IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S102166
Plaintiff and Respondent,	)	
	)	Riverside County
v.	)	Superior Court
	)	No. CR-68928
RICHARD NATHAN SIMON,	)	
	)	
Defendant and Appellant.	)	
	)	

Automatic Appeal From the Superior Court of Riverside County

Honorable Gordon R. Burkhart, Judge

APPELLANT'S OPENING BRIEF

KIMBERLY J. GROVE
Attorney at Law
CA STATE BAR NO. 095225
P.O. Box 425
Ligonier, Pennsylvania 15658
(724) 238-3497

Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES AND ARGUMENT

ERROR AFFECTING BOTH PHASES

GUILT PHASE ISSUES

TABLE OF AUTHORITIES

Cases

Statutes

Evidence Code

Penal Code

California Rules of Court

United States Constitution

California Constitution

Jury Instructions

Secondary Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S102166
Plaintiff and Respondent,	)	
	)	Riverside County
v.	)	Superior Court
	)	No. CR-68928
RICHARD NATHAN SIMON,	)	
	)	
Defendant and Appellant.	)	
	)	

Automatic Appeal From the Superior Court of Riverside County

Honorable Gordon R. Burkhart, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to California Constitution, article VI, section 11, and Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, Richard Nathan Simon (hereinafter "appellant"), in Riverside County Superior Court on November 2, 2001. The appeal is from a final judgment following a jury trial, and is further authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

I. THE CHARGES

The charges in this case stem from two separate incidents, one occurring on December 3, 1995, and one occurring on May 25, 1996. The first incident involved two homicide victims, Vincent Anes and Sherry Magpali. The second involved a single homicide victim, Michael Sterling. Appellant was initially charged by complaint with the Sterling homicide. (1 CT 1.) Subsequently, the complaint was amended to add charges relating to the Anes and Magpali homicides. (1 CT 8-11.) Following a two-day preliminary hearing, appellant was bound over for trial. (1 CT 28-31, 33-190.)

An information filed October 16, 1997, charged appellant with murdering (Pen. Code, §187) both Anes and Magpali, and with kidnaping (Pen. Code, § 207, subd. (a)) and raping (Pen. Code, §261, subd. (a)(2)) Magpali. One felony-murder special circumstance allegation accompanied the Anes murder charge (Pen. Code §190.2, subd. (a)(17)(i) [robbery]), and three accompanied the Magpali murder charge (Pen. Code, §190.2, subd. (a)(17)(i) [robbery], §190.2, subd. (a)(17)(ii) [kidnaping], and § 190.2, subd. (a)(17)(iii) [rape]). The information also alleged that appellant was unlawfully in possession of a firearm on that date (Pen. Code, §12021.1), and that he personally used a firearm in connection with the murders, the kidnaping (Pen. Code, §12022.5, subd. (a)), and the rape (Pen. Code, §12022.3, subd. (a)). (1 CT 191-194.) Appellant was also charged with murdering Michael Sterling (Pen. Code, § 187). The information alleged that appellant used a firearm (Pen. Code, § 12022.5, subd. (a)) in connection with the Sterling homicide, and that he was in unlawful possession of a firearm on that date (Pen. Code,

§ 12021.1). A multiple murder special circumstance allegation (Pen. Code, §190.2, subd. (a)(3)) was also included in the information. (1 CT 191-195.)

Appellant was arraigned on November 3, 1997. He entered pleas of not guilty to the charges, and denied the enhancement and special circumstance allegations. (1 CT 202; 1 RT 36.)

II. PRE-TRIAL PROCEEDINGS AND VOIR DIRE

Several written motions were filed by the parties prior to trial, and were litigated before and during jury selection. Various procedural matters were resolved before the jury panel was assembled. Appellant's motion to sever counts relating to the Anes/Magpali incident from those relating to the Sterling incident was heard and denied. (1 CT 223 [motion]; 2 CT 387 [opposition]); 2 CT 397, 1 RT 95-105 [hearing].) The trial court also held a hearing on the need for appellant to be restrained by means of a REACT[1] belt during trial. After hearing from the bailiff, the court overruled the defense objection and ordered that the device would be used. (2 RT 128-134.)

Prospective jurors were assembled and provided with questionnaires on September 13, and 14, 1999. (2 CT 433; 10 CT 2703; 2 RT 139, 3 RT 348.) Voir dire of prospective jurors for cause began on September 20, 1999, and continued on September 21,1999. (4 RT 458, 5 RT 567.) Voir dire concluded on September 22, 1999, when both sides accepted the panel of jurors and the alternate jurors. (12 CT 3355; 6 RT 921, 933.)

On September 28, 1999, appellant's motion to suppress evidence pursuant to Penal Code section 1538.5 was heard and denied. (1 CT 283 [motion]; 12 CT 3306 [opposition]; 12 CT 3369 [reply]; 13 CT 3456, 7 RT 945-952 [hearing].)

---

[1] Remote Electronically Activated Control Technology belt.

III. THE GUILT PHASE

On October 19, 1999, the trial court read preliminary jury instructions, and the parties presented their opening statements. (12 RT 1715-1745; 13 CT 3494.) The prosecution thereafter began its case-in-chief. (12 RT 1745.) After nine days of testimony, the prosecution completed its case on November 3, 1999. (13 CT 3511.)

Outside the presence of the jury, appellant waived his right to a jury determination of the prior conviction element of the Counts 5 and 7 unlawful possession of a weapon charges, and stipulated that he had been convicted of the felony of attempted robbery on February 2, 1993, in Los Angeles County. (20 RT 2895-2897.) After the prosecution rested, appellant's Penal Code section 1118.1 motion was heard and denied. (20 RT 2903-2915.)

Defense witnesses testified on November 10, 1999. (13 CT 3541; 22 RT 3156.) The prosecution did not call any rebuttal witnesses. On November 15, and 16, 1998, the parties presented their closing arguments, and the court instructed the jury. (13 CT 3553-3554; 23 T 3250-3470.) The jury retired to commence deliberations at 2:17 p.m. on the 16th (18 CT 4862), and continued deliberating for the next 2 days (18 CT 3555-3556).

On November 23, 1999, the jury returned verdicts finding appellant guilty on all counts. With respect to Counts 1 and 2, the jury convicted appellant of first degree murder. However, the jury returned a verdict of second degree murder on Count 6. The jury found that appellant did use a firearm in connection with the Sterling homicide, but did not find any of the other weapon allegations to be true.[2] All of the alleged special circumstance

---

[2] The court declared a mistrial on these allegations when the jury was unable to agree. (14 CT 3738; 24 RT 3540.)

allegations were found to be true. (14 CT 3701-3714.) Each juror was polled as to his or her verdict, and ordered to return on December 1, 1999, when the penalty phase of trial was set to begin. (24 RT 3547-3555.)

IV. FIRST PENALTY PHASE

On December 1, 1999, the court pre-instructed the jurors and the prosecution and defense presented their opening statements. (25 RT 3604, 3604.) The prosecution then presented evidence in aggravation. (14 CT 3827-3829.) The defense evidence in mitigation was presented on December 2, 6, 7, and 8, 1999. (14 CT3829-3835.) The prosecution presented rebuttal evidence on December 14, and the defense presented additional evidence the following day. (14 CT 3962, 3964.) After both sides had rested their cases, the trial court instructed the jurors and closing arguments were presented. (32 RT 4615-4724.)

The jurors began deliberations on December 15, at 4:40 p.m. (15 CT 3964.) The following day juror #10 was excused by stipulation, an alternate juror was selected by random draw, and the jurors were instructed to begin deliberations anew at 10:18 a.m. (15 CT 3866; 33 RT 4734-4737.) Deliberations continued on December 17, 20, 21 and 22. (15 CT 3968-3970.) On the 22nd the jurors informed the court they were deadlocked and unable to reach a verdict. (15 CT 4053; 33 RT 4767.) The court inquired further and was informed that three ballots had been taken resulting in split votes of 5 to 7, 6 to 6, and 7 to 5. (33 RT 4770.) After individually polling the jurors as to whether they felt that further deliberations would be productive (all jurors answered in the negative), the court declared a mistrial. (15 CT 3970; 33 RT 4772-4773.)

V. SECOND PENALTY PHASE

Re-trial of the penalty phase began on July 16, 2001. (21 CT 5872.) On this date the court revisited the issue of whether appellant would be required to wear the REACT belt during trial. Again the court overruled appellant's objection, and ordered that the belt would be used during trial. (21 CT 5872; 35 RT 4862-4871.) Voir dire of prospective jurors also began on this date, and continued on the following day. (35 RT 4874; 36 RT 5100.) On July 19, 2001, various *in limine* motions were litigated. At this time the court heard and denied appellant's renewed motion to exclude victim impact evidence. (36 RT 5130-5162.) On motion of the prosecution, the trial court dismissed the weapons allegations for which a mistrial had been declared at the close of the guilt phase. (36 RT 5202.) Voir dire continued on August 7th and concluded on August 8th. (23 CT 6308-6309.)

On August 13, 2001, the jurors were sworn, preliminary instructions were read, and the parties presented their opening statements. (39 RT 5558-5629.) The prosecution presented evidence over the course of four days, August 13, 14, 15, and 16, 2001. (23 CT 6311-6314.) The defense evidence in mitigation was presented on August 28, 29, and 30. (23 CT 6333, 6335, 6338.) The prosecution presented rebuttal evidence on August 30, 2001. (45 RT 6499.) Closing arguments were given by the parties on September 4, 2001. (46 RT 6519-6625.) The trial judge then instructed the jurors. (45 RT 6626.) Jury deliberations began at 4:25 p.m. on September 4th, (23 CT 6341), and continued on September 5th and 6th (23 CT 6341-6342, 6405). On September 6th, the jury returned a verdict fixing the penalty for the murders at death. (46 RT 6663.)

VI. SENTENCING

On November 2, 2001, the trial judge conducted an automatic review of the verdict under Penal Code section 190.4, subdivision (e), and declined to modify the jury's verdict of death. (47 RT 6672-6689.) The court then formally imposed the death sentence with respect to Counts 1 and 2. (23 CT 6442.) In addition, the court imposed a sentence of 15 years to life on the Count 6 second degree murder conviction, plus 4 years for the weapon enhancement accompanying this count. The court also imposed a determinate sentence of eight years on the Count 3 rape conviction, plus nine years for the Penal Code section 667.8 kidnaping enhancement accompanying this count. Concurrent terms were imposed on Count 4 [five years], Count 5 [two years], and Count 7 [two years]. (23 CT 6439-6441, 6447; 47 RT 6701-6706.)

STATEMENT OF THE FACTS

I. THE GUILT PHASE

A. OVERVIEW

On December 3, 1995, two teenagers Vincent Anes (Anes) and Sherry Magpali (Magpali) were found shot to death in separate locations in Riverside County. The two had recently begun dating and were apparently accosted during the early morning hours as they sat in Anes' car at Pedrorena Park. Appellant was charged with murdering both Anes and Magpali and with kidnaping and raping Magpali. Another individual, Curtis Williams, was later charged separately with also having participated in the crimes.[3] Appellant was arrested in connection with a traffic violation on January 18, 1996. At that time a handgun was found under the passenger seat of the car. In early May of 1996, law enforcement connected the weapon with the Anes/Magpali homicides through the "Drug Fire" computerized system.

Michael Sterling was killed by a single gunshot wound during a dispute between appellant, Sterling, and Williams on May 25, 1996. Appellant and Williams were friends, and the incident took place outside Williams' apartment where Sterling and his girlfriend were visiting with Williams and his girlfriend. No witness at trial described the actual shooting. Appellant was arrested at his home later that night, and a handgun was found underneath the mattress in his master bedroom. Subsequent analysis matched this handgun to a shell casing found outside Williams' apartment.

---

[3] Williams was tried and convicted in separate proceedings. (Riverside Superior Court No. RIF88153; Court of Appeal No. E031301.)

B. THE ANES/MAGPALI INCIDENT

1. Events Surrounding the Homicides

On the evening of December 2, 1995, Anes picked up Magpali and Jose and Eugene Menor, and drove them to a friend's birthday party in his black Nissan 200SX. (14 RT 2088-2090.) After spending an hour or two at the party, the four young people went to a bowling alley in Moreno Valley, then to a Claim Jumper restaurant. (14 RT 2091-2092.) At the end of the evening, Anes dropped Magpali off a few blocks from her house, and then took Jose and Eugene home. After taking the boys home, Anes made a U-turn, and drove back in the direction of Magpali's house. (14 RT 2093-2095.)

Around 1:00 a.m., some of Anes' friends — Kenneth Riomales, brothers Jason and John Marianas, and Noah Maling — saw his Nissan in the parking lot of Pedrorena Park as they drove past on their way to a nearby golf course. (12 RT 1747-1749, 1769-1770.) Riomales and the others thought Anes was probably with Magpali, and decided not to bother them. (12 RT 1750, 1771.) About 30 minutes later the guys drove back past the park, and decided to stop when they saw that Anes' car was still there,. (12 RT 1753, 1780.)

After they pulled into the parking lot, and stopped near Anes' Nissan, Riomales got out of the truck he and his friends were in, walked over the Anes' car, and looked in the windows. He at first thought he saw someone sleeping in the car naked, and walked back to the truck and to tell his friends what he had seen. (12 RT 1753-1754, 1788.) The four then walked back to Anes' car together. Looking more carefully this time, Riomales saw blood in the car and feared the person in the backseat may have been shot. (12 RT 1756-1757, 1788.) The boys thought about calling 911, but decided to first go to Anes' house to see if he was there. (12 RT 1758.)

Anes' mother, Priscilla Severson, answered the door and Riomales asked her if Anes was home. When she said he was still out, they told her what they had seen at the park, then telephoned 911. (12 RT 1790-1791.) Severson and the boys then went to the park to meet police. (12 RT 1791, 1821.) Officers arrived within minutes and determined that Anes was deceased. (13 RT 1848.)

There was no sign of Magpali and, after searching the park, investigators went to her home in an attempt to locate her. (13 RT 1971.) Later that morning Highway Patrol officers found Magpali's body on the side of Interstate 215 in Sun City. (13 RT 1871.) Magpali was clothed in jeans and a blouse tied at the waist. She wore no underwear, shoes or socks. (13 RT 1885, 1975; 14 RT 1993; 16 RT 2426-2427.) There was blood under her head, and blood stains, on her right hand, and on her jeans. (13 RT 1977.)

2. The Investigation

a. Crime Scenes

Investigators at Pedrorena Park collected eight 9-millimeter shell casings and three expended projectiles from the interior of Anes' vehicle. (13 RT 1850-1851, 1860-1864, 1867-1870.) They also found Anes' clothing and Magpali's bra and underwear in the park. Most clothing items were on the roof or rafters of a restroom by the parking lot including a pair of white underwear, a pair of blue pants size 33 waist with a black belt, a white sock, and a piece of torn white underwear. (13 RT 1853-1854.) A bra was found by the restroom on the side opposite Anes' car. (13 RT 1856.) A white or grey T-shirt was found under a bench near the restroom. (13 RT 1857.) And a pair of torn mens' underwear was found right outside the car. (13 RT 1858.) Inside the vehicle investigators found Anes' and Magpali's shoes and socks, a black and grey plaid shirt, a plaid wool poncho, and a black nylon jacket

with a small bag in the pocket containing Magpali's wallet, makeup and candy. (13 RT 1898, 1901-1902.) When Anes left his house that evening he had been wearing a gold necklace and a gold ring with a Rolex logo. (12 RT 1818-1819.) He did not have these items on when his body was discovered. (16 RT 2431.) A large speaker was also missing from the trunk of his car. (14 RT 2087, 2095-2096; 16 RT 2481.)

Two 9-millimeter shell casings were found at the Magpali crime scene. (13 RT 1875.) With the aid of a metal detector, investigators also located two projectiles by digging up the ground where Magpali's head had rested. (13 RT 1879, 1975.) Photographs of Magpali taken at the party earlier that night showed her wearing a necklace and rings. (19 2775.) These items were not on her body, nor were they found at the scene. (16 RT 2426-2427.)

b. Post-Mortem Exams

An autopsy determined that Anes had been shot eight times in the left side of his head, chest and left arm. (16 RT 2356.) Stippling on some of the wounds indicated that the shots had been fired at close range, from a distance of less than 1½ feet. (16 2357-2358.) The shots appeared to have been fired within a relatively short period of time, and Anes might have been alive for almost all of the wounds. (16 RT 2362.) One shot, which penetrated the right side of his brain, would have been rapidly fatal. Three others to the left arm and chest perforated both lungs, the aorta and the spine, and would also have been fatal. (16 RT 2362.) Five projectiles were recovered from Anes' body during the autopsy. (16 RT 2363-2367.) The cause of death was listed as multiple gunshot wounds. Anes had no alcohol or drugs in his system. (16 RT 2368.)

Magpali's autopsy revealed that she had been shot at least twice, possibly three times, in the right side of the head. (16 RT 2337-2338.) There

were two entrance wounds, one to the right temple and the other to the back side of the head near the right ear. (16 RT 2344.) The trajectory of the first bullet was from back to front, right to left, and downward at a 60° angle. (16 RT 2344.) This shot perforated the brain, and the resulting injury would have been rapidly fatal. The bullet coursed through the skull, pierced the right side of the brain, traveled through the base of the skull, and exited the left side of the chin. (16 RT 2344-2346.) The other bullet coursed through the maxillary bones of the face, and exited inside the mouth at the right upper lip. It did not penetrate the brain. Although this second wound would have been potentially fatal, with immediate medical attention it might theoretically have been survivable. (16 RT 2348-2349.) Both shots were fired from a distance of greater than 1½ feet. (16 RT 2345.) It is possible that a third gunshot may have grazed the skin on the right side of Magpali's face. (16 RT 2350.) Magpali died of gunshot wounds to her head. (16 RT 2352.) No projectiles were found during the autopsy. (16 RT 2353.) External examination of Magpali's body also revealed bruises on her lower legs and feet that were consistent with "fingertip bruising," indicating she might have been grabbed or gripped with force prior to death. (16 RT 2338-2341.) A sexual assault kit was collected during the autopsy. (16 RT 2353.) Toxicology screening later established that Magpali had no alcohol or drugs in her system. (16 RT 2354.)

A forensic serologist detected semen on Magpali's jeans, and in her shallow vaginal swab. (14 RT 2003-2005, 2013-2014, 2021-2023, 2027-2029.) The semen found on Magpali was matched to appellant through DNA analysis. (18 RT 2633-2638, 2644.) Trace evidence collected from Magpali's body included red fibers located on her jeans near the button on the inside, and on the back of the right leg. (14 RT 2043-2045.) These fibers were

consistent with carpet fibers from a car Williams owned at the time of the homicides. (14 RT 2058-2061; 15 RT 2188.)

3. The Murder Weapon

On January 18, 1996, a City of Redlands police officer stopped appellant for driving with a cracked windshield. (13 RT 1830-1833.) There were three people in the vehicle. In addition to appellant who was driving, Mamie Meeks was in the front passenger seat and Jackie McDavid was the passenger in the backseat.[4] (13 RT 1833, 1934.) Appellant was arrested, and because neither of the passengers was in possession of a valid drivers' license, the car was impounded. During an inventory search of the vehicle, a Taurus 9-millimeter handgun was found under the right front passenger's seat. (13 RT 1835.) The firearm was loaded with 17 live rounds of 2 different brands, Remington Peters and CCI. (13 RT 185-1837, 1923.)

The gun was seized, and test fired rounds were later entered into a computerized firearms identification system known as "Drug Fire." (13 RT 1918.) Through the computerized system, the test fired casings were found to be similar to those involved in the Anes and Magpali homicides. (13 RT 1918-1919.) Forensic comparison later determined that the eight cartridge casings retrieved from Anes' car, and the two found near Magpali's body, had been fired by this handgun. (13 RT 1922.) The examiner also compared test fired rounds with the projectiles recovered in this case. Although there were

---

[4] Meeks testified that appellant phoned her from jail and asked her to tell police the gun was hers. He told her that she would only get a ticket if she claimed ownership of the gun, but that he would go to prison for three years. Meeks did not believe appellant and refused his request. He became angry with her, and she later told police he threatened her. Meeks moved to Nevada as a result of the situation (13 RT 1944-1945), but later returned to San Bernardino (13 RT 1955).

similarities between the collected projectiles and the test fired rounds, there was insufficient detail to make a positive identification. (13 RT 1922.)

4. Curtis Williams

In the course of preparing for trial, appellant's defense investigator located a 1981 Dodge Colt Williams had owned at the time of the Anes and Magpali homicides. The investigator took fiber samples from the floor carpet of the Dodge Colt, and later informed detectives on the case that fibers from this vehicle matched those recovered from Magpali's body. (17 RT 2563-2564.) Subsequently, law enforcement investigators obtained additional fibers from the carpet (17 RT 2563), and independently determined that the fibers were similar to those lifted from Magpali's jeans. (14 RT 2058-2061; 15 RT 2188.) Investigators also found two holes in the glove box of Williams' vehicle. One hole, perforating the front and rear of the glove box and terminating within the structure of the vehicle, tested weakly positive for the presence of lead, indicating it could be a bullet hole. A single bullet could have caused both holes. (14 RT 2062-2065.) While examining these holes, investigators observed fine splatters behind the glove box which they swabbed and sent for DNA analysis. (14 RT 2068.) Williams was ultimately arrested and charged with the Anes/Magpali homicides. (17 RT 2564.)

C. STERLING HOMICIDE

1. The Shooting Incident

The evening of May 25, 1996, Michael Sterling and his girlfriend Vernice Haynes were visiting Curtis Williams and his girlfriend Davinna Gentry in their apartment located on Elsworth Street in Moreno Valley. (15 RT 2148, 2150, 2262.) Gentry and Sterling were cousins. (15 RT 2151.) Around 8:00 that night appellant came to the door with Jamal and Raheen Brown. (15 RT 2153, 2265-2267; 20 RT 2822.) Gentry answered the door

and appellant asked if "Droopy" (Williams) was home. As Gentry turned, looked at Williams, then walked away from the door, appellant stepped into the apartment and shook Williams' hand. (15 RT 2153-2154.)

Williams introduced appellant to Sterling, and appellant shook his hand then asked him where he was from. When Sterling identified himself as a member of the Inland Empire ("IE") gang, appellant became angry and cursed at him. (15 RT 2155, 2268.) Sterling stood up and lifted his shirt to show he was unarmed. (15 RT 2156, 2279.) He told appellant he had just been released from prison and was "trying to be cool." (15 RT 2156.) Appellant told Jamal and Raheen to go get his gun.[5] (15 RT 2159, 2268-2269.) They refused, and Williams attempted to get appellant to go outside and talk. (15 RT 2159-2160.) Appellant swung at Williams and asked him why he was hanging out with IE. (15 RT 2161, 2164.) Gentry told appellant there would be no fighting in her house, and asked him to leave. (15 RT 2157.)

Appellant asked Williams if he could use the restroom.[6] When he left the room, Gentry told Williams to try to get appellant out of the house. Although they were all concerned because they did not know whether appellant was armed, both couples stayed in the livingroom and Gentry did not see Williams or Sterling do anything to arm themselves. (15 RT 2169.)

---

[5] The testimony at trial was conflicting on this point. Gentry testified that appellant asked the boys to get his gun; however, Jamal Brown denied that appellant had made such a request (20 RT 2832-2833).

[6] Haynes testified that appellant cooled down, apologized to Sterling, and hugged him before he went to the restroom. (15 RT 2269.) She testified that while appellant was in the bathroom she told Sterling they should leave, but he wanted to stay with Williams to make sure he was okay. (15 RT 2269.) Haynes also testified that when appellant came out of the bathroom he apologized again to Sterling, but then hit Williams hard in the face with his elbow and yelled at him about having Sterling in the house. (15 RT 2270.)

By the time appellant returned, he appeared to have calmed down. He apologized to Sterling and Williams, then shook Sterling's hand again, hugged him, and left the apartment. Williams followed him out. (15 RT 2169.)

Gentry and Haynes urged Sterling to stay inside, but he refused saying he wanted to go out to make sure Williams was all right. (15 RT 2170, 2272-2273.) Haynes asked Gentry if she had a back door so she could go get Sterling's brothers. Gentry, however, told her not to leave the house.[7] As they argued, three shots rang out.[8] (15 RT 2273.) Within moments Williams returned, and knocked on the front door. When Gentry opened it, Williams, who was dirty and appeared to have been in a fight (15 RT 2282), "slumped"

---

[7] Again the testimony on this point was conflicting. The facts stated above were taken from Haynes' testimony. Gentry's version differed and she testified that when Sterling left the house, Haynes became hysterical and ran in the bathroom. (15 RT 2176.) According to Gentry's testimony, she then ran out the back door and looked over the gate to see if she could see anything. Although Gentry could only see shadows, she claimed to have been able to tell Sterling was leaning on appellant's car. She testified that appellant told Sterling to get off his car. As Sterling stood up, she heard two shots fired together and then another shot three to four minutes later. Gentry said she ran to a neighbor's house, looked out the front window, and saw Williams and Haynes walking across the street to where Sterling then was. She went over to Sterling, who was alive, told him to stay still, and put pressure on his wounds. (15 RT 2170.) With respect to this portion of the incident, Gentry's story varied widely from what she had earlier told police. (15 RT 2217-2219.) When interviewed Gentry's version of events was consistent with Haynes' testimony since she told police she was inside the apartment when she heard the gunfire. (16 RT 2472-2474.) However, at trial she testified that the transcript of her taped interview with officers was wrong and she denied saying she had been in the apartment when the shots were fired. (15 RT 2234.)

[8] When interviewed after the incident, Haynes told police she heard four shots. (17 RT 2532, 2539.)

in, and said: "Vernice go get Mike. Go get Mike." Haynes screamed, asked where Sterling was, then ran out the door. She saw appellant and his friend running in the street toward appellant's car, and Sterling staggering in the field across the street. Haynes ran to Sterling. (15 RT 2276.). (15 RT 2275.) When she reached him, he fell to the ground, and told her he would be going back to prison. (15 RT 2275, 2280.) Haynes stayed with Sterling until paramedics arrived. (15 RT 2283.) Sterling died within a short time of being shot.

2. The Investigation

An autopsy revealed that Sterling had been killed by a single gunshot wound to the torso. (17 RT 2577.) The bullet entered under the right arm, perforated the chest wall after penetrating the right 5th rib, traveled though both lungs and the heart, penetrated the 6th rib, and came to rest in the pectoralis muscle. The trajectory of the bullet was from right to left, very slightly downward and slightly forward. (17 RT 2570-2575.) A .22 caliber bullet was recovered from this location during the autopsy. The wound would have been rapidly fatal. (1 16 RT 2434-2435; 7 RT 2575.) It was estimated that the shot had been fired at fairly close range, from a distance of about 2 feet. (17 RT 2576.) Toxicology screening determined that Sterling's blood alcohol content was .1% at the time of his death, and a drug screen was positive for marijuana. (17 RT 2578.)

At the scene, investigators discovered a spent shell casing under a stairway directly across the street from where Sterling had fallen. (15 RT 2118, 2120.) No other casings were found near the apartment complex or in the field across the street. (15 RT 2122.)

Appellant was arrested on May 26, 1996 (16 RT 2470), and his house was searched (15 RT 2128). Officers found a .22 caliber Intratec Tec-22

handgun beneath the mattress in the master bedroom. (15 RT 2136-2137, 2249.) They also discovered a box of CCI brand ammunition and a loaded clip on top of a dresser in the room. The clip contained a variety of brands of ammunition. (15 RT 2137.) Later analysis determined that the shell casing found in the apartment complex parking lot had been fired by this gun. (15 RT 2120, 2256.) The projectile recovered from Sterling's body could have been fired by this gun or any other semi-automatic pistol of the same caliber with the same rifling class characteristics. The size of the projectile was consistent with a .22 caliber bullet. Markings on the projectile were similar to those found on rounds test fired from the recovered handgun. However, there were insufficient individual characteristics to make a positive identification. (15 RT 2257-2258; 16 RT 2434.)

D. DEFENSE EVIDENCE

The defense theory of the Anes/Magpali homicides was that Williams alone was responsible for killing the two young people. In support of this theory, evidence was presented that Williams would have had access to the murder weapon during this time period. Defense witnesses testified that on the day appellant was stopped for the traffic violation, he had gone with Mamie Meeks to a residence on Fay Avenue to pick up the gun. (22 RT 3156-3163, 3175-3186.) The house was vacant, and was owned by the parents of Sandy Ferguson. (22 RT 3205-3207.) Ferguson's boyfriend at the time was at the residence on a daily basis, and his friend Curtis Williams visited him there regularly. (22 RT 3208-3210.)

The Sterling homicide was argued to be less than first degree murder based in part upon evidence of Sterling's character for violence. His girlfriend Vernice Haynes testified that Sterling had been in prison for

assaulting another man, and that he had also been in jail on other occasions. (15 RT 2288, 2290.)

II. THE SECOND PENALTY PHASE

At the re-trial of the penalty phase the prosecution relied upon the circumstances of the crime and previous misconduct by appellant in support of its case for imposition of the death penalty. The prosecution also presented victim impact evidence. The defense introduced evidence in mitigation relating to appellant's psychological background and make-up including testimony from appellant's relatives regarding his upbringing as well as expert testimony regarding organic brain damage.

A. EVIDENCE IN AGGRAVATION

1. Circumstances of the Crimes

Since the jury at the second penalty phase had not heard evidence produced during the guilt phase, testimony relating to the circumstances of the offenses of which appellant was convicted was presented in its entirety. This evidence did not differ in any significant respect from that described above. Consequently, it would serve no purpose to repeat it here. To the extent the evidence is relevant to issues raised on appeal, it will be discussed in the argument portion of the brief.

2. Victim Impact Evidence

a. Sherry Magpali

At the time of her death Sherry Magpali (Sherry) was 19 years old, and a student at Riverside Community College. She had graduated from high school, magna cum laude, the year before. (39 RT 5701.) Sherry was generally a good student, and had received an outstanding academic achievement award in 1995. (39 RT 5699.) She was a creative, friendly, fun person. Her hope was to become a professional artist. She was interested in

graphics and Japanese animation, and was also a poet. (39 RT 5699-5701; 42 RT 6061.) A selection of Sherry's artwork was entered into evidence and displayed to the jurors. (39 RT 5700.) Sherry also liked to sing and even tried to interest her younger brother Jeffrey, and younger sister Jasmine, in forming a band. (39 RT 5708.) The jury was shown photographs of Sherry as a baby, a young child, and as she was grew into a young adult. (39 RT 5702, 5704-5707.) Photos taken of Sherry with friends at the birthday party she attended with Vincent the night she died were also displayed to the jurors. (39 RT 5707.)

The Magpali family was close and Sherry frequently included her sister Jasmine in her activities. (39 RT 5696.) She had asked Jasmine and Jeffrey to go with her to the party the night of the incident. (39 RT 5697; 42 RT 6015.) Jeffrey was shy and did not want to go to the party. (42 RT 6015.) Jasmine declined because she had to get up early the next morning to go to a church retreat. (39 RT 5697.)

Both Jasmine and Jeffrey went to the retreat before the family learned of Sherry's death. However, one of their uncles came to pick them up shortly after they arrived. He took the two into a room, and told them he needed to take them home, but would not tell them why. (42 RT 6017.) When they arrived home, their mother had fainted, and was lying on the floor with other family members around her trying to comfort her. No one wanted to tell Jasmine what had happened, but she sensed that Sherry was dead. (39 RT 5709.) Jasmine read about the homicides in the newspaper. (39 RT 5710.)

Jeffrey at first could not believe that Sherry was gone. (42 RT 6017.) He had always seen her as so strong, and thought she should have been able to fight off anyone. It was difficult for him to attend the funeral because that is when it hit him that she was really dead. Later he had a difficult time

dealing with the manner in which she died. He believed it would have been different if she had died in a traffic accident. In general it has been difficult for Jeffrey to deal with life since his sister's passing. She was the oldest and had always helped him with his life experiences as he was growing up. (42 RT 6018.) Daily life in the family has changed. After Sherry's death they no longer went out together as a family, did not eat meals together, and the house was sad all of the time. (42 RT 6019.) Holidays are also different since the family now visits the cemetery or puts things on an alter to remember Sherry rather then celebrating. Jeffery understood that the sadness would lessen in time, but the pain would never go away. (42 RT 6019.)

b. Vincent Anes

Vincent's mother Pricila Severson and his step-father Timothy Severson testified at trial, and numerous photographs of Vincent as a young child and teenager where displayed to the jury. (39 RT 5668-5672.) Mrs. Severson described Vincent as a good son who was never a problem. (39 RT 5667.) She said he was a sweet thoughtful boy who looked after his younger brother. (39 RT 5681.) At the time of his death Vincent was in his senior year of high school. He was an A and B student and planned to go to into the military, then to college, and become a dentist. (39 RT 5665.) Mr. Severson and Vincent were close. They played basketball, video games, and cards together, and Vincent frequently helped Mr. Severson when he worked on his car. Mr. Severson explained that Vincent was always very nice, did what he was asked, and even volunteered to do things before being asked. He had no bad qualities, and had many friends. (39 RT 5688.) Vincent and his brother Dino were also close. They played games together often, and Vincent would help Dino with his homework. (42 RT 6020.)

The night of the incident, Mrs. Severson was asleep when Vincent's friends came to the door, asked whether he was home, and told her about seeing Vincent's car. Dino was also at home that night and heard the door bell ring repeatedly. He heard people panicking and screaming after his mother answer the door. The people at the door were asking about Vincent, and Dino was afraid something had happened to him. While Dino went to the door and asked what had happened, Mrs. Severson went the phone and called her parents. She was crying and holding her stomach, and Dino did not know what to do. (42 RT 6021.)

When Mrs. Severson's parents arrived, they all drove to the park for answers. (39 RT 5676-5677; 42 RT 6022.) On the way, Dino prayed and hoped that his brother was still alive. (42 RT 6022.) When they reached the park, Mrs. Severson was not immediately told that her son had died. An officer asked her if her son was wearing an earring and ring and had short hair, but would not tell her whether the person in the car was dead. An ambulance arrived and Mrs. Severson first wondered why no one was helping the person in the car, then realized that the person in the car was Vincent, and that he was not alive. (39 RT 5678.)

At the time of the incident Mr. Severson was in the military stationed in Nevada. He was soon to be transferred to California and had sent Mrs. Severson, Vincent, and Dino ahead so that their school year would not be interrupted by a move. (39 RT 5694.) Mrs. Severson telephoned Mr. Severson to tell him what had happened; however, her brother ended up explaining the situation because she was crying and unable to communicate well. (39 RT 5689.) Since he was on active duty, Mr. Severson needed to obtain documents from the Red Cross, and permission from his superiors, before he could travel to California. (39 RT 5690-5691.) It took him a day

to get permission to go, and he was only able to stay in California for a few weeks before he had to return to Nevada. (19 RT 5691, 5693.)

Mr. Severson told the jurors that he blamed himself for Vincent's death, because he had sent his family on ahead and was not there with them when it happened. (39 RT 5694.) He also said that Vincent's death changed his family. He indicated that they no longer take vacations or do things together. His wife's personality changed, and Dino became morose. (39 RT 5693.) Mrs. Severson agreed that she changed after Vincent's death, and that their family has not been the same. She was unable to recall any happy moments since the incident, and the family had even stopped celebrating holidays. They had not put up a Christmas tree since that time. (39 RT 5680.) At Christmas and on Vincent's birthday, instead of celebrating, the family would go to the cemetery which was painful for them. (42 RT 6023.)

Mrs. Severson also became a more fearful person, and more strict with Dino as a result. She was afraid something would happen to him, and did not want him to go out at night. For a time she even turned the ringer on the phone off to prevent Dino's friends from calling and asking him to go out. (39 RT 5679-5680.) After the incident, Mrs. Severson noticed that Dino became more withdrawn. (39 RT 5680.)

Dino told the jurors that he had difficulty coping with Vincent's death, particularly in light of the way he died. It was painful for him to think about, but he would think of it at night when he could not sleep, and would wonder what things would be like if Vincent were alive. (42 RT 6022.) Because Dino's prayers were not answered that night, he came to believe that it is "stupid" to pray. One of the hardest things for Dino to deal with was that he did not have the opportunity to say goodbye to his brother. (42 RT 6024.)

The family moved from the area four months after the incident, and Mrs. Severson traveled three or four times a week to visit the cemetery for two years. At the time of trial she was still having nightmares about the way Vincent died. (39 RT 5683.) She explained that she had saved all of Vincent's belongings, all of his clothing, books, shoes, and even the last can of soda he had shared with her. She even disposed of some of her own things to make room for Vincent's. (39 RT 5682-5683.) The family also kept Vincent's car. Dino drives it on occasion and thinks of Vincent when he does. (42 RT 6023.)

c. Michael Sterling

Michael Sterling's sister-in-law Dyanne Sterling testified about the effect of Michael's death on her husband and son. Michael and his three brothers were very close. (42 RT 6010, 6013.) All of the brothers, including Dyanne's husband David, were affected by his death. (42 RT 6013.) Dyanne's son, who was six when Michael died, was also affected. He cried frequently and obviously missed his uncle. (42 6013-6014.) Michael had been living with Dyanne and David for a few days before his death. He was planning to marry Dyanne's sister, and she had offered them a room. (42 RT 6014.)

3. Other Misconduct

The prosecution introduced evidence that, on two occasions while appellant was incarcerated pending trial, jail personnel found shanks in his cell. The first incident occurred on April 13, 1997, when guards searched a cell appellant had occupied alone, and found a shank made out of black plastic sharpened to a point at one end. The shank, made from a comb provided routinely to inmates, was lying flat on top of the metal bunk under the mattress. (42 RT 5978-5982.) Appellant had occupied this cell since

November 27, 1996, and the cells in that unit were routinely searched at least twice a week. (42 RT 5982, 5985.) The second incident occurred on September 12, 1998. This search involved a cell occupied by appellant and another inmate. Guards found two shanks under a cage enclosing the television. The shanks were made from standard commissary toothbrushes sharpened to a point with a towel taped to one end of a handle. The tape had been taken from deodorant containers. (42 RT 6001-6006.)

A letter purportedly written by appellant to his cousin Terri Richardson from jail was also introduced into evidence. (42 RT 5989-5990.) The admissible portion of the letter read to the jurors as follows:

> Hey, Stretch:
>
> What's up with you? Me, these mother fuckin', blank, got me wanting to blast they bitch ass. These fools keep saying Nig, blank, and laughing. I'll hurt one of these fools, blank. I'm tired of these punk ass fools in here, blank. I ain't never seen a bunch of hooks in one area like this in my life. I know you don't really care about this kind of shit, but I'm writing you about this so that I can refrain from taking one of these hooks away from himself. You see, everybody is in one-man cells, blank.
>
> I'll fuck around and hurt somebody in here for talking shit. Fools talk shit and don't even know who they are talking to. I was making some of their homies hide behind and under cars when I was on the street. Knockin' them out in the club and shit.
>
> But when a mother fucka can't get to them, they all of a sudden become big shit. I'll tell you about punk ass people. In jail these, blank, are some of the scariest people. Anybody that has to get a group of people so they can fight a head-up fight, is a bitch.
>
> Stretch, I'm not going to take this shit too much longer. They keep using that word about my people. I'm going to lay one of they ass out. I'll beat the shit out of one of these fools, blank. I never have been a

light weight, and I don't want to do the shit all my life either. One thing I'll always be is a heavy weight contender, blank.

Still yo cuz, Nate.

(42 RT 5992-5993.)

B. EVIDENCE IN MITIGATION

1. Childhood Experiences and Developmental History

Appellant's mother Evelyn Malachi met his father Richard Aldrich when she was 16 years old, and married him two years later. She was a few months pregnant with appellant at that time. (45 RT 6420.) Both Evelyn and Aldrich kept the marriage a secret initially, and continued to live with their parents for a few months. (45 RT 6419.) Eventually they rented an apartment and moved in together. However, after about 8 months, Evelyn moved back in with her mother because she and Aldrich were continuously fighting, both verbally and physically. (45 RT 6421.)

There were no complications with Evelyn's pregnancy, and appellant was a healthy baby. (45 RT 6421.) Aldrich was incarcerated shortly after appellant was born in 1967, and served two years in prison. (42 RT 6423, 6425.) After his release, he committed another crime, and was incarcerated for an additional five years. Evelyn took appellant to court so that he could see Aldrich before he went back to prison. (42 RT 6425.)

Although Aldrich did not play an active part in appellant's life, his parents did and they were positive influences. Evelyn's mother was also a part of appellant's life in a positive way. (45 RT 6423.) After obtaining a job with the police department, Evelyn was able to obtain an apartment for herself and appellant. (42 RT 6423-6424.) One of appellant's grandmothers would watch him while she was at work. (42 RT 6424.) Evelyn began as a records

clerk, then became a dispatcher, and eventually became a police officer. (42 RT 6426.)

When appellant was 2 or 3 years old, Evelyn began seeing Fred Iams. (43 RT 6086.) Evelyn was still a communications officer at that time. (43 RT 6086.) Their relationship began as friendship and eventually Iams asked Evelyn to marry him. She did not initially accept his proposal, and told him she did not love him. After a time Evelyn agreed to marry Iams because he was in love with her and she liked him. (45 RT 6427.) Iams's initial opinion of appellant was that he was spoiled. Evelyn gave him everything he wanted. However, over the four years that Iams and Evelyn were together, appellant matured into a very disciplined child. He did as he was asked, and generally was a good kid. (43 RT 6085.) Appellant also received good grades in school during this time. (43 RT 6091.) Iams was a father figure for appellant and took him everywhere with him. He also disciplined appellant when he needed it. They had a very good relationship. (43 RT 6084-6085.) Appellant's natural father, however, visited only two times. Iams recalled that on several occasions Aldrich made plans to visit appellant, but then failed to show up which understandably upset appellant. (43 RT 6084.)

Evelyn and Iams separated after four years and divorced thereafter. (43 RT 6082; 45 T 6428.) The separation and divorce were Evelyn's idea. At the time she thought Iams lacked ambition, but later she realized that she had just been immature. (45 RT 6428.) The two, however, remained friends after their divorce and Iams continued to spend time with appellant. (43 RT 60876091-6092.) Appellant had been a happy, fun child, who laughed a lot, but that seemed to change after the divorce. (43 RT 6111.) After he and Evelyn separated, Iams saw appellant about once every two weeks until

appellant was 12. After that point he saw him only occasionally; and, after appellant was 16, Iams was unable to visit him at all. (43 RT 6091-6092.)

Toward the end of Evelyn's relationship with Iams, and after they had separated, Evelyn attended the police academy. The training was physically and mentally demanding. She was required to run 15 miles a day, and would have class work to complete after she returned home. Often as she did her homework, appellant would sit at Evelyn's feet and cry. He would rub her swollen feet and ankles, and ask her not to go back because the training was hurting her. (42 RT 6439.)

About a year after divorcing Iams, and after she completed her training, Evelyn began seeing fellow police officer John Davis. (45 RT 6429.) They dated for a while, then lived together for a time. (45 RT 6429.) Their relationship, however, was not a good one. Rather it was volatile and often violent. (45 RT 6430.) Evelyn did not know whether appellant was aware of the fights even though he was in the house when the confrontations occurred. They never spoke of it. Over the course of their relationship, Evelyn sustained injuries resulting in bruises and scars from Davis' abuse. (45 RT 6431-6432.)

A final violent confrontation between the two occurred after Evelyn and Davis separated. Late one night Davis broke into Evelyn's house, and attacked her while she slept. She awoke to find him standing over her, with a car jack in his hand, threatening her. He told her he was going to kill her because, if he couldn't have her, no one else would. (45 RT 6432-6433.) Evelyn slept with her .45 caliber automatic service revolver under her pillow, and came up with it in her hand as Davis pulled her from bed. (45 RT 6433.) She tried to reason with him as he dragged her out of the bedroom, down the hall and into the bathroom by her hair. She was trying to convince him to leave her alone, begging him to stop because she did not want either of them

to be hurt. Davis banged her head against the wall and attempted to take the gun from her. As they struggled over the weapon, a single shot was fired which grazed Davis' abdomen. He grabbed his stomach, looked down, said: "You shot me," and ran from the house. (45 RT 6434-6435.) Evelyn panicked, ran out the front door, and to a neighbor's house, leaving appellant alone in the house, and asked her neighbor to call police. (45 RT 6435-6436.)

After she ended her relationship with Davis, Evelyn began dating fellow officer Ron Malachi. Malachi was Evelyn's patrol sergeant, and their relationship began when he started appearing at the scene of almost every call to which Evelyn and her partner Jackie Youngern responded. Evelyn initially thought Malachi was interested in her partner because it was known that he did not like African American women and only dated white women. She discovered he was interested in her when, after her house had been burglarized and a watch was stolen, he left a diamond watch on the seat of her patrol car with a note that said: "To replace the watch you lost." Sometime after that they began dating, and eventually married. (45 RT 6441.)

Malachi had two children from a previous relationship, and he was initially very good with appellant. In fact Evelyn described appellant and Malachi as "best buddies" at first. She cited as an example that appellant had put a sign on the door to his room saying that he did not want anyone to enter. After Evelyn and Malachi began dating, appellant added "except Malacot"to the sign, which was what appellant called Malachi,. (45 RT 6442.) The relationship between Malachi and appellant changed after the marriage. Appellant was 11 or 12 at that time. (45 RT 6443.)

Malachi became physically abusive in his "punishment" of appellant. For example, on one occasion when appellant and Malachi's son Ricky teased Malachi's youngest son Shawn by saying "Helter Skelter" because they knew

it would upset him and make him cry, Malachi became enraged and punched both of the boys knocking them into the tub in the bathroom. (45 RT 6444.) On another occasion Malachi tied appellant's hand to a door with a belt and beat him severely. Evelyn was present while appellant screamed and cried and tried to get away from Malachi. On several other occasions Malachi disciplined appellant severely. He was also verbally and physically abusive to Evelyn. (45 RT 6444-6445.) On more than one occasion, after they had gone to sleep, Evelyn would wake up with Malachi on top of her choking and slapping her. Afterward he would explain that he had a nightmare. (45 RT 6446.) Malachi would become physically violent with Evelyn at least once a week. Much of this occurred while appellant was in the house. Evelyn did not talk to him, or anyone else, about the abuse because she was ashamed. (45 RT 6447.) Evelyn's mother, however, was aware of some of the injuries Evelyn sustained including a broken arm, and a broken rib. (43 RT 6133.) Evelyn's partner Jackie Youngren was also aware of the abuse as she observed bruises on Evelyn's hands and face, and saw that she was having trouble moving after her ribs had been injured. (44 RT 6383-6384.) Youngren urged Evelyn to get out of the relationship, but she was apparently in denial about the seriousness of the situation. Youngern felt that Evelyn was suffering from battered women syndrome. (43 6384.)

After Malachi was involved in a motorcycle accident which resulted in the loss of his leg, Evelyn stayed with him and nursed him back to health. At this time she was pregnant with Malachi's child and was still working as a police officer. There were complications with the pregnancy, and Evelyn was under doctor's orders to take it easy. Once Malachi became ambulatory on crutches, the physical abuse resumed. (45 RT 64470-6448.) Evelyn eventually decided she needed to leave him before one of them killed the

other, and she terminated the relationship shortly before their daughter Dawn was born. (45 RT 6446.)

After they separated, Malachi began to stalk Evelyn. He would come to the house every day, and would follow Evelyn when she left. He would frequently sit in front of her house for hours after she returned from work. This activity continued for about two years. Malachi eventually remarried. (45 RT 6449.) During the five years after the separation Malachi would visit their daughter Dawn, but he did not spend any time with appellant. (45 RT 6450.) Apparently jealous of Evelyn's prior relationship with appellant's father, Malachi would call Aldrich names in front of appellant and would ask Evelyn how she could ever have been involved with him. (45 RT 6450.)

As is typical of an abuser, Malachi could be as charming as he was abusive, and he eventually succeeded in convincing Evelyn to give him another chance. The couple got back together in 1985, and moved to Moreno Valley. (45 RT 6449.) Appellant was 18 at the time, and was not permitted to move with Malachi, Evelyn and Dawn. (44 RT 6208.) Appellant and Dawn had been close, and she was very upset that he was not going to be living with them. (44 RT 6208.) Although Malachi had been good with Dawn as a baby (45 RT 6450), he became abusive with her when she was older, and she remembered him as always being mean to everyone including family, friends and co-workers. In her mind he was always angry, always wanted to hit someone or yell or cuss at them. (44 RT 6207.) Appellant provided Dawn with a sense of security against Malachi's abuse, and she missed him when they moved to Moreno Valley. (44 RT 6208.)

After Evelyn moved without him, appellant went to live with Aldrich. He also stayed at times with Evelyn's mother Yvonne Gilmore. (43 RT 6141.) One night appellant was knocked unconscious in a fight in a park. One of his

friends called his grandmother. She asked the person to take appellant to Evelyn's old house, and went to pick him up there. (43 RT 6137-6138.) He was still unconscious when Gilmore picked him up to take him to her house, and he remained unconscious throughout the night. Gilmore contacted Evelyn to take him to the doctor. (43 RT 6140.)

About a year later appellant moved to Michigan to live with relatives. (43 RT 6141-6142; 45 RT 6452.) While in Michigan, appellant was shot in the head as he slept. Evelyn was notified, and she and Dawn traveled to Michigan. When Evelyn first saw appellant at the hospital, she did not recognize him. She asked nurses in the intensive care unit how they knew that was her child. Appellant's head was bandaged, and his eye was swollen shut, but she knew it was him when he heard her voice and said "Momma." (45 RT 6455.) Evelyn stayed in Michigan while appellant recovered from his injuries. (45 RT 6456.) After his condition improved, she returned to Moreno Valley.

There her relationship with Malachi again deteriorated. Evelyn was diagnosed with cancer, and Malachi was not there for her while she was undergoing chemotherapy. He also did not support her in her efforts to help Dawn who Evelyn feared had become suicidal. When Malachi found out that Evelyn was taking Dawn to counseling, he told her to stop. He would not be embarrassed by people thinking his daughter was crazy. Evelyn explained that Dawn was genuinely suicidal, but Malachi merely replied: "F the B, if she's that weak, she needs to die." At that point Evelyn began making plans to leave him for good. (45 RT 6457.) To avoid a confrontation, Evelyn and Dawn took their belongings and left the house while Malachi was at work. Appellant had by this time returned to California, and had moved into an apartment Evelyn rented for the three of them. (45 RT 6458.)

Appellant lived with Dawn and Evelyn for a while until he moved into an apartment with his girlfriend Keisia. (45 RT 6458.) Keisia and appellant married in 1995, and had a daughter named Tabernay born on January 31, 1996. (45 RT 6459.)

2. Appellant's Physical and Psychological Disabilities

During the time appellant was incarcerated pending trial in this case, he was treated by Dr. David Fukuda. (44 RT 6266.) Because appellant had a history of seizures, Dr. Fukuda prescribed Dilantin. (44 RT 6268-6269.) He also sent him for x-rays to determine the condition of bullet fragments near his eye. Skull x-rays revealed multiple small bullet fragments extending from the region of the right ethmoid sinus across the midline to the left infraorbital region. There was also evidence of a fracture involving the left lateral nasal bone which suggested there might be bullet fragments in the floor of the left orbit. The x-rays further revealed evidence of fractures to the left nasal bone, bullet fragments imbedded in the right nasal bone, and a suggestion of bullet fragments in the floor of the left orbit. (44 RT 6270.)

While he was incarcerated, appellant was sent regularly for eye examinations as the result of complaints about his vision. (44 RT 6272-6273.) He was also prescribed Motrin for frequent headaches, and artificial tear drops for his left eye. (44 RT 6273-6274.) He has optic nerve damage and a cataract on his life eye lens. (44 RT 6275.) After appellant suffered a seizure, Dr. Fukuda also ordered a computed axial tomography or CAT scan which showed bullet fragments in the region of the nasal bone and inferior aspect of the left eye orbit. It also revealed encephalomalacia of the right frontal lobe with deformity of the overlying cranium which was consistent with appellant's previous surgery in this area. No acute hemorrhage or mass effect was observed. (44 RT 6276.)

Prior to trial, appellant was examined by neurologist Dr. Kenneth Nudleman. Dr. Nudleman reviewed medical records relating to the incident in the park where appellant was beaten into unconsciousness, and the shooting incident. (44 RT 6305-6306.) He also reviewed jail medical records and the report of the CAT scan as well as the CAT scan films. (44 RT 6307.) Dr. Nudleman also ordered other testing including an electroencephalogram or EEG, a magnetic resonance imaging or MRI scan, and a Positron emission tomograph or PET scan. (44 RT 6326-6327.)

From all of the testing, Dr. Nudleman concluded that appellant has significant organic brain damage primarily to the right frontal lobe and, to a lesser extent, the left frontal lobe. (44 RT 6329.) In fact, approximately 20-25 percent of appellant's right frontal lobe is missing. (44 RT 6317-6318.) The majority of the damage would have been the result of the gunshot wound, but there may also have been some pre-existing damage from the beating incident. (44 RT 6330.) There would have been a significant change in the function of appellant's brain as a result of the damage Dr. Nudleman observed. (44 RT 6331.)

As Dr. Nudleman explained, studies have reported a connection between right frontal lobe damage and criminality. (44 RT 6320.) The right frontal lobe is involved with some degree of memory, impulse function, and control of anger. It tends to override some more hostile activities. More language function is centered in the left frontal lobe than the right. A person with damage to this area might have problems understanding words and trying to integrate speech. Additionally, persons with damage to the right frontal lobe might have problems with impulse control, may be less disinhibited, less interested in social graces, and may be more quick to respond out of anger, even lashing out. Such a person may have problems with the ability to control

sexual urges, and display a lack of aggressive sexual control. (44 RT 6302-6304.)

AUTHORITIES AND ARGUMENT

ERROR AFFECTING BOTH PHASES

I.

THE TRIAL COURT ERRONEOUSLY ORDERED APPELLANT TO WEAR A "REACT"[9] STUN BELT DURING THE ENTIRE TRIAL, VIOLATING THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CORRESPONDING CALIFORNIA CONSTITUTIONAL GUARANTEES.

A. INTRODUCTION

Throughout both phases of trial appellant was ordered, at the request of the court bailiff and over defense objection, to wear a remote-controlled electronic stun belt — "a device that delivers an eight-second long, 50,000-volt, debilitating electric shock when activated by a transmitter controlled by a court security officer" (*People v. Mar* (2002) 28 Cal.4th 1201, 1204). Despite the extreme nature of the device, in overruling the defense objection the trial court applied a lesser standard than that applicable to traditional methods of restraint such as shackles which require a showing of "manifest need" before they can be imposed upon a defendant.

The court did not make a finding of manifest need, and even sustained the defense objection to shackles, but nonetheless approved the bailiff's

---

[9] "REACT" is the manufacturer's acronym for "Remote Electronically Activated Control Technology" belt." (*People v. Mar* (2002) 28 Cal.4th 1201, 1215.)

request to use the stun belt. Apparently focusing solely on the visibility of the device, and concluding that the stun belt was less restrictive and burdensome than traditional methods of restraint, the trial court applied something akin to a good cause standard in approving use of the device based only on a finding that some kind of restraint was "appropriate." In so doing the trial court not only determined the need for restraints under an improperly lenient standard, but also failed to take into consideration the unique problems and dangers associated with the stun belt in determining whether the device was the least restrictive and burdensome method of securing the courtroom.

The remotely operated electronic restraint device used in this case is designed to cause an electric shock that will "disorient, temporarily immobilize and stun a person without causing permanent injuries." (*Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1231.) More specifically:

> When activated, the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds. Once the belt is activated, the electro-shock cannot be shortened. It causes incapacitation in the first few seconds and severe pain during the entire period. Activation may lead to involuntary defecation and urination; immobilization may cause the victim to fall to the ground. Other courts have found the shock can "cause muscular weakness for approximately 30-45 minutes," [citations], and it is suspected of having triggered a fatal cardiac arrhythmia. [Citation.] The "belt's metal prongs may leave welts on the victim's skin" that take months to heal. [Citation.]

(*Ibid.*) Manufacturers of the stun belt emphasize that the device relies on the continuous fear of what might happen if the belt is activated for its effectiveness. (*Wrinkles v. State* (Ind. 2001) 749 N.E.2d 1179, 1194-1195.) As this court has recognized: "Promotional literature for the REACT stun belt provided by the manufacturer of the belt reportedly champions the ability of

the belt to provide law enforcement with '"total psychological supremacy . . . of potentially troubling prisoners"' [citations], and a trainer employed by the manufacturer has been quoted as stating that '"at trials, people notice that the defendant will be watching whoever has the monitor."' [Citation.]" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) "Indeed, the psychological toll exacted by such constant fear is one of the selling points made by the manufacturer of the belt." (*Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at p. 1236.)

This "selling point," however is precisely what renders the device unacceptably burdensome in the courtroom setting. Numerous courts have recognized that requiring an unwilling defendant to wear a stun belt during trial may adversely impact his ability to participate in his defense by impairing his capacity to concentrate on the events of the trial, interfering with his ability to assist and communicate with counsel, and adversely affecting his demeanor in the presence of the jury. (See, e.g., *People v. Mar*, *supra*, 28 Cal.4th at p. 1205; *Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at pp. 1239-1240, *Wrinkles v. State*, *supra*, 749 N.E.2d at pp. 1194-1195.) Because a defendant's ability to participate in his own defense is one of the cornerstones of our judicial system, questions have been raised as to whether stun belts have any place in a court of law. In fact the Supreme Court of Indiana has issued an outright ban of this pain infliction device in courtrooms of that state. (*Wrinkles v. State*, *supra*, 749 N.E.2d at pp. 1194-1195.)

Considering the prejudicial effect of a stun belt on a defendant's constitutional rights, if the device is to be used to restrain a particular defendant, a court must subject that decision to careful scrutiny. Federal and state courts considering the matter, including this court, have determined that this scrutiny should include addressing factual questions related to the stun belt's operation, the exploration of alternative less problematic methods of

restraint, and a finding that the device is necessary in that particular case for a set of reasons that can be articulated on the record. The trial court here did not take the steps necessary to justify using a stun belt to restrain appellant at trial.

Significantly, the trial court failed to consider whether, in light of appellant's medical condition — which includes a history of seizures, documented brain injury, and the presence of metal fragments in his head — activation of the device might actually constitute lethal force in appellant's case. The court also failed to investigate or make any factual findings regarding the possible accidental activation of the device, and failed to provide any guidance on what behavior could prompt the deputy to activate the belt. Finally, and most importantly, the trial court failed to take into consideration the psychological impact of the device on appellant, and the likelihood that it would create a level of anxiety sufficient to impair his ability to concentrate on the proceedings and participate in his defense. In light of the known severe consequences of the device, coupled with significant unknown factors which the trial court failed to investigate, in appellant's case the psychological effect of wearing the belt was likely to have been profound yet the trial court also failed to consider this burdensome effect. The trial court here did not make any factual findings to justify its order requiring appellant to wear the device, and did not explain why less severe security methods would have been inadequate.

For all of these reasons, as discussed more fully below, the trial court's order imposing this highly intrusive method of restraint in not supported by the record. Therefore, the court abused its discretion in ordering appellant to wear the belt. From the record it cannot be said that the burden on appellant's

constitutional rights created by this error was harmless. Appellant's conviction must, therefore, be vacated.

B. SUMMARY OF PROCEEDINGS BELOW

From May of 1996 through September of 1999, appellant attended numerous court appearances without restraints and without incident. Nevertheless, on September 10, 1999, the bailiff requested and the trial court issued an *ex parte* order requiring appellant to wear an electronic remote controlled "REACT" belt throughout trial. (2 CT 432.) During the next court appearance,[10] the defense objected to appellant being restrained in any manner, and objected specifically to the stun belt. (2 RT 128-129.) The trial court "grant[ed] the motion that he be unshackled." (2 RT 129.) However, the court considered the issue of the REACT belt to be a separate matter, and asked the bailiff to detail the factors he had cited in support of his *ex parte* request to use the device. The bailiff's unsworn response was as follows:

> THE BAILIFF: In May of '96 the defendant was arrested.
>
> In June of '96 he had a fight with an inmate.
>
> In April of '97 they found a shank in his cell.
>
> In May of '98 they gave him a marker, but they didn't have marked down what that marker was about.
>
> In July of '98 he refused to obey a deputy's order, and they found excess food in his cell.
>
> In September of '98 they found two plastic shanks in his cell.
>
> Again in September he refused to go in his cell for a lockdown.

---

[10] This court date was the first day of voir dire. (2 CT 433.)

> In August of this year, '99, they found feces stored in a container in his cell, along with cleaning products.
>
> And in the same month of — August of '99, he threatened a new deputy, which we think was probably a personality conflict between the inmate and the new deputy.
>
> For those reasons, I asked to have the REACT belt on the defendant during the course of trial, knowing that he can't be shackled. And that's just a means of — of keeping control of him in case he has a problem. And we can take care of the problem a lot easier.

(2 RT 130-131.)

Despite the fact that appellant had never presented a problem in the courtroom, the court reconfirmed the order that he be restrained with the REACT belt during the entire trial. In this regard the trial court stated:

> THE COURT: Right. Okay. It was primarily the shanks and the fights that caused some concern to me. And I felt that the REACT belt would be appropriate, after hearing the list that the bailiff has just read to me.
>
> And one more thing. I questioned the feces and the cleaning supplies. And I was advised by not only this bailiff, but I believe another deputy was in the room at the time, that these were common elements sometimes used in producing explosives, so –

(2 RT 131.) Defense counsel pointed out that any concerns the court had that appellant might attempt to bring weapons of any kind into the courtroom could be addressed by searching him. (2 RT 132.) Counsel also pointed out that the belt was causing appellant physical discomfort because of a previous injury to his left hip, and that the positioning of the belt prevented him from leaning back in his chair. (2 RT 131-132.) The bailiff indicated that the belt could not be repositioned and suggested that a cushion placed on appellant's

right side might alleviate his discomfort. The cushion, however, did not help the situation. (2 RT 131-133.)

After again objecting that there was no need for restraints, defense counsel expressed concern about appellant's "appearance of being uncomfortable in front of the jury. Because they are going to watch him. And he's obviously not able to lean back." (2 RT 133.) The court, however, refused to reconsider:

> THE COURT: . . . Well, I'm not going to change my position. I'm going to order that he continue to wear the REACT belt. And it's not necessarily that he has a shank or that he is a flight risk, per se. But the fact that he has had shanks and that he has chemicals or — or elements that could be developed into — into explosives indicates to me that he is a danger to others still. And the fact that he's had confrontations with others, again, is further indication of that.
>
> When we bring 75 good citizens into the courtroom, I think we need to do everything we can to make sure that they are protected, as well as our own staff and counsel. And I think that the — some kind of restraint is appropriate.

(2 CT 132-133.) The trial court did not inquire into the nature and operation of the stun belt, and did not consider wether the device was a safe, appropriate, and necessary security measure.

Appellant was required to wear the REACT belt during the entirety of the guilt phase. Additionally, over renewed objection, appellant was required to wear the device throughout the penalty phase proceedings. No new information was presented to justify use of the belt, and the court relied upon the same circumstances which it believed justified use of the device during the guilt phase. (35 RT 4862-4872.) The court's reasons for ordering use of the stun belt during the penalty phase were stated as follows:

> The fact that he has had in his possession shanks in the jail in the past creates some concern to me. And I agree with you. I don't have the concern that he is going to bring those things into the jail today. I would agree that the chances of him act — I'm sorry — from the jail to here, to court. I think the chances of him having a weapon in court is virtually nil as well. But it demonstrates to me an attitude of violence. It demonstrates to me a readiness to do — to do violence. And in a courtroom where we're dealing with one, perhaps two armed personnel, but perhaps almost as many as — what? — counting my staff and all the jurors, in excess of 90 people, I think the — "prospects" is not the right word. The situation could easily give rise to where he could act out on some of those, what appears to me to be violent tendencies, even though I don't think he would have a weapon. But he's demonstrated an attitude toward violence while in custody.

(35 RT 4871.) Again, the trial court made no finding of manifest need for restraint, and stated no reasons why security concerns could not be addressed with less burdensome measures.

C. GENERAL PRINCIPLES REGARDING SHACKLING

Limitations regarding the courtroom use of physical restraints on criminal defendants date from the early common law. "In the 18th century, Blackstone wrote that 'it is laid down in our ancient books, that, though under an indictment of the highest nature,' a defendant 'must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.' [Citations.]" (*Deck v. Missouri* (2005) 544 U.S. 622, 629.) "American courts have traditionally followed Blackstone's 'ancient' English rule, while making clear that 'in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained.'" (*Id.* at p. 630)

"Many considerations dictate that the use of shackles to restrain a defendant at trial should rarely be employed as a security device." (*Zygadlo*

v. Wainwright (11th Cir.1983) 720 F.2d 1221, 1223.) First, the criminal process presumes that the defendant is innocent until proven guilty. (*Coffin v. United States* (1895) 156 U.S. 432, 453 [presumption of innocence "lies at the foundation of the administration of our criminal law."].) Visible shackling undermines the presumption of innocence and the related fairness of the fact finding process. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged. (*People v. Duran* (1976) 16 Cal.3d 282, 290; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.)

Second, shackling may interfere with a defendant's ability to participate in his or her defense. The "affront to human dignity" caused by shackles may impair the defendant's mental faculties by confusing or embarrassing him, or by inflicting pain. Shackles may also prevent effective communication with counsel and discourage a defendant from testifying. (*People v. Duran*, *supra*, 16 Cal.3d at pp. 290-291; *People v. Fierro* (1991) 1 Cal.4th 173, 219-220; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 720-721.)

"Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives." (*Deck v. Missouri*, *supra*, 544 U.S. at p. 639; see also

Illinois v. Allen (1970) 397 U.S. 337, 344; *People v. Duran, supra*, 16 Cal.3d at p. 290.)

The importance of these considerations dictates that the imposition of physical restraints be subject to careful judicial review. In fact the United States Supreme Court has determined that the shackling doctrine is a basic element of due process protected by the Federal Constitution. (*Deck v. Missouri, supra*, 544 U.S. at pp. 633, 635; see also *Illinois v. Allen, supra*, 397 U.S. at pp. 343-344.) Similarly, this court has long confirmed the common law rule as a part of California law. (*People v. Harrington* (1871) 42 Cal. 165.)

1. California Standard

In *People v. Harrington, supra*, 42 Cal. 165, this Court reviewed the early law prohibiting routine shackling:

> It has ever been the rule at common law that a prisoner brought into the presence of a Court for trial, upon his plea of not guilty to an indictment for any offense, was entitled to appear free of all manner of shackles or bonds; and prior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape. (2 Hale's Pleas of the Crown, 219; 4 Black. Com. 322; Layer's Case, 6 State Trials, 4th edition, by Hargrave, 230, 231, 244, 245; Waite's Case, 1 Leach's Cases in Crown Law, 36.)
>
> The Legislature of this State, at its first session, declared that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." (Stats. 1850, p. 219); and by the thirteenth section of our Criminal Practice Act it is declared that "no person shall be compelled in a criminal action to be a witness against himself, nor shall a person charged with a public offense be subjected, before conviction, to any more

> restraint than is necessary for his detention to answer the charge."
>
> The same statute also requires that at every stage of a prosecution for felony the defendant shall personally be present in Court. (Secs. 259, 320, 415, 449, Criminal Practice Act.)
>
> By section eight, Article I, of our State Constitution, it is declared that "in any trial in any Court whatever, the party accused shall be allowed to appear and defend in person and with counsel"; and further, by the Act of April 2d, 1866, in all proceedings against persons charged with the commission of crime or offense, the person so charged is granted the privilege, on request, of testifying in his own behalf as a competent witness. (Stats. 1865-6, p. 865.)

(*Id.* at pp. 166-167.) The court also recognized that "any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf." (*Id.* at p. 168.) Ultimately the court held that it was prejudicial error, a violation of the common law rule, and a violation of then section 13 of the Criminal Practice Act,[11] for a trial court to refuse to allow the defendant to appear before the jury without physical restraints unless there was "evident necessity" for shackling. (*Ibid.*)

---

[11] The current equivalent provision is found in Penal Code section 688 which states: "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

Subsequently, in *People v. Duran, supra*, 16 Cal.3d at pp. 290-291, this court "reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." " 'Manifest need' arises only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . ..' [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 651 [citing *People v. Duran, supra*].) Further, "even when the record in an individual case establishes that it is appropriate to impose some restraint upon the defendant as a security measure, a trial court properly must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purposes." (*People v. Mar, supra*, 28 Cal.4th at p. 1226 [citing *People v. Duran, supra*, 16 Cal.3d 282 , 291].)

Because the imposition of restraints is a judicial function, the trial court has a *sua sponte* duty to initiate whatever procedures it deems sufficient in order to make an on the record determination that the contemplated restraints are necessary. (*People v. Duran, supra*, 16 Cal.3d at p. 293, fn. 12.) "[W]hen the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others." (*People v. Mar, supra*, 28 Cal.4th at p. 1221; see also *People v. Anderson* (2001) 25 Cal.4th 543, 595 [holding that a shackling decision must be based on facts, not mere rumor or innuendo].) The

imposition of physical restraints in the absence of an adequate record will be deemed to constitute an abuse of discretion. (*People v. Cox*, *supra*, 53 Cal.3d at p. 651)

2. ***Federal Constitutional Standard***

In *Deck v. Missouri, supra,* 544 U.S. 622, a majority of the United States Supreme Court held that the use of visible physical restraints on a criminal defendant violates his rights under the Fifth and Fourteenth Amendments absent a trial court determination that they are justified by a state interest specific to the particular defendant, such as courtroom security or the risk of escape. (*Id.* at p. 624.) Additionally, the court must pursue less restrictive alternatives before imposing physical restraints. (*Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748; *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897; *Morgan v. Bunnell* (9th Cir.1994) 24 F.3d 49, 51.) These restrictions on the use of physical restraints apply at least equally to the penalty phase of a trial. (*Deck v. Missouri*, *supra*, 544 U.S. 622.)

In cases in which shackling has been approved, there has been "evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities." (*Duckett v. Godinez* , *supra*, 67 F.3d at p. 749.) As is the case in California, if the requisite showing does not appear on the record, a trial court ordering such shackling commits an abuse of discretion. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 635.) Further, a "defendant need not demonstrate actual prejudice to make out a due process violation," and the error is reversible unless the prosecution proves beyond a reasonable doubt that the error did not contribute to the verdict. (*Ibid.*)

D. ADDITIONAL CONSIDERATIONS APPLICABLE TO USE OF A STUN BELT.

In the present case, appellant was not restrained with traditional shackles. Rather he was compelled to wear a remote controlled electronic "REACT" belt. The physical attributes and functions of this device have been explained as follows:

> "Stun belts are used to guard against escape and to ensure courtroom safety. This device, manufactured by Stun-Tech, is known as the Remote Electronically Activated Control Technology (REACT) belt. The type of stun belt which is used while a prisoner is in the courtroom consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. This band wraps around the prisoner's waist and is secured by a Velcro fastener. The belt is powered by two 9-volt batteries connected to prongs which are attached to the wearer over the left kidney region. . . . (Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions* (1998) 30 St. Mary's L.J. 239, 242-243, 246-247 (hereafter REACT Security Belt); *People v. Garcia* [, *supra*,] 56 Cal.App.4th 1349, 1354, 1358 . . . .)
>
> "The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [Citations.]"

(*People v. Mar*, *supra*, 28 Cal.4th at pp. 1214-1215.)

In *People v. Mar*, *supra*, 28 Cal.4th 1201, this court addressed the issue of whether the principles set forth in *Duran* applied to the use of a stun belt. Prior to *Mar*, "a number of appellate court decisions ha[d] suggested that, as a general matter, a stun belt should be viewed as a less restrictive and presumptively less prejudicial security tool than traditional shackles or chains because a stun belt, when worn under a defendant's clothing, is not visible to the jury and, at least as a physical matter, will interfere less with the defendant's freedom of movement than shackles or chains. [Citations.]" [12] (*Id.* at p. 1226.) In ultimately rejecting the conclusion that the device should be considered a less restrictive and prejudicial security tool, the *Mar* court observed:

> Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for

---

[12] For example in *People v. Garcia* (1997) 56 Cal.App.4th 1349, the Court of Appeal concluded that the foundational requirements of *Duran* did not apply because: "The cases limiting use of physical restraints uniformly are concerned with traditional devices such as handcuffs, leg irons, waist chains and gags. These differ significantly from the belt at issue here because, as the trial court found, the belt does not restrain physical movement and cannot be seen by jurors. Thus jurors who cannot see the belt cannot use it as a basis for drawing inferences about the wearer's guilt or propensity for violence. The belt does not diminish courtroom decorum, is less likely to discourage the wearer from testifying, and should not cause confusion, embarrassment or humiliation." (*Id.* at p. 1356.) The court acknowledged: "the case law dealing with physical restraints at a jury trial is well settled. The underpinnings for these rules remain valid. The rules, however, have no application to the instant case. Since the reasons for the rules have largely ceased, the physical restraint rules should cease to have application here." (*Ibid.*) Based on this reasoning, the court concluded that the rigorous "manifest need" standard imposed in *Duran* was not applicable to the use of a stun belt, and that the use of such a device instead could be justified under a less demanding "good cause" standard. (*Id.* at p. 1357.)

> the defendant to focus his or her attention on the substance of the court proceedings, and affect his or her demeanor before the jury especially while on the witness stand.

(*Id.* at p. 1219.) Consequently, the device may interfere with "the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*Id.* at p. 1226.) In light of these considerations, the court concluded, "the general principles set forth in *Duran* that apply to the use of traditional types of physical restraints also apply to the use of a stun belt." (*Id.* at p. 1205.)

The court also recognized that features and aspects of the stun belt are sufficiently distinct to require a trial court to consider additional factors in order to determine whether use of the device is safe and appropriate under the particular circumstances of the case. First, "a trial court must take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures — such as chains or leg braces — or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." (*Id.* at p. 1228.) Second, "the risk of accidental activation is one that should be considered by the trial court, and should be brought to the attention of any defendant who is asked to express a preference regarding the use of such a stun belt over a more traditional security restraint." (*Id.* at p. 1229.) "Third, the manufacturer of the REACT stun belt and regular users of the device apparently recognize that the stun belt poses special danger when utilized on persons with particular medical conditions, such as serious heart problems." (*Ibid.*) Consequently, "[p]articularly when the risk of accidental activation is considered, use of a stun belt without adequate

medical precautions is clearly unacceptable." (*Ibid.*) Fourth, and finally, "a trial court's assessment of whether the stun belt proposed for use in a particular case is the least restrictive device that will serve the court's security interest must include a careful evaluation of . . . whether the current design of the belt — delivering a 50,000-volt shock lasting 8 to 10 seconds, that cannot be lowered in voltage or shortened in duration — is necessary to achieve the court's legitimate security objectives, or whether instead a different design, perhaps delivering a much lower initial shock and equipped with an automatic cutoff switch, is feasible and would provide adequate protection." (*Id.* at pp. 1229-1230.)

The Nevada Supreme Court has also considered the potential problems associated with the stun belt and determined that factors similar to those recognized by this court in *Mar* should be considered by trial judges before approving use of the device in any given case. (*Hymon v. State* (2005) 111 P.3d 1092.) More specifically, the court concluded:

> [T]he district court must conduct a hearing and determine whether an essential state interest, such as special security needs relating to the protection of the courtroom and its occupants or escape risks specific to the defendant on trial, is served by compelling the defendant to wear a stun belt. As part of this determination, the district court must consider less restrictive means of restraint. Additionally, the district court must: (1) make factual findings regarding the belt's operation, (2) address the criteria for activating the stun belt, (3) address the possibility of accidental discharge, (4) inquire into the belt's potential adverse psychological effects, and (5) consider the health of the individual defendant. The district court's rationale must be placed on the record to enable this court to determine if the use of the stun belt was an abuse of discretion. Furthermore, the decision must be made by the district court, not by law enforcement officers. "The use of physical restraints is subject to close judicial, not law enforcement, scrutiny. It is

> the duty of the [district] court, not correctional officers, to make the affirmative determination, in conformance with constitutional standards, to order the physical restraint of a defendant in the courtroom."

(*Id.* at p. 1099 [footnotes omitted].)

Although the United States Supreme Court has yet to address the stun belt issue, lower federal courts have echoed *Mar*'s concerns regarding use of stun belts in the courtroom. For example, in *Gonzalez v. Pliler*, *supra*, 341 F.3d 897, the court observed:

> The use of stun belts, depending somewhat on their method of deployment, raises all of the traditional concerns about the imposition of physical restraints. The use of stun belts, moreover, risks "disrupt[ing] a different set of a defendant's constitutionally guaranteed rights." [Citaion.] Given "the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences." [Citation.] These "psychological consequences," [citation] cannot be understated. Stun belts, for example, may "pose[ ] a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles." [Citation.] We have long noted that "one of the defendant's primary advantages of being present at the trial[ ] [is] his ability to communicate with his counsel." [Citations.] Stun belts may directly derogate this "primary advantage[ ]," [citation] impacting a defendant's right to be present at trial and to participate in his or her defense. As the Eleventh Circuit recently observed, "[w]earing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case." [Citation.] "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely" hinders a defendant's participation in defense of the case, "chill[ing] [that] defendant's inclination to make any movements during trial — including those movements necessary for effective communication with counsel." [Citation.]

(*Id.* at p. 902.)

Similar concerns led to a reversal in *United States v. Durham* (11th Cir. 2002) 287 F.3d1297. There a serial bank robber with a history of escape attempts from federal custody, was compelled to wear a stun belt throughout trial over his objection. (*Id.* at p. 1301.) On appeal the court articulated its concerns about the device and its potential impact on a defendant's constitutional rights. First, with respect to the traditional objection to shackles — that visible restraints undermine the presumption of innocence and the related fairness of the fact finding process — the court noted that "if the stun belt protrudes from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury [and] [i]f seen, the belt 'may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant.'" (*Id.* at p. 1304.)

The court, however, was "more concerned about the possibility that a stun belt could disrupt a different set of a defendant's constitutionally guaranteed rights." Specifically the court was concerned with the effect of the device on the defendant's right to counsel and noted that "[t]he fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movement during trial — including those movements necessary for effective communication with counsel." (*Ibid.*) The court also found that "[a]nother problem with this device is the adverse impact it can have on a defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense." (*Id.* at pp. 1305-1306.) The court recognized that a stun belt might create anxiety, by forcing the defendant to worry about the belt and preventing it from being activated, which could interfere with his ability to fully participate in his defense at trial. Or, as the court stated in a

footnote, "[m]andatory use of a stun belt implicates [the right to be present at trial], because despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense." (*Id.* at p. 1306 n. 7.)

The court's final concern was that "stun belts have the potential to be highly detrimental to the dignified administration of criminal justice." (*Id.* at p. 1306.) The court noted that "[s]hackles are a minor threat to the dignity of the courtroom when compared with the discharge of a stun belt, which could cause the defendant to lose control of his limbs, collapse to the floor, and defecate on himself." (*Ibid.*) It then held that "a decision to use a stun belt must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints. Due to the novelty of this technology, a court contemplating its use will likely need to make factual findings about the operation of the stun belt, addressing issues such as the criteria for triggering the belt and the possibility of accidental discharge. A court will also need to assess whether an essential state interest is served by compelling a particular defendant to wear such a device, and must consider less restrictive methods of restraint. Furthermore, the court's rationale must be placed on the record to enable us to determine if the use of the stun belt was an abuse of the court's discretion." (*Id.* at pp. 1306-1307 [internal quotation marks, citations and footnotes omitted].)

After finding that the government's attempts to demonstrate harmless error were insufficient, the court concluded that "the defendant's ability to participate meaningfully throughout his trial was hampered by the use of the stun belt. The government has not demonstrated that Durham's defense was not harmed by such an impediment to Durham's ability to participate in the

proceedings." (*Id.* at p. 1309.) The court then vacated the bank robbery and related convictions and remanded the case for further proceedings. (*Ibid.*)

As the above discussion indicates, state and federal appellate courts generally agree that the limitations applicable to traditional methods of restraint in the courtroom also apply to the use of a stun belt and that, in light of the unique attributes of the device, additional factors must also be taken into consideration before a trial court may compel a defendant to wear such a device. As discussed more fully below, the trial court here did not take the necessary steps to justify using a stun belt to restrain appellant during trial. Under the circumstances of the present case the trial court committed prejudicial error in requiring appellant to wear a stun belt during both phases of his trial.

E. THE TRIAL COURT ERRED BY ORDERING THAT APPELLANT BE PHYSICALLY RESTRAINED WITH THE STUN BELT DURING TRIAL.

Although a trial court's decision to order restraints is subject to deferential review for abuse of discretion, this court has recognized that the discretion is "relatively narrow." (*People v. Cox*, *supra*, 53 Cal.3d at p. 651.) As discussed above, a criminal defendant cannot be physically restrained unless there is a showing of manifest need for such restraints. (*People v. Soukomlane* (2008) 162 Cal.App.4th 214, 229; *Deck v. Missouri*, *supra*, 544 U.S. at pp. 633, 635.) In addition, even where restraints are appropriate, a trial court must authorize the "least obtrusive or restrictive restraint that effectively will serve the specified security purpose." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226; see also *Duckett v. Godinez*, *supra*, 67 F.3d at p. 748.) In the case of a stun belt, the trial court must also consider a number of distinct features and dangers before determining that its use is appropriate and

necessary. (*People v. Mar*, *supra*, 28 Cal.4th 1205.) The imposition of physical restraints in the absence of an adequate record will be deemed to constitute an abuse of discretion. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944 [overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110]; *Deck v. Missouri*, *supra*, 544 U.S. at p. 635.)

As discussed more fully below, the trial court in the present case erred in ordering appellant to wear a stun belt throughout trial for a number of reasons. First, the record does not demonstrate that the court was aware of, and applied, the proper legal standards. Next, the record does not support a finding of "manifest need" to restrain appellant since there was no evidence that he posed a security threat in the courtroom. Additionally, even if this court finds that the record supports the imposition of some form of restraints, the trial court did not correctly determine the stun belt was the least "onerous" or "restrictive" device available to provide the needed restraint. In fact the trial court failed to even consider other methods of restraint, instead presuming that the stun belt was less intrusive than traditional shackles because it would be less visible to jurors, and failed to make factual findings on critical matters relating to the operation of the stun belt. For all these reasons the order requiring appellant to wear a stun belt throughout trial constituted an abuse of discretion.

1. The Trial Court's Ruling Did Not Represent an Informed Exercise of Discretion.

Initially it should be noted that the comments made by the trial court in connection with its order requiring appellant to wear the stun belt during trial indicate that it applied an improper standard, and failed to consider relevant facts, in ruling on appellant's objection to use of the device. As a result, the order did not represent and informed exercise of discretion, and thus was an

abuse of discretion. "[A]ll exercises of legal discretion must be grounded in reasoned judgment guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 194-195.) "Because decision making, hence discretion is largely a process of choosing alternatives, a mistake as to the alternatives open to the court affects the very foundation of the decisional process." (*Adoption of Driscoll* (1969) 269 Cal.App.2d 735, 737.) Judicial discretion can only truly be exercised if there is no misconception by the trial court as to the basis for its action. (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.) Here none of the trial court's comments indicate it was aware that the substantive requirements discussed above governed its consideration and determination of appellant's objection to the use of the stun belt.

The preliminary issue before the court was whether there was a "manifest need" for restraints sufficient to overcome appellant's constitutionally based right to participate in the proceedings free of restraint. The trial court's comments, however, indicate that the matter was instead viewed as a question of whether there was "good cause" to support the bailiff's request for the stun belt. Significantly, the court sustained the defense objection to shackles, but considered use of the stun belt a separate and different question. The court did not make a finding that there was a "manifest need" for restraints based upon a showing that appellant posed a special security risk in the courtroom. Instead, based upon the bailiff's representations that appellant had been involved in a fight at the jail and that shanks and other potentially dangerous material had been found in his cell, the

court concluded that appellant was "a danger to others" and that "some kind of restraint" was "appropriate." (2 RT 130-133.) The trial judge's finding that restraints were "appropriate" not that they were "required" suggests that, rather than applying the stringent "manifest need" standard, the court applied a less demanding "good cause" standard. (See *People v. Garcia, supra*, 56 Cal.App.4th 1349, 1357 [also incorrectly concluding that a "good cause" standard was applicable to the use of a stun belt].)

In addition to applying an improper standard, the trial court also failed to determine whether the stun belt was the least restrictive and onerous method of securing the courtroom in light of any risk posed by appellant. As was the case in *Mar*, the trial court considered the stun belt preferable to traditional restraints and, consequently, failed to consider relevant factors in evaluating whether the device was necessary and appropriate. It is an abuse of discretion for a trial court to apply the wrong legal standards applicable to the issue at hand. (*Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1136; accord, *Loftin v. Dalessandri* (10th Cir. 2001) 3 F.3d 658, 664; *EEOC v. Bruno's Restaurant* (9th Cir. 1992) 976 F.2d 521, 523). Because the trial court failed to apply the appropriate standard, incorrectly presumed that the stun belt was the least restrictive means of maintaining courtroom security, and failed to consider relevant factors to determine whether the belt was necessary and appropriate, the order requiring appellant to wear the device did not represent an informed exercise of discretion and was, therefore, an abuse of discretion.

2. ***In The Absence Of Any Evidence Of Escape Risks or Unruly Courtroom Behavior By Appellant There Was No "Manifest Need" For Physical Restraints.***

Even if the trial court had been aware of, and applied, the proper standard, the record does not support a finding of manifest need for restraints. A defendant's "record of violence, or the fact that he is a capital defendant, cannot alone justify his shackling." (*People v. Hawkins*, *supra*, 10 Cal.4th at p. 944.) Instead appellate courts have generally required that a defendant make specific threats of violence or escape from court or demonstrate unruly conduct in court before restraints are justified. (*People v. Anderson* (2001) 25 Cal.4th 543, 595; *People v. Valenzuela* (1984) 151 Cal.App.3d 180, 192.) Similarly, federal courts have required "evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities." (*Duckett v. Godinez*, *supra*, 67 F.3d at p. 749.)

Although a trial judge must make the decision to use physical restraints on a case-by-case basis,[13] a consideration of other cases illustrates what circumstances will demonstrate a showing of "manifest need" required before any type of physical restraint may be imposed. In cases where a manifest need for restraints has been found, substantial evidence established that the defendant posed a sufficient danger of violent conduct in the courtroom, or of escape, to justify the use of restraints. For example, in *People v. Kimball* (1936) 5 Cal.2d 608, 611, the defendant expressed an intent to escape, threatened to kill witnesses, and had secreted a lead pipe in the courtroom. In *People v. Burwell* (1955) 44 Cal.2d 16, 33, the defendant had written letters

---

[13] *People v. Duran*, *supra*, 16 Cal.3d at p. 293; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 744.

stating that he intended to procure a weapon and escape from the courtroom with the aid of friends. Evidence of an attempted escape was also found in *People v. Burnett* (1967) 251 Cal.App.2d 651, 655. So too in *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-863, the defendant had attempted to escape from county jail while awaiting trial on other escape charges. Evidence of unruly courtroom behavior was found in *People v. Hillery* (1967) 65 Cal.2d 795, 806, where the defendant had resisted being brought to court, refused to dress for court, and had to be taken bodily from prison to court. Similarly, in *People v. Loomis* (1938) 27 Cal.App.2d 236, 239, the defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and threw himself on the floor. Overall, courts have found that the decision to physically restrain a defendant depends on evidence "which indicates the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom. To do otherwise is an abuse of the trial court's discretion." (*State v. Finch* (WA 1999) 975 P.2d 967.)

In the present case the trial court determined that "some kind of restraint" was appropriate based upon the bailiff's representations that: (1) appellant had been involved in a fight with an inmate; (2) shanks had been found in his cell; and (3) feces and cleaning products were found stored in a container in his cell. (2 RT 130-133.) However, all of these factors related solely to appellant's behavior in the jail, and none demonstrated that he posed a risk to courtroom security. Unlike the cases cited above, here there was no evidence of disruptive courtroom behavior or planned escape. In fact, the most compelling evidence, which clearly demonstrated that physical restraints were not required, was appellant's in-court behavior. For more than three

years (from May of 1996, through September 13, 1999) appellant attended numerous court appearances without incident. During this entire time he had been completely compliant with the decorum of the court. Fears and speculation aside, the evidence of appellant's actual courtroom behavior was that he had never said, or done, anything which might have justified restraints. Quite simply, he had behaved himself as a gentleman throughout all previous court appearances and there is nothing in the record to suggest that appellant posed a threat in the courtroom. (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1222.) Consequently, the record does not support a finding or determination that appellant posed a serious security threat in the courtroom such that there would have been a "manifest need" for any type of restraints. For this reason alone, the trial court erred in requiring him to wear a stun belt.

3. ***Even If this Court Finds That the Record Supported Imposition of Some Form of Restraints, The Trial Court Erred by Selecting The "REACT" Belt in Lieu of Other, Less Onerous, Forms of Restraint.***

As discussed above, even when the record in an individual case establishes that it is appropriate to impose some restraint upon the defendant as a security measure, a trial court must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purpose. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226; *Spain v. Rushen*, *supra*, 883 F.2d 712.) Here the trial judge concluded that some form of restraint was "appropriate," and, rather than considering other means of securing the courtroom, assumed that the stun belt was the least onerous or restrictive restraint so long as jurors could not see it. However, as this court has recognized, "although the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as

a general matter, be less debilitating or detrimental to the defendant's ability fully to participate in his or her defense than would be the use of more traditional devices such as shackles or chains." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) By focusing on the visibility of the device, and failing to consider other relevant factors, the trial court erroneously concluded that the stun belt was the less restrictive alternative available.

One crucial factor the trial court failed to consider was whether, in light of appellant's medical condition, use of the stun belt on him might constitute lethal force and, thus, whether the stun belt was even an acceptable option in this case. As noted by this court in *Mar*, "the manufacturer of the REACT stun belt and regular users of the device apparently recognize that the stun belt poses special danger when utilized on persons with particular medical conditions, such as serious heart problems. (Welsh, *Electroshock Torture and the Spread of Stun Technology*, *supra*, 349 The Lancet 1247; see also Schulz, *supra*, N.Y. Review of Books at p. 53 [quoting statement of the Assistant Director of the Federal Bureau of Prisons indicating the bureau's policy not to use stun belts on ' "1) pregnant female inmates, 2) inmates with heart disease, 3) inmates with multiple sclerosis, 4) inmates with muscular dystrophy, and 5) inmates who are epileptic" '].)" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1229.) In *Mar* this court concluded that "because the stun belt poses serious medical risks for persons who have heart problems or a variety of other medical conditions, . . . a trial court, before approving the use of such a device, should require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found to be free of any medical condition that would render the use of the device unduly dangerous." (*Id.* at pp. 1205-1206.) In light of appellant's history of seizures, and the fact that metal bullet fragments are present in his head, at a

very minimum the trial judge was required to satisfy himself that the device could safely be used.[14] As this court noted in *Mar*, "use of a stun belt without adequate medical precautions is clearly unacceptable." (*People v. Mar, supra*, 28 Cal.4th 1229.)

Another significant factor the trial court failed to consider was the psychological impact of the device on appellant. As this court noted in *Mar*, "requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury." (*Id.* at p. 1205.)

---

[14] During the time appellant was incarcerated pending trial in this case, he had a history of seizures, and was prescribed Dilantin. (44 RT 6266-6269, 6276.) It was also documented, through x-rays, a CAT scan, an EEG test, an MRI scan, and a PET scan, that appellant has a number of bullet fragments in his head. (44 RT 6272-6273, 6326-6327.) These tests also showed that appellant has significant organic brain damage primarily to the right frontal lobe and, to a lesser extent, the left frontal lobe. (44 RT 6329.) In fact appellant is missing approximately 20-25 percent of his right frontal lobe. (44 RT 6317-6318.) Expert testimony during the penalty phase established that there would have been a significant change in the function of appellant's brain as a result of the damage observed. (44 RT 6331.) "According to two physicians, and a 1990 study by the British Forensic Service, electronic devices similar to the belt may cause heart attack, ventricular fibrillation, or arrhythmia, and may set off an adverse reaction in people with epilepsy or on psychotropic medications." (Cusac, *Life in Prison: Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry* (July 1996) The Progressive, p. 20.) Additionally, "Corey Weinstein, a physician and co-director of the Pelican Bay Information Project (which monitors human-rights abuses at Pelican Bay prison in California), says that stun belts 'have the same problems as tasers. With tasers, people on psych meds have altered neurological responses. People with seizures have real problems.' " (*Ibid.*)

> The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury. Promotional literature for the REACT stun belt provided by the manufacturer of the belt reportedly champions the ability of the belt to provide law enforcement with "'total psychological supremacy . . . of potentially troubling prisoners'" [citation], and a trainer employed by the manufacturer has been quoted as stating that "'at trials, people notice that the defendant will be watching whoever has the monitor.'" [Citation.] Other courts have noted that the psychological effect of a stun belt may affect adversely a defendant's participation in the defense [citations], and, indeed, the Supreme Court of Indiana recently held that stun belts should not be used in the courtrooms of that state at all, because other forms of restraint "can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated." [Citation.]

(*Id.*, at pp. 1226-1227 [footnote omitted].) Consequently, before ordering that a defendant be shackled with a stun belt, the judge must "take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and give considerable weight to the defendant's perspective in determining whether traditional security measures — such as chains or leg braces — or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1228; see also *id.* at p. 1222; cf., *People v. O'Dell* (2005) 126 Cal.App.4th 562 [failure to consider the facts and special circumstances of the defendant's case provided insufficient

evidence to support his involuntary medication].) Here the trial court did not inquire regarding the potential psychological consequences.

Finally, there was no showing or finding that the design of the belt used on appellant was necessary to restrain him. "[A] trial court's assessment of whether the stun belt proposed for use in a particular case is the least restrictive device that will serve the court's security interest must include a careful evaluation of [the belt's] design . . . ." (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1229-1230.) For example, consideration should be given to whether "a 50,000 volt shock lasting 8-10 seconds, that cannot be lowered in voltage or shortened in duration [] is necessary to achieve the court's legitimate security objectives, or whether instead a different design, perhaps delivering a much lower initial shock and equipped with an automatic cutoff switch, is feasible and would provide adequate protection." (*Id.* at pp. 1229-1230.) Consideration must also be given to the criteria for triggering the belt, and the possibility of an accidental discharge. (See *United States v. Durham*, *supra*, 287 F.3d 1297 [consideration must be given to criteria for triggering device and potential for accidental activation]; *People v. Mar*, *supra*, 28 Cal.4th at p. 1228-1229 [consideration must be given to potential for accidental activation]; *Hymon v. State*, *supra*, 111 P.3d at p. 1099 [court must consider accidental activation and criteria for activating].) The trial court failed to make factual findings on any of these critical matters relating to operation of the stun belt, and thus had no basis for concluding that it was the least restrictive means of restraint.

Because the trial court failed to take into consideration any of the distinct features, problems, and risks associated with the stun belt, the record does not support a finding that the device was the least restrictive means of securing the courtroom. The judge abused his discretion by failing to consider

less invasive ways to restrain appellant and by failing to make an on the record determination that less onerous restraints would not be effective. For this additional reason, the stun belt order was an abuse of discretion.

F. THE ERROR IN REQUIRING APPELLANT TO WEAR THE REACT BELT DURING TRIAL MANDATES REVERSAL.

Because the trial court acted outside the scope of its discretion in ordering appellant to wear the stun belt during trial, several of appellant's fundamental rights were unjustly burdened. Under the circumstances, this error cannot be viewed as harmless. In the case of errors relating to traditional methods of restraint, appellate courts have focused on the visibility of the shackles in determining the applicable standard of review. When a trial court abuses its discretion in shackling a defendant, and there is evidence establishing that jurors saw the restraints, the error rises to the level of constitutional error to be tested under the *Chapman* test. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 635 [citing *Chapman v. California* (1967) 386 U.S. 18, 24]; see also *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1830; *People v. Ceniceros* (1994) 26 Cal.App.4th 266, 278-279.) On the other hand, where the shackles are not visible, the use of physical restraints in the courtroom without a prior showing of the manifest need for such restraints violates only *Duran*, and results in application of the *Watson* standard. (*People v. Mar*, *supra*, at p. 1225 [citing *People v. Watson* (1956) 46 Cal.2d 818, 836-837]; see also *People v. Vance* (2006) 141 Cal.App.4th 1104, 1114-1115.) This is so because the primary prejudice associated with traditional methods of restraint is that visible shackling undermines the presumption of innocence because the appearance of the defendant in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged. (See, *People v. Duran*, *supra*, 16 Cal.3d at p. 290.)

The use of a stun belt, however, implicates a different set of a defendant's constitutionally guaranteed rights by interfering with his ability to effectively participate in his defense. In *People v. Mar*, *supra*, 28 Cal.4th 1201, 1225, n. 7, this Court recognized that the "potential adverse psychological effect of the [stun belt] upon the defendant" might call for application of a "more rigorous prejudicial error test" than the *Watson* standard. While the particular circumstances present in *Mar* allowed the Court to apply the *Watson* "reasonable probability" standard to find reversible error, the Court did not foreclose use of the federal standard in future stun belt cases. The Court noted that none of the Court of Appeal shackling decisions[15] applying the *Watson* standard "involved the improper use of a stun belt, where the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury." (*Id.* at p. 1225, fn. 7.) The *Mar* Court further recognized that in *United States v. Durham*, *supra*, 287 F.3d 1297, the court found the error to be of federal constitutional dimension requiring reversal unless the State proved the error was harmless beyond a reasonable doubt. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn.7.) Here, the judge's erroneous stun belt order abridged appellant's state and federal constitutional rights to due process, fair trial by jury, personal presence during trial, confrontation, compulsory process, assistance of counsel and against self incrimination, by impairing his ability to defend himself. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 and 17.) Consequently, irrespective of whether the stun belt was visible to jurors, the

---

[15] *People v. Jackson*, *supra*, 14 Cal.App.4th at pp. 1827-1830; cf. *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.

error must be evaluated under the standard applicable to federal constitutional error.

1. ***The Error Violated State Law And Appellant's Federal Constitutional Rights.***

The United States Supreme Court has consistently held that due process (14th Amend.) and confrontation (6th Amend.) principles guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*United States v. Gagnon* (1985) 470 U.S. 522, 526-527; *Illinois v. Allen*, *supra*, 397 U.S. at p. 338; *Snyder v. Mass.* (1934) 291 U.S. 97, 105-106 [overruled on other grounds *Malloy v. Hogan* (1964) 378 U.S. 1, 2].) It is true that appellant was physically present in the courtroom. However, "[p]resence at trial is meaningless if the defendant is unable to follow proceedings or participate in his own defense. Mandatory use of a stun belt implicates this right, because despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense." (*United States v. Durham*, *supra*, 287 F.3d at p. 1306, fn. 7.)

Additionally, the stun belt abridged appellant's state (art. I, § 15) and federal (6th Amend. and 14th Amend.) constitutional right to counsel. "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial — including those movements necessary for effective communication with counsel." (*Id.* at p. 1305; see also *Hyman v. State* (2005) 111 P.3d 1092, 1098; *Gonzalez v. Pliler*, *supra*, 341 F.3d 897, 900 [stun belt "chills" the defendant's inclination to make "any movements" during trial].) As this court recognized in *Mar*, "requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that

may . . . interfere with the defendant's ability to assist his or her counsel. . . ." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1205.)

The stun belt also interfered with appellant's state (art. I, § 7 and 15) and federal (5th, 6th and 14th Amends.) constitutional rights against self incrimination, to due process, to trial by jury and to confront the witnesses against him by adversely affecting his demeanor in the courtroom. As this Court observed in *Mar*, "The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or unintentionally) . . . in many instances may impair the defendant's ability to . . . maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) Even though appellant did not testify, his in-court demeanor was important because jurors observe and consider the demeanor of a non-testifying defendant during trial. (See e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1226, fn. 26; *People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *Riggins v. Nevada*, *supra*, 504 U.S. 127 [impact of compelled use of anti-psychotic drugs on the defendant's "courtroom appearance" impaired his constitutional rights].) "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." (*Riggins v. Nevada*, *supra*, 504 U.S. at p. 142 [conc. opn. of Kennedy, J.) Furthermore, by affecting appellant's demeanor, the use of the stun belt also impaired his ability to exercise his Sixth Amendment confrontation rights. (Cf. *Id.* at p. 142, [in the context of forced administration of mood altering medication citing *Coy v. Iowa* (1988) 487 U.S. 1012, 1016-1020 emphasizing the importance of face to face encounter between accused and accuser].)

Finally, the error also abridged the Cruel and Unusual Punishment Clause of the 8th Amendment because the jurors' consideration of demeanor is especially crucial in a capital case. As was noted in a related context:

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]

(*Riggins v. Nevada*, *supra*, 504 U.S. at pp. 143-144 [conc. opn. of Kennedy, J.) By impairing appellant's ability to maintain a positive demeanor during trial, the error undermined his Eighth Amendment right to a fair, nonarbitrary, and reliable determination of guilt and penalty. (See *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Saffle v. Parks* (1990) 494 U.S. 484, 493, and cases cited therein [pointing to the longstanding recognition that capital sentencing must be reliable, accurate and nonarbitrary]; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois*, *supra*, 502 U.S. at pp. 363-364 [reliability required by due process].)

Finally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Pen. Code, § 1044.) The violations of appellant's state created rights regarding the imposition of restraints abridged the Due Process Clause (14th Amend.) of the

United States Constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.)

Here the stun belt denied appellant his right to be personally present at trial by interfering with his ability to effectively participate in his defense, to confront the witnesses against him, to respond and react to the evidence, and to consult with counsel. In short, the trial court's error in requiring appellant to wear a stun belt throughout trial violated his state and federal constitutional rights by "confus[ing] and embarrass[ing] his mental faculties, and thereby materially . . . abridg[ing] and prejudicially affect[ing] his constitutional rights of defense. . . ." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1219 [internal citations and quote marks omitted].) The error, therefore, requires reversal under the standard of review applicable to federal constitutional standards.

2. The Error Is Reversible Per Se.

The United States Supreme Court recognizes two categories of constitutional error: "structural error" and "trial error." (*Arizona v. Fulminate* (1991) 499 U.S. 279, 307-308.) The prejudicial effect of "trial error" can be determined from a review of the record. By contrast, structural errors "'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.' [Citations.]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [126 S.Ct. 2557, 2563-2564].) Accordingly, structural errors require reversal without resort to the impossible task of assessing prejudice. (*Arizona v. Fulminate*, *supra*, 499 U.S. at pp. 307-308; *United States v. Gonzalez-Lopez*, *supra*, 126 S.Ct. 2557.) Importantly, notwithstanding use of the term "trial errors," the Supreme Court has made clear that it is the characteristic of the claimed error, including the difficulty of assessing its effect, which determines whether an error is subject to review for

harmlessness. (*United States v. Gonzalez-Lopez*, *supra*, 126 S.Ct. at p. 2564, fn. 4.) Because it is virtually impossible to ascertain the prejudicial effect of an error such as the one claimed here, the error must be deemed "structural" and found to be reversible *per se*.

As noted by this court in *Mar*, the nature of the error is comparable to the error in *Riggins v. Nevada*, *supra*, 504 U.S. at p. 137. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1227.) In *Riggins* the defendant challenged his convictions on the ground that he had been forced to take an antipsychotic drug during his trial. Because the state court had failed to make sufficient findings to support the drug's forced administration, the United States Supreme Court reversed, and did so without requiring Riggins to demonstrate record-based prejudice. As the Court observed,

> [E]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams* (1976) 425 U.S. 501, 504-505, or of binding and gagging an accused during trial, see [*Illinois v. Allen* (1970) 397 U.S. 337, 344], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Riggins v. Nevada*, *supra*, 504 U.S. at p. 137.) As recognized by this Court, *Riggins* raised "some of the same concerns" as compelled stun belt use. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1228.) Specifically, *Riggins* also dealt with concerns that arise from the circumstances that the state's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to conduct a defense at trial." (*Ibid.*) Because it is impossible to determine the effect on appellant of being shackled with a

"control belt" carrying a 50,000 watt charge, the entire judgment against him must be reversed.

For all of these reasons it is impossible to divine from a transcript of the trial proceedings what effect the stun belt had on either appellant's internal mental processes or the jurors' perception of his demeanor. Reversal is therefore required.

3. The State Cannot Prove That Requiring Appellant To Wear A Stun Belt At The Penalty Phase Was Harmless Beyond A Reasonable Doubt.

Even if this court determines the error is not reversible *per se*, at the very least, prejudice must be evaluated under the reversible error standard set forth in *Chapman v. California*, *supra*, 386 U.S. 18. This test provides that "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." (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Louis* (1986) 42 Cal.3d 969, 993-994.) Judged in accordance with *Chapman*'s "harmless beyond a reasonable doubt" standard, the error here requires reversal.

With respect to the guilt phase it should be noted that the existence of substantial evidence in support of the verdict does not cure the fundamental error of forcing the accused to stand trial while not in the full enjoyment of his mental power. "Whether guilty or innocent the same rule must be given application. Constitutional and statutory provisions in reference to the

conduct of a felony prosecution were designed to secure to every accused person a fair trial, not merely to those who are innocent. Full and strict observance of such rules is the primary responsibility of every tribunal assaying to try such a case." (*People v. Berling* (1953) 115 Cal.App.2d 255, 270.) Additionally, because the strength of the prosecution's case is relative to, and dependent upon, the strength of the defense case, any error impacting the presentation of a defense necessarily renders an argument based on the strength of the prosecution's evidence meaningless. Consequently, respondent may not contend the error was harmless error by arguing the strength of the prosecution's evidence.

Additionally, in *Durham*, the court observed that "it is not sufficient for the government to point out that the defendant was represented by an attorney looking out for his interests, thus rendering the defendant's presence or participation at trial unnecessary. Such a claim 'ignores the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.' [Citation.]." (*United States v. Durham, supra,* 287 F.3d at pp. 1308-1309.) It was also insufficient "for the government to argue that the defendant cannot name any outcome determinative issues or arguments that would have been raised had he been able to participate at trial." (*Id.* at p. 1309.) This is so because, "such an argument impermissibly transfer[s] the burden of proof back to the defendant, but it also would eviscerate the right in all cases where there is strong proof of guilt. [Citations.] 'The right to be present at one's own trial is not that weak.' [Citation.]" (*Ibid*; see also *Wrinkles v. State, supra,* 749 N.E.2d at p. 1194 ["A defendant's ability to participate in his own defense is one of the cornerstones of our judicial system."].) The court went on to point out that in cases where error affecting the defendant's right to be present at trial had been

found to be harmless "the defendant generally has been absent for only a brief or minor portion of the trial." (287 F.3d at p. 1309.) However, because "the defendant's ability to participate meaningfully throughout his trial was hampered by the use of the stun belt," the court concluded that "[t]he government has not demonstrated that Durham's defense was not harmed by such an impediment to Durham's ability to participate in the proceedings. Therefore, Durham's conviction must be vacated, and his case remanded for a new trial." (*Ibid.*)

The court's reasoning in *Durham* applies equally to the present case. Accordingly, even if the *Chapman* standard of review is applied, reversal is required because it cannot be shown that the error was harmless beyond a reasonable doubt.

GUILT PHASE ISSUES

II.

THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE REQUIRES REVERSAL.

A. INTRODUCTION

Appellant was arrested between and 3:30 and 4:00 a.m. on May 26, 1996 (16 RT 2469), for the Sterling homicide which occurred some eleven hours earlier (15 RT 2153). Around 7:00 a.m. on the 26th, several hours after appellant was arrested and transported to the local police station, investigators arranged for a nurse to obtain a blood sample from him. (7 RT 946.) The officers did not seek a warrant before extracting the blood sample, and at 12:25 p.m. that same day a second blood sample was taken, again without a warrant. (7 RT 947.) This second sample was later utilized in connection with DNA analysis relating to the Anes/Magpali homicides. (7 RT 947-948.)

Appellant filed a written motion to suppress all evidence involving the blood samples, including the results of DNA testing, on the grounds that the samples had been unconstitutionally and unlawfully obtained without a warrant and in the absence of any exception to the warrant requirement. (1 CT 283-287.) The prosecution filed written opposition to the motion asserting several potential grounds for denial (12 CT 3306-3310), and appellant filed a reply to the prosecution's opposition (13 CT 3369-3455).

At the hearing on the motion, the prosecution elected to rely solely on one potential justification for the search and seizure — appellant was on probation and subject to a general search condition at the time of his arrest, and the prosecution contended that the taking of the blood samples fell within

the scope of this provision. No witnesses were called to testify at the hearing. Instead the prosecutor relied upon a set of stipulated facts. (7 RT 946-948.) At the conclusion of the hearing the trial court agreed with the prosecution's position that the blood samples were included within the scope of the general search condition of appellant's probation, and denied the motion to suppress. (7 RT 952-953.) Evidence relating to the DNA testing was introduced at trial and formed the primary evidence against appellant with respect to the Anes/Magpali homicides.

B. BACKGROUND INFORMATION

Prior to trial the defense moved, pursuant to Penal Code section 1538.5, to suppress: "defendant's blood samples contained in two vials . . . and/or observations made and test results obtained from the seizure of his bodily fluids in violation of the United States Fourth, Fifth, and Fourteenth Amendments and Article I, sections 1 and 19, of the Constitution of the State of California." (1 CT 283.) The defense maintained that the seizure of appellant's blood was unconstitutional because it was accomplished without a warrant and in the absence of any applicable exception to the warrant requirement. (1 CT 284-286.)

The prosecution filed points and authorities in opposition to the motion contending that the warrantless seizure of appellant's blood was authorized by consent because appellant was on probation and subject to a general search condition at the time the blood sample was taken. More specifically, the prosecution argued as follows:

> The defendant will acknowledge that he was subject to a valid probation search condition on May 26, 1996. However, he contends that the seizure of a sample of his blood was outside the scope of the waiver of his Fourth Amendments [sic] rights....

> It is the People's position that the probation search term which requires the defendant to submit "his person" to a search with or without a warrant or probable cause encompasses the seizure of a blood sample from the defendant's person . . . . The broad Fourth Amendment waiver included in the defendant's probation terms should not be so narrowly interpreted as to exclude the minimally intrusive seizure occasioned by [a] simple blood test.

(12 CT 3307.) The prosecutor also argued that the first blood sample was justified based upon exigent circumstances because the sample could have yielded relevant evidence of intoxication which was "subject to dissipation over time" (12 CT 3308), and that "[s]ince this sample was validly seized, the forensic analysis performed on the second sample, taken at 12:30 p.m., would inevitably have been discovered by law enforcement (12 CT 3309). Finally, the prosecutor asserted that the evidence should not be suppressed because: "[a] search warrant for such evidence would have been sought in the normal course of the investigation of that matter based on information already possessed by law enforcement prior to the seizure of the defendant's blood on May 26, 1996." (12 CT 3309.)

At the outset of the hearing on the motion to suppress, the prosecutor recited a number of stipulated facts as follows:

> MR. MITCHELL: . . . Those being that the defendant was arrested during the early morning hours of May 26th, 1996, for commission of an offense that had occurred during the nighttime hours of May 25th, 1996.
>
> That at approximately 0700 hours on 5-26-96, blood was drawn from the defendant in Moreno Valley Case No. 96146168. That blood —
>
> * * * *
>
> THE COURT: And approximately what time was the arrest?

MR. MITCHELL: At approximately — between 3:00 and 4:00 a.m. in the morning.

THE COURT: Okay. And the blood was drawn when?

MR. MITCHELL: At —

THE COURT: Three or four hours later?

MR. MITCHELL: Correct. Once he was transported to the Moreno Valley Police Department, he was witnessed by a Deputy Robert Marks.

THE COURT: Go ahead.

MR. MITCHELL: Investigators questioned the defendant concerning that homicide offense from May 25th, 1996, and the defendant was then questioned regarding other homicides.

And another blood sample was taken from the defendant at 1225 hours on May 26th, 1996, along with hair and, I believe, saliva.

THE COURT: So that would be shortly after noon, then?

MR. MITCHELL: Yes.

THE COURT: Yeah.

MR. MITCHELL: It was the second blood sample that was subsequently analyzed by a criminalist and used to determine a DNA profile for offenses that are alleged to have been committed on December 3rd, 1995. I believe the defense will also be willing to stipulate that the defendant, at the time of his arrest on May 26th, 1996, was on formal probation in Los Angeles County, Case No. YA014002, based on his conviction on February 22, 1993, for an attempt robbery, and that term No. 18 of his probation, which was in effect at the time of his arrest, read, quote, "Submit your person and property under your control to search or seizure at any time of the day or night by

any probation officer or other peace officer, with or without a warrant or probable cause," close quote.

* * * *

THE COURT: Is there a further stipulation that the search terms were known to the officer at the time that they questioned Mr. Simon on May 26th?

MR. MITCHELL: Yes. We used those search terms in order to actually search his residence.

(7 RT 946-948.) No witnesses were called to testify at the hearing, and these stipulations formed the factual basis for the trial court's ruling.[16]

The prosecutor ultimately relied exclusively on the general search condition of probation to justify the warrantless search and seizure stating his position as follows:

> The defendant was subject to a valid search term. The officers were within their responsibility and discretion to search the defendant's residence and his person, according to those search terms and the plain meaning of these search terms, and that they violated no laws or judicial precedent by taking blood, hair, and saliva from him underneath those search terms. And that is the defendant's consent to search. And the giving up of his Fourth Amendment rights is a condition of being placed on probation and avoiding a prison term.
>
> He agreed to that in 1993, and the officers had the right under that [] judicial authority of those probation terms to search him, including taking his blood —

(7 RT 948-949.) Defense counsel argued that the general search condition did not, and was not intended to, include the taking of biological samples for

---

[16] After reciting the stipulated facts the prosecutor stated: "Well, I believe that the entire motion can be dealt with expeditiously, based on the facts that have been stipulated to." (7 RT 948.)

testing purposes. Counsel also pointed out that the probation order was entered on a form containing various conditions which were checked off as imposed. The general search condition was checked; however, a specific condition which would have required appellant to provide biological samples for purposes of drug testing was not checked. Had it been intended that appellant was to be required to provide biological samples for testing purposes, this condition would have been included in the terms of his probation. (7 RT 949; 1 CT 290 [probation order].)

After hearing argument, the trial court denied the motion to suppress as follows:

> THE COURT: Very well. In reviewing these documents and now having heard the arguments, I agree with the position taken by Mr. Mitchell. It does appear to me that the search terms, specifically No. 18 that we referred to, does include the right to search the person, and including even the bodily fluids, hair, various other samples that might be taken — urine samples, things of that nature. So I do feel that the search was appropriate. No law was violated. None of the defendant's rights were violated. So the motion to suppress is denied.

(7 RT 952-953.) The court made no factual findings, and drew no legal conclusions, with respect to any other potential justification for the search or any possible exception to the exclusionary rule.

C. STANDARD OF REVIEW

In ruling on a motion to suppress, the trial court is charged with (1) finding the historical facts; (2) selecting the applicable rule of law; and (3) applying the latter to the former to determine whether or not the rule of law as applied to the established facts has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279.) The burden of justifying a warrantless search, seizure, arrest or detention falls upon the prosecution. (*People v. Williams* (1999) 20

Cal.4th 119; *Wilder v. Superior Court* (1979) 92 Cal.App.3d 90.) The prosecution is required to present evidence to support every theory upon which it relies to justify the search and seizure. (*People v. Williams, supra,* 20 Cal.4th at pp. 129-130 ["[b]ecause law enforcement personnel, not the defendant, made the decision to proceed without a warrant, they, not the defendant, are in the best position to know what justification, if any, they had for doing so."].)

On appeal, the prosecution is bound by the justifications offered to the trial court and may not assert new justifications for the first time on appeal. As this court stated in *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640:

> If the People had other theories to support their contention that the evidence was not the product of illegal police conduct the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal. To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of the evidence, would defeat the purpose of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of admissibility of evidence is initially raised. [Citations.]

(*Id.* at p. 640 [fn. omitted].)

An appellate court gives deference to a trial court's resolution of questions of fact if supported by substantial evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 327; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *People v. Glaser* (1995) 11 Cal.4th 354, 362.) With regard to pure questions of law, an independent standard of review is employed. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119.) De novo review is also applied concerning the trial court's application of the law to the facts. (*People v. Weaver, supra,*

26 Cal.4th at p. 924; *People v. Ayala* (2000) 23 Cal.4th 225, 235; *United States v. Hernandez-Alvarado* (9th Cir. 1989) 891 F.2d 1414, 1416.)

Finally, under California law, issues relating to the suppression of evidence derived from police searches and seizures are reviewed under federal constitutional standards. (Cal. Const., art. I, § 28, subd. (d); *People v. Willis* (2002) 28 Cal.4th 22, 29; *People v. Ayala, supra*, 23 Cal.4th at pp. 254-255; *People v. Bradford* (1997) 15 Cal.4th 1229, 1291.)

D. THE WARRANTLESS SEIZURE OF APPELLANT'S BLOOD WAS ILLEGAL AND UNCONSTITUTIONAL.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Similarly California Constitution, Article 1, § 13, provides that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures may not be violated . . .."

A non-consensual gathering of biological samples constitutes a search and seizure subject to Fourth Amendment protection. (See *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 616-617; *United States v. Kincade* (9th Cir. 2004) 813, 836-839; see also *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 867; *People v. Travis* (2006) 139 Cal.App.4th 1271.) The drawing of blood samples invades the body itself, and law enforcement procedures invading the physical integrity of the body are viewed under the Fourth Amendment as far more intrusive than other types of searches. "Numerous cases have recognized a person's right, under due process and search and seizure protections provided by both state and federal Constitutions, to be free from unwarranted bodily intrusions by agents of government." (*People v. Melton* (1988) 44 Cal.3d 713, 738 [citing *Schmerber v. California* (1966) 384 U.S. 757, 769-770; *Rochin v. California* (1952) 342 U.S. 165, 172-174; *People v. Bracamonte* (1975) 15 Cal.3d 394, 401-403].)

"[T]he circumstances which permit penetrations beyond the body's surface are particularly limited, since such intrusions may readily offend those principles of dignity and privacy which are protected by the Fourth Amendment." (*People v. Scott* (1978) 21 Cal.3d 284, 293.) In the context of blood tests the United States Supreme Court similarly recognized, in the pivotal case of *Schmerber v. California*, *supra*, 384 U.S. 757, that: "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." (*Id.* at pp. 769-770.)

The United States Supreme Court has stated unequivocally that: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.'" (*Mincey v. Arizona* (1978) 437 U.S. 385, 390 [quoting *Katz v. United States* (1967) 389 U.S. 347, 357].) Consequently, search warrants are normally required before agents of the state can seize the blood of an individual:

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." [Citations.] The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

(*Schmerber v. California, supra,* 384 U.S. at p. 770; see also, *Winston v. Lee* (1985) 470 U.S. 753 [forced extraction of evidence from the body infringes individual's most personal expectation of privacy]; *Fuller v. M.G. Jewelry* (9th Cir. 1991) 950 F.2d 1437, 1449 ["*Schmerber* governs all searches that invade the interior of the body — whether by a needle that punctures the skin or a visual intrusion into a body cavity."]; *United States v. Nicolosi* (E.D.N.Y. 1995) 885 F.Supp. 50 [search warrant required to obtain saliva sample from defendant, where sample was sought to develop incriminating evidence]; *Barlow v. Ground* (9th Cir. 1991) 943 F.2d 1132 [warrantless seizure of gay arrestee's blood for HIV testing, after arrestee bit an officer, was per se unreasonable in absence of exigent circumstances]; *Walker v. Sumner* (9th Cir. 1990) 917 F.2d 382 [general concerns about welfare of citizens and prison community insufficient to justify forced seizure of blood from inmates for AIDS testing].)

A judicial warrant is a necessary component of the "normal need for law enforcement," because it protects privacy interests "by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. [Citations.] A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." (*Skinner v. Railway Labor Executives' Assn., supra,* 489 U.S. at pp. 621-622; see also *Treasury Employees v. Von Raab, supra,* 489 U.S. at p. 666.) The Supreme Court has determined that the vital public interest in the prompt investigation of serious crimes, even murder, does not justify disregard of the warrant requirement. (*Mincey v. Arizona, supra,* 437 U.S. at p. 394; see also, *Flippo v. West*

Virginia (1999) 528 U.S. 11, 14.) Nor is disregard of the warrant requirement justified by the "mere fact that law enforcement may be made more efficient." (*Mincey v. Arizona*, *supra*, 437 U.S. at p. 393.)

The burden of justifying a warrantless search, seizure, arrest or detention falls upon the prosecution. (*People v. Williams*, *supra*, 20 Cal.4th 119.) Decisions of the United States Supreme Court have emphasized that exceptions to the warrant requirement are "'few in number and carefully delineated' [citation], and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 749-750.) Here, as discussed more fully below, the prosecution failed to justify the warrantless intrusion.

1. The Trial Court Erred in Finding That the Warrantless Seizure Could Be Justified Based Upon Appellant's Probationary Search Condition.

In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. (*People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Mason* (1971) 5 Cal.3d 759, 764-766.) Consequently, a search conducted pursuant to a valid probation condition does not violate the Fourth Amendment unless the search exceeds the scope of the consent. (*People v. Bravo*, *supra*, 43 Cal.3d at p. 604; *Washington v. Chrisman* (1982) 455 U.S. 1, 9-10.) However, in the present case the warrantless taking of blood samples exceeded the scope of appellant's consent to a search of "his person."

The scope of a probationer's consent to warrantless searches is determined on the basis of an objective test of what a reasonable person would

understand from the language of the condition. (*People v. Bravo*, *supra*, 43 Cal.3d at pp. 606-607.) As this court has held:

> Law enforcement officers who rely on search conditions in probation orders, the probationer himself, and other judges who may be called upon to determine the lawfulness of a search, must be able to determine the scope of the condition by reference to the probation order. We cannot expect police officers and probation agents who undertake searches pursuant to a search condition of a probation agreement to do more than give the condition the meaning that would appear to a reasonable, objective reader.

(*Id.* at p. 606.) The search provision must therefore be interpreted on the basis of what a reasonable person would understand from the language of the probation order. (*Ibid.*)

As noted above, appellant was granted probation with a condition that he "submit [his] person and property under [his] control to search or seizure at any time of the day or night by any probation officer or other peace officer, with or without a warrant or probable cause." (7 RT 947-948; 1 CT 290 [probation order].) The plain language of the probation order required only that appellant submit to a search of his "person" and/or property under his control. It did not require that he submit to a search beyond the surface of the body and, consequently, did not authorize the taking of a blood sample.

Under analogous circumstances this court has recognized that a search warrant authorizing the search of a defendant's "person" and her property did not authorize a search beyond the surface of the body. (*People v. Bracamonte*, *supra*, 15 Cal.3d 394.) In *Bracamonte* law enforcement officers "procured a warrant authorizing the search of the residence of defendant and her husband, their vehicles and their persons." The defendant was observed by officers swallowing several objects. After searching the defendant's

residence, officers transported her to the hospital for the purpose of retrieving the objects she had swallowed. At the hospital the defendant was forced to ingest an emetic solution known as Syrup of Ipecac. Shortly thereafter she regurgitated seven multi-colored balloons which later proved to contain heroin. (*Id.* at pp. 397-398.) In finding that the balloons had been unlawfully seized, this court stated as follows:

> Although in the instant case there clearly was probable cause to believe that the defendant had swallowed packages containing heroin, there was no warrant justifying the intrusion into her body. As previously set forth, the agents had procured a search warrant authorizing the search of the residence of defendant and her husband, their vehicles and their persons. It is quite clear, and the People admit, that the warrant was not intended to authorize intrusions beyond the surfaces of their bodies. Assuming arguendo that the magistrate intended the warrant to justify such further intrusions, we find that the warrant did not so specify. (U.S. Const., Amend. IV; Cal. Const., art. I, § 13.)

(*Id.* at pp. 400-401.) Consequently the court concluded that "the search could not be justified based upon the warrant. . . ." (*Id.* at p. 401.)

In a similar case, *Jauregue v. Superior Court (People)* (1986) 179 Cal.App.3d 1160, the appellate court recognized that a warrant authorizing the search of the defendant's "person" obviously did not authorize a search beneath the skin (again the administration of an emetic solution to induce vomiting), and that "[n]o objectively reasonable officer could assume it did." (*Id.* at pp. 1164-1167.)

As in *Bracamonte* and *Jauregue*, the search term in the present case authorized only a search of appellant's "person" and property. It did not authorize a search beneath the skin, and did not require that appellant submit to a blood test. In view of the language of the search condition, no reasonable person would have concluded that any type of search beyond the surface of

the body was authorized by the probation order. Consequently, the seizure of appellant's blood exceeded the scope of his "consent" as set forth in the conditions of probation. The trial court, therefore, erred in concluding that the warrantless seizure of appellant's blood was justified based upon the general search condition contained in the probation order.

2. ***The Trial Court's Ruling Cannot Be Upheld Based Upon the Exigent Circumstances Exception to the Warrant Requirement.***

As noted above, the prosecution's written response to the motion to suppress raised the possibility of "exigent circumstances" as a potential justification for the warrantless seizure of the first blood sample:

> This blood sample was drawn within hours of the defendant's arrest for a homicide, which had occurred within the preceding eight hours. The forensic analysis of this blood sample would be relevant evidence of the defendant's intoxication and state of mind at the time of the killing. This evidence was subject to dissipation over time, just like the evidence of alcohol intoxication in *Schmerber*. No warrant was required to seize this blood sample because the time necessary to secure a warrant might result in a loss of relevant evidence. [¶] Since this sample was validly seized, the forensic analysis performed on the second sample, taken at 12:30 p.m., would inevitably have been discovered by law enforcement.

(12 CT 3308-3309.) However, because the prosecution presented no evidence in support of this theory of justification, and the trial court did not make a factual finding on the matter, exigent circumstances cannot form the basis of justification for the search and seizure on appeal.

A warrantless search may be justified by proof of "exigent circumstances." (*Michigan v. Tyler* (1978) 436 U.S. 499, 509.) However, "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." (*Welsh v. Wisconsin*,

supra, 466 U.S. at pp. 749-750; see also, *United States v. Shepard* (9th Cir.1994) 21 F.3d 933, 938; *United States* v. *Gooch* (9th Cir. 1993) 6 F.3d 673, 679; *United States v. Alvarez* (9th Cir. 1987) 810 F.2d 879, 881; *United States v. Radka* (6th Cir.1990) 904 F.2d 357, 363.) The exigent circumstance exception has been "recognized . . . very sparingly." (*United States v. Dawkins* (D.C. Cir. 1994) 17 F.3d 399, 405.)

Mere speculation is not sufficient to show exigent circumstances. (*United States v. Tarazon* (9th Cir.1993) 989 F.2d 1045, 1049.) Rather, "[t]he government bears the burden of showing the existence of exigent circumstances by particularized evidence." (*Ibid.*) This burden can be satisfied "only by demonstrating specific and articulable facts to justify the finding of exigent circumstances." (*LaLonde v. County of Riverside* (9th Cir. 2000) 204 F.3d 947, 954 [internal quotation marks omitted].) Furthermore, "the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time." (*United States v. Tarazon, supra*, 989 F.2d at p. 1049; accord *United States v. George* (9th Cir.1989) 883 F.2d 1407, 1412; *Murdock v. Stout* (9th Cir.1995) F.3d 1437; *United States v. Patino* (7th Cir.1987) 830 F.2d 1413, 1417; *United States v. Radka, supra*, 904 F.2d at p. 363 [length of time required to obtain a warrant a crucial factor in determining whether exigent-circumstance exception met].)

In the present case there was a complete failure of proof as to any and all relevant factors. Clearly this was not the actual basis for law enforcement's desire to obtain a blood sample. If investigators had been concerned with appellant's blood alcohol level they presumably would not have waited an additional three to four hours after arresting him before obtaining the sample. Additionally, there was no indication the sample was

ever tested for drugs and/or alcohol. Further, there was no showing that evidence of intoxication might be found in a person's blood 15 hours after the event in question. Finally, there was no showing that officers could not have obtained a telephonic warrant for the blood sample in the 10-11 hours between the homicide and when the sample was taken, or even in the 3-4 hours between the time appellant was arrested and the time the sample was taken. In short, there was no evidence which would have supported a finding a warrant was unnecessary based upon "exigent circumstances," and the trial court made no such finding. Consequently, the trial court's order cannot be upheld on this basis.

E. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE EVIDENCE OBTAINED AS A RESULT OF THE UNLAWFUL SEIZURE OF APPELLANT'S BLOOD.

As noted above, federal constitutional standards generally govern review of claims that evidence is inadmissible because it was obtained during an unlawful search. (Cal. Const., art. I, § 28, subd. (d); *People v. Woods* (1999) 21 Cal.4th 668, 674.) Under these standards, evidence obtained in violation of the Fourth Amendment may not be introduced at trial for the purpose of proving the defendant's guilt. (*Mapp v. Ohio* (1961) 367 U.S. 643, 654-655.) As this court observed in *People v. Saunders* (2003) 31 Cal.4th 318:

> "The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ... .'" (*United States v. Calandra* (1974) 414 U.S. 338, 347 [38 L. Ed. 2d 561, 94 S. Ct. 613].) "[T]he 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' [Citations.]" (*United States v. Janis* (1976) 428 U.S. 433, 446 [49 L. Ed. 2d 1046, 96 S. Ct. 3021]; *Stone v. Powell* (1976) 428 U.S. 465, 479 [49 L. Ed. 2d 1067,

> 96 S. Ct. 3037] ["'[T]he exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers.'"].)
>
> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' [Citation.] Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: 'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' [Citations.] In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." (*United States v. Calandra, supra*, 414 U.S. 338, 347-348, fn. omitted; *United States v. Leon* (1984) 468 U.S. 897, 906 [82 L. Ed. 2d 677, 104 S. Ct. 3405].)

(*Id.* at p. 324.)

"The rule also serves another vital function — 'the imperative of judicial integrity.' [Citation.] Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus, in our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." (*Terry v. Ohio* (1968) 392 U.S. 1, 12-13; see also *Stone v. Powell* (1976) 428 U.S. 465, 492 ["this demonstration that our society

attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." [fn. omitted]].) The prosecution should not be allowed to benefit from the unlawful police conduct. "Indeed, only suppression will serve the 'deterrence principle inherent in the exclusionary rule.'" (*United States v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1077, quