6 CT 1810-1811.) In their separate trials—without any change in the evidence other than admissions by the defendants (58 RT 6055)—the government adopted inconsistent theories as to which defendant was the actual killer. During the Glover trial, the prosecutor maintained in opening statement and closing argument that Glover was the shooter. (13 CT 3727.) The jury was not persuaded and returned not true findings on the personal use and true findings on the armed enhancements. (11 CT 3278-3289.)

In appellant's trial, the district attorney reversed his position, and argued Thomas fired the solitary gunshot that killed Young. Again, the jury was not convinced, and returned not true findings on personal use of a firearm and true findings on the armed with a firearm enhancements. (60 RT 6306-6322.) Despite the not true findings, Thomas was prejudiced by the inconsistent theories, for the allegations and the government's guilt phase argument contributed to the jury's decision to recommend the death penalty.

(A) **The Fourteenth Amendment Due Process Motion to Dismiss the Personal Use of a Firearm Enhancements.**

On March 19, 1997, counsel for Thomas filed a motion to dismiss the personal use of a firearm enhancements. Counsel argued federal due process prohibited the government from pursuing incompatible theories against separately tried defendants for crimes arising from a single incident. In this case, Young was killed by one bullet, which could only have been fired by one or the other defendant. Hence, by arguing Glover was the shooter in one trial, the government could not make the opposite argument that Thomas was the actual killer. (13 CT 3727-3731.) In his written opposition to the motion, the prosecutor acknowledged he had named Glover as the shooter in the codefendant's trial, but maintained there was nothing to prohibit him from making an inconsistent argument against Thomas.[22] (13 CT 3752-3757.)

On May 30, 1997, counsel for the parties presented argument on the motion. Counsel for appellant highlighted the government's shifting positions on who was the actual killer. In the Glover guilt phase, the district attorney had maintained Glover was the shooter. (25 RT 1714, 1717.) After the first penalty phase ended in a mistrial, the government told the penalty retrial jury in opening statement that Thomas was the shooter. (25 RT 1719.) In his penalty retrial

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[22] Appellant filed a reply brief which highlighted the government's concession that only one of the defendants could have fired the fatal shot, and reiterated inconsistent arguments on personal use of a firearm for a single gunshot violated due process. (13 CT 3766-3768.)

closing argument, however, the district attorney argued the two defendants were acting in concert and it did not matter who pulled the trigger. (25 RT 1720.) Given these shifting theories, defense counsel maintained the government should not be allowed to argue that Thomas was the shooter, and the personal use enhancements should be dismissed. (25 RT 1713, 1723, 1734.)

Defense counsel maintained the not true findings on the firearm use enhancements were not a vindication of Glover that made Thomas the shooter. Instead, the finding meant no more than the government had not proven the truth of the enhancement beyond a reasonable doubt. (25 RT 1715.) Absent new evidence, the district attorney should be prohibited from switching to a theory Thomas was the shooter. (25 RT 1716.)

The court rejected the defense arguments, and found there was no rule of law that prohibited the government from changing theory on the identity of the shooter. The court denied the motion, and stated a jury should decide the issue. (25 RT 1739-1740.)

(B) **The Motion to Prohibit the Prosecutor From Arguing that Appellant Was the Shooter in Guilt Phase Closing Argument.**

On September 17, 1997, prior to guilt phase closing argument, defense counsel made an oral motion in limine to prevent the district attorney from arguing appellant was the shooter. In the event the court denied the motion, defense counsel asked to be able to provide the jury with the government's argument in the guilt phase of Glover's trial in which he named the codefendant as the shooter. Counsel argued the government's use of inconsistent theories raised

questions of fundamental fairness and federal due process. (58 RT 6051-6053.)

The prosecutor defended the change in theory on the ground the evidence at the two trials was different. (58 RT 6056.) The trial court rejected this assertion. Judge Delucci recalled the evidence was the same other than the admissions made by the defendants. (58 RT 6055.) The court believed the defense had a strong argument, for the prosecutor had picked the person he believed to be the shooter in the first trial. (58 RT 6059.) Nevertheless, the court denied both defense requests. (58 RT 6060-6061.) The court cautioned the district attorney to be careful in how he argued the case to the jury. According to the court, "it could really amount to error that could rise to a violation of due process if it gets up to the federal court on a writ." (58 RT 6060.)

The district attorney told the jury that the only issue—or the most important issue—was who fired the fatal gunshot. (59 RT 6086, 6095.) He argued the shooter was Thomas. After all, appellant admitted to having possession of the weapon at the scene of the kidnapping. (59 RT 6095-6096.) After quoting from appellant's statement to law enforcement that he retrieved the firearm from its hiding place near the MacArthur BART station, the prosecutor argued:

> "So what is the only direct evidence that anybody ever handled the AK-47 at the Francia Young murder scene? [¶] The only direct evidence is out of Keith Thomas's mouth. [¶] Now, other than the self-serving lies that the defendant tells the police trying to lay the blame on his

crime partner, Henry Glover, where is there any other direct evidence that anyone other than Keith Thomas himself ever handled the murder weapon? [¶] The silence is deafening. There is none. The only evidence in this case that anybody ever handled the murder weapon that killed Francia Young was from Keith Thomas's mouth, and he indicates that he handled the gun." (59 RT 6096.)

The prosecutor returned to the question of the identify of the actual killer near the conclusion of his final argument:

"So, bottom line, by his own admission of bringing this AK-47 to the abduction scene, by his consciousness of guilt as to who shot the weapon, by his consciousness of guilt as to who took that last 275-foot death march with Francia, isn't it reasonable to infer that this slick, savvy, street-wise ex-felon, one who can deceive an 18-year-veteran detective into letting him go at a crime scene after he committed a robbery with another, one who thinks and tries to clear up his involvement in this murder by just getting it our of the way, isn't it reasonable to infer that he was the actual killer? [¶] He is the only one with any direct evidence of ever handling the murder weapon in the Francia Young case. [¶] Other than his saying Henry Glover did it, Henry Glover did it, where is there any evidence, any proof of anyone else ever having that gun other than him? [¶] Flat out there is none." (59 RT 6106.)

In his rebuttal argument, the prosecutor reiterated the only issue in the case was the identity of the shooter. (59 RT 6205.) He speculated Thomas and Glover each had an AK-47 assault rifle. (59 RT 6193.) The district attorney again cited appellant's statements to law enforcement as a basis for inferring Thomas was the shooter. (59 RT 6189.)

As in the Glover trial, the jury found the personal use enhancements to be not true. (60 RT 6306-6322.) In his penalty phase argument urging the jury to return a death verdict, the district attorney acknowledged the guilt phase verdicts indicated the jury regarded Thomas as an accomplice rather than the shooter. Nonetheless, the prosecutor urged the jury to vote for death. (66 RT 6994.) In addition to the name-calling and vituperation discussed below, the prosecutor explained death was fitting because Thomas was a major participant who acted with reckless indifference during the course of horrific crimes against Young, and had committed a number of other crimes, including the robbery of Silvey, who was no doubt intended to be "Francia number two." (66 RT 6970, 6981, 6994.)

(C) **A Prosecutor Must Seek the Truth Rather Than to Maximize Convictions and Punishment by Means of Inconsistent Theories.**

It is a familiar maxim that the duty of a prosecutor is to see justice is done, not simply to secure convictions. (*Berger v. United States* (1934) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314].) A 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." (*Ibid.*) Prosecutors are held to a higher standard of behavior than other members of the bar. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [72 Cal.Rptr.2d 656, 952 P.2d 673].) Thus, while counsel representing a private party can do everything ethically permissible to advance the client's interest, a prosecutor in a criminal case must serve truth and justice. (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) As the high court has stated, "society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." (*Brady v. Maryland*, *supra*, 373 U.S. 83, 87.)

Because a prosecutor must seek truth, it is a violation of due process for a prosecutor to obtain convictions through the knowing use of perjured testimony. (*Mooney v. Holohan* (1935) 294 U.S. 103, 112-113 [55 S.Ct. 340, 79 L.Ed. 791].) Similarly, due process is violated when a prosecutor allows false testimony to stand without correction. (*Giglio v. United States* (1972) 405 U.S. 150, 155 [92 S.Ct. 763, 31 L.Ed.2d 104]; see also *Napue v. Illinois* (1959) 360 U.S. 264, 269 [79 S.Ct. 1173, 3 L.Ed.2d 1217].)

(D) **The Government's Use of Inconsistent Theories Was Not Justified By Any Ambiguity as to the Identity of the Shooter.**

The government's use of inconsistent theories in the separate trials of defendants charged with acts arising from a single incident violates the defendant's right to due process (*Smith v. Groose* (8th

Cir. 2000) 205 F.3d 1045, 1049-1050; *Bankhead v. State* (Mo, 2006) 182 S.W.3d 253, 258), Sixth Amendment right to a fair trial, and, in a capital case, the Eighth Amendment right to a reliable penalty determination (*In re Sakarias* (2005) 35 Cal.4th 140, 160 [25 Cal.Rptr.3d 265, 106 P.3d 931]; Shatz & Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants* (2002) 36 U.S.F. L.Rev. 853, 888-889 [*Use of Inconsistent Theories*]).

Unfortunately, the federal Supreme Court has not had an opportunity to rule on the merits of this issue. (*Use of Inconsistent Theories*, *supra*, 36 U.S.F. L.Rev. 853, 877.) However, some members of the court have taken note of the problem and suggested actions like those undertaken by the prosecutor in this case violate the federal Constitution. In *Jacobs v. Scott* (1995) 513 U.S. 1067 [115 S.Ct. 711, 130 L.Ed.2d 618], Jacobs kidnapped Etta Urdiales and took her to an abandoned house where his sister, Bobbie Hogan, was waiting. Hogan had a romantic relationship with Etta's estranged husband. After he was arrested, Jacobs confessed to killing Urdiales and led police to the body. At trial, Jacobs repudiated his confession and explained his admissions were intended to lead to a death sentence, which he preferred to life in prison. Jacobs testified Urdiales went inside the house with Hogan, who shot the victim. Jacobs had believed the purpose of the kidnapping had been to frighten Urdiales into giving up custody of her children, who were at the center of a bitter divorce proceeding between Urdiales and her spouse. The government argued Jacobs

was the killer and the only person responsible for the victim's death. Jacobs was convicted and sentenced to death.

Some months later, Jacobs was called to testify as a witness at his sister's murder trial. The prosecutor argued he had changed his mind and accepted Jacob's second version of events and trial testimony as true. Even though the state had rejected the theory used to convict Jacobs, it nevertheless insisted on carrying out the death sentence obtained on the basis of the discarded theory.

The court denied an application for stay of execution and petition for writ of certiorari. Justice Stevens wrote in dissent that for the state to take inconsistent positions in two cases arising from the same facts raised a serious question of prosecutorial misconduct. (*Jacobs v. Scott*, *supra*, 513 U.S. 1067, 1069 (dis. opn. of Stevens, J.).) He went on to state, "I have long believed that serious questions are raised 'when the sovereign itself takes inconsistent positions against two of its citizens.' [Citations.] The 'heightened need for reliability' in capital cases [citation] only underscores the gravity of those questions in the circumstances of this case." (*Id.* at p. 1070.)

In *Bradshaw v. Stumpf* (2005) 545 U.S. 175 [125 S.Ct. 2398, 162 L.Ed.2d 143], the defendant pleaded guilty to murder and admitted a capital special which made him eligible for the death penalty. In a contested penalty hearing before a three-judge panel, the defendant denied being the shooter and maintained his participation was at the urging of his crime partner, Wesley, who fired the fatal gunshots. The prosecutor maintained Stumpf was the shooter, and the court sentenced Stumpf to death. When Wesley

stood trial, the government had new evidence—the testimony of a snitch—that he was the shooter rather than Stumpf. Wesley testified Stumpf was the shooter. A jury sentenced Wesley to life with the possibility of parole in twenty years.

On federal habeas corpus, Stumpf argued the government's inconsistent theories rendered his guilty plea involuntary and the inconsistent theories violated federal due process. The high court rejected the challenge to the validity of the guilty plea. The court declined to reach merits of the due process issue, which had not been passed on by the court of appeal. The court recognized it was at least arguable that the government's use of inconsistent theories had a direct impact on the death sentence and could amount to a due process violation. (*Bradshaw v. Stumpf*, *supra*, 545 U.S. 175, 187.)

In a concurring opinion, Justice Souter pointed out Stumpf's argument had been anticipated by Justice Stevens in his dissent from the denial of certiorari in *Jacobs v. Scott*, *supra*, 513 U.S. 1067. (*Bradshaw v. Stumpf*, *supra*, 545 U.S. 175, 189 (conc. opn. of Souter, J.).) In his opinion, the Stevens dissent echoed the court's opinion in *Berger v. United States*, *supra*, 295 U.S. 78. (*Bradshaw v. Stumpf*, *supra*, 545 U.S. 175, 189 (conc. opn. of Souter, J.).) As seen above, *Berger* concerned the due process obligation of prosecuting attorneys to serve the truth and attempt to secure justice rather than merely obtain convictions. (*Berger v. United States*, *supra*, 295 U.S. 78, 88.)

It can be argued that the leading case on the government's use of inconsistent theories is this Court's decision in *In re Sakarias*,

supra, 35 Cal.4th 140. In that case, Peter Sakarias and Tauno Waidla were charged with a murder committed by use of a hatchet and a knife. In Waidla's trial, the prosecutor attributed the fatal hatchet blows to Waidla. When Sakarias stood trial, the prosecutor reversed course and argued Sakarias was the actual killer rather than Waidla. This Court granted a petition for writ of habeas corpus filed on behalf of Sakarias and set aside his death sentence.

The court explained: "By intentionally and in bad faith seeking a conviction or death sentence for two defendants on the basis of culpable acts for which only one could be responsible, the People violate 'the due process requirement that the government prosecute fairly in a search for truth....' [Citation.] In such circumstances, the People's conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the state to punish a person factually innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them. In that situation, we *know* that *someone* is factually innocent of the culpable acts attributed to both." (In re Sakaris, *supra*, 35 Cal.4th 140, 160, emphasis in original.)

In its analysis of the issues in *Sakaris*, this Court cited *Thompson v. Calderon* (9th Cir. 1997) 130 F.3d 1045, revd. on other grounds sub nom. *Calderon v. Thompson* (1998) 523 U.S. 538 [118

S.Ct. 1489, 140 L.Ed.2d 728].[23] In *Thompson*, the government advanced inconsistent theories in the prosecution of Thompson and Leitch in separate trials for rape and murder. In Thompson's trial, the district attorney argued the defendant raped the victim, Leitch's former girlfriend, and killed her to avoid leaving any witnesses to his crime. Two jailhouse informants supported this theory with alleged confessions by Thompson. In Leitch's trial, the government maintained Leitch wanted to kill the victim because she was an impediment to a reunion with his ex-wife and enlisted Thompson to assist him. Four different informants were used to buttress this theory, while the informants from Thompson's trial were not called.

The Ninth Circuit was not amused by this chicanery. According to the court, "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." (*Thompson v. Calderon*, *supra*, 120 F.3d 1045, 1058.) For the district attorney to resort to such tactics violated due process. (*Id.* at p. 1059.)

When the evidence as to the identity of the shooter can be viewed as ambiguous, a prosecutor has three options: first, employ

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[23] Judge Reinhart, a member of the plurality whose decision was overturned by the high court, described the "other grounds" as follows: "The ostensible reason this time was that the judges on our court had missed a deadline, the state's 'final' judgment had become incrementally more final, and, as a result, the en banc hearing we held had been conducted too late." (Reinhart, *The Anatomy of an Execution: Failure vs. "Process"* (1999) 74 N.Y.U. L.Rev. 313, 321-322.)

his or her best judgment to select the defendant who was most likely to be the shooter and proceed accordingly; second, acknowledge the uncertainty and delete from the information any enhancement applicable only to the actual killer; third, exploit the uncertainty and attempt to obtain the maximum punishment in separate trials of the codefendants. (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 Calif. L.Rev. 1423, 1424-1425 [hereafter *Prosecutorial Inconsistency*].) Here, in an apparent effort to obtain a death sentence against both defendants, the prosecutor elected to take the third option.

In the present matter, only one person could have fired the gunshot that killed Young. In the Glover trial, the government elected to attribute the fatal act to the codefendant. When the jury failed to endorse this theory, the government reversed course and named Thomas as the actual killer. However, a jury does not determine the truth of an allegation, only whether then government has satisfied the burden of proof. (*Use of Inconsistent Theories*, *supra*, 36 U.S.F. L.Rev. 853, 865.) That the Glover jury returned not true findings on the personal use enhancements did not mean Glover was not the shooter, only that the district attorney failed to prove that fact beyond a reasonable doubt. Moreover, the government will inevitably know more of the relevant facts and circumstances than a jury can learn at trial. (*Ibid.*) Hence, only the discovery of new evidence can justify a change of theories, not the jury verdicts in the first trial. (*Id.* at p. 866.)

(E) **Appellant Was Prejudiced as a Result of the False Claim He Was the Shooter, and the Penalty Verdict Must Be Reversed.**

In this context, prejudice analysis is based upon the answers to two questions: first, whether the government's attribution of the act to the defendant is probably true or probably false; second, whether a false attribution could reasonably have affected the penalty verdict. (*In re Sakarias*, *supra*, 35 Cal.4th 140, 164.) "Only as to the defendant convicted or sentenced by use of the probably false theory can it be said the prosecution has presented a materially false picture of the defendant's culpability." (*Ibid.*) The second step of the prejudice test is identical to the *Chapman* "beyond a reasonable doubt" standard. (*Id.* at p. 165.)

(1) Step 1: Glover Was the Shooter, and the Government Claim Thomas Was the Actual Killer Was False.

From the available evidence, it is more likely than not that Glover was the shooter. There were no disinterested eyewitnesses to the crime. Thomas denied responsibility for the murder, and alleged Glover was the killer. (57 RT 5938.) Of course, standing alone, a self-serving attempt to shift responsibility to another suspect is not reliable evidence. (See e.g., *Lilly v. Virginia* (1999) 527 U.S. 116, 137-139 [119 S.Ct. 1887, 144 L.Ed.2d 117] [statements purportedly against penal interest which shift or share blame are not reliable and therefore are not admissible pursuant to residual trustworthiness exception to hearsay rule].)

The only remaining statement by appellant meriting mention was highlighted by the prosecutor in his guilt phase closing

argument. As seen above, the prosecutor reminded the jury that Thomas admitted he had handled the assault rifle at the time of the Young kidnapping. (59 RT 6106.) In the district attorney's view, this admission supported an inference Thomas was the actual killer. The argument is not persuasive.

Appellant told police that Glover wanted to rob a Safeway store but needed a car. Glover and Thomas spotted Young's Mustang at the MacArthur BART station and decided to wait for the owner in order to steal the vehicle. (57 RT 5920-5921.) Glover told appellant to get the firearm from its hiding place. When Thomas returned with the weapon, Glover was closing the Mustang's trunk with someone inside. (57 RT 5921.)

This snippet of appellant's interrogation has no direct bearing on the identity of the shooter. The statement is also at odds with the testimony of William Dials. The eyewitness described Thomas as resembling the perpetrator who stood with his hands on the Mustang's roof while a second man talked to Young inside the car and then walked her to the trunk. (52 RT 5369-5370.) In other words, the evidence suggests Thomas was present at the kidnapping scene and did not handle the assault rifle.

The fact appellant surrendered himself in at the Oakland police station suggests he was not the actual killer. Because appellant knew Glover was the killer and he was not familiar with the felony-murder rule, Thomas no doubt believed he had little to fear in turning himself in to law enforcement.

If appellant's statements are set aside, the remaining evidence strongly suggests Glover was the shooter. In the guilt phase, the

government presented evidence concerning two incidents involving Glover and Thomas: the Young murder, and the Flennaugh robbery and shootout with the police. In the penalty phase, the district attorney introduced the Silvey-White incident. All three incidents suggest Glover was more likely than not the shooter who killed Young.

On the street in Oakland, inside Flennaugh's apartment in Hayward, and in Silvey's driveway in Berkeley, Glover was the perpetrator who had the most contact with the victim, and exhibited the most violence. In Oakland, Glover talked to Young inside the Mustang, walked to the back of the car with her, and closed the trunk with the victim inside. (52 RT 5369-5370, 5372.) While Glover intimidated Young and forced her into the trunk, Thomas stood by and acted as a lookout. (52 RT 5369-5371.)

In Hayward, Glover was the first offender to enter the Flennaugh apartment uninvited (55 RT 5676), which suggests it was Glover who kicked in the apartment door (55 RT 5644). Glover was armed with an assault rifle and pointed the weapon at Flennaugh. (55 RT 5647-5648, 5651-5652.) Glover repeatedly demanded money. (55 RT 5649, 5653, 5679.) Glover punched Flennaugh in the face even though she was eight or nine months pregnant. (55 RT 5643, 5680.) The blow knocked Flennaugh to the floor and broke her nose. (55 RT 5655, 5687.) While she was on the floor bleeding, Glover caressed her leg, which made Flennaugh suspect she might be raped. (55 RT 5657-5659.) In contrast to Glover, appellant never had a weapon. (55 RT 5678.) Flennaugh testified that after Glover broke her nose, Thomas did not look like he wanted

to be there. (55 RT 5687.) When she offered gold jewelry to him, appellant told her to keep it. (55 RT 5687-5688.)

In Berkeley, Glover was the offender who told Silvey to be quiet, tried to force her into the trunk of her car, and engaged the victim in a fight. (61 RT 6443, 6449-6450, 6486.) As with Flennaugh, Glover punched Silvey in the face and broke her nose. (61 RT 6444, 6448, 6453.) Thomas, on the other hand, went to Silvey's car and sat down in the driver's seat. (61 RT 6443, 6470.) Thomas never spoke to Silvey or had any physical contact with her. (61 RT 6517.)

Critically, it was Glover who fired the AK-47 at police officers in his flight from the Flennaugh apartment. (55 RT 5647-5648.) In his separate trial, Glover was convicted on two counts of assault on a peace officer with an assault weapon (§ 245, subd. (d)(3)), and the jury returned true findings on enhancements for personal use of an assault weapon (§ 12022.5). (11 CT 3278-3279.) Rather than join Glover in flight, Thomas remained inside the apartment and posed as a victim instead of a perpetrator.

In summary, the evidence showed Glover was willing to harm vulnerable women. He punched Flennaugh and broke her nose even though she was in the last stages of pregnancy. Glover punched Silvey, despite the fact she was a mature woman and perhaps a senior citizen.[24] It is therefore reasonable to believe he

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[24] Although Silvey's age is not stated in the record, she testified to thirty years experience as a schoolteacher. (61 RT 6458.) Photographs of Silvey suggested she was at least a woman of mature years. (See exhibits 54 and 55.)

would kill Young. In his anxiety to flee the Hayward crime scene, Glover was willing to use a high-powered weapon to clear an escape route and discourage pursuit. The fusillade of gunshots could have killed peace officers or innocent apartment dwellers. Moreover, Glover's use of an AK-47 in his escape suggests consciousness of guilt. Since the incident took place nearly two weeks after the murder of Young, it is reasonable to infer Glover was willing to engage in a firefight to get away because he was the actual killer. Given his reckless disregard for innocent life and willingness to harm the helpless, it is more likely than not that Glover was the shooter. Thomas was falsely accused of being the shooter, and is entitled to penalty relief.

(2) Step 2: The Penalty Verdict Was Affected by the Government's False Claim Thomas Was the Shooter.

At the second step of the prejudice test, the appellant is entitled to relief "if he can show a reasonable likelihood the prosecutor's use of a tainted factual theory affected the penalty verdict." (*In re Sakarias*, *supra* 35 Cal.4th 140, 165.) In *Sakarias*, the court granted the petitioner penalty relief despite the presence of other significant aggravation. This included evidence the petitioner played a direct role in the fatal attack by stabbing the victim four times in the chest. Two of the wounds inflicted by Sakarias were potentially fatal. Furthermore, the petitioner had used the hatchet to strike the victim twice in the head some time after her death. (*Id.* at pp. 165-166.) The court pointed out the offender was young, lacked a prior record of violence, had experienced persecution while a member of the Soviet armed forces, and had been diagnosed with a

mental disorder. (*Id.* at p. 166.)

Here, Thomas was not a participant in the fatal attack. Unlike the horrific assault in *Sakarias*, the victim in this case was killed by a single gunshot. Thomas did admit to sexual intercourse with Young. (57 RT 5927.) However reprehensible, this crime cannot compare to the petitioner's important role in the murderous assault in *Sakarias*. Thomas had a negligible history of violence at the time of the offense. In the penalty phase, in addition to the homicide and Flennaugh robbery, the government could add only the Silvey robbery, in which Thomas did not touch the victim, two instances of domestic violence, and a battery on McNulty. Like the successful petitioner in *Sakarias*, appellant was a young man—a mere 19-years-old—at the time of the homicide. As seen in the defense penalty phase case-in-mitigation, appellant's history was characterized by abuse and deprivation. The record, then, contains significant mitigation and justification for a sentence of less than death.

The government's use of a false theory during the guilt phase tainted the trial and contributed to the death verdict. Although the jury returned not true findings on the personal use enhancements, the result means nothing more than the district attorney failed to prove the allegations beyond a reasonable doubt—not that the jury disbelieved the prosecution theory. As in *Sakarias*, the false theory that Thomas was the actual killer cannot be seen as harmless. The court should reverse the death sentence.

V.

THE ADMISSION OF INFLAMMATORY PHOTOGRAPHS VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

(A) Procedural History

On August 24, 1995, the public defender filed trial motion number 15 on appellant's behalf to limit photographic evidence. The motion was grounded upon the right to a fair trial (U.S. Const, 6th Amend.), to due process (U.S. Const., 5th & 14th Amends.), and heightened evidentiary reliability (U.S. Const, 8th Amend.). It was further argued that photographs of Young while alive were not relevant to any contested issue. As for crime scene photos of the victim, it was argued the pictures were more prejudicial than probative (Evid. Code, § 352), not relevant to any disputed, material issue, and cumulative of other evidence. (8 CT 2412-2418.) On October 5, 1995, the court deferred consideration of the motion until opening statements. (1 RT 174.)

Consistent with this ruling, on September 4, 1997, after the completion of jury selection and prior to guilt phase opening statements, the court and counsel revisited the motion in connection with the items the prosecutor planned to employ during opening statement. (52 RT 5244.) Defense counsel focused his argument on three photographs that had been marked for the Glover trials and were renumbered for appellant's case.

Exhibit 13-C, formerly exhibit 7-C, showed the victim at the crime scene with hands tied behind the back, ankles together and secured to a branch. The torso is clothed in a jacket and the area

from the waist down is exposed. An "X" is drawn on the photograph in red ink to depict where a shell casing was found a few feet from the head. (52 RT 5250.) Defense counsel objected to the image as more prejudicial than probative and cumulative. (*Ibid.*)

Exhibit 13-E, previously marked as exhibit 7-G, depicted the right side of the decedent's head. The photograph shows a bullet exit wound just in front of the ear. Blood, brain tissue, dirt, and dried grass are shown, along with miscellaneous scratches and impressions on the side of the face. Defense counsel objected the photo was more prejudicial than probative and cumulative of other photographs of the same area after the body had been cleaned. (52 RT 5250-5251.)

Exhibit 13-F, formerly marked as exhibit 7-H, showed a bullet lying in the grass amid blood and brain tissue. Counsel objected to the photograph as unduly inflammatory. (52 RT 5252.)

The court concluded the photographs were all probative; the probative value outweighed any prejudice, and overruled the objections. (52 RT 5252-5253.)

As a result of the court's decision, the district attorney used exhibit 13-C, the photograph of Young facedown on the hillside, during his opening statement. (52 RT 5279.) The following day, EBRPDP evidence technician Dale Davidson testified to his work photographing and collecting evidence at the Point Richmond crime scene. Along with other photographs, the prosecutor showed Davidson exhibits 13-C, 13-E, and 13-F, and had him describe the contents of the photographs. (53 RT 5428, 5439.) The exhibits were subsequently admitted into evidence. (53 RT 5440.)

(B) **Appellant's Constitutional Claims of Error Have Not Been Waived.**

Although defense counsel limited the objections stated at the motion in limine to the Evidence Code, appellant's constitutional claims of error are nonetheless germane. During proceedings on the motions filed by the public defender, the court granted without objection by the government trial motion number seven, to federalize all objections stated during trial. (1 RT 161-162.) At the urging of Glover's counsel, the court expanded the ruling so that all objections by counsel encompassed the entire federal Constitution. (1 RT 162-163.) The prosecutor voiced no objection to this decision. The court also granted a motion to make all in limine rulings binding. (1 RT 157-159.) Thus, at the time the public defender was relieved, the court had ruled defense objections would include federal constitutional grounds without the need to articulate articles and amendments to the Constitution in order to preserve these grounds for post-conviction review.

After successor counsel was appointed, Mr. Wagner adopted as his own all motions made by the public defender. (9 RT 513-514.) The court proceeded on the assumption counsel endorsed his predecessor's motions (15 RT 1170), and both the court and defense counsel affirmed this understanding prior to jury selection (27 RT 1802). The district attorney voiced no objection to this procedure. As a result, trial counsel's Evidence Code objections must be viewed as also incorporating all federal constitutional grounds.

(C) **Admission of the Inflammatory Photographs Violated Appellant's Fifth and Fourteenth Amendment Right to Due Process.**

The issue of gruesome photographs is a common point of contention in homicide cases. The simple fact is that "most, if not all, photographs of a victim are 'gruesome' depicting as they do in criminal cases, violent death." (*People v. Willis* (1980) 104 Cal.App.3d 433, 451 [163 Cal.Rptr. 718].) Photos of a bloody corpse "have a sharp emotional effect, exciting a mixture of horror, pity and revulsion." (*People v. Smith* (1973) 33 Cal.App.3d 51, 69 [108 Cal.Rptr. 698], disapproved on other grounds, *People v. Wetmore* (1978) 22 Cal.3d 318, 324, fn. 5 [149 Cal.Rptr. 265, 583 P.2d 1308].)

"Not infrequently, evidentiary resort to such vivid horrors is rationalized by the statement that they tend to prove malice [citations], or that they are relevant to aggravation of the crime and the penalty [citation]. Such pictures are always offered as parts of an evidentiary mosaic; thus it is more appropriate to appraise their probative value as cumulative rather than isolated evidence." (*People v. Smith*, *supra*, 33 Cal.App.3d 51, 69.) The admissibility of gruesome photographs, then, should in the usual case be analyzed pursuant to Evidence Code section 352. (*People v. Willis*, *supra*, 104 Cal.App.4th 433, 451.)

This Court has summarized the rules governing the admissibility of photographs as follows: "all relevant evidence is admissible, unless excluded under the federal or state Constitution or by statute, and trial courts have broad discretion in determining

the relevance of evidence but lack discretion to admit irrelevant evidence. [Citation.] Photographs of a murder victim 'are always relevant to prove how the charged crime occurred, and the prosecution is "not obliged to prove these details solely from the testimony of live witnesses,"' even in the absence of a defense challenge to particular aspects of the prosecution's case." (*People v. Vieira* (2005) 35 Cal.4th 264, 293 [25 Cal.Rptr.3d 337, 106 P.3d 990].)

Despite the freedom enjoyed by trial courts, abuse of the authority to permit introduction of photographs can result in prejudicial error requiring reversal of convictions. (See e.g., *People v. Gibson* (1976) 56 Cal.App.3d 119, 134-136 [128 Cal.Rptr. 302] [abuse of discretion for trial court to permit introduction of cumulative and gruesome photographs of murder victim]; *People v. Love* (1960) 53 Cal.2d 843, 857-858 [3 Cal.Rptr. 665, 350 P.2d 705] [prejudicial error in penalty phase to admit photograph of victim's face to show she died in excruciating pain and playing of audiotape of her dying groans in emergency room which served only to inflame passions of jury]; *People v. Burns* (1952) 109 Cal.App.2d 524, 541-542 [241 P.2d 308] [admission of post-autopsy photographs to inflame passions of jury against defendant prejudicial error].)

When the district attorney relies upon a felony-murder theory, photographs that, for example, depict the position of the decedent's body or the manner in which wounds were inflicted are not relevant. (*People v. Turner* (1984) 37 Cal.3d 302, 321 [208 Cal.Rptr. 196, 690 P.2d 669] disapproved on other grounds, *People v. Anderson* (1987) 43 Cal.3d 1104, 1115 [240 Cal.Rptr. 585, 742 P.2d 1306].)

In *People v. Marsh* (1985) 175 Cal.App.3d 987, 998 [221 Cal.Rptr. 311], the court found the admission of seven gory autopsy photographs did not aid the jury in any way and was instead a "'blatant appeal to the jury's emotions.' [Citation.]" Likewise, in *People v. Anderson* (1987) 43 Cal.3d 1104, 1137 [240 Cal.Rptr. 585, 742 P.2d 1306], this Court found that photographs of the victim "seem relevant only on what in this case is a non-issue [i.e. whether a human being was killed] and therefore should not have been received into evidence."

The admission into evidence of gruesome photographs violates the federal constitution as well as provisions of the Evidence Code. For example, in *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, the prosecutor introduced penalty phase photographs of the decedent that showed numerous post-mortem stab wounds, gash wounds, exposed intestines, and a swollen face. The Tenth Circuit found the photographs were either not relevant or minimally relevant, while the prejudicial effect of the pictures was so substantial as to deprive the defendants of a fundamentally fair penalty phase. (*Id.* at p. 1229.)

Here, the contested photographs served only to inflame the jury's passions against Thomas. The images were not necessary to an understanding of the crime scene, which was fully described by EBRPDP witnesses Dale Davidson and Sarah Christopherson. The photographs were not required for explication of Young's injuries and cause of death, which in any event were not in dispute. Rather than illuminate an element of the government's case, the three photographs were presented to enrage the jury against Thomas and

Glover. It was an abuse of discretion for the court to allow the challenged photographs to be presented in the government's case against Thomas.

(D) **The Constitutional Error Requires Reversal of the Judgment**

Because the error is of federal constitutional dimension, reversal of the judgment is required unless the government can demonstrate admission of the challenged exhibits was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) In the alternative, if the error is construed as a matter of state law, reversal is required if there is a reasonable probability that Thomas would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 834-836 [299 P.2d 243].) Admission of the incendiary images demands reversal whatever standard for assessing prejudice is employed.

By almost any standard, the present matter is a close case. In a close case, "any substantial error tending to discredit the defense or to corroborate the prosecution must be considered as prejudicial." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [15 Cal.Rptr.2d 112].)

From the trial record, it is apparent the jury regarded both guilt and penalty phase decisions as involving close and difficult issues. In the guilt phase, the case was submitted for decision on September 23, 1997. (13 CT 3869.) The jury deliberated all day on September 24 and 25, 1997. (13 CT 3875-3876, 3881.) Verdicts were returned late in the day on September 29, 1997, the fourth day of deliberations. (13 CT 3889-3890.) Over the four days, the jury

spent more than 16 hours deliberating, listening to testimony read anew, and hearing the audiotape of appellant's admissions to Kozicki. By any standard, this is a lengthy period of deliberations and an indicator of a close case. (*People* v. *Woodard* (1979) 23 Cal.3d 329, 341 [152 Cal.Rptr. 536, 590 P.2d 391] [six hours deemed a long time and indicative of a close case]; *People* v. *Collins* (1968) 68 Cal.2d 319, 332 [66 Cal.Rptr. 497, 438 P.2d 33] [eight hours].)

A jury request to reread testimony is indicative of a close case. (*People* v. *Hernandez* (1988) 47 Cal.3d 315, 352-353 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People* v. *Williams* (1971) 22 Cal.App.3d 34, 38-40 [99 Cal.Rptr. 103].) Here, the jury asked to hear the testimony of two witnesses concerning DNA issues, Edward Blake and Brian Wraxall. (13 CT 3872.) The jury also wanted to hear appellant's taped statements. (*Ibid.*) These requests are further evidence the present matter is indeed a close case.

Jury questions are another indicia of a close case. (*People v. Markus* (1978) 82 Cal.App.3d 477, 480-482 [147 Cal.Rptr. 151].) Here, in the guilt phase the jury questioned the court about kidnap for purposes of rape or sodomy. (13 CT 3880.)

Finally, when the jury returns a partial verdict, the decisions regard the matter as a close case. (*People* v. *Washington* (1958) 163 Cal.App.2d 833, 846 [330 P.2d 67].) In this case, the jury returned not true findings on the personal use of a firearm (§ 12022.5) and arming (§ 12022.3, subd. (a)) conduct enhancements. Again this suggests a close case.

As for the penalty phase, the jury again required substantial

deliberations in order to arrive at a decision. Over a period of five days, beginning on October 16 and ending on October 22, 1997, the jury deliberated for more than 15 hours. (14 CT 4049-4052, 4065, 4143.) Again, this indicates a close penalty case.

Because both the guilt and penalty decisions were close, contested issues, the error in allowing into evidence the inflammatory photographs cannot be viewed as harmless no matter which standard is used to assess prejudice. The judgment should be reversed.

VI.

THE TRIAL COURT COMMITTED ERROR IN DENYING A MISTRIAL AS A RESULT OF TESTIMONY BY DETECTIVE DALEY THAT APPELLANT ASKED FOR A LAWYER, FOR THE *DOYLE* ERROR DEPRIVED APPELLANT OF DUE PROCESS.

At the outset of court proceedings on September 15, 1997, the prosecutor notified the court that his witnesses for the day included detective Frank Daley, who had talked to appellant at the Flennaugh apartment and, after Thomas turned himself in to the Oakland police, had questioned appellant. The district attorney stated he would not elicit evidence Thomas had invoked his Fifth Amendment rights. (56 RT 5729.) The court agreed, and told the prosecutor that he could elicit testimony the questioning had ceased, but not the reason why the session ended. (56 RT 573.)

On direct examination, the prosecutor questioned Daley about the *Miranda* admonition and waiver of rights. (56 RT 5815-5817.) The following exchange then took place:

> "Q. Okay. And when you talked to him on this occasion, did he deny any involvement in the Hayward Sebrena Flennaugh robbery?
>
> "A. Yes.
>
> "Q. And was all questioning stopped at that point in time?
>
> "A. After a few minutes, he said he wanted a lawyer, and I stopped." (56 RT 5817.)

The prosecutor asked no further questions and defense counsel conducted cross-examination. At the next break, defense

counsel made a motion for a mistrial. (56 RT 5832.) The prosecutor assured the court that he had instructed the witness not to mention the invocation of rights. (56 RT 5833.) Concerning his final question to the witness, the district attorney had anticipated a yes or no answer. He was "caught completely by surprise" when Daley mentioned the request for counsel. (*Ibid.*) The court denied a mistrial on the ground the error had not deprived Thomas of his right to a fair trial. (56 RT 5834.)

In *Doyle v. Ohio* (1976) 426 U.S. 610, 619 [96 S.Ct. 2240, 49 L.Ed.2d 91] the court held the use of a defendant's post-arrest silence after receiving a *Miranda* admonition for purposes of impeachment violated the Fourteenth Amendment right to due process. The court has explained that the *Miranda* warnings contain an implicit promise that silence will not be penalized. (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 290 [106 S.Ct. 634, 88 L.Ed.2d 623].) *Doyle*, then, rests upon the premise "it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." (*Id.* at p. 292.) This Court has held the logic of *Doyle* extends to post-arrest invocation of the right to counsel. (*People v. Crandell* (1988) 46 Cal.3d 833, 878 [251 Cal.Rptr. 227, 760 P.2d 423].) Consistent with *Doyle*, it is improper to elicit testimony the accused invoked the right to counsel. Daley's testimony that Thomas had asked for an attorney was improper and a violation of the Fifth and Fourteenth amendments right to due process.

The lower court committed error in denying the mistrial motion. The denial of a mistrial motion is reviewed for abuse of discretion. (*People v. McLain* (1988) 46 Cal.3d 97, 111 [249 Cal.Rptr. 630, 757 P.2d 569].) A mistrial motion should be granted when the prejudice to the defendant cannot be cured by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565 [280 Cal.Rptr. 631, 809 P.2d 290].) Although a mistrial motion is often caused by prosecutorial or judicial misconduct, a witness's answer can also provoke a mistrial. (*Ibid.*)

Here, an admonition would have been a pointless attempt to unring the bell. This Court has acknowledged that efforts to cure prejudice can be a futile effort to "unring the bell." (*People v. Morris* (1991) 53 Cal.3d 152, 188 [279 Cal.Rptr. 720, 807 P.2d 949].) In *People v. Hill*, *supra*, 17 Cal.4th 800, 845, the court acknowledged, "It has been truly said: You can't unring a bell. [Citation.]" Once Daley testified Thomas had asked for an attorney, the jury knew he had been initially willing to talk to law enforcement, then reconsidered his decision and retreated to the safety provided by the Fifth Amendment. The change of heart smacks of guilty knowledge and would suggest to the jury that Thomas had a great deal to hide. It was an abuse of discretion for the lower court to deny the mistrial motion.

As seen above, the jury plainly regarded both the guilt and penalty decisions as close issues. Because this is a close case, any significant error that tends to assist the prosecution or discredit the defense must be seen as prejudicial. (*People v. Von Villas*, *supra*, 11 Cal.App.4th 175, 249.) Testimony appellant invoked his Fifth

Amendment rights compromised the defense case and bolstered the government's position. The error in denying the mistrial motion, then, was prejudicial. As a result of the improper testimony and the lower court's mistaken ruling, appellant was deprived of due process (U.S. Const., 5th & 14th Amends.), a fair trial (U.S. Const., 6th Amend.), and a reliable penalty determination (U.S. Const., 8th Amend.). The judgment should be reversed.

VII.

THE PROSECUTOR COMMITTED MISCONDUCT IN HIS CLOSING AND REBUTTAL ARGUMENTS.

(A) Introduction

James Anderson, the prosecutor in this case, was a longtime assistant district attorney (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 180 [115 Cal.Rptr.2d 674, 38 P.3d 512]) and supervised the capital case trial team (*In re Freeman* (2006) 38 Cal.4th 630, 646 [42 Cal.Rptr.3d 850, 133 P.3d 1013]) from 1991 to his retirement in October 2004 (Chapman, *A Passionate Foe of Killers Cedes Stage After 34 Years*, Oakland Tribune (Oct. 7, 2004) More Local News [*Passionate Foe*]). Anderson prided himself on taking his cases personally. (*Ibid.*) During a 34-year career, Anderson sent ten defendants to death row. (*Ibid.*) Anderson memorialized these victories by hanging framed booking photos of the ten offenders on a wall of his office that he christened "The Wall of Shame." (*Ibid.*) Of all his cases, Anderson viewed the present matter as the high point of his career. (*Ibid.*) Unfortunately, Anderson's zeal led him to cross the line separating vigorous advocacy from over-the-top misconduct.

This Court has held that "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." *(People v. Hill, supra*, 17 Cal.4th 800, 823, fn. 1.) "Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal.4th 822,

839 [3 Cal.Rptr.3d 733, 74 P.3d 820].)

(B) **Shifting the Burden of Proof**

In closing argument, the prosecutor briefly listed the nine counts in the amended information. He then stated the case was unusual because the government's evidence was "uncontroverted" as "there was no contradictory evidence given to us by the defense to challenge it." (59 RT 6074.) He added that Thomas had admitted his guilt of kidnapping, rape, robbery, residential robbery, and being a convicted felon in possession of a firearm. (*Ibid.*) Because of the rules of aiding and abetting, appellant's admissions to Kozicki also meant he was guilty of murder and assault with a firearm on the Hayward officers. (59 RT 6078-6079.) Hence, by his own admissions and "the unchallenged, uncontroverted testimony," Thomas was guilty on all nine counts. (59 RT 6086.) Therefore, the only "real decision" the jury would need to make was to determine who was the shooter for purposes of the personal use of a firearm enhancements. (*Ibid.*)

In his argument, defense counsel responded to the government's framing of the issues. Counsel agreed there was "plenty of evidence" of a kidnap, a rape, and a robbery in addition to appellant's statements. (59 RT 6108.) Counsel stated the jury would need to make its own decision on application of the felony-murder rule. (*Ibid.*) In his view, the "main battlefields" were the sodomy charge, the identity of the shooter, and appellant's intent. (59 RT 6109.)

Near the conclusion of his argument, defense counsel asked the jury to return a not guilty verdict on the sodomy charge, as well

as not true findings on the use of a firearm enhancements and the felony-murder special circumstances. (59 RT 6180-6181.) He finished by stating, "So—and what I only ask you to do is basically not convict Mr. Thomas of anything where there is no guilt beyond a reasonable doubt and to an abiding conviction. Ultimately, when you boil it down, that's all I can ask. [¶] Thank you." (59 RT 6182.)

On rebuttal, the prosecutor pounced upon the defense argument and characterized it as conceding guilt on all counts other than the sodomy. (59 RT 6184-6185.) The district attorney exulted, "What more proof do I need other than the evidence and their confession [sic] of it?" (59 RT 6184.) Defense counsel twice objected the argument misstated the record, but his objections were overruled. (59 RT 6184-6185.)

Counsel for the government returned to this theme moments before concluding rebuttal argument: "Now, remember what I said. They've conceded eight of the nine counts. So to make these deliberations go more quickly, fill out the guilty forms of the ones I've told you they conceded. And then discuss the sodomy, then discuss the special circumstances, and then discuss the use of the firearm." (59 RT 6205.) The government's argument constituted misconduct, for it shifted the burden of proof to the defense. Furthermore, the prosecutor mischaracterized defense counsel's argument as substantive evidence that rendered deliberations superfluous.

In *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1169, a prosecutor stated during rebuttal argument, "In a short period of time, the case will be handed to you. You're going to go back into that deliberation room and that presumption of innocence .

. . That presumption, when you go back in the room right behind you, is going to vanish when you start deliberating. And that's when the presumption of guilt is going to take over you . . ." The argument was interrupted by objections which were overruled.

The Ninth Circuit found the comments amounted to prejudicial misconduct. The court pointed out, "Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt." (*United States v. Perlaza*, *supra*, 439 F.3d 1149, 1171.) The presumption of innocence does not disappear when contrary evidence is presented. (*Id.* at p. 1172.) Instead, the presumption goes with the jury when it deliberates (*ibid.*), and remains in place until the jury concludes the government has proven each and every element of the charge beyond a reasonable doubt. (*Pagano v. Allard* (D. Mass. 2002) 218 F.Supp.2d 26, 33.)

In *People v. Hill*, *supra*, 17 Cal.4th 800, 831, this Court concluded the prosecutor committed misconduct in rebuttal argument by making ambiguous comments that suggested the defendant had the burden of producing evidence to show a reasonable doubt as to his guilt.

Here, the prosecutor shifted the burden of proof to appellant. By his emphasis on the supposed unchallenged nature of the government's evidence, the prosecutor transferred the burden of proof to the defense. The misconduct was exacerbated by a false depiction of the defense closing argument as conceding guilt on eight of the nine counts so that it was unnecessary to even deliberate whether the government had satisfied the burden of proof.

The misconduct was more egregious than in *United States v. Perlaza*, *supra*, 439 F.3d 1149. Rather than suggest a presumption of guilt would replace the presumption of innocence during deliberations, the prosecutor argued the jury could forego deliberations and fill out guilty verdict forms before even considering the evidence. The misleading argument was also worse than in *People v. Hill*, *supra*, 17 Cal.4th 800. In that case, the prosecutor's rebuttal argument on reasonable doubt was at best unclear. Here, the prosecutor expressly stated his evidence and defense counsel's supposed concessions were decisive so that deliberations were not necessary for any count other than the charge of sodomy. (59 RT 6184, 6205.) Anderson, then, engaged in misconduct in closing and rebuttal argument.

(C) **The Misconduct Claim Has Not Been Waived**

Whenever prosecutorial misconduct is alleged, it is inevitable the attorney general will maintain any error has been waived. Prince Hamlet addressed the inescapable when he told the mourners at Ophelia's grave, "Let Hercules himself do what he may, the cat will mew, and the dog will have his day." (Shakespeare, Hamlet, act V, scene one, lines 293-294.) Though appellant cannot ward off respondent's certain argument, it is possible to address waiver in advance so that it need not be revisited in the reply brief.

First, the constitutional basis of the claim of error was established prior to jury selection. As appellant pointed out above, the trial court granted a motion to federalize all objections, and further agreed that all objections of counsel would include the entire federal Constitution. (1 RT 161-163.) The court also granted a

motion to make all in limine decisions binding. (1 RT 157-159.) After Mr. Wagner replaced the public defender, he adopted as his own all motions made by the public defender. (9 RT 513-514.) The court proceeded on the assumption counsel endorsed his predecessor's motions (15 RT 1170), and both the court and defense counsel affirmed this understanding prior to jury selection (27 RT 1802). The district attorney voiced no objection to this procedure. Hence, trial counsel's objections to the prosecutor's argument must be viewed as also incorporating all federal constitutional grounds.

Second, there is no waiver for failure to object to each and every improper comment by Anderson. As respondent will inevitably point out, defense counsel did not immediately object to every instance of misconduct. However, the law does not require the doing of a futile act. (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1438 [105 Cal.Rptr.2d 504].) Thus, argument or objection is not required to preserve a point for review when it would have been futile. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8 [113 Cal.Rptr.2d 804]; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5 [161 Cal.Rptr. 762, 605 P.2d 401].) In this case, defense counsel objected repeatedly without success. Further objections would have been a waste of time.

Third, it can be anticipated the government will complain defense counsel failed to request a curative admonition to the misconduct. However, when defense counsel's objection is overruled, there can be no waiver for failure to request an admonition. (*People v. Hall* (2000) 82 Cal.App.4th 813, 817 [98 Cal.Rptr.2d 527]; see also *People v. Hill*, *supra*, 17 Cal.4th 800, 801-

821; *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19 [164 Cal.Rptr. 1, 609 P.2d 468].) For all the foregoing reasons, the claim of error has not been waived.

Finally, even when the appellant has failed to object or lodged an objection which was somehow deficient, a reviewing court has the discretion to reach the merits of the claim of error. (See e.g., *In re Stuart S.* (2002) 104 Cal.App.4th 203, 206 [127 Cal.Rptr.2d 856]; *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188 [122 Cal.Rptr.2d 866].) While appellant would never agree any portion of the assignment of misconduct has been waived, the Court can always consider the merits of the issue regardless of any waiver argument.

(D) **The Constitutional Error Requires Reversal of the Judgment**

Because the prosecutor's argument improperly informed the jury about the presumption of innocence and the government's burden of proof beyond a reasonable doubt, the misconduct is reversible per se, for it can never be harmless to misstate these fundamental elements of a criminal trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182].) In the alternative, the misconduct is at least federal constitutional error that is reversible unless the government can establish it was harmless beyond a reasonable doubt. (*People v. Woods* (2006) 146 Cal.App.4th 106, 114 [2006 Cal.App. Lexis 2055]; *United States v. Perlaza*, *supra*, 439 F.3d 1149, 1171.)

As argued above, the present matter satisfies the *Chapman* standard for reversal for federal constitutional error as well as the

Watson test for prejudice as a consequence of errors of state law. The prosecutor's outrageous effort to shift the burden of proof and to persuade the jury that defense counsel's argument rendered deliberations superfluous cannot be harmless no matter what standard is used to assess prejudice. The judgment should be reversed.

VIII.

REVERSAL OF THE JUDGMENT IS REQUIRED FOR CUMULATIVE ERROR.

Should the court conclude none of the foregoing errors compel reversal of the judgment standing alone, the judgment should nonetheless be reversed pursuant to the cumulative error rule. The rule recognizes that even in cases where no single error demands reversal, the defendant may nevertheless be deprived of federal due process in light of the cumulative effect of a number of errors. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488, fn. 15 [98 S.Ct. 1930, 56 L.Ed.2d 468].) As for the state Constitution, the cases recognize that cumulative error must be assessed in any determination of prejudice within the meaning of article VI, section 13. (See *People v. Holt* (1984) 37 Cal.3d 436, 459 [208 Cal.Rptr. 547, 690 P.2d 1207].)

The cumulative error rule is "the litmus test for whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 [234 Cal.Rptr. 442].) The cumulative error doctrine requires a reviewing court to "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*) When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795 [118 Cal.Rptr.2d 668].)

As detailed above, the trial in this case was infected with several serious errors. These errors deprived Thomas of due process (U.S. Const. 5th & 14th Amends.) a fair trial (U.S. Const. 6th

Amend.) and a reliable penalty determination (U.S. Const. 8th Amend.). Reversal is therefore the appropriate remedy.

PENALTY PHASE ERROR

IX.

THE TRIAL COURT'S DENIAL OF CHALLENGES FOR CAUSE TO PRO-DEATH JURORS DEPRIVED APPELLANT OF HIS RIGHT TO AN IMAPARTIAL JURY, DUE PROCESS, AND A RELIABLE PENALTY DETERMINATION.

Jury voir dire in this matter was conducted over a period of 25 court days, beginning on July 17, 1997, and ending on August 26, 1997. At the conclusion of voir dire, the remaining venire members were ordered to return to court on September 3, 1997. On that date, counsel for the parties exercised peremptory challenges, and a jury and five alternates were selected. (13 CT 3832.)

Prior to voir dire, prospective jurors were required to complete a questionnaire. They were then questioned about their views on capital punishment in sequestered voir dire. During this process, defense counsel challenged a number of venire members for cause based upon their views in favor of the death penalty. The court committed error by denying four of these challenges as the potential jurors were such emphatic supporters of capital punishment, so unwilling to give meaningful consideration to LWOP as an alternative to death, that they were substantially impaired in their ability to perform the duties of a trial juror as required by the law and the juror's oath.

(A) The Right to an Impartial Jury.

The Sixth Amendment guarantees the right to an impartial jury. (U.S. Const., 6th Amend.) This fundamental right is binding upon the states pursuant to the due process clause of the

Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156 [88 S.Ct. 1444, 20 L.Ed.2d 491].) The state's power to exclude venire members from capital juries is limited to exclusion of persons whose views would prevent or substantially impair the performance of their duties in accordance with the law and their oaths. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) Potential jurors who oppose the death penalty may serve on a capital jury if they are willing to look beyond their own views and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

Like jurors whose opposition to capital punishment would prevent them from following the law and honoring their oaths, proponents of the death penalty are subject to challenge for cause when their beliefs interfere with the ability to be fair and impartial. In *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492], the court explained a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." Because such prospective jurors ignore the law, they are subject to challenge for cause by the defendant. (*Id.* at pp. 729, 735.) This Court has held the *Witt* standard for jurors generally opposed to capital punishment and the *Morgan* test for potential jurors who strongly support capital punishment are the same. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121 [36 Cal.Rptr.2d 474, 885 P.2d 887].)

On appeal, a reviewing court's duty is to examine the circumstances surrounding a challenge for cause to determine if the

trial court's decision about whether the juror's beliefs would "substantially impair the performance of his duties" is "fairly supported by the record." (*People v. Miranda* (1987) 44 Cal.3d 57, 94 [241 Cal.Rptr. 594, 744 P.2d 1127].)

(B) **The Challenges for Cause.**

(1) Eric Horodas.

At the time of jury selection, Horodas was the president of a real estate investment firm in San Francisco. (36 CT 10145.) A graduate of New York University School of Law, Horodas had practiced law in the past but he "got smart" and changed careers. (35 RT 2992; 36 CT 10145.) Horodas was 43-years-old, married, and the father of two children. (36 CT 10143.)

As he did with all potential jurors on individual voir dire, the court explained to Horodas that a potential capital case is divided into guilt and penalty phases; in a penalty phase the government would present evidence in aggravation and the defense would proffer circumstances in mitigation. The court also told Horodas that any penalty decision made by the jury would be carried out. (35 RT 2992-2995.)

After hearing a succinct summary of the Young murder, Horodas told the court he would not automatically vote for death, that he would still need to hear the evidence in aggravation and mitigation. (35 RT 2996.) However, Horodas stated, "My predisposition would be to minimize the impact of the mitigating factors. I think the crime would stand on its face." (35 RT 2998.) Asked if he could still vote for LWOP, Horodas answered, "Yeah. It's a long road, but it's an option." (*Ibid.*)

Questioned on voir dire by defense counsel concerning his inclination to minimize mitigation, Horodas explained he meant several things. First, as a result of past experience with mental health professionals, he did not value the opinions of psychologists and psychiatrists. (35 RT 3008.) "I think common sense tells you most of the time what you need to know. You don't need a psychiatrist to tell you that." (*Ibid.*) Second, because murder was such a serious matter, he would impose a heavy burden on the defense to show any mitigation. (35 RT 3008-3009.) Horodas was not impressed with complaints about a difficult childhood, for many people have overcome an adverse upbringing. The important thing was to take responsibility for one's actions. (35 RT 3009.) Horodas was simply "not likely" to consider family background as mitigation. (35 RT 3019-3020.)

If the allegations were true, Horodas would be "predisposed to the harshest penalty." (35 RT 3012-3013.) The defense would have a difficult time "convincing me that there was anything that was mitigating." (35 RT 3013.) Questioned as to whether he would consider appellant's youth as mitigation, Horodas said it would have some weight, but it would not change his opinion. (35 RT 3020-3021.)

Defense counsel challenged Horodas for cause. He argued Horodas was substantially impaired because he would not consider some potential mitigation, such as age and family history. Because he would not consider relevant evidence, Horodas should be excused. (35 RT 3022-3026.) The court denied the challenge. (35 RT 3026.)

The decision was an abuse of discretion. It is long settled that a sentencer must consider relevant mitigation. In *Eddings v. Oklahoma* (1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1], a sentencing court recognized a youthful killer's age as mitigation but refused to consider his troubled childhood. The high court reversed the death sentence, for the sentencer must consider relevant mitigation. (*Id.* at p. 115, fn. 10.) The weight to give mitigation is a separate question. (*Id.* at p. 115.)

Here, the potential juror dismissed out of hand any evidence concerning appellant's background. (35 RT 3009, 3019-3020.) This refusal was apparently predicated upon the alleged crime (35 RT 3012-3013), his belief death was the appropriate penalty for the offense, and a philosophy of personal responsibility (35 RT 3009). Horodas, then, would not follow the law and honor the juror's oath. The trial court committed error in denying the challenged for cause.

(2) Pamela Snyder.

Snyder was a high school graduate and worked as a meat clerk at a Safeway store in San Lendro. (33 CT 9636-9637.) Snyder was 43-years-old, divorced, and the mother of two adult children. (33 CT 9635.)

As part of his standard voir dire, the prosecutor asked Snyder to self-score her views on capital punishment. He explained a score of one denoted someone who would never vote for death, a person akin to Mother Theresa. At the other extreme, a self-score of ten suggested a person who would automatically vote for death, one who believed if you kill, then you forfeit your life. As an example, the

district attorney cited the Terminator.[25] (36 RT 3080-3081.) Given this system of measurement, Snyder said she was, "Probably ten." (36 RT 3081.)

Questioned by the court concerning her answer, Snyder explained, "If I found that a person was guilty of a crime that should be punished by death, I would feel—I would always go with the death penalty." (36 RT 3084.) The venire member said she must have misunderstood the self-score question. (*Ibid.*)

Defense counsel challenged Snyder for cause. Counsel pointed out Snyder was the only potential juror to that point who had scored herself as a ten in response to the district attorney's question.[26] Defense counsel explained the prospective juror's demeanor was a ten on the "Rambo scale," and dismissed her answers backing away from extreme views as nothing more than an effort to provide the correct answer. (36 RT 3095-3096.) The court denied the motion. (36 RT 3096.)

The ruling was an abuse of discretion. Because Snyder answered the district attorney's "Terminator versus Mother Theresa"

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[25] The Terminator (MGM 1984).

[26] At the time of the challenge for cause, the district attorney had asked a total of 22 potential jurors the "Terminator versus Mother Theresa" hypothetical. Snyder was the only person to self-score as a ten. The 21 answers in addition to Snyder were as follows: one self-score of 3 [35 RT 2975]; eight scores of 5 [31 RT 2401; 32 RT 2433, 2479; 33 RT 2630; 34 RT 2754, 2829, 2877, 2916]; one self-score of 5 or 6 [31 RT 2308]; one self-score of 5 to 7 [34 RT 2722]; three self-scores of 6 [31 RT 2337, 32 RT 2527; 34 RT 2691]; three self-scores of 7 [33 RT 2662; 35 RT 3006; 36 RT 3055]; two votes for 7 or 8 [31 RT 2366; 2792]; and two self-scores

hypothetical with a self-score of ten, she placed herself squarely in the category of automatic death. A juror who will vote for death in every instance is subject to challenge for cause, for the juror cannot follow the law and respect her oath. (*Morgan v. Illinois*, *supra*, 504 U.S. 719, 729.) This score was not a misunderstanding. Snyder stated on voir dire that how a child was raised had no impact on the adult. (36 RT 3088.) She also stated adults needed to be responsible for their conduct. (36 RT 3089.) It was error for the court to deny the challenge for cause.

(3) Juror No. 17/Alternate Juror No. 5.

Juror No. 17, who was seated as Alternate Juror No. 5, worked as a computer-programming analyst for the court system in Santa Clara County. (44 RT 4440; 15 CT 4466.) At the time of trial, Juror No. 17 was 33-years-old. He was single and lived in Fremont with his sister, brother-in-law, and their three children. (15 CT 4464-4465.) Juror No. 17 was born in Cambodia, and arrived in the United States in 1982. (44 RT 4415.) In his questionnaire, the juror explained his general feelings about the death penalty as follows: "I think that if it can be proven beyond a reasonable doubt then a death penalty is a justice." (15 CT 4473.)

Questioned by defense counsel, Juror No. 17 explained his questionnaire response describing his feelings about the death penalty: "Well, it's only fair. I that that if somebody kills somebody, and it can be proven beyond a reasonable doubt, then, you know, it's an eye for an eye." (44 RT 4432.) The court interrupted

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of 8 [33 RT 2561, 2591].

counsel's voir dire to ask Juror No. 17 if he would always vote for death if appellant was found guilty beyond a reasonable doubt. (44 RT 4433.) Juror No. 17 answered that he would. (*Ibid.*) Juror No. 17 said LWOP would not be an acceptable punishment if the crime was severe enough. (44 RT 4438-4439.) In this case, he believed the allegations were severe. (44 RT 4439.) Hence, the mitigation case would be irrelevant to the juror.

Defense counsel challenged Juror No. 17 for cause. He argued the juror acknowledged LWOP would not be adequate punishment for a severe crime, and the charges in this case were severe. (44 RT 4441.) The court denied the challenge. (44 RT 4442.)

Denial of the challenge was an abuse of discretion because the venire member espoused an "eye for an eye" philosophy that is antithetical to the reasoned decision-making required for a juror in a capital case. Juror No. 17 said he would hear the mitigation (44 RT 4434-4435), but this answer is meaningless. A juror must not just listen to mitigation; he or she must consider it, take it into account, and give the evidence some sort of weight in arriving at a penalty decision. (*Eddings v. Oklahoma*, *supra*, 455 U.S. 105, 115, fn. 10.) Juror No. 17, however, focused upon the crime. If the facts described by the court were developed at trial, then Juror No. 17 would automatically vote for death. (44 RT 4432, 4439.) Hence, Juror No. 17 could not consider both penalties as required by the law and the juror's oath. The court committed error in denying the challenge for cause.

(4) Raquel Disperati.

At the time of voir dire, Disperati was a 49-year-old housewife who lived in Fremont. (36 CT 10227.) Her spouse was a truck driver. (36 CT 10228.) Disperati completed high school and had received secretarial training at a business college. (36 CT 10229.) She recalled television news coverage of the Young homicide. (36 CT 10237.) Concerning the death penalty, Disperati believed "There are some people that are not fit to have the privilege of been [sic] on earth." (36 CT 10236.)

On voir dire, the prosecutor asked Disperati his standard "Terminator versus Mother Theresa" hypothetical. He explained a ten, someone who would always vote for death, as follows: "a ten is somebody who believes in the old Bible, an eye for an eye. You take somebody's life or if you participate in activities in which somebody dies and those activities are critical—robbery, kidnapping, something like that—somebody dies you lose your life every time. He will give a death penalty every time. You kill, you be [sic] killed. [¶]] And we've been using the—to show somebody like that, the only one— [¶]] Remember that movie the Terminator where the guy came from out of the other time and he was killing everybody? [¶]] Anyway, we've been using the Terminator or Rambo to show--" (38 RT 3568.)

Asked to self-score, Disperati asked for some clarification. The prosecutor stated, "Mother Theresa would never give it and the other guy would always. [¶] What number do you think you'd be?" (38 RT 3569.) Disperati answered, "I would be a ten." (*Ibid.*) In

other words, like a courtroom Rambo, Disperati would vote for death in every case.

Questioned by the court and defense counsel, Disperati quickly backed away from her position. Rather than hew to her self-score, Disperati agreed with the court's leading questions explaining her "Terminator versus Mother Theresa" answer as nothing more than an affirmation of her belief the death penalty should be an available punishment—but not an automatic one. (38 RT 3570.)

Disperati was questioned on voir dire on July 30, 1997. (13 CT 3809.) Twelve days later, defense counsel asked whether a challenge for cause had been made as to Disperati. (44 RT 4405.) When he was informed no challenge had been lodged following voir dire, the challenge was made and denied by the court. (44 RT 4476.)

As seen above, a juror who will vote for death in every instance is subject to challenge for cause, for the juror is unable to follow the law and respect her oath. (*Morgan v. Illinois*, *supra*, 504 U.S. 719, 729.) Here, Disperati was provided with a detailed hypothetical question and chose to place herself among the extreme death penalty advocates who would vote for capital punishment in every case. The trial court committed error in denying the challenge for cause.

(C) **The Claim of Error Has Not Been Waived.**

In general, to preserve a claim the trial court committed error in denying a challenge for cause, the defendant must exercise a peremptory challenge to excuse the offending venire member, exhaust the available peremptory challenges, and express

dissatisfaction with the jury as finally constituted. (*People v. Weaver* (2001) 26 Cal.4th 876, 910-911 [111 Cal.Rptr.2d 2, 29 P.3d 103].) This Court has applied these requirements to capital cases. (See e.g., *People v. Hayes* (1999) 21 Cal.4th 1211, 1287 [91 Cal.Rptr.2d 211, 989 P.2d 645].)

In this case, defense counsel did not satisfy these prerequisites. Of the four prospective jurors challenged for cause without success, only Pamela Snyder took a place in the jury box and was excused by defense counsel. (52 RT 5227.) Juror No. 17/Alternate No. 5 was called and seated as an alternate and was not challenged by the defense. (52 RT 5232.) Horodas and Disperati were not summoned during the jury selection process, so it was not necessary to exercise peremptory challenges to remove them.

Defense counsel exercised 16 of the allotted 20 peremptory challenges.[27] Finally, before the jury was sworn, counsel did not state dissatisfaction with the panel. Appellant respectfully requests the Court reconsider the aforementioned requirements in the context of challenges for cause founded upon a potential juror's general support of capital punishment.

In *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622], the prosecutor in a capital case used up the

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[27] Defense challenges were used to excuse Kenneth Brunskill, Barry Bridges, Marilyn Kesseler, Amy Rouse, Joan Smith, Pamela Snyder, Kenneth Gault, Francisco Perez, Julia HoShue, Jason Cox, Marlene Eastman, Carolyn Lofton, Steve Abina, Susan Larson, Robert Kocik, and Tina Jackson-Odell. (52 RT 5225-5232.)

peremptory challenges conferred by state law, yet wanted to exclude a potential juror he perceived as unfavorable. Counsel therefore asked the court for another peremptory challenge on the ground he had been wrongly forced to expend his challenges on jurors the court should have excluded for cause. Rather than accede to this request, the trial judge excused the juror for cause despite her willingness to consider imposition of capital punishment.

A closely divided high court reversed the judgment. The majority concluded the nature of jury selection defies harmless error analysis. (*Gray v. Mississippi*, *supra*, 481 U.S. 648, 665.) Thus the improper removal of a potential juror for cause required per se reversal of the judgment. (*Id.* at p. 668.) *Gray* was decided in the final term of Justice Powell's tenure on the high court.

Ross v. Oklahoma (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], decided the following year, reached a different conclusion. Justice Kennedy joined the four dissenters from *Gray* to form the majority. In *Ross*, a trial court committed error in failing to grant a challenge for cause to a pro-death juror. The defense was forced to use a peremptory challenge to remove the juror, and expended the challenges permitted by state law. The court was not persuaded by the argument a peremptory challenge was needlessly used on a biased juror. (*Id.* at p. 88.)

Justice Marshall authored a dissent for the four justices remaining on the court from the *Gray* majority. He noted that *Gray* stands for the proposition reversal is mandatory when "the composition of the jury panel as a whole could possibly have been affected by the trial court's error." (*Ross v. Oklahoma*, *supra*, 487

U.S. 81, 92 (dis. opn. of Marshall, J.) This is so whether the error is grounded upon *Witt* exclusion or failure to excuse for cause jurors biased in favor of capital punishment, for either error affects the composition of the jury panel under the *Gray* standard. (*Ross v. Oklahoma*, *supra*, 487 U.S. 81, 93 (dis. opn. of Marshall, J.)

The *Gray* and *Ross* decisions are incongruent, and the efforts of the *Ross* majority to limit *Gray* to its facts are far from persuasive. In *Gray*, the high court reaffirmed the per se penalty reversal rule of *Davis v. Georgia* (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339]. (*Gray v. Mississippi*, *supra*, 481 U.S. 648, 667.) *Gray* and *Davis*—not to be confused with the Honorable Gray Davis—are grounded upon a real-world recognition that mistaken exclusion of a scrupled juror or the failure to remove an auto-death venire member changes the dynamics and structure of jury selection. The order in which potential jurors are called for voir dire matters, and so does a trial court's rulings on challenges for cause based upon a prospective juror's views on capital punishment. Each venire member changes the dynamics of the jury selection process. Each ruling by the trial court likewise affects the dynamics, as well as the strategy of both sides in attempting to seat an impartial jury.

Rather than focus upon the gritty facts of jury selection, *Ross* is based upon a myopic concentration on the peremptory challenge as a creation of state law rather than a prerequisite imposed by the Constitution. The peremptory challenge, however, is nothing more than a tool, a means to the end of enforcing the Sixth Amendment right to trial by an impartial jury. The *Ross* majority's focus on the peremptory challenge—the means rather than the end—fails to

consider the larger picture, the crucible of a courtroom, the place where constitutional rights must be enforced in order to have meaning.

In the present case, the trial court committed multiple jury selection errors, and these errors violated appellant's rights to due process (U.S. Const., 5th & 14th Amends.), a fair trial by an impartial jury (U.S. Const., 6th Amend.), and a reliable penalty determination (U.S. Const., 8th Amend.). The court should reverse the judgment.

X.

THE TRIAL COURT COMMITTER ERROR IN DENYING A DEFENSE MOTION TO PROHIBIT THE CASE FROM PROCEEDING TO A PENALTY PHASE IN LIGHT OF THE LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE IMPOSED ON CODEFENDANT GLOVER.

(A) Procedural Background

On April 4, 1997, Henry Glover was sentenced to life imprisonment without the possibility of parole, life with the possibility of parole, and a determinate term of 20 years. (13 CT 37458-3750.) This outcome and the issues posed by the codefendant's sentence were raised and litigated at three discrete points in appellant's trial.

On July 2, 1997, prior to jury selection, the district attorney made an oral motion to exclude any reference to the Glover sentence at any point during trial. (27 RT 1803.) Defense counsel stated he did not plan to bring it up during voir dire, but might wish to revisit the question at a later point in time. (*Ibid.*) The trial court found Glover's sentence was not relevant "because we are not talking about proportionality." (27 RT 1804.) The court therefore prohibited any mention of the codefendant's sentence during jury selection and the "trial in chief," presumably meaning the government's case-in-chief. (*Ibid.*)

On October 3, 1997, the court considered penalty phase motions in limine. Defense counsel raised the question of intra-case proportionality and argued a death sentence for Thomas would be arbitrary and capricious in violation of the Eighth and Fourteenth amendments given that Glover—who was likely the actual shooter—

was sentenced to life imprisonment without the possibility of parole. Counsel therefore asked the court to prohibit the case from going forward to a penalty phase. (60 RT 6355-6356.) The district attorney opposed the motion, and the court denied the request. (60 RT 6359.)

On January 9, 1998, after the jury returned a penalty decision and prior to the sentencing hearing, defense counsel filed a motion to reduce the punishment from death to life imprisonment without the possibility of parole. (14 CT 4155.) In the motion, counsel argued imposition of the death penalty would be cruel and unusual in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. Counsel pointed out Glover was more likely than not the shooter and actual killer. Furthermore, Glover was the primary actor in the crimes. Hence, death for appellant would be disproportionate to his individual culpability and arbitrary and capricious given the sentence imposed on Glover. (14 CT 4161-4163.1.)

On January 16, 1998, defense counsel reiterated these arguments in support of the motion to reduce the punishment. Counsel reminded the court that he was prohibited from mentioning the Glover sentence during the penalty phase. He maintained a death sentence in this matter would violate federal due process and equal protection guarantees. A death sentence would also be arbitrary and capricious. (67 RT 7119.) The court denied the motion to modify the punishment on proportionality grounds and sentenced appellant to death. (67 RT 7131, 7138.)

(B) **The Trial Court Committed Error in Denying the Motion to Prohibit a Penalty Phase as the Death Penalty Is Grossly Disproportionate to Appellant's Personal Culpability**

Throughout the modern era of death penalty jurisprudence inaugurated by the high court's decision in *Furman v. Georgia* (1972) 408 U.S. 239 [92 S.Ct. 2726, 33 L.Ed.2d 346] the Eighth Amendment has been interpreted to prohibit imposition of capital punishment in an arbitrary and irrational manner. To eliminate random imposition of the death penalty, which Justice Stewart famously compared to being struck by lightning (*id.* at p. 309, conc. opn. of Stewart, J.), sentencing discretion must be channeled and limited (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 [96 S.Ct. 2909, 49 L.Ed.2d 859] (plur. opn. of Stewart, J.)). Furthermore, the Eighth Amendment bans capital punishment when it is disproportionate to the crime (*id.* at p. 173) or the individual defendant's personal culpability (*Enmund v. Florida* (1982) 458 U.S. 782, 798 [102 S.Ct. 3368, 73 L.Ed.2d 1140]).

The Eighth Amendment does not demand intercase proportionality review, meaning a reviewing court is not compelled by the federal Constitution to compare a death sentence on appeal with the punishment imposed in other cases. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29].) However, this Court has held that article I, section 17 of the California Constitution, which prohibits the imposition of cruel and unusual punishment, requires intracase proportionality, meaning a comparison of the offender's sentence with the punishment imposed on his or her confederates and determination whether the death

penalty is disproportionate to the offender's personal culpability within the meaning of *People v. Dillon* (1983) 34 Cal.3d 441, 478-489 [194 Cal.Rptr. 390, 668 P.2d 697]. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 151-152 [2 Cal.Rptr.2d 335, 820 P.2d 559].) In appellant's view, the death penalty is grossly disproportionate to his personal culpability under both the state and federal constitutions.

(1) California Constitution, Article I, Section 17 Analysis

The California Constitution prohibits the imposition of cruel or unusual punishment. (Cal. Const., art. I, § 17.) Like the Eighth Amendment, the Constitution forbids torture as a means or method of punishment. (*Weems v. United States* (1910) 217 U.S. 349, 371 [30 S.Ct. 544, 54 L.Ed. 793].) The state Constitution also bans punishment that "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 [105 Cal.Rptr. 217, 503 P.2d 921].)

This Court has described three techniques to ascertain if a sentence if grossly disproportionate and therefore prohibited as cruel and unusual punishment. First, the court looks to "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch*, *supra*, 8 Cal.3d 410, 425.) The nature of the offense should be examined in the abstract and in light of the facts of the case. (*People v. Dillon*, *supra*, 34 Cal.3d 441, 479.) As for the offender, the analysis focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as

shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

In *Dillon*, the Court's proportionality analysis included a comparison of the appellant's punishment with the sentences imposed on his associates in the fatal incident. (*People v. Dillon*, *supra*, 34 Cal.3d 441, 488.) In subsequent death penalty cases, however, the Court has backed away from such sentence comparisons. In *People v. Hill* (1992) 3 Cal.4th 959, 1014 [13 Cal.Rptr.2d 475, 839 P.2d 984] the Court stated, "Properly understood, intracase proportionality review is 'an examination of whether defendant's death sentence is proportionate to his *individual* culpability irrespective of the punishment imposed on others. [Citation.]'" In *People v. Maury* (2003) 30 Cal.4th 342, 441 [133 Cal.Rptr.2d 561, 68 P.3d 1], the Court explained Intracase proportionality review entails an examination of the circumstances of the offense, including the extent of the defendant's involvement in the crime, as well as the offender's personal characteristics, including age, criminal history, and mental capabilities.

In this case, there can be no doubt the crime which rendered appellant eligible for capital punishment was a terrible one. As seem above in appellant's argument on the government's use of inconsistent theories, as between Thomas and Glover, it is more likely that Glover was the actual killer rather than appellant. Glover was the leading actor in the Young homicide. Glover rather than Thomas talked to—and no doubt intimated—Young inside the Mustang and forced her to submit to being enclosed in the vehicle's trunk. (52 RT 5369-5370.) Although the police tried to get Thomas

to admit he was the shooter, he steadfastly denied it. (57 RT 5938.) Instead, appellant assured the officers that he did not want any harm to come to the victim. (57 RT 5942.) He therefore urged Glover to leave the victim at the Point Richmond crime scene. (57 RT 5943, 5949.)

In the Flennaugh incident, Glover was again the leader while Thomas was a mere follower. Glover carried the AK-47, demanded money, punched the pregnant victim and broke her nose. (55 RT 5643, 5680.) When the police arrived, Glover engaged in a firefight rather than surrender. (55 RT 5647-5648.) In the Silvey-White robbery, Glover once again confronted the victim, punched her, and fought with her. (61 RT 6443, 6449-6450.) Thomas, by contrast, played a much lesser role. Given this pattern of Glover acting as the leader and more than willing to engage in intimidation, physical violence against a pregnant woman and an elderly female, there is good cause to believe Glover was the actual killer rather than appellant.

As for the offender, Thomas was a very young man at the time of the crimes. Born on May 19, 1973, appellant was 19-years-old at the time of the crimes on December 8, 1992. Youth is universally recognized as a factor in mitigation. (*Johnson v. Texas* (1993) 509 U.S. 350, 367 [113 S.Ct. 2658, 125 L.Ed.2d 290]; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 115.) Similarly, a childhood of deprivation and neglect is generally accepted as powerful mitigation. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256].) In this case, the penalty phase case-in-mitigation demonstrated appellant came from a background of extreme abuse

and neglect.

In summary, Glover was the leading actor in all three incidents with appellant. Appellant's relative culpability compared to the codefendant, then, strongly favored imposition of life without the possibility of parole—the same punishment as Glover received—rather than the death penalty. Thomas was a teenager at the time of the crimes, and a young man who had suffered a great deal for such a young age. It is a gross miscarriage of justice and a violation of the state Constitution's ban on cruel and unusual punishment for the killer to receive a life without parole sentence and the non-shooter to receive the death penalty. On these facts, when the leading actor is sentenced to less than death, appellant's death sentence is arbitrary and capricious. The trial court committed prejudicial state constitutional error in denying the motion to prohibit the case from proceeding to a penalty hearing.

(2) Eighth Amendment Analysis

In appellant's view, despite *Pulley v. Harris*, *supra*, 465 U.S. 37, the Eighth Amendment requires intracase proportionality review. As seen above, the Eighth Amendment proscribes the death penalty when the punishment is disproportionate to the crime (*Gregg v. Georgia*, *supra*, 428 U.S. 153, 173 (plur. opn. of Stewarrt, J.) or to the individual defendant's personal culpability. Because of these restrictions on capital punishment, the death penalty is grossly disproportionate and excessive punishment for the rape of an adult woman. (*Coker v. Georgia* (1977) 433 U.S. 584, 592 [97 S.Ct. 2861, 53 L.Ed.2d 982] (plur. opn. of White, J.).) The death penalty is also forbidden for an accomplice who does not harbor an intent to kill or,

as a major participant, act with reckless indifference to human life. (*Tison v. Arizona*, *supra*, 481 U.S. 137, 158.)

Given the limitations on capital punishment imposed by the Eighth Amendment, federal law and the state of Florida recognize the lesser sentence of another participant in the fatal crime as relevant mitigation. (*Ray v. State* (Fla. 2000) 755 So.2d 604, 611.) For example, in the *Ray* case, the Florida Supreme Court reversed the appellant's death sentence because his codefendant, who was at least as culpable if not more so, had received a life term. (*Ibid.*)

In *Parker v. Dugger* (1991) 498 U.S. 308 [111 S.Ct. 731, 112 L.Ed.2d 812] a Florida defendant presented evidence in the penalty phase that his associates in crimes which resulted in two convictions for first degree murder had received sentences of life imprisonment. For reasons unrelated to the present contention, the high court reversed the judgment. *Parker* is relevant to the present case because the court explicitly noted the fact that none of the defendant's accomplices received a death sentence was relevant mitigating evidence that should have been considered by the state Supreme Court. (*Id,* at p. 314.)

Appellant recognizes the Court has rejected this interpretation of *Parker.* (*People v. Mincey* (1992) 2 Cal.4th 408, 480 [6 Cal.Rptr.2d 822, 827 P.2d 388].) The Court has instead held that evidence of a codefendant's sentence is not relevant "because it does not shed any light on the circumstance of the offense or the defendant's character, background, history or mental condition." (*People v. Cain* (1995) 10 Cal.4th 1, 63 [40 Cal.Rptr.2d 481, 892 P.2d 1224] see also *People v. Brown* (2003) 31 Cal.4th 518, 562 [3

Cal.Rptr.3d 145, 73 P.3d 1137]; *People v. McDermott* (2002) 28 Cal.4th 946, 1005 [123 Cal.Rptr.2d 654, 51 P.3d 874].) The Court should reconsider its reading of *Parker*.

The trial court's error in denying the motion to prohibit the case proceeding to penalty phase, then, was federal constitutional error as well as a violation of the California Constitution.

(C) **The Trial Court Committed Error in Denying the Post-Trial Motion to Reduce the Penalty to Life Imprisonment Without the Possibility of Parole on Proportionality Grounds**

As seen above, defense counsel filed a motion to modify the sentence to life without the possibility of parole. (14 CT 4155.) In his written brief and in oral argument in support of the motion, defense counsel stressed intracase proportionality and maintained imposition of a death sentence would be in violation of the Eighth Amendment and the state Constitution's prohibition on cruel and unusual punishment. (67 RT 7119; 14 CT 4161-4163.1.) The district attorney cited *People v. Hill*, *supra*, 3 Cal.4th 959, and other cases for the proposition proportionality analysis was prohibited. (67 RT 7120-7121.)

The trial court believed it was inappropriate to even consider the codefendant's sentence. (67 RT 7120.) Hence, the court denied the motion to reduce the punishment on comparative proportionality grounds: "The Court with respect to the motion to modify, to impose a lesser punishment on proportionality grounds, that will be denied, obviously, because it's not the law in California. The cases cited by

the prosecution the Court is familiar with. And so, on that basis, the motion will be denied." (67 RT 7131.)

The trial court was mistaken in believing an Intracase proportionality analysis was prohibited in California. Instead, as explained above, the state Constitution's prohibition on cruel and unusual punishment also bars the imposition of punishment that is grossly disproportionate to the defendant's individual culpability. As seen above, a death sentence is grossly disproportionate for appellant, a non-killer who lacked the intent to kill. Although guilty of felony-murder as a principal in the kidnapping and rape, the death penalty is so disproportionate to appellant's personal responsibility as to shock the conscience. In short, intracase proportionality review pursuant to the Eighth Amendment and the California Constitution requires reversal of the death sentence imposed on Thomas.

XI.

THE TRIAL COURT COMMITTED ERROR IN DENYING A MOTION TO EXCLUDE SILVEY'S IDENTIFICATION OF APPELLANT AS THE SECOND OFFENDER AS UNRELIABLE AND TAINTED BY SUGGESTIVE POLICE PROCEDURES.

(A) Procedural History

The trial motions filed by the public defender on behalf of appellant included trial motion 18, which sought to prohibit the introduction of any testimony concerning Constance Silvey-White's identification of appellant as the second offender in the assault and robbery which took place in the driveway of her Berkeley home on December 11, 1992. (8 CT 2359.) On October 10, 1995, the trial court granted a motion to sever trial on the Silvey incident from the charges stemming from the Young murder and the Flennaugh robbery. As a consequence of this ruling, the district attorney amended the statement in aggravation to include the Silvey matter. (2 RT 260.)

The court conducted a hearing on the motion beginning on March 14, 1996. Berkeley Police Department inspector Daniel Wolke testified that he was in charge of the robbery detail and handled the Silvey case. (20 RT 1515-1516.) Patrol officer Gomez took the initial report in the case. (20 RT 1516.) Counsel for the parties stipulated that immediately after the incident, Silvey told the officer that she did not get a very good look at the suspect who accompanied her assailant. (21 RT 1677.)

Wolke first questioned Silvey on December 14, 1992. (20 RT 1516.) At the time of the interview, Wolke was familiar with the

BART murder case from reports in the news media. (20 RT 1535.) He believed the Silvey incident was similar to the BART case. (20 RT 1534.) At some point before Silvey viewed a live lineup, Wolke told her the incident might be connected to the BART murder. (20 RT 1538, 1540.) Wolke told Silvey that he was working with Oakland police to determine if her case was similar to the BART murder. (20 RT 1540.) Silvey was familiar with the BART case from both the newspaper and television before she was attacked. (21 RT 1600-1602.) Prior to the lineup, Silvey recognized there were points of similarity between the two cases. (21 RT 1604, 1611.)

On December 17, 1992, Wolke drove Silvey to San Jose for a meeting to develop a composite drawing of the offenders. (20 RT 1517.) Silvey was able to provide a description of the offender who tried to force her into the trunk of her car, and a drawing of this individual was assembled. (20 RT 1567.) She could not recall enough about the second man to do a composite. (20 RT 1568.)

On January 7, 1993, Wolke transported Silvey to a live lineup conducted by Oakland Police Department and supervised by detective Kozicki. (20 RT 1517-1518; 21 RT 1589.) There were eight black males in the lineup, including Glover in position three and Thomas in position seven.[28] (20 RT 1522-1523,) The lineup participants were required to approach the window individually, don a baseball hat, and then put on a knit cap. (20 RT 1527.) The men

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[28] A photograph of the lineup was identified as exhibit 15 for the 402 hearing. (20 RT 1522.) The photograph was renumbered as exhibit 57 during the penalty phase. (61 RT 6463.)

were directed to say, "Shh, be quiet. Don't say a word. Get in. Get in." (21 RT 1660.)

Silvey testified that when Glover put on the knit cap and spoke, "it all came back to her." (21 RT 1659.) After viewing the lineup, Silvey marked her lineup card by placing an "X" on the figure in position three.[29] Silvey explained she was positive of her identification of Glover as the offender who assaulted her. (21 RT 1591.) As for Thomas, who was in position seven, Silvey placed a question mark on her lineup card. (*Ibid.*) Silvey stated she did not see the second perpetrator as clearly as the attacker, so her memory of him was not as clear. (21 RT 1591-1592.)

Wolke gave Silvey a ride home from the lineup. (20 RT 1532.) At her residence, Wolke questioned Silvey about her choices. Silvey told him that she was positive about her identification of number three—meaning Glover—as the person who grabbed her. (*Ibid.*) She thought number seven—appellant Thomas—was the second offender. (*Ibid.*) Silvey had initially believed the man in position two was the second perpetrator. (20 RT 1532-1533.) However, after looking at the lineup for a time she concluded number two was not the other man involved in the incident. (20 RT 1533.)

The court found there was no evidence the lineup was suggestive or that law enforcement engaged in any improper conduct. The motion was therefore denied. (21 RT 1678.) The decision was an abuse of discretion.

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[29] For purposes of the 402 hearing, a copy of the lineup card was marked as exhibit 19. (20 RT 1529.) During the penalty phase,

(B) **Silvey's Identification of Appellant Was Unreliable, Tainted by Suggestive Police Procedures and Resulted in a Violation of Fifth and Fourteenth Amendment Due Process.**

The risks and hazards associated with eyewitness identification are well-known. (*United States v. Wade* (1967) 388 U.S. 218, 228 [87 S.Ct. 1926, 18 L.Ed.2d 1149].) When an initial misidentification occurs, it reduces the value of subsequent lineup and courtroom identification, for the witness acts upon a recollection of the photograph or lineup rather than a memory of the perpetrator of the underlying crime. (*Simmons v. United States* (1968) 390 U.S. 377, 383-384 [88 S.Ct. 967, 19 L.Ed.2d 1247].) A conviction based upon mistaken identification is a gross miscarriage of justice. (*Stovall v. Denno* (1967) 388 U.S. 293, 297 [87 S.Ct. 1967, 18 L.Ed.2d 1199].)

When a contested identification is challenged on appeal, "each case must be decided upon its own facts . . ." (*Simmons v. United States*, *supra*, 390 U.S. 377, 384.) Accordingly, a reviewing court must apply a totality of the circumstances test to determine whether identification procedures violate due process. (*Stovall v. Denno*, *supra*, 388 U.S. 293, 302; *People v. Contreras* (1993) 17 Cal.App.4th 813, 819 [21 Cal.Rptr.2d 496].) The standard of review is de novo rather than abuse of discretion. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609 [31 Cal.Rptr.3d 160, 115 P.3d 472].) In reviewing an identification, the court should consider: "the

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the card was remarked as exhibit 60. (61 RT 6464.)

opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighted the corrupting effect of the suggestive identification itself." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114 [97 S.Ct. 2243, 53 L.Ed.2d 140].) Consistent with the high court cases, the California decisions apply a totality of the circumstances test to determine if identification procedures violate federal due process. (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071 [249 Cal.Rptr. 240].)

In the present matter, the totality of the circumstances demonstrate the trial court abused its discretion in denying the motion to prohibit Silvey from identifying Thomas as the accomplice of her assailant. To begin with, Silvey acknowledged she had only a limited opportunity to observe the second perpetrator. She explained the second man went to the car rather than approach her. (21 RT 1619-1620.) Second, Silvey's attention was focused on Glover, the person with whom she had a physical struggle. Third, Silvey was uncertain of her identification of Thomas at the lineup. This doubt was physically recorded as a question mark. (21 RT 1591-1592.)

Finally, the identification procedures were suggestive. Wolke told Silvey in advance the case could be related to the BART murder—a case that was in the newspapers and in the television news. (20 RT 1538-1540; 21 RT 1600-1602.) Silvey therefore had ample opportunity to view images of the BART murder suspects

prior to the lineup.

At the 402 hearing, Silvey testified the assailant had a moustache and perhaps additional facial hair. (21 RT 1647-1648.) At the time of the lineup, Glover had a moustache and may have also had a goatee.[30] (21 RT 1675.) However, Silvey did not think he had as much hair as the assailant. (*Ibid.*) A viewing of the lineup photograph shows Glover was the only participant who had substantial facial hair.[31] The composition of the lineup was therefore suggestive.

In addition to selecting lineup participants to make Glover stand out, the police included Thomas in the same lineup. Again, a viewing of the lineup photograph shows Thomas and Glover were dissimilar in size and appearance. Glover had significant facial hair, while Thomas was clean-shaven.[32] It was therefore unlikely Silvey would confuse one man for the other. However, their joint appearance in a single lineup was suggestive.

The suggestiveness from a joint lineup is apparent from several facts. First, Silvey was shown a single lineup to identify two suspects. Because of her close contact with the assailant and ability to provide adequate information to prepare a composite drawing, there was every reason to believe she would pick out Glover as the

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[30] The moustache and goatee are visible in exhibit 58, a lineup photograph with Glover standing near the window. (61 RT 6463.)

[31] In her penalty phase testimony, Silvey pointed out the man in position two had a moustache. (61 RT 6500.)

[32] Appellant's appearance at the time of the lineup is shown in exhibit 59, a lineup photograph with Thomas standing in front of the group and close to the window. (61 RT 6464.)

assailant. This identification reduced the number of possible accomplices in the lineup from eight to seven. It also allowed Silvey to focus upon the remaining men as the accomplice rather than the assailant. Finally, the single lineup permitted Silvey to compare the participants to one another—as in any lineup—and also to Glover. All of these circumstances increased the likelihood of an identification of Thomas as the second perpetrator.

In summary, the hearing on appellant's motion established there was a very low probability of Silvey being able to identify the assailant's confederate. She had only a limited view of the man while her attention was focused on her attacker. (21 RT 1619-1620.) Immediately after the incident, Silvey told a patrol officer that she did not get a very good look at the second man. (21 RT 1677.) Prior to the lineup, Wolke planted the thought with Silvey that the attack on her was linked to the BART murder—a crime which was in the newspapers and on the television news. (20 RT 1538,1540.) At the lineup, the government used suggestive procedures by the selection of lineup participants and placing Thomas in the same group as Glover.

The totality of the circumstances, then, supports a conclusion the identification of Thomas was tainted. Her identification of Thomas at the preliminary hearing and again at trial was based upon a recollection of the lineup rather than the underlying incident. (*Simmons v. United States*, *supra*, 390 U.S. 377, 383-384.) Denial of the motion to exclude the identification resulted in a denial of due process (*Stovall v. Denno*, *supra*, 388 U.S. 293, 203) and a miscarriage of justice (*id.* at p. 297.) Because the identification was

crucial to the most substantial factor in aggravation presented during the case-in-aggravation, the penalty decision in this matter does not meet the Eighth Amendment requirement of heightened reliability. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) The penalty verdict must be reversed.

XII.

THE VICTIM IMPACT TESTIMONY OF MARY YOUNG AND ELY GASSOWAY VIOLATED THE EIGHTH AMENDMENT AND REQUIRES REVERSAL OF THE PENALTY DECISION

(A) Procedural History

On August 23, 1995, the public defender filed trial motion number three to limit victim impact evidence. (8 CT 2162-2178.) In the motion, counsel requested the court place strict limits on victim impact evidence consistent with the views expressed by Justice Kennard in a concurring opinion filed in *People v. Fierro* (1991) 1 Cal.4th 173 [3 Cal.Rptr.2d 426, 821 P.2d 1302]. (8 CT 2178.) In her opinion, Justice Kennard stated victim-impact evidence should be limited to personal characteristics of the victim known to the defendant at the time of the crime or properly received during the guilt phase. (*Id.* at pp. 263-264, conc. & dis. opn. of Kennard, J.)

On October 10, 1995, the trial court considered the motion. The court ruled victim-impact would be limited to family members. (2 RT 238.) As there were 12 persons on the government's witness list, the court stated the number of family members could raise a 352 issue. (*Ibid.*) The court deferred any consideration of the 352 question to the penalty phase. (2 RT 241.) The defense motion was therefore granted in part. (2 RT 242.)

Nearly two years later, on October 3, 1997, the court and successor counsel revisited the victim-impact issue in a motion in limine prior to the start of the penalty phase. Counsel argued Mary Young should not be allowed to testify that she incurred debts for funeral expenses and grief counseling. Defense counsel maintained

such economic losses were a result of some sort of error by victim-impact people rather than a direct result of the homicide. He went on to argue losses to Mary's childcare business should not be admitted. Counsel made a causation argument, and contended these developments did not satisfy the "but for" test. (60 RT 6342-6346.) The court overruled the objections. (60 RT 6346, 6348.)

On October 7, 1996, Mary testified as a victim-impact witness. She described her youngest daughter as kind, helpful, and a religious person who was a church volunteer. (62 RT 6604.) Mary was very close to the victim. (62 RT 6605.) She initially learned of Francia's death on the television news. (*Ibid.*) Mary could not believe her daughter was dead until she saw the body at a funeral home. (62 RT 6605-6606.) Francia was buried in Texas next to Mary's father. (62 RT 6606.) A special headstone was made in the shape of a pink heart. Inscribed on it are the words, "My Beloved Daughter, Francia Young." (*Ibid.*)

After the murder, Mary could no longer operate her business, an in-home daycare for children. (52 RT 5383; 62 RT 6607.) She was also unable to provide care for her own sick mother and had to entrust her care to a family member in Louisiana. (62 RT 6607.) Mary was unable to sleep for three months after the murder and ended up in the hospital for a week. (*Ibid.*) Mary received weekly grief counseling which she thought would be paid for by the "victim of a crime board." (62 RT 6607-6608.) Because Mary had insurance, the bill was not paid and she was left nine thousand dollars in debt. (62 RT 6608.)

Following Mary's testimony, Ely Gassoway was called as a

victim-impact witness. Gassoway testified Mary was a very good friend whom he had known since 1973. (62 RT 6610.) Mary's daughters considered Gassoway like a stepfather. He reciprocated and considered Francia his daughter. (*Ibid.*) Gassoway testified he was "destroyed" by the news of Francia's death. (62 RT 6611.)

(B) **The Mary Young Victim-Impact Testimony Violated the Eighth Amendment Heightened Reliability Requirement**

The public defender asked the court to limit victim-impact testimony to the victim's personal characteristics known to appellant at the time of the homicide as well as evidence properly received during the guilt phase. (8 CT 2164.) This request was granted in part by the ruling restricting the class of victim-impact witnesses to family members. (2 RT 242.) Successor counsel added objections to financial losses incurred by Mary following her daughter's death. (60 RT 6342-6346.)

Despite these objections, Mary was permitted to testify to characteristics of the victim that could not have been known to Thomas at the time of the crimes, to funeral and burial arrangements, the loss of her daycare business, and debts for grief counseling. All of this evidence was improper and highly prejudicial.

In *Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 115 L.Ed.2d 720] the court held the Eighth Amendment did not forbid the introduction of victim-impact evidence. Unfortunately, the court failed to articulate any procedural guidelines to restrict the introduction of victim impact evidence. (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L. Rev. 257, 267.)

In *People v. Edwards* (1991) 54 Cal.3d 787 [1 Cal.Rptr.2d 696, 819 P.2d 436] this Court held victim-impact evidence was admissible under factor (a), the circumstances of the crime. The Court declined to "hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* [citation]." (*Ibid.*) Instead, this Court cautioned the decision did "not mean there are no limits on emotional evidence and argument." (*Id.* at p. 836.) To the contrary, the jury must "not be given the impression that emotion may reign over reason." (*Ibid.*) Trial courts must attempt to strike a balance: "On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' [Citation.]" (*Ibid.*)

As explained above, in *People v. Fierro*, *supra*, 1 Cal.4th 173, Justice Kennard wrote in a concurring and dissenting opinion that victim-impact evidence should be limited to personal characteristics of the victim known to the defendant at the time of the crime or properly received during the guilt phase. (*Id.* at pp. 263-264 (conc. & dis. opn. of Kennard, J.).) The public defender urged the court to apply this standard to victim-impact testimony. (8 CT 2168.)

In her concurring and dissenting opinion in *Fierro*, Justice Kennard pointed out that in *Booth v. Maryland* (1987) 482 U.S. 496, 504-505 [107 S.Ct. 2529, 96 L.Ed.2d 440] the high court considered it self-evident that the phrase "circumstances of the crime" did not

include evidence of the personal characteristics of a murder victim and the emotional impact of the crimes on the victim's family. (*People v. Fierro*, *supra*, 1 Cal.4th 173, 260 (conc. & dis. opn. of Kennard, J.).) Justice Kennard also pointed out that in *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876] the court held "that the term 'circumstances of the crime' did not include personal characteristics of the victim that were unknown to the defendant at the time of the crime." (*People v. Fierro*, *supra*, 1 Cal.4th 173, 260 (conc. & dis. opn. of Kennard, J.).)

Justice Kennard acknowledged the court in *Payne v. Tennessee*, *supra*, 501 U.S. 808, had overruled *Booth* and *Gathers*. However, the *Payne* majority did not overrule the conclusions about "circumstances of the crime" contained in those cases. Instead, the court construed the victim-impact evidence as the "harm caused by the crime." (*People v. Fierro*, *supra*, 1 Cal.4th 173, 260 (conc. & dis. opn. of Kennard, J.).) "Rather than including victim impact as a 'circumstance of the crime,' the high court in *Payne* expanded from two to three the number of considerations permissible for capital sentencing under the Eighth Amendment. Previously, a death sentence might be based only on the defendant's character and background and the circumstances of the crime, but after *Payne* it might be based also on the specific harm caused by the crime." (*Id.* at p. 261 (conc. & dis. opn. of Kennard, J.).)

According to Justice Kennard, it was a mistake to construe the circumstances of the crime as defined in section 190.3 factor (a) as including victim-impact evidence. This construction was overbroad and made the factor so broad that it included the remaining factors

listed in section 190.3. (*People v. Fierro*, *supra*, 1 Cal.4th 173, 260 (conc. & dis. opn. of Kennard, J.).) To avoid this vagueness problem and conform to the still valid portions of *Booth* and *Gathers*, Justice Kennard believed the circumstances of the crime "should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in the proof of the charges adjudicated in the guilt phase." (*Id,* at p. 264 (conc. & dis. opn. of Kennard, J.).)

The Louisiana Supreme Court has reached the same conclusions. The court has explained, "To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime." (*State v. Bernard* (La. 1992) 608 So.2d 966, 972.)

In this case, the Mary Young testimony was enormously damaging to appellant's right to a fair penalty decision and contrary to the Eighth Amendment heightened reliability requirement. Had the court followed the guidelines proposed by Justice Kennard, the victim's mother would not have been able to describe her months of sleeplessness, grief counseling and the debt which resulted from the therapy, loss of her in-home daycare business, and the pink heart-shaped grave marker.

It cannot be doubted that victim impact testimony "is perhaps the most compelling evidence available to the State—highly

emotional, frequently tearful testimony coming directly from the hearts and mouths of the survivors left behind by killings." (Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials* (1999) 41 Ariz. L. Rev. 143, 178-179.) Victim impact evidence can "overwhelm the jury with feelings of outrage towards the defendant and identification with the victim." (Bandes, *Empathy, Narrative, and Victim Impact Statements* (1996) 63 U. Chicago L. Rev. 361, 401.)

The trial court committed error in allowing the victim's mother to testify to Francia's characteristics not apparent at the time of the incident, burial arrangements, her own grief, losses, and debts from grief therapy.

(C) **Ely Gassoway's Testimony Violated the Court's Ruling Limiting Victim-Impact Evidence to Family Members.**

As seen above, the trial court ruled victim-impact testimony to family members. (2 RT 238.) As a friend of Mary Young, Gassoway was not a member of the victim's family. His testimony was therefore offered in violation of the court's ruling on trial motion number three.

(D) **Appellant Is Entitled to a New Penalty Determination**

The trial court's decisions in this case opened the door to wrenching, highly emotional testimony. In his closing argument, the prosecutor used the victim-impact testimony to make melodramatic, over-the-top appeals to emotion. Anderson went through a litany of derision to demonize and dehumanize Thomas. Anderson contrasted appellant—a vile, nasty predator of women, a hyena, and a cancer—with the murder victim, whom he characterized as a

"virtual living saint" and a "pious, religious, beautiful person." (66 RT 7013-7014.) Anderson was not above reminding the jury the victim was buried "underneath that tombstone with the big pink heart down in Texas." (66 RT 7013.)

The error in admitting the heart-rending victim-impact testimony was of federal constitutional dimension, for it prevented Thomas from receiving a fair penalty hearing and violated the Eighth Amendment heightened reliability requirement. Reversal of the penalty verdict is therefore required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.)

The trial record discloses important mitigation. At the time of the crimes, Thomas was a mere 19-year-old.[33] Appellant's childhood was a nightmare of abuse, neglect, and deprivation. Even the prosecutor had to acknowledge Thomas suffered a "rotten, lousy, abusive childhood." (66 RT 6996.) Despite the emotional victim-impact testimony and the prosecutor's efforts to exploit it in argument, the jury required some fifteen hours of deliberations over a period of five days in order to reach a decision. (14 CT 4049-4052, 4065, 4143.) The improper victim-impact evidence was not harmless beyond a reasonable doubt. The penalty decision should be reversed.

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[33] Anderson denied appellant's age should be considered as mitigation for at 19 and a half he was a "full blown adult." (66 RT 6993.) He therefore urged the jury to give factor (i) "scant attention and consideration." (66 RT 6994.)

XIII.

LIMITIATIONS PLACED ON THE CASE IN MITIGATION VIOLATED THE EIGHTH AMENDMENT AND REQUIRES REVERSAL OF THE PENALTY DECISION.

(A) Procedural History

(1) Evidence Code Section 402 Hearing

The trial court placed restrictions on the case-in-mitigation in violation of appellant's Eighth Amendment right to introduce evidence that provides a basis for a sentence less than death. Specifically, the court prohibited the defense from introducing two keys facts about his mother, Veronica Johnson: she was a victim of sexual abuse at the hands of her father, and had attempted to kill a stepbrother using a meat cleaver.

On October 8, 1997, the court considered what defense counsel described as a *Rowland* issue regarding the admissibility of appellant's personal and family background during the case-in-mitigation.[34] Counsel explained he would offer a social history of appellant through the testimony of psychologist Ranald Bruce. In his view, the crux of the defense case was based upon the fact Thomas experienced substantial abuse as a child which had a lasting impact upon him. (63 RT 6622.)

Dr. Bruce believed appellant's mother, Veronica Johnson, lacked any parenting skills. These abilities are generally developed during childhood. Johnson, however, experienced a horrific

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[34] The name given to the issue is taken from this Court's decision in *People v. Rowland* (1992) 4 Cal.4th 238 [14 Cal.Rptr.2d

childhood, which included physical and sexual abuse. (63 RT 6623-6624.) Counsel illustrated the importance of Johnson's history to appellant's character and background by examples. Johnson was abandoned by her mother, who left the children with their father. Johnson, in turn, abandoned appellant. Furthermore, Johnson was sexually exploited by her father and beaten by her stepmother. (63 RT 6627.) Johnson then beat appellant. The court was inclined to permit the general subject of Johnson's history without going into specific incidents. (63 RT 6627.)

Counsel objected that conclusions without examples—which he characterized as "some flesh on those bones"—would just be statements lacking persuasive force. (63 RT 6628.) Defense counsel pointed out Johnson was held down and beaten, then reenacted this abuse by having appellant restrained for beatings. (63 RT 6629.) On one occasion, Johnson tried to kill her brother with a meat cleaver. (*Ibid.*) Counsel expected the testimony about Johnson could be presented in five to ten minutes. (63 RT 6630.)

The prosecutor had no objection to testimony Johnson was herself a victim of physical and sexual abuse. However, he did object to testimony describing specific events in her history, as he was unable to cross-examine any witnesses to such events. (63 RT 6630, 6632.)

The court ruled the defense could present testimony Johnson was a victim of sexual abuse, but without going into specific examples of mistreatment. (63 RT 6633.) Specifically, the court

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377, 841 P.2d 897].

refused to allow testimony that Johnson had sex with her father, became pregnant, and wanted to terminate the pregnancy but was not allowed to do so. (63 RT 6640.) The court allowed testimony that at the time she became pregnant with appellant, Johnson was selling drugs. Counsel was also allowed to present evidence the father, Keith Thomas, Sr., was a pimp. The court also allowed evidence Johnson did not want the baby, meaning appellant. (63 RT 6644-6645.) As for physical abuse, the court would allow the defense to elicit specific examples of violence visited upon Johnson if she later inflicted similar abuse on appellant. (63 RT 6634, 6638.)

On October 9, 1997, the court and counsel revisited the family background issue. In a videotaped interview, Johnson said when she was 14-years-old she had been molested by a stepbrother. When she caught the same stepbrother attempting sexual acts with a 12-year-old stepsister, Johnson got a meat cleaver and chased him out of the house. (64 RT 6733-6734.) Defense counsel argued the incident was relevant because Johnson also attempted to kill appellant. (64 RT 6735.) The court sustained the government's objection and excluded any testimony about this incident. (64 RT 6738.)

(2) Testimony About Appellant's Family Background

Defense witnesses testified Johnson was a victim of sexual abuse between the ages of nine and twelve. (64 RT 6751.) Her stepmother was physically abusive and struck her with two by four pieces of lumber. (64 RT 6751-6752.) Johnson's stepbrother was also physically and emotionally abusive. (63 RT 6718.) When she was fourteen, Johnson was sent to live with an aunt. (63 RT 6718-

6719.) The aunt used physical discipline on her, and Johnson ran away when she was 16-years-old after being struck with an umbrella. (63 RT 6719.) When she was 17-years-old, Johnson became pregnant with appellant by Keith Sr. (*Ibid.*)

The defense psychologist testified on October 10, 1997. Bruce testified that parental background is important since parenting skills are largely taken from one's childhood. (65 RT 6868-6869.) Appellant's mother was a victim of physical and sexual abuse. (65 RT 6869.) Bruce testified Thomas was born as a consequence of an unwanted pregnancy. (65 RT 6870.)

(B) **The Eighth Amendment Right to Present Family History During the Case-in-Mitigation**

In *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [98 S.Ct. 2954, 57 L.Ed.2d 973] a plurality of the high court held "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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 proffers as a basis for a sentence less than death." Since *Lockett*, the Eighth Amendment requires the defendant in a capital case be permitted to introduce any relevant mitigating evidence. (*California v. Brown* (1987) 479 U.S. 538, 541 [107 S.Ct. 837, 93 L.Ed.2d 934].)

"Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440 [110 S.Ct. 1227, 108 L.Ed.2d 369].) "Once this low threshold for relevance is met, the

'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence. [Citations.]" (*Tennard v. Dretke* (2004) 542 U.S. 274, 285 [124 S.Ct. 2562, 159 L.Ed.2d 384].) In *Payne v. Tennessee*, *supra*, 501 U.S. 808, 822, the court wrote, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances . . ."

The offender's background in general (*People v. Rowland*, *supra*, 4 Cal.4th 238, 278) and childhood in particular (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 115) is relevant mitigation. To ensure that all relevant mitigation is developed and presented at trial, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases impose a duty on defense counsel to conduct a "thorough and independent investigation relating to issues of both guilt and penalty." (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) 31 Hofstra L. Rev. 913, 1015 [ABA Guidelines].) Penalty phase investigation of family and social history must include "physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence . . ." (*Id.* at p. 1022.) The high court has endorsed the ABA Guidelines as describing the benchmark against which the performance of counsel must be measured. (*Wiggins v. Smith* (2003) 539 U.S. 510, 524 [123 S.Ct. 2527, 156 L.Ed.2d 471].)

Given these standards, myriad cases have found prejudicial error in the exclusion of family history or the failure of defense counsel to investigate and present this information. (See e.g.,

Daniels v. Woodford (9th Cir. 2005) 428 F.3d 1181, 1205-1206 [guilt and penalty phase relief for numerous failings by defense counsel, including failure to present the defendant's family history of mental illness]; *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1176 [death sentence vacated for defense counsel's failure to develop and present mitigation, including evidence the defendant's sister was a victim of sexual molestation and he was aware of the abuse]; *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1501 [death sentence set aside for defense counsel's failure to present mitigating evidence, including evidence the defendant's grandmother had a history of psychosis that required hospitalization].)

This Court's decisions are not entirely consistent with the standards established by the high court. According to this Court, standing alone, the background of the defendant's family is not relevant. (*People v. Rowland*, *supra*, 4 Cal.4t 238, 279.) However, "the background of the defendant's family is material if, and to the extent that, it relates to the backgrounds of defendant himself." (*Ibid.* see also *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061-1062 [90 Cal.Rptr.2d 607, 988 P.2d 531][minimal limits placed on defense expert concerning the background of capital defendant's mother permissible when expert allowed to testify to mother's behavior in relation to defendant].)

In this case, the court followed *Rowland* and excluded from evidence two critical pieces of background information: Johnson was a victim of incest, and she had attempted to kill a stepbrother with a meat cleaver. Exclusion of the fact appellant's mother was a survivor of incest was egregious error. Sexual relations between a

parent and child are taboo, and generally regarded with horror. (Encyclopedia Britannica Online, Incest, http://www.britanica.com/eb /article-9042245/incest> [as of January 6, 2007].)

Revulsion at incestuous relations, along with parricide, drives once of the great plays of ancient Greece, Oedipus the King. (The Complete Greek Tragedies, Volume II, Sophocles, Oedipus the King (Univ. of Chicago Press 1991).) In the ancient tragedy, when the doomed king's mother and wife Jocasta learned she had unknowingly married her son and had children with him, she took her own life by hanging. Oedipus reacted to the disclosure of his unwitting crimes by blinding himself and going into exile from his kingdom in Thebes. (Encyclopedia Britannica Online, Sophocles, Oedipus the King, <http://www.britannica.com/eb/article-30145/ Sophocles#30145> [as of January 6, 2007].)

In more recent times, incest is one of the central themes of the classic film Chinatown (Paramount Pictures 1974). Even private eye Jake Gittes—played by Jack Nicholson—is stunned when he learns a mysterious blonde girl is both the sister and daughter of his client, Evelyn Mulwray, a result of being raped by her father when she was 15-years-old. (Wikipedia, Chinatown, <http://en.wikipedia.org/wiki/ Chinatown_(film)> [as of January 6, 2007].)

These examples from popular culture illustrate the longstanding importance of the prohibition on incest. Johnson's regrettable experience as a victim of incest was relevant family background for it doubtless had an influence on appellant's personal history. Defense counsel told the court appellant's mother was a "little crazy." (63 RT 6639.) This craziness can be glimpsed in

Johnson's inappropriate views on sex, such as how she laughed at Thomas being a victim of sexual abuse at a very young age. (65 RT 6876.) It is certainly possible that Johnson allowed appellant to be sexually abused because of her own victimization. Because the court excluded mention of the fact Johnson was a victim of incest, the defense expert could not link this fact to her treatment of appellant. In a death penalty case involving sex crimes against the murder victim, the persistence of sexual exploitation in the defendant's family across three generations is surely relevant mitigation. It was fundamental error for the court to exclude evidence appellant's mother was an incest victim.

Similarly, the court committed error in excluding evidence Johnson had attempted to kill her stepbrother with a meat cleaver. The district attorney objected to this incident because in his view it was not a crime. Instead, Johnson acted in defense of a stepsister. (64 RT 6736-6738.) This argument is so preposterous it cannot pass the "straight face test." Surely Anderson was familiar with the rule self-defense and defense of others do not provide the actor with unfettered discretion to resort to deadly force and murderous weapons.

In any event, whether or not the act was a crime is not the point. The willingness to resort to deadly force, to wield a fearsome weapon against a family member is the significance of the excluded evidence. The incident suggests a propensity for extreme violence and, at the same time, a touch of the craziness described by defense counsel. Certainly the meat cleaver incident placed Johnson's admitted effort to choke appellant to death in a different,

more sinister light. Johnson's statement she tried her best to kill appellant and would have succeeded if a family member had not intervened (65 RT 6877) rings true when viewed against the background of the meat cleaver incident. It was error for the court to exclude this important information from the case-in-mitigation.

(C) **Appellant Is Entitled to a New Penalty Determination**

The exclusion of relevant mitigation is constitutional error in violation of the Eighth Amendment. Reversal of the penalty verdict is therefore required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.)

As seen above, the jury required some 15 hours of deliberations in order to arrive at a decision. The penalty case was a close contest, one in which any meaningful error could have tipped the balance against appellant. The exclusion of important elements of Johnson's history that had a direct bearing on appellant's life cannot be construed as harmless beyond a reasonable doubt. The penalty judgment should be reversed.

XIV.

THE PROSECUTOR ENGAGED IN EGREGIOUS MISCONDUCT IN CLOSING ARGUMENT THAT TAINTED THE PENALTY PHASE WITH UNFAIRNESS AND DEPRIVED APPELLANT OF DUE PROCESS AND A RELIABLE PENALTY DETERMINATION.

Assistant district attorney Anderson committed multiple acts of misconduct in closing argument. He engaged in name-calling intended to dehumanize Thomas in the eyes of the jury, made repeated outrageous statements designed to appeal to passion and prejudice, called attention to appellant's failure to testify, and attempted to transform mitigation into aggravation. In the aggregate, the many instances of improper argument tainted the penalty phase, denied Thomas due process (U.S. Const., 5th & 14th Amends.), and rendered the penalty decision unreliable in violation of the Eighth Amendment.

(A) The Prosecutor Engaged in Dehumanizing Name-Calling

Assistant district attorney Anderson "had a flair for labeling killers as vermin, reptiles, hyenas or worse while telling jurors the defendants were cancers best cut from the world." (*Passionate Foe, supra.*) Anderson's "flair" for vilification of the accused as something less than human was on full display in this case. In his guilt phase closing argument, the prosecutor told the jury the special circumstance allegations were true "no matter which one of these depraved cowards pulled the trigger." (59 RT 6087.)

In his penalty phase argument, Anderson ratcheted up the purple prose to a level that would be farcical in a different context. The prosecutor showered Thomas with invective, describing him as

a "predator of the women of Alameda County" (66 RT 6962), a "depraved predator" (69 RT 6974), and "vile, nasty predator of women" (66 RT 7010). Anderson characterized Thomas and Glover as "predators" (69 RT 6964) and "hyenas" (66 RT 6969). He twice referred to appellant as a sociopath. (69 RT 6963, 6973.) In line with his so-called "flair" for vituperation, Anderson twice referred to appellant as a "walking cancer." (66 RT 6970, 7016.) Just as described in the newspaper article on his retirement (*Passionate Foe*, *supra*) Anderson told the jury, "You cull out cancer . . . That cancer deserves the death penalty." (66 RT 6970.)

This Court has held the government's lawyer can vigorously argue his case and is not required to use "Chesterfieldian politeness."[35] (*People v. Stanley* (2006) 39 Cal.4th 913, 952 [47 Cal.Rptr.3d 420, 140 P.3d 736].) However, the latitude granted the government's lawyer in argument should not be confused with license. Name-calling—such as calling the defendant an animal—is improper and constitutes misconduct. (*Darden v. Wainwright* (1986)

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[35] Presumably the Court's citation refers to Philip Dormer Stanhope, the fourth earl of Chesterfield. Stanhope was an eighteenth century British statesman, diplomat and wit who is best remembered for Letters to His Son and Letters to His Godson, which can be described as guides to manners, the art of pleasing, and worldly success. "Ironically, Chesterfield's painstaking advice seems to have fallen on deaf ears: his son was described by contemporaries as 'loutish,' and his godson was described by Fanny Burney as having 'as little good breeding as any man I ever met.'" (Encyclopedia Britannica Online, Philip Dormer Stanhope, 4th earl of Chesterfield, <http://www.britannica.com/eb/article-9023891/Philip-Dormer-Stanhope-4th-earl-of-Chesterfield> [as of December 29, 2006].)

477 U.S. 168, 179-180 [106 S.Ct. 2464, 91 L.Ed.2d 144].) This Court does not approve of "the use of opprobrious terms in argument . . ." (*People v. McDermott*, *supra*, 28 Cal.4th 946, 1002.) However, the Court has also held that "such epithets are not necessarily misconduct when they are reasonably warranted by the evidence." (*Ibid.*) Be that as it may, it is impossible to imagine how expletives such as "hyena" and "cancer" can be "reasonably warranted by the evidence."

In *Martin v. Parker* (6th Cir. 1993) 11 F.3d 613, the prosecutor described the defendant as a dictator and compared him to the infamous Adolph Hitler. The Sixth Circuit found this argument to be "highly improper" and "deplorable" and, in conjunction with additional acts of misconduct, deprived the defendant of his due process right to a fair trial. (*Id.* at pp. 616-617; see also *Bates v. Bell* (6th Cir. 2005) 402 F.3d 635, 643-644 [misconduct for prosecutor in penalty phase closing argument to describe defendant as a "rabid dog"].)

Here, the prosecutor's vituperation was not haphazard name-calling. To the contrary, Anderson carefully selected his words so as to dehumanize Thomas, and make it easier for the jury to vote for death. "Dehumanization is a psychological process whereby opponents view each other as less than human and thus not deserving of moral consideration." (Maisse, *What it Means to Dehumanize*, Beyond Intractability, <http://www.beyondintractability.org/essay/dehumanization> [as of December 30, 2006].) Once an individual or group is dehumanized, the way is open for "human rights violations, war crimes, and genocide." (*Ibid.*) "Social psychologists have recognized that dehumanization is one of the

most powerful cognitive processes that can distance people from the moral implications of their actions." (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1454.) Dehumanization is therefore an essential step for jurors to condemn a convicted killer to death.[36] (*Id.* at p. 1451.) Anderson's use of epithets amounted to misconduct.

(B) **The Prosecutor Made Repeated Appeals to Passion and Prejudice**

Anderson made repeated appeals to passion and prejudice rather than the facts and the law. He warned the jury that Thomas would always be a "walking time bomb." (66 RT 7011.) Because he would not receive any therapy or rehabilitation in prison, an LWOP sentence would be "a Gold Visa card to continue his marauding ways in the state prison system." (*Ibid.*) An objection was sustained to this argument and counsel requested an admonition. The court merely said, "The jury can disregard that comment. [¶] Go ahead." (66 RT 7011.)

Anderson was not chastised by the objection or the vague admonition and returned to his improper theme. He argued any misconduct by Thomas could not be punished by further incarceration. (66 RT 7012.) Hence, the only possible way to

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[36] It should be noted that at one time six members of this Court held capital punishment "degrades and dehumanizes all who participate in its processes." (*People v. Anderson* (1972) 6 Cal.3d 628, 656 [100 Cal.Rptr. 152, 493 P.2d 880].) The *Anderson* holding was overruled by voter approval of Article I, section 27 of the

penalize him would be the loss of privileges, such as taking away his color television. (66 RT 7011-7012.) Defense counsel objected there was no evidence to support the argument and requested an admonition, but the objection was overruled. (*Ibid.*)

At the conclusion of his penalty argument, Anderson's misconduct reached an apogee: "Now, I'm telling you that you 12 jurors are the conscience of this community, and I ask right now, should this community—should our community, should Alameda County show any mercy, any compassion, any sympathy for the defendant?" (66 RT 7013-7014.) Defense counsel objected and asked for an admonition. The court replied, "The jury can disregard the whole community comment." (66 RT 7014.)

Unbowed by the court's ruling, a short time later the prosecutor stated, "Ladies and gentlemen, I implore you to send a message out that this kind of --" (66 RT 7016.) Again defense counsel objected and asked for an admonition. The court stated, "Yes. The jury can disregard that comment." (*Ibid.*)

In argument to the jury, a prosecutor cannot make appeals to passion and prejudice. (*Viereck v. United States* (1943) 318 U.S. 236, 247-248 [63 S.Ct. 561, 87 L.Ed. 734].) In penalty phase closing argument, "a prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." (*Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1020.)

In *Bates v. Bell*, *supra* 402 F.3d 635, the government's penalty

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California Constitution.

phase argument for a death sentence included comments meant to inflame the jury against the defendant. The prosecutor argued that if the defendant received a life term, he would almost certainly commit additional murders in prison. The jury would be accomplices to such future crimes. The Sixth Circuit held the argument was misconduct and violated "the cardinal rule that a prosecutor cannot make statements calculated to incite the passions and prejudices of the jurors." (*Id.* at p. 642 [internal quotation marks omitted].)

As in *Bates v. Bell*, *supra*, 402 F.3d 635, the prosecutor assured the jury that Thomas would be a menace if he received an LWOP sentence. Even worse—without any evidence in the record to support his argument—Anderson warned the jury that prison officials would not be able to control appellant. With an LWOP sentence, Thomas could receive no additional punishment. As a result, the only way to influence his behavior would be to take away his color television. (66 RT 7011-7012.)

Although bad faith is not required for the Court to conclude Anderson engaged in misconduct (*People v. Hill*, *supra* 17 Cal.4th 800, 822-823), the facts support an inference the prosecutor knew or should have known his argument was a caricature of the facts. Anderson was hired by the district attorney's office in April 1971. (*Passionate Foe*, *supra*.) At the time of trial in this matter, Anderson had 26 years of experience as a prosecutor. Furthermore, Anderson had been responsible for "lifer hearings" for prisoners serving indeterminate sentences. (*Ibid.*) It is reasonable to infer from his experience that Anderson had some knowledge of the Department of Corrections, and such disciplinary measures as administrative

segregation and the SHU or segregated housing units used to house high-risk prisoners. Anderson had to know his color television argument was disingenuous, misleading, and amounted to misconduct.

The "conscience of the community" remarks were a brazen attempt to rouse the jury's passions. As the supervisor of the district attorney's "death team," surely Anderson was familiar with such fundamental concepts as the Eighth Amendment requirement the capital sentencing decision must be based upon the facts and circumstances of the crime and the offender's character and background. (*Gregg v. Georgia*, *supra*, 428 U.S. 153, 189.) The conscience of the community has no role in the jury's individualized sentencing decision. To appeal to the conscience of the community was a blatant appeal to emotion in an effort to inflame the jury against appellant.

No doubt respondent will maintain the objections by defense counsel and admonitions by the court were sufficient to cure any prejudice from the improper argument. As a general rule, the jury is presumed to obey the court's admonitions and instructions. (*People v. Adcox* (1988) 47 Cal.3d 207, 253 [253 Cal.Rptr. 55, 763 P.2d 906].) Hence, in most instances, an admonition is a sufficient remedy. However, as seen above, there are times when it is not possible to "unring the bell." (*People v. Hill*, *supra*, 17 Cal.4th 800, 845.) Here, the admonitions given by the court could not undo the harm to appellant.

Initially, the court's admonitions were so laconic as to be inscrutable. Rather than phrase the admonitions as directions—the

jury *shall* disregard the "conscience of the community" and "send a message" arguments—the court used discretionary language: the jury *can* disregard the prosecutor's arguments. (66 RT 7011, 7014, 7016.) Thus the jury was free to consider the improper appeals to passion and prejudice. Lukewarm advice cannot produce anything more than a tepid result. The nominal admonitions were not sufficient to cure the prejudice to Thomas.

Furthermore, Anderson's appeals to passion and prejudice were so inflammatory as to be immune to muted directions the jury could disregard the comments. The prosecutor maintained Thomas was a cancer, a hyena, and a thing that could only be controlled by a death sentence. By the terms of his argument, Anderson branded appellant as a toxic hazard that would cause harm inside any prison to which he was confined. Therefore, as the conscience of the community, the jury had a duty to eradicate the cancer and, in the process, send a message crimes such as those described in the guilt phase would not be tolerated in Alameda County. Such inflammatory rhetoric cannot be cured by halfhearted admonitions. The court's directions to the jury were akin to dousing a house afire with a single bucketful of water. The admonitions failed to cure the harm to appellant from Anderson's outrageous argument.

(C) ***Griffin* Error**

A prosecutor's comment on the defendant's failure to testify violates the Fifth Amendment privilege against self-incrimination. (*Griffin v. California* (1965) 380 U.S. 609, 612 [85 S.Ct. 1229, 14 L.Ed.2d 106].) The reference to a defendant's failure to testify need not be direct; indirect references or implications can also violate the

Fifth Amendment. (See, e.g., *United States v. Cotnam* (7th Cir. 1996) 88 F.3d 487, 497, 500 [reversal required where prosecutor commented that the evidence was uncontroverted]; *Williams v. Lane* (7th Cir. 1987) 826 F.2d 654, 664 [prosecutor's comment that nobody contradicted only testifying witness constituted indirect comment on failure to testify]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 810 [improper for prosecutor to make repeated references to the failure to hear from the "only person" who could explain what happened].)

Here, the prosecutor argued Silvey's in-court identification of Thomas as one of the offenders who confronted her in the driveway of her home was accurate and defense efforts to call the identification into question were not persuasive. He argued: "Think about this, too. Did you ever hear an alibi put forth for Keith Thomas on the evening of December 11th, 1992. Did you ever hear an alibi? [¶] Anybody come forward and say he couldn't have done it, he was with me? [¶] Not one person came forward." (66 RT 6989-6990.) Defense counsel interjected, "Objection. Misconduct. *Griffin* error." (66 RT 6990.) The court overruled the objection, and explained the argument was fair comment on the evidence. (*Ibid.*) Not so.

Rather than fair comment, the government's argument reminded the jury that no defense had been presented to the Silvey incident. The first four sentences of the quoted argument described a lack of alibi that can be viewed as comment on the state of the evidence. However, last sentence—"Not one person came forward"—goes beyond a lack of alibi argument to point out "one person," meaning Thomas, did not come forward to allege he was

elsewhere at the time of the Silvey incident. This is *Griffin* error and misconduct. The court was wrong to overrule the objection.

As a consequence of the mistaken ruling, Anderson continued in the same vein for more than an additional page of argument on the failure to present a defense to the Silvey incident. (66 RT 6990-6991.)

(D) ***Boyd* Error**

Boyd error occurs when a prosecutor erroneously argues that factor (k) evidence, which can only be considered in mitigation, is in fact aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776 [215 Cal.Rptr. 1, 700 P.2d 782].) In this case, the prosecutor attempted to transform mitigation into aggravation in two ways. First, the prosecutor agreed appellant endured a "rotten, lousy, abusive childhood." (66 RT 6996.) He then attempted to twist the mitigation into aggravation by maintaining the abuse did not cause Thomas to commit murder and other crimes. Instead, he was a killer by choice. (66 RT 6999.) Of course, the defendant is not required to establish proffered mitigation was the reason for murder. (*Tennard v. Dretke* , *supra*, 542 U.S. 274, 285-286.) Here, however, the prosecutor dismissed the case-in-mitigation because of the lack of a nexus between the abuse of Thomas as a child and his crimes as an adult.

Second, the government used the defense evidence to maintain appellant would be a "walking time bomb forever." (66 RT 7011.) The prosecutor quoted from the testimony of Dr. Ranald Bruce, who stated on direct examination that blocking things out "only guarantees that they will come back and haunt you throughout

your life." (66 RT 7010, quoting 65 RT 6882.) As described above, Anderson went on to maintain the absence of therapy and rehabilitation in prison meant appellant would pose a danger to others if sentenced to life imprisonment without the possibility of parole. (66 RT 7011-7012.)

In short, the prosecutor maintained appellant's childhood of abuse and deprivation did not cause the murder and other crimes, so it was not mitigation. The history of abuse, did, however, make Thomas a "walking time bomb" and was therefore evidence in aggravation. Hence, the case-in-mitigation was in fact a reason to vote for the death penalty. This is *Boyd* error.

(E) **The Constitutional Error Requires Reversal of the Penalty Verdict**

A prosecutor's misconduct violates the federal constitution when it amounts to a pattern so egregious that it taints the trial with unfairness and makes any conviction a denial of due process. (*People v. Stanley*, *supra*, 39 Cal.4th 913, 951.) Misconduct that does not rise to the level of federal constitutional error amounts to misconduct under state law if it entails the use of deceptive or reprehensible methods in an effort to persuade the court or jury. (*Ibid.*).)

In this case, Anderson used disingenuous arguments, name-calling, appeals to passion and prejudice, comment on appellant's failure to take the witness stand, and attempted to convert mitigation into aggravation. If the misconduct is correctly understood as federal constitutional error, it was not harmless beyond a reasonable doubt, and reversal is required. (*Chapman v. California*, *supra*, 386

U.S. 18, 24.)

If the misconduct is viewed as state law error, reversal is still required. In *People v. Brown* (1988) 46 Cal.3d 432, 448 [250 Cal.Rptr. 604, 758 P.2d 1135], this Court stated penalty phase error which does not amount to federal constitutional error requires reversal is there is a realistic possibility the jury might have reached a different result in the absence of the error. In *People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 [2 Cal.Rptr.2d 112, 820 P.2d 214] the Court explained this standard required reversal when there was a possibility a hypothetical reasonable juror might have reached a different decision in the absence of the error. This is a more exacting standard than the error-tolerant *Watson* test. (*People v. Brown*, *supra*, 46 Cal.3d 432, 447.)

Here, the lengthy penalty phase deliberations demonstrate the jury viewed the sentencing decision as a close issue. But for the multiple acts of misconduct, a hypothetical reasonable juror could have readily come to a more favorable decision. The multiple acts of misconduct in penalty phase argument deprived appellant of due process (U.S. Const., 5th & 14th Amends.), a fair sentencing hearing and a reliable penalty determination (U.S. Const., 8th Amend.). The penalty decision must be reversed.

XV.

THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO INFORM THE JURY OF THE PRESUMPTION OF INNOCENCE AND ALLOCATION OF THE BURDEN OF PROOF FOR FACTOR (B) EVIDENCE, AND CONTAINED INCOMPLETE DIRECTIONS ON THE EVALUATION OF EVIDENCE.

(A) Procedural History

On October 14, 1997, following the conclusion of penalty phase evidence, the court and counsel discussed jury instructions. Defense counsel asked the court to modify CALJIC No. 8.85 to delete inapplicable factors (e) on whether the murder victim participated in the fatal incident or consented to the homicidal conduct, and (f) on whether or not the crime was committed under circumstances the defendant viewed as moral justification or extenuation for his conduct. (66 RT 6954-6955; 14 CT 4115.) The court denied the defense motion. (66 RT 6955.) At the conclusion of the review of instructions, defense counsel stated he no further objections or requests for instructions. (66 RT 6955-6956.)

On October 15, 1997, after the prosecutor and the defense attorneys made their finals arguments to the jury, the court instructed the jury. The court read CALJIC No. 8.84.1, which provides, in relevant part, "You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial." (66 RT 7071; 14 CT 4074.) In light of this instruction telling the jury to disregard the guilt phase instructions, the trial court

had a sua sponte duty to instruct the jury on the controlling legal principles applicable to the penalty phase—including matters that had already been covered in the guilt phase instructions. Indeed, this Court has cautioned trial judges "not to dispense with penalty phase evidentiary instructions . . ." (*People v. Carter* (2003) 30 Cal.4th 1166, 1222 [135 Cal.Rptr.2d 553, 70 P.3d 981].)

The court gave a series of penalty phase instructions,[37] instructions on uncharged offenses introduced as factor (b) evidence,[38] an instruction on possession of controlled substances as a prior felony conviction introduced pursuant to factor (c),[39] general instructions on consideration of the evidence,[40] and instructions on

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[37] In addition to 8.84.1, the penalty instructions were CALJIC Nos. 8.84 [introductory], 8.85 [factors for consideration], 8.86 [proof of prior convictions beyond a reasonable doubt], 8.87 [other criminal activity], and 8.88 [concluding instruction]. (14 CT 4070-4074, 4094-4095, 4112, 4114-4116, 4122-4124.)

[38] The factor (b) evidence instructions were CALJIC Nos. 6.00 [attempt defined], 9.50 [simple kidnapping], 9.40 [robbery], 9.41 [fear], 16.140 [battery], 16.141 [force and violence], 16.142 [insulting words], and 16.460 [concealed weapons]. (14 CT 4101-4111.)

[39] CALJIC No. 12.02.

[40] The evidentiary instructions were CALJIC Nos. 1.01 [instructions considered as a whole], 1.02 [statements of counsel, etc.], 1.03 [independent investigation], 1.05 [use of notes], 2.11 [production of all available evidence], 2.13 [prior statements], 2.20 [believability of witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.23 [witness felony conviction], 2.60 [defendant not testifying], 2.80 expert witnesses, 2.81 [lay witness opinion], 2.82 [hypothetical questions], 2.91 [eyewitness identification], 2.92 [eyewitness identification factors], 3.30 [general criminal intent], and 3.31 [specific intent]. (14 CT 4075-4093, 4096-4100.)

jury deliberations.[41] The court gave a special instruction admonishing the jury against considering deterrence and costs in penalty deliberations. (14 CT 4073.) Finally, the court gave a truncated version of CALJIC No. 2.90 on proof beyond a reasonable doubt. (14 CT 4100.) The instructions were inadequate for failure to inform the jury on direct and circumstantial evidence (CALJIC Nos. 2.00 and 2.01), weighing conflicting testimony (CALJIC No. 2.22), and the presumption of innocence (CALJIC No. 2.90). Furthermore, the instructions were fatally deficient for failure to correctly advise the jury on the core concepts of proof beyond a reasonable doubt and the need for a unanimous decision consistent with the high court's landmark decision in *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324.

(B) **General Rules for Jury Instructions**

The guiding principles for jury instructions in a criminal case are well known. The defendant in a criminal case has a fundamental right to have the jury decide every significant issue raised by the evidence. (*People v. Flood* (1998) 18 Cal.4th 470, 480 [76 Cal.Rptr.2d 180, 957 P.2d 869].) Hence, trial courts have a sua sponte duty to instruct the jury as to the controlling principles of law. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) The general principles of law governing the case "are closely and openly connected to the facts and that are

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[41] The instructions on jury deliberations were CALJIC Nos. 17.40 [individual opinion required], 17.41 [juror's task], 17.45 [manner of recording instructions], 17.47 [jury balloting], and 17.53 [admonition to alternates]. (14 CT 4117-4121.)

necessary for the jury's understanding of the case." (*People v. Carter*, *supra*, 30 Cal.4th 1166, 1219.)

The test for assessing the adequacy of the jury instructions is to determine whether the trial court "fully and fairly instructed on the applicable law . . ." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111 [93 Cal.Rptr.2d 433].) Hence, a claim of instructional error is to be judged in light of the entire charge to the jury. (*People v. Lewis* (2001) 25 Cal.4th 610, 649 [106 Cal.Rptr.2d 629, 22 P.3d 392].)

(C) **The Court Had a Sua Sponte Duty to Instruct the Jury on Direct and Circumstantial Evidence Pursuant to CALJIC Nos. 2.00 and 2.01**

A trial court is required to instruct the jury on direct and circumstantial evidence (CALJIC No. 2.00) and the sufficiency of circumstantial evidence (CALJIC No. 2.01) whenever the government's case rests substantially or entirely upon circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 351 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1].)

In this case, the government's case on the murder accusation rested upon circumstantial evidence, for there were no testifying witnesses to the crime and appellant insisted in his post-arrest statements that he did not want the victim harmed. Appellant's post-arrest admissions to participation in the kidnapping and rape, considered in conjunction with the remaining evidence, may have sufficed for conviction on the murder charge on theories of aiding and abetting and felony-murder. However, the district attorney's case for true findings on the special circumstances for purposes of

death-eligibility and factor (a) evidence for death-selection rested upon circumstantial evidence. The omitted instructions on circumstantial evidence were therefore required sua sponte in the penalty phase.

(D) **The Court Had a Sua Sponte Duty to Instruct the Jury on Weighing Conflicting Testimony Pursuant to CALJIC No. 2.22**

The trial court failed to give the standard jury instruction on weighing conflicting testimony. This Court has imposed a sua sponte duty on trial courts to give this instruction "in every criminal case in which conflicting testimony has been presented." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885 [123 Cal.Rptr. 119, 538 P.2d 247]; see also *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097 [24 Cal.Rptr.2d 922].)

Here, the trial evidence was in significant conflict on key issues. For example, in the guilt phase, William Dials testified he witnessed the BART station kidnapping. According to the witness, Glover escorted the victim to the trunk and closed it with her inside. (52 RT 5370-5372.) Dials believed appellant resembled the lookout who stood on the sidewalk with his empty hands resting on top of the Mustang. (52 RT 5367-5370.) This testimony was inconsistent with appellant's post-arrest statement to Kozicki that he went to retrieve a rifle from its hiding place and when he returned noticed Glover closing the Mustang's trunk. (57 RT 5921.) As seen above, this discrepancy was important, for the prosecutor exploited the admission to argue Thomas was the actual killer. (59 RT 6096.)

In the penalty phase, there were important inconsistencies in the testimony of Constance Silvey and Berkeley inspector Daniel Wolke contradicted one another about their post-lineup conversations. Wolke testified he asked Silvey about her lineup choices. (62 RT 6557.) According to Wolke, she explained the person in position seven looked more like the thin offender than the individual in position two. (62 RT 6558.) Silvey denied having such an exchange with Wolke. (61 RT 6496-6497.) Since identification of Thomas as the thin offender was a contested issue, whether or not this conversation took place shortly after the lineup was a meaningful point in the jury's evaluation of the identification of appellant. Given these conflicts in the evidence, the trial judge had a sua sponte duty to give CALJIC No. 2.22.

(E) **The Trial Court's Modification of CALJIC No. 2.90 Was Federal Constitutional Error.**

The lower court gave the jury a truncated version of CALJIC No. 2.90 that defined reasonable doubt without mention of the presumption of innocence.[42] In *People v. Prieto* (2003) 30 Cal.4th 226 [133 Cal.Rptr.2d 18, 66 P.3d 1123], the trial court's penalty phase instructions, as in the present matter, defined reasonable

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[42] The modified instruction provided, "The following instruction applies to proof beyond a reasonable doubt as it relates to alleged aggravating factors as set forth in these instructions. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they

doubt without mention of the presumption of innocence and allocation of the burden of proof. This Court held the omission was not error as the rules governing consideration of other crimes evidence as aggravation are statutorily based rather than constitutionally mandated. (*Id.* at p. 262.) This Court's conclusion must be reexamined in light of recent decisions by the federal Supreme Court.

In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 476-477, the high court held that any finding other than the fact of a prior conviction which can increase an offender's punishment implicates "constitutional protections of surpassing importance," namely the right to due process, to trial by an impartial jury, and proof beyond a reasonable doubt. These basic rights require that the truth of every accusation be subjected to trial by jury and the standard of proof beyond a reasonable doubt. (*Id.* at pp. 477-478.)

In *Ring v. Arizona*, *supra*, 536 U.S. 584, the court held the *Apprendi* standards are controlling in the penalty phase of a potential capital case. The court reaffirmed that when "a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (*Id.* at p. 602.) This rule applies to the aggravating factors that can raise punishment from life without parole to the death penalty. (*Id.* at p. 609.) As the court stated: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it

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feel an abiding conviction of the truth of the charge." (14 CT 4100.)

encompassed the factfinding necessary to increase a defendant's sentence by two years [as in *Apprendi*], but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

In *Blakely v. Washington*, *supra*, 542 U.S. 296, the court reaffirmed the importance of the jury's role in a democracy and the concomitant right of the accused in a criminal case to have his fate determined by his peers rather than a judge who is a government official. In *Blakely*, the high court stated the right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." (*Id.* at p. 306.)

Blakely continued the "*Apprendi* revolution" by delimiting the scope of a trial court's sentencing authority under a determinate sentencing scheme. When exercising sentencing authority pursuant to such a statute, the maximum punishment that the court can impose is limited to the facts reflected in the jury's verdict or admitted by the defendant. (*Blakely v. Washington*, *supra*, 542 U.S. 296, 303-304.) "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." (*Ibid*, emphasis in original.)

In *Blakely*, the defendant admitted kidnapping his estranged spouse, and the facts acknowledged by his guilty plea supported a maximum sentence of 53 months. The trial court, however, found an additional fact—the kidnapping was done with deliberate

cruelty—and imposed a sentence of 90 months. The defendant objected and the court conducted a hearing with testimony from the defendant, the victim, and others. At the conclusion of the hearing, the judge made 32 findings of fact, confirmed the finding of deliberate cruelty, and stood by the 90 months term of imprisonment. The high court held the judicial fact-finding violated the Sixth Amendment right to trial by jury: "The Framers wound not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors,' [citation] rather than a lone employee of the State." (*Blakely v. Washington*, *supra*, 542 U.S. 296, 313-314.)

The government argued in *Blakely* that there was no *Apprendi* violation because the defendant's 90-month sentence was below the maximum punishment of 10 years, the "statutory maximum" punishment for class B felonies. (*Id.* at p. 303.) The high court rejected that argument by holding "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority."

(*Blakely v. Washington*, *supra*, 542 U.S. 296, 303-304, emphasis in original.)

The court concluded: "Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. (Fn. omitted.)" (*Blakely v. Washington*, *supra*, 542 U.S. 296, 305, emphasis in original.)

The high court's most recent decision on point is *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324. In *Cunningham*, the court considered the application of *Apprendi* to California's Determinate Sentencing Law [DSL]. In the process, the court examined this Court's decision in *People v. Black*, *supra*, 35 Cal.4th 1238, and found its reasoning to be mistaken and inconsistent with the requirements of the federal Constitution.

The high court affirmed the basic premise of *Apprendi* and its progeny: "This Court has repeatedly held that under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham v. California*, *supra*, slip opinion at p. 8.) As applied to the DSL with its familiar triad system of lower term,

middle term, and upper term, the issue posed on *Cunningham* was whether the relevant statutory maximum to which a judge could sentence a defendant without additional fact finding was the upper or middle term.

In *People v. Black*, *supra*, 35 Cal.4th 1238, 1254, this Court held the statutory maximum was the upper term. The high court disapproved this conclusion, and held the relevant maximum to which an offender could be sentenced without additional fact finding in compliance with *Apprendi* and its progeny was the middle term. According to the court, "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham v. California*, *supra*, slip opinion at p. 21.)

As seen above, in *People v. Prieto*, *supra*, 30 Cal.4th 226, 262, the trial court instructed the jury that it could consider evidence of defendant's prior criminal activity, but only if the prosecution established that defendant committed the alleged criminal activity beyond a reasonable doubt. The trial court, however, did not instruct the jury on the presumption of innocence.

The defendant in *Prieto* argued on appeal that the failure to instruct the jury on the presumption of innocence was federal constitutional error and this Court's prior decisions to the contrary had been undermined by *Ring v. Arizona*, *supra*, 536 U.S. 584. (*People v. Prieto*, *supra*, 30 Cal.4th 226, 262.) This Court was not

persuaded, and explained that any finding of aggravation in the penalty phase did not increase the penalty for the crime beyond the statutory maximum. Accordingly, *Ring* did not impose any new constitutional requirements, and prior decisions rejecting any need to instruct on the presumption of innocence did not need to be reconsidered. (*Id.* at p. 263.) The Court's reasoning is mistaken.

In *Prieto*, the Court stated that once a defendant is convicted of first-degree murder and at least one special circumstance is found true, "the prescribed statutory maximum for the offense" is either life without the possibility of parole or death. (*People v. Prieto*, *supra*, 30 Cal.4th 226, 263.) The lynchpin to this Court's position that *Apprendi* and its progeny does not call the state's death penalty scheme into question is the Court's definition of "the prescribed statutory maximum for the offense" of capital murder. Hence, the applicability of *Apprendi* to California capital cases turns on whether or not this Court's definition of the maximum statutory penalty is consistent with the high court's cases.

The Court's definition of the statutory maximum for a capital case defendant in *Prieto* is wrong in exactly the same way the Court was wrong in defining the statutory maximum in *People v. Black*, *supra*, 35 Cal.4th 1238. The decision in *Black* was mistaken for equating the statutory maximum for *Apprendi* purposes with the upper term, which can only be imposed after additional facts have been found. Similarly, in *Prieto*, the Court confused the statutory maximum within the meaning of *Apprendi* with the maximum penalty which can be imposed after factors in aggravation are found true and further found to substantially outweigh the factors in mitigation.

In *Blakely*, the court defined the "statutory maximum" as denoting the maximum punishment a judge can select based on the convictions alone: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington*, *supra*, 542 U.S. 296, 303-304, emphasis in original.)

Under the 1978 death penalty law, a conviction for first-degree murder with a true finding on at least one special circumstance renders the defendant death-eligible. As this Court has explained (*People v. Green*, *supra*, 27 Cal.3d 1, 61), the special circumstances perform the narrowing function required by the Eighth Amendment to rationally define the class and limit the number of killers eligible for the death penalty (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305 [107 S.Ct. 1756, 95 L.Ed.2d 262]). However, before a jury can select a sentence of death, three additional findings must be made. First, each juror must determine whether there are any factors in aggravation. Second, the jury is required to decide if there are any factors in mitigation. Third, jurors must decide whether the factors in aggravation substantially outweigh any factors in mitigation. (§ 190.3.) Without these additional findings, the "statutory maximum" punishment for special circumstance murder is life imprisonment without the possibility of parole. (*Ibid.*) Hence, the definition of "statutory maximum" used by this Court in *Prieto*, just like the

definition of statutory maximum used by the Court in *Black*, is inaccurate and inconsistent with *Apprendi* and its progeny.

The *Prieto* definition of "statutory maximum" is wrong because it merges two Eighth Amendment requirements for a constitutional death penalty law. To satisfy the federal Constitution, a state's death penalty scheme must perform two functions. First, the law "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235].) Second, the death-selection decision must take into account the circumstances of the offense along with the character and background of the defendant. (*Lockett v. Ohio*, *supra*, 438 U.S. 586, 604-605.) In a case where the defendant has been sentenced to death, the controlling statutory maximum is not, as the Court's decision in *Prieto* would have it, established by a conviction for first-degree murder with a true finding on at least one special circumstance. Instead, the statutory maximum is based upon the additional findings required by section 190.3, which are made by the jury during the penalty phase. Hence, consistent with *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, appellant was entitled to penalty phase instructions on the presumption of innocence and requiring a unanimous finding of aggravation by proof beyond a reasonable doubt. (*Blakely v. Washington*, *supra*, 542 U.S. 296, 303-304; see also *Ring v. Arizona*, *supra*, 536 U.S. 584 [holding that because Arizona's enumerated aggravating factors operate as the functional

equivalent of elements of the offense, the Sixth Amendment requires that they be found by a jury].)

Because the trier of fact in California cannot impose a death sentence based only on a conviction for first-degree murder with a true finding on one or more special circumstances, the decisions in *Apprendi*, *Ring*, *Blakely* and *Cunningham* impose federal constitutional requirements that are not satisfied by California's penalty phase proceedings. The trial court violated appellant's federal constitutional rights by instructing his penalty jury with CALJIC No. 8.84.1 to disregard all prior instructions and not reinstructing on the presumption of innocence.

(F) **Failure to Delete Inapplicable Factors From CALJIC No. 8.85**

As seen above, defense counsel requested the court delete factors (e) and (f) from CALJIC No. 8.85 as inapposite to the evidence in this case. The court overruled the motion. (66 RT 6954-6955.) In *People v. Marshall* (1990) 50 Cal.3d 907, 933 [269 Cal.Rptr. 269, 790 P.2d 676], this Court recognized a trial court is not obligated by law to instruct on all statutory factors sua sponte, but held that the "better practice" is to instruct on all statutory penalty factors while directing the jury to be guided by those applicable on the record. The high court later held that in order "to comply with due process states courts need give jury instructions in capital cases only if the evidence so warrants." (*Delo v. Lashley* (1993) 507 U.S. 272, 275 [113 S.Ct. 1222, 122 L.Ed.2d 620].) Following *Delo*, this Court has continued to hold it is proper to instruct the jury on

inapplicable aggravating and mitigating factors. (*People v. Webb* (1993) 6 Cal.4th 494, 532-533 [24 Cal.Rptr.2d 779, 862 P.23d 779].)

The failure to delete inapplicable factors from CALJIC No. 8.85 presents a risk the jury can be misled into considering the absence of mitigation as aggravation. This danger is heightened by the failure to designate factors as aggravating or mitigating. Jury instructions that are cluttered with irrelevant factors violate the right to an individualized sentencing determination based only on the offender's background and record and the particular circumstances of the crime in violation of the Eighth and Fourteenth Amendments.

(G) **The Jury Instruction Errors Requires Reversal of the Death Sentence.**

A review of the penalty phase instructions as a whole confirms the jury did not receive instructions defining direct and circumstantial evidence, the sufficiency of circumstantial evidence to establish the necessary mental state for any of the uncharged offenses alleged under factor (b), or the evaluation of conflicting testimony. Critically, the jury was not informed appellant was presumed to be innocent of the offenses alleged as factor (b) crimes. Finally, the jury was not advised the government had the burden of proving guilt beyond a reasonable doubt. Instead, the jury was instructed pursuant to CALJIC No. 8.87 that uncharged acts could be considered as aggravation by any juror who was "satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts." (14 CT 4094.)

The failure to instruct on the presumption of innocence and allocation of the burden of proof was structural error that requires

reversal of the judgment without regard to proof of prejudice. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 278.) This conclusion is irrefutable following *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324. In the alternative, the failure to properly instruct the jury was constitutional error as the instructions did not include the presumption of innocence or allocation of the burden of proof, both of which are elements of due process. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) As seen above, constitutional errors in this matter cannot be construed as harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) The penalty judgment should be reversed.

XVI.

THE PENALTY JUDGMENT SHOULD BE REVERSED FOR CUMULATIVE ERROR.

As with the guilt phase errors, the cumulative effect of the penalty trial errors requires reversal of the penalty even if no single error does so when considered in isolation. (*Taylor v. Kentucky*, *supra*, 436 U.S. 478, 488, fn. 15.) Further, many of the guilt phase errors had a significant impact on the penalty determination and the impact of these antecedent guilt phase errors must also be considered in evaluating the prejudice resulting from penalty phase errors. After all, the jury is required to consider all guilt phase evidence is arriving at a penalty phase sentencing decision. (§190.4, subd. (d).) Because it is not possible to conclude that the guilt phase errors did not affect the sentencing decision, the death penalty imposed in this case fails to satisfy the Eighth Amendment reliability requirement. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Finally, the combination of guilt and penalty phase errors requires reversal of the judgment of death, for the sentence was imposed in violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

XVII.

TRIAL COURT FAILED TO CONSIDER MITIGATING CIRCUMSTANCES IN RULING ON THE MOTION TO MODIFY THE DEATH SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, AND THEREFORE DENIED APPELLANT A STATE STATUTORY RIGHT IN VIOLATION OF DUE PROCESS

(A) Procedural History

On January 9, 1998, defense counsel filed a motion to modify the sentence from death to life imprisonment without the possibility of parole. (14 CT 4155.) As seen above, the motion included an argument based upon intracase proportionality given the life without parole sentence imposed upon Glover, who was the leading actor and likely shooter.

On January 16, 1998, the court presided over a hearing on the motion. Defense counsel reminded the court he had been prohibited from mentioning Glover's sentence during the penalty phase. (67 RT 7119.) Counsel argued the court should consider appellant's role in the offense, for Glover was in charge and Thomas was not the actual killer. (67 RT 7125-7126.) Defense counsel reminded the court that appellant turned himself in and confessed to the crimes other than murder. (67 RT 7127-7128.) Thomas was only 19-years-old at the time of the crimes. Counsel reminded the court that appellant grew up in "swamp" conditions with a crazy mother. (67 RT 7128.) In his view, the evidence simply did not merit a death sentence. (*Ibid.*)

In ruling on the motion, the trial court found that as to the guilt phase, there was proof beyond a reasonable doubt that appellant

was guilty of first-degree murder and the four special circumstances were true beyond a reasonable doubt. (67 RT 7136.) As for the penalty phase, the court found as aggravation "that the circumstances surrounding the first-degree murder of Francia C. Young were particularly cruel, savage, and cold blooded."[43] The court was also satisfied the factor (b) other crimes were shown beyond a reasonable doubt. (*Ibid.*)

Concerning the defense case-in-mitigation, the court found "there were no circumstances presented which extenuate the gravity of the crime, whether or not it be a legal excuse." (67 RT 7136-7137.) The court repeated the circumstances of appellant's childhood, his background, and upbringing did not provide "a moral justification or an extenuating factor for his conduct." (67 RT 7137.) As for the fact Thomas was 19-years-old at the time of the crimes, the court concluded it was not a mitigating factor. (*Ibid.*) The court concluded the factors in aggravation were so substantial when compared to the mitigation that death was the appropriate punishment. (67 RT 7138.) Accordingly, the court denied the automatic motion to modify the punishment from death to life imprisonment without the possibility of parole. (*Ibid.*) The ruling was an abuse of discretion.

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[43] The court's language recalls the special circumstance for a murder that is "especially heinous, atrocious, or cruel, manifesting exceptional depravity" (§ 190.2, subd. (a)(14).) Of course, this special was long age found to be unconstitutionally vague. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803 [183 Cal.Rptr.

(B) **The Decision Was an Abuse of Discretion**

Penal Code section 190.4, subdivision (e) requires an automatic motion for modification of any death verdict. In ruling on the motion, the trial judge "shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to the law or the evidence presented. The judge shall state on the record the reasons for his findings." (§190.4, subd. (e).) On appeal, this Court subjects the trial court's ruling to independent review, although this review is limited to reviewing the trial court's determination after independently reviewing and construing the record. (*People v. Samayoa* (1997) 15 Cal.4th 795, 859 [64 Cal.Rptr.2d 400].)

The trial court's decision on the motion to modify was unreasonable and failed to conform to the requirements of section 190.4, subdivision (e). "Under that statute, the trial court is required to 'independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury's verdict.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1039 [108 Cal.Rptr.2d 291, 25 P.3d 519].)

From the court's statement of the decision, it is apparent the court failed to consider the case-in-mitigation because the evidence

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800, 647 P.2d 76].)

did not extenuate the gravity of the crimes. (67 RT 7137-7138.) As a result, the court did not reweigh the aggravating and mitigating circumstances as required by the statute. In explaining his evaluation of the case-in-mitigation, the court used the word "extenuate" five times. (*Ibid.*) On two occasions, the term was used in the phrase "extenuate the gravity of the crime." (67 RT 7137.) The court also used "extenuates" with the same "gravity of the crime" phrase. (67 RT 7138.) The court employed "extenuate" in the slightly longer phrase "extenuate the seriousness and gravity of the crime." (67 RT 7137) Finally, the court referred to appellant's background as not being an "extenuating factor for his conduct." (67 RT 7137.)

To extenuate means to "make" (guilt or an offense) seem less serious or more forgivable: there were extenuating circumstances that caused me to say the things I did." (The New Oxford American Dictionary (2001) p. 601, col. 2.) A fair reading of the court's explanation, then, shows the judge failed to attribute any significance to the case-in-mitigation because appellant's childhood and personal background did not have a causal connection to the murder. However, mitigation does not have to extenuate a crime in the sense of being a causal factor. (*Tennard v. Dretke*, *supra*, 542 U.S. 274, 285-286.) Moreover, it is settled law that a childhood of youth and deprivation is a powerful factor in mitigating. (*Penry v. Lynaugh*, *supra*, 492 U.S. 302, 328.) It was error for the trial court to dismiss the mitigation due to the lack of a nexus to the murder.

The court also concluded appellant's age was not a factor in mitigation. (67 RT 7137.) This finding is simply wrong. Youth is

indeed a mitigating circumstance. (*Johnson v. Texas*, *supra*, 509 U.S. 350, 367.) It is such a powerful factor in mitigation that the Eighth Amendment prohibits imposition of the death penalty on a young person who committed murder before the age of 18. (*Roper v. Simmons* (2005) 543 U.S. 551, 568 [125 S.Ct. 1183, 161 L.Ed.2d 1].) Here, appellant was 19-years-old at the time of the murder. Plainly, his age was a factor in mitigation and the court was wrong to fail to consider youth as a circumstance in mitigation.

The trial court's failure to follow state law and determine the propriety of the death verdict by a reweighing of the aggravation and mitigation deprived appellant of a liberty interest protected by the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347 [100 S.Ct. 2227, 65 L.Ed.2d 175].) Reversal and remand for a new modification hearing is required. (*People v. Sheldon* (1989) 48 Cal.3d 935, 963 [258 Cal.Rptr. 242, 771 P.2d 1330].)

SYSTEMIC ERROR

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. Following *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324, the Court has no choice but to reassess its previous decisions on challenges to the state's death penalty law.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) ___ U.S. ___ [126 S.Ct. 2516, 2527, fn. 6, 165 L.Ed.2d 429]; see also *Pulley v. Harris*, *supra*, 465 U.S. 37, 51.) When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment.

California's death penalty statute is so broad that virtually every murderer is death-eligible. It then allows any conceivable

circumstance of a crime to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first-degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" statute. However, section was specifically crafted to make every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, jurors who are not instructed on any burden of proof, and who may not even agree with each other make findings necessary for imposition of the death penalty. Paradoxically, the fact that "death is different" (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305) has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding necessary for imposition of death. The result is truly a "wanton and freakish" (*Furman v. Georgia*, *supra*, 408 U.S. 238, 310 (conc. opn. of Stewart, J.)) system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

XVIII.

APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia*, *supra*, 408 U.S. 238, 313 (conc. opn. of White, J.).) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, this narrowing function is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo*, *supra*, 1 Cal.4th 103, 148.)

The purpose of the 1978 death penalty law was not to narrow those eligible for the death penalty but to make all murderers death-eligible. (Shatz & Rivkin, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U.L. Rev. 1283, 1310.) To achieve an all-encompassing death penalty scheme, the Briggs Initiative expanded the number of special circumstances from 12 to 26, broadened preexisting specials such as contract killing, loosened mental state requirements, and expanded accomplice liability. (*Id.* at pp. 1310-1313.) At the time of the offenses in this case, December 1992, section 190.2 contained 29 special circumstances. At the present time, the number of special circumstances has grown to 34. These special circumstances are so numerous and so broad in definition as to encompass virtually every first-degree murder.

Almost all felony-murders are now special circumstance killing. These cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon*, *supra*, 34 Cal.3d 441, 477.)

The reach of section 190.2 has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515 [117 Cal.Rptr.2d 245, 40 P.3d 754].) Indeed, members of this Court have warned the lying-in-wait special circumstance has been construed so broadly as to be unconstitutional (*People v. Morales* (1989) 48 Cal.3d 520, 574 [257 Cal.Rptr. 64, 770 P.2d 244] (conc. opn. of Mosk, J.)) or so that it may no longer serve the narrowing function required by the Eighth Amendment (*People v. Ceja* (1993) 4 Cal.4th 1134, 1147 [17 Cal.Rptr.2d 375, 847 P.2d 55] (conc. opn. of Kennard, J.)).

Considered together, the 34 special circumstances, the Court's interpretation of felony-murder, and the lying-in-wait special circumstance section 190.2 now comes perilously close to achieving its goal of making every murderer eligible for death. In other words, the Eighth Amendment requirement that death penalty laws narrow the class of killers eligible for capital punishment is not satisfied by Penal Code section 190.2. Hence, the state's death penalty law violates the federal Constitution.

XIX.

APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE PENAL CODE SECTION 190.3, FACTOR (a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (See e.g., *People v. Adcox*, *supra*, 47 Cal.3d 207, 270.) The Court has allowed extraordinary expansions of factor (a), approving reliance on the circumstance of the crime aggravating factor because the defendant had a "hatred of religion" (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [286 Cal.Rptr. 628, 817 P.2d 893]), or because three weeks after the crime defendant sought to conceal evidence (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10 [253 Cal.Rptr. 863, 765 P.2d 70], or threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204 [5 Cal.Rptr.2d 796, 825 P.2d

781]), or disposed of the victim's body in a manner that precluded its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35 [259 Cal.Rptr. 630, 774 P.2d 659]). It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652 [36 Cal.Rptr.3d 760, 124 P.3d 363].)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process and the Eighth Amendment.

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. (*Tuilaepa v. California*, *supra*, 512 U.S 967, 986-990 (dis. opn. of Blackmun, J.).) Factor (a) is used to embrace facts that are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts, or facts that are inevitably present in every homicide, into aggravating factors that the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty. This is contrary to the narrowing requirement of the Eighth

Amendment. In *Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372], the high court explained why Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance failed to narrow the class of death-eligible killers: the circumstance stated nothing more than "that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Id.* at p. 363.) The circumstances of the crime factor in aggravation, like the "outrageously or wantonly vile, horrible or inhuman" discussed in *Maynard*, is applied in the trial courts and interpreted by this Court so that the facts of any murder can be construed as an "aggravating circumstance." Factor (a) is therefore devoid of any meaning, fails to narrow the class of death-eligible offenders, and allows the imposition of arbitrary and capricious death sentences, in violation of the federal Constitution.

XX.

CALIFORNIA'S DEATH PENALTY STATUTE DEPRIVES DEFENDANTS OF THE RIGHT TO A UNANIMOUS JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH AND THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

As seen above, California's death penalty law does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" statute (§ 190.2) or in its sentencing guidelines (§ 190.3). Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to factors in aggravation. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, and that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral and normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 38 [45 Cal.Rptr.3d 407, 137 P.3d 229]), the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make—whether or not to condemn another human being to death. None of these

failings are defensible following the high court's decision in *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324.

(A) **The Death Verdict in This Case Was Not Premised on Unanimous Jury Findings Made Beyond a Reasonable Doubt**

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. All this was consistent with this Court's previous interpretations of California's death penalty law. (See e.g., *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [69 Cal.Rptr.2d 784, 947 P.2d 1321].) The Court's views on capital punishment have been overtaken by the high court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona*, *supra*, 536 U.S. 584, *Blakely v. Washington*, *supra*, 542 U.S. 296, and *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324.

As seen above, in *Apprendi*, the court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 478.) The Sixth Amendment and the due process clause of the Fourteenth Amendment compelled this result. (*Id.* at pp. 477-478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona*, *supra*, 536 U.S. 584, 593.) The court acknowledged that in *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511] it had held that aggravating factors were sentencing considerations guiding the choice between life and death rather than elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. 584, 598.) The court found that in light of *Apprendi*, the *Walton* holding was an anachronism. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what label the state chooses to attach to it. Therefore, the finding must be made by a jury based upon proof beyond a reasonable doubt. (*Id.* at p. 609.)

As explained above, in *Blakely* the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." The Washington statute listed illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. The court held this procedure was invalid because it did not comply with the right to a jury trial. (*Blakely v. Washington*, *supra*, 542 U.S. 296, 313.)

The high court reaffirmed that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt. Critically, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely v. Washington*, *supra*, 542 U.S. 296, 303-304.)

In *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324, the high court disapproved this Court's definition of the statutory maximum within the meaning of the DSL. In *People v. Black*, *supra*, 35 Cal.4th 1238, 1254, this Court held the statutory maximum was the upper term. The high court disapproved this conclusion, and held the relevant maximum to which an offender could be sentenced without additional fact finding in compliance with *Apprendi* and its progeny was the middle term. According to the court, "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham v. California*, *supra*, slip opinion at p. 21.)

The *Apprendi* line of authority has been consistently reaffirmed by the high court. In *United States v. Booker*, *supra*, 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found the federal sentencing

guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth and Fourteenth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Id.* at p. 244.)

(1) Any Jury Finding Necessary for the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law does not require use of the reasonable doubt standard during the penalty phase other than as to proof of prior crimes under factor (b). Even in that context the finding need not be unanimous. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133, 841 P.2d 118].) As the death-selection phase of trial, California law does require the jury to make findings before the death penalty can be imposed. Section 190.3 requires the trier of fact to find that at least one aggravating factor exists and the factor or factors substantially outweigh any and all mitigating factors. As set forth in CALJIC No. 8.88, which at the time of trial was California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 192 [121 Cal.Rptr.2d 106, 47 P.3d 988]), which was read to appellant's jury (14 CT 4122), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself."

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the jury must find the presence of one or more aggravating factors. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[44] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings. (*People v. Allen* (1986) 42 Cal.3d 1222, 1277 [232 Cal.Rptr. 849, 729 P.2d 115].)

In *People v. Anderson*, *supra*, 25 Cal.4th 543, 589, fn. 14, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death, *Apprendi* was not applicable to the state's death penalty law. Following *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [132 Cal.Rptr.2d 271, 65 P.3d 749], and *People v. Prieto*, *supra*, 30 Cal.4th 226. According to the Court, "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, supra, 30 Cal.4th 226, 263.) The Court's analysis is mistaken and

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[44] In *Johnson v. State* (2002) 118 Nev. 787, 802, [59 P.3d 450, 460], the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination which must be made by the jury beyond a reasonable doubt.

cannot be sustained following *Cunningham v. California*, *supra*, 2007 U.S. Lexis 1324.

In *Ring*, the state of Arizona made the same argument. The government pointed out that a finding of first degree murder in Arizona, like a finding of special circumstance murder in California, leads to only two sentencing options: death or life imprisonment. Hence, Ring was sentenced within the range of punishment authorized by the jury's verdict. The high court was not persuaded: "This argument overlooks *Apprendi's* instruction that 'the relevant inquiry is one not of form, but of effect.' [Citation.] In effect, 'the required finding [of an aggravated circumstance] exposed [Ring] to a greater punishment than that authorized by the jury's guilty verdict." (*Ring v. Arizona*, *supra*, 536 U.S. 584, 604.)

In this regard, California's death penalty statute is indistinguishable from the Arizona law at issue in *Ring*. In Arizona, the trier of fact is required to impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency.[45] (Ariz.Rev.Stat. § 13-703(E).) California's death penalty statute provides that the trier of fact may impose death only if the aggravating circumstances

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[45] Arizona Revised Statutes Annotated, title 13, section 703, subdivision (E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call

substantially outweigh the mitigating circumstances. (§ 190.3.) There is no meaningful difference between the processes followed in California and Arizona.

Just as in Arizona, a California conviction for first-degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring v. Arizona*, supra, 536 U.S. 584, 604.) Section 190, subdivision (a) provides that the punishment for first-degree murder is 25 years to life, life without possibility of parole, or death. The penalty to be imposed in a particular case must be determined pursuant to sections 190.1, 190.2, 190.3, 190.4 and 190.5.

Neither life without parole or death can be imposed unless the jury returns a true finding on a special circumstance. (§ 190.2.) Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and the aggravation substantially outweighs any mitigating circumstances. (§ 190.3.) Moreover, a section 190.2 special circumstance cannot be equated with a section 190.3 factor in aggravation. (*People v. Adcox*, *supra*, 47 Cal.3d 207, 270.) As seen above, CALJIC No. 8.88 defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself. This Court has recognized that a special circumstance can even be argued to the jury as a mitigating circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 863-864 [134 Cal.Rptr.2d 602, 69 P.3d 446].)

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for leniency."

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. 584, 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. 296, 328 (dis, opn. of Breyer, J.).) The applicability of the Sixth Amendment right to trial by jury turns on whether, as a practical matter, additional findings must be made during the penalty phase before the death penalty can be imposed. In California, as in Arizona, penalty phase findings are a necessary predicate to a death sentence.

A California jury must first decide whether there are any factors in aggravation. Only after this initial factual determination has been made can the jury weigh those factors against the proffered mitigation. On remand from the high court, the Arizona Supreme Court found that the statutorily-specified finding as to the relative weight of aggravating and mitigating circumstances is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth and Fourteenth Amendments. (See *State v. Ring* (2003) 204 Ariz. 534, 562 [65 P.3d 915, 943]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State*, *supra*, 59 P.3d 450; see also Stevenson, *The Ultimate Authority on the*

Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing (2003) 54 Ala L. Rev. 1091, 1126-1127.)

This Court's refusal to accept the applicability of *Ring* to the penalty phase violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. Following *Cunningham v. California*, *supra*, 2007 U.S. 1324, there can no longer be any doubt that any aggravating factor must be found beyond a reasonable doubt by a unanimous jury in order to comply with the Fifth, Sixth, Eighth, and Fourteenth amendments.

(2) Any Finding Necessary for a Death Sentence Must Be Made by a Unanimous Jury

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 [276 Cal.Rptr. 391, 801 P.2d 1142].) In the Court's view, unanimity is only required as to penalty. (*People v. Stanley*, *supra*, 39 Cal.4th 913, 963.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor. With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons for the sentencing decision. It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual

findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate penalty decision is made. As seen above, in *Apprendi*, *Ring*, *Blakely*, and *Cunningham* the high court made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence.

These protections include jury unanimity. A jury finding on the truth of an enhancement allegation in a non-capital case must be unanimous. (See, e.g., §§ 1158, 1158a.) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836]), and certainly no less (*Ring v. Arizona*, *supra*, 536 U.S. 584, 609).

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. (Cal. Const. art. I, § 16.) To apply the requirement to findings carrying a maximum punishment of a year but not to factual findings that have a substantial impact on the jury's determination whether the defendant should live or die would be so inequitable as to violate the equal protection clause (U.S. Const., 14th Amend.), and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

(B) **Penalty Phase Jury Instructions on Proof Beyond a Reasonable Doubt**

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [78 S.Ct. 1332, 2 L.Ed.2d 1460].)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the due process clauses of the Fifth and Fourteenth amendments. (*In re Winship*, *supra*, 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 393].) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the due process clause of the Fourteenth Amendment and by the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. 358, 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323].)

There is no interest that is litigated in the courts than whether a human being will live or die. Far less compelling interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*In re Winship*, *supra*, 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [121 Cal.Rptr. 509, 535 P.2d 373] [commitment as mentally disordered sex offender]; *People v. Thomas* (1977) 19 Cal.3d 630 [139 Cal.Rptr. 594, 566 P.2d 228] [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [152 Cal.Rptr. 425, 590 P.2d 1] [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky v. Kramer* (1982) 455 U.S. 745, 755 [102 S.Ct. 1388, 71 L.Ed.2d 599] the high court explained that "in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." Thus, in a civil case, the litigants share the risk by means of the preponderance of the evidence burden of proof. (*Ibid.*) In a criminal case, "the interests of the defendant are of such magnitude that historically and

without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. [Citation.]" (*Ibid.*) "The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society [impose] almost the entire risk of error upon itself." (*Ibid.*)

Adoption of a reasonable doubt standard in the penalty phase would not deprive the government of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) The only risk of error suffered by the state under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death would instead be confined in prison for the rest of his life without possibility of parole.

The high court has acknowledged the "unique circumstances of a capital sentencing proceeding" (*Caspari v. Bohlen* (1994) 510 U.S. 383, 392 [114 S.Ct. 948, 127 L.Ed.2d 236]) present an "acute need for reliability." (*Monge v. California*, *supra*, 524 U.S. 721, 732.) According to the court, "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Id.* at pp. 732-733.) The sentencer of a person facing the death penalty is required by the due process and

Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

(C) **The Failure to Require Written Findings Regarding Factors in Aggravation.**

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. 5338, 543; *Gregg v. Georgia*, *supra*, 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*, 16 Cal.3d 1223), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct 745, 9 L.Ed.2d 770].)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859 [9 Cal.Rptr.2d 24, 831 P.2D 249]; *People v. Rogers* (2006) 39 Cal.4th 826, 893 [48 Cal.Rptr.3d 1, 141 P.3d 135].) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of

habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361, 521 P.2d 97].) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 269.) The same reasoning should be applied to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (§ 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [108 S.Ct. 1860, 100 L.Ed.2d 384].) Even where the decision to impose death is putatively "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th 1, 41-42) and "moral" (*People v.*

Hawthorne, *supra*, 4 Cal.4th 43, 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Furthermore, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See e.g., *Kansas v. Marsh*, *supra*, 226 S.Ct. 2516 [death penalty law which treats a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

(D) **The Lack of Intercase Proportionality Review.**

The Eighth Amendment prohibits cruel and unusual punishment. As a result, to satisfy the Eighth Amendment death judgments must be reliable and proportionate. A common mechanism to satisfy these requirements is comparative

proportionality review—a procedural safeguard this Court has rejected.

As seem above, in *Pulley v. Harris*, *supra*, 465 U.S. 37, 51, the high court, declined to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme. However, the court added it was conceivable that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.)

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become a sentencing scheme lacking any constraints on arbitrariness. The high court in *Pulley v. Harris*, *supra*, 465 U.S. 37, upheld California's 1977 law against a lack-of-comparative-proportionality-review challenge. The court went on to note that the 1978 law had "greatly expanded" the list of special circumstances. (*Id.* at p. 52, fn. 13.) That number has continued to grow, and expansive judicial interpretations of section the lying-in-wait special circumstance have made first-degree murders that cannot be charged with a "special circumstance" a rarity.

As explained above, the special circumstances fail to meaningfully narrow the pool of death-eligible defendants and therefore open the door to the same sort of arbitrary sentencing condemned in *Furman v. Georgia*, *supra*, 408 U.S. 238. As seen above, the 1978 death penalty law lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing

factor—the circumstances of the crime—has been construed so as to be an invitation to arbitrary and capricious sentencing. Given these failings, the lack of comparative proportionality review renders the 1978 death penalty law arbitrary and capricious in violation of the Eighth Amendment.

Although section 190.3 does not require intercase proportionality review (see People v. *Fierro*, *supra*, 1 Cal.4th 173, 253), the statute does not forbid it. Instead, the prohibition on the on intercase proportionality review is a creation of this Court. (See, e.g., *People v. Marshall*, *supra*, 50 Cal.3d 907, 946-947.) The Court's refusal to engage in intercase proportionality review violates the Eighth Amendment.

(E) **The Introduction of Uncharged Acts Evidence in the Penalty Phase as Factor (b) Aggravation**

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under 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 [108 S.Ct. 1981, 100 L.Ed.2d 676][Eighth Amendment violation to permit introduction at penalty phase of felony conviction which had been set aside for violation of the right to appeal].) In this case, the government relied heavily upon unadjudicated criminal activity in the penalty phase. This evidence included the Silvey robbery, possession of a firearm as a minor, battery incidents with Cathy Brown, and a battery on Timothy McNulty. In his closing argument, the district attorney talked about all of these matters (66 RT 6971-6973), with particular

emphasis on the Silvey incident (66 RT 6974-6991). In his argument, the prosecutor assured the jury the factor (b) evidence was the "clincher" demanding a death sentence. (66 RT 6970.)

As seen above, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* confirm the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process require that findings underlying a death sentence must be proven beyond a reasonable doubt and found by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, the acts would have to be have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for a unanimous finding; to the contrary, the jury was advised there was no unanimity requirement.

(F) **Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by the Jury**

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (factors (d) and (g)) and "substantial" (factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

(G) **The Failure to Instruct That Statutory Mitigating Factors Were Relevant Only as Potential Mitigation Precluded a Fair, Reliable, and Evenhanded Administration of the Death Penalty**

The jury was given with the standard jury instruction describing the factors in mitigation and aggravation, CALJIC No. 8.85. (14 CT 4114-4116.) As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigation. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [254 Cal.Rptr. 586, 766 P.2d 1].) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence, such as evidence establishing a defendant's mental illness or defect, into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating

factors weighing towards a sentence of death. (*People v. Morrison* (2004) 34 Cal.4th 698, 730 [21 Cal.Rptr.3d 682, 101 P.3d 568].) However, the facts in *Morrison* demonstrate this assertion is mistaken. In that case, the trial judge erroneously believed factors (e) [whether or not the victim was a participant in the homicidal act or consented to it] and (j) [whether or not the defendant was an accomplice whose participation was relatively minor] constituted aggravation instead of mitigation. (*People v. Morrison*, *supra*, 32 Cal.4th 698, 727-729.) This Court recognized the trial court's error, but found it to be harmless. (*Id.* at p. 729.) Other trial judges have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945 [21 Cal.Rptr.2d 705, 855 P.2d 1271]; *People v. Carpenter*, *supra*, 15 Cal.4th 312, 423-424.) If experienced judges can be misled by the "whether or not" language at issue, there can be little doubt jurors make the same mistake.

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest—the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd*, *supra*, 38 Cal.3d 765, 772-775)—and thereby violated appellant's Fourteenth Amendment right to due process. (See e.g., *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

XXI.

THE CALIFORNIA SENTENCING SCHEME VIOLATES THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As described above, the high court has repeatedly held the Eighth Amendment requires heightened reliability in capital cases and courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. 721, 731-732.) Despite this oft-repeated directive, California's death penalty law provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55, 551 P.2d 375].) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487].) A state may not create a classification scheme that affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the

distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d 236, 243.)

In the present case, the government cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *People v. Prieto*, *supra*, 30 Cal.4th 226, 275, and *People v. Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a judge is weighing an appropriate sentence in a non-capital case, the decision is governed by court rules—and these rules require a statement of reasons for sentencing decisions. For example, rule 4.406(b)(4) requires a statement of reasons for selecting a term of imprisonment other than the midterm.

In a capital sentencing context, however, there is no burden of proof other than as to factor (b) evidence of other crimes. Even as

to this aggravation, however, jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike sentencing decisions for non-capital crimes, no reasons need be given for a death sentence. These discrepancies are skewed against persons subject to the death penalty and violate the requirement of equal protection of the laws. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105 [121 S.Ct. 525, 148 L.Ed.2d 388].) For the state to provide greater protection to non-capital defendants than to capital defendants violates due process (U.S. Const., 5th & 14th Amends), equal protection (U.S. Const., 14th Amend.), and the prohibition on cruel and unusual punishment (U.S. Const., 8th Amend.).

XXII.

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY

The United States is one of the few nations that regularly uses the death penalty as a form of punishment. (Donnelly, *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?* (1990) 16 N.E. J. on Crim. and Civ. Con. 339, 366.) The death penalty has been abolished in law or practice in 128 nations. (Amnesty International, The Death Penalty, Abolitionist and Retentionist Countries, <http://web.amnesty.org/pages/deathpenalty-countries-eng> [as of January 20, 2007].) In 2005, the most recent year for which statistics are available, 94 percent of executions worldwide took place in China, Iran, the United States, and Saudi Arabia. (Amnesty International, The Death Penalty, Death Sentences and Executions in 2005, <http://web.amnesty.org/pages/deathpenalty-sentences-eng> [as of January 20, 2007].)

The United States as a sovereign nation is not bound by the laws of other nations in its administration of the criminal justice system. Nevertheless, as a member of the community of nations, it has always taken into account the customs and practices of the international community. Since the Second World War, the United States has joined other members of the international community in taking steps to protect basic human rights. For example, the Nuremberg trial of surviving members of the German fascist leadership for war crimes and crimes against humanity took place at

the insistence of the United States. (Conot, Justice at Nuremberg (1983) pp. 10-13.) President Truman considered the prosecution so important that he persuaded Justice Robert Jackson to take a leave of absence from the high court to serve as the nation's chief prosecutor. (*Id.* at p. 14.)

The United States has supported international institutions and agreements fostering human rights. On December 10, 1948, the United States joined the overwhelming majority of nations in the General Assembly of the United Nations in adopting the Universal Declaration of Human Rights. (Re, *The Universal Declaration of Human Rights and the Domestic Courts* (1998) 31 Suffolk U. L. Rev. 585, 589 [hereafter *Human Rights and the Domestic Courts*].) The Declaration was approved without a single dissenting vote. (*Id.* at p. 590.) Among other provisions, the Declaration affirms "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Universal Declaration of Human Rights, art. V <http://www.un.org/Overview/rights.html> [as of March 6, 2004].) The Declaration is a statement of principals describing the standards and expectations of the international community rather than a treaty or law. (*Human Rights and the Domestic Courts*, *supra*, 31 Suffolk U. L. Rev. 585, 591.)

Given this history, it is not surprising the high court examines the views of the international community when confronted with Eighth Amendment issues. To determine whether a challenged punishment is cruel and unusual, the court looks to a range of sources to determine "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S.

86, 101 [78 S.Ct. 590, 2 L.Ed.2d 630] (plur. opn. Of Warren, C.J.).) The views of other nations have played a role in a number of recent cases. In *Roper v. Simmons*, *supra*, 543 U.S. 551, 578, the court took note of the fact the United States was the only nation in the world, which retained the death penalty for juveniles. This isolation in the community of nations was among the factors that led the court to hold the Eighth Amendment prohibited the death penalty for offenders who committed murder while still minors. (See also *Atkins v. Virginia* (2002) 536 U.S. 304, 316 [122 S.Ct. 2242, 153 L.Ed.2d 335][world community overwhelmingly disapproves of imposition of death penalty on the mentally retarded]; *Lawrence v. Texas* (2003) 539 U.S. 558, 572-573 [123 S.Ct. 2473, 156 L.Ed.2d 508] [international opinion and court decisions relevant to determination "evolving standards of decency" prohibit prosecution of homosexual relations between consenting adults].)

In the international community, regular use of the death penalty for the crime of murder is contrary to the norms of human decency. Simply stated, capital punishment is no longer accepted in Western nations. Indeed, the European Union opposes the death penalty in all cases and has lobbied for its abolition in the United States. (See European Union, Delegation of the European Union Commission to the USA, EU Policy and Action on the Death Penalty, <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#EUPolicyDocuments> [as of January 20, 2007].) As seen above, the vast majority of nations have abolished the death penalty for ordinary crimes such as murder. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind the views of the

international community. (See *Atkins v. Virginia*, *supra*, 536 U.S. 304, 316.)

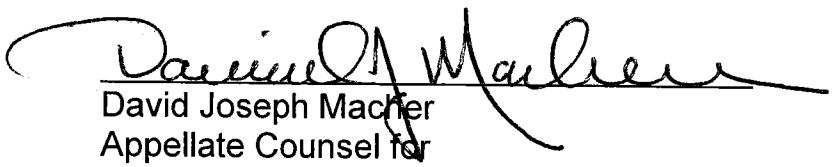
Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

CONCLUSION

For the foregoing reasons, appellant Keith Tyson Thomas respectfully requests the court grant the relief prayed for in this appeal.

Dated: January 26, 2007.

Respectfully Submitted,



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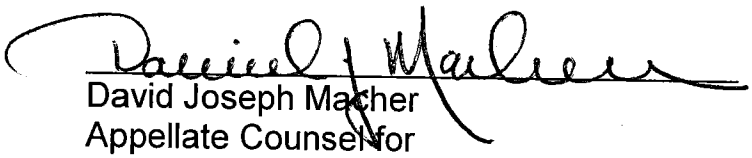
CERTIFICATE OF LENGTH

I, David Joseph Macher, appellate counsel for Keith Tyson Thomas, hereby certify, pursuant to the California Rules of Court that the word count for this document is 61,447 words. The total excludes the tables, proof of service, and this certificate. This document was prepared in Microsoft Word for Mac, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Murrieta, California, on January 26, 2007.



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Declaration Of Service By Mail

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is P.M.B. 298, 40485 Murrieta Hot Springs Road, Murrieta, California 92563.

On January 29, 2007, I served the foregoing document described as **Appellant's Opening Brief** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Murrieta, California, addressed to the person in charge as follows:

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

Executed this 29th day of January 2007 at Murrieta, California.

David Joseph Macher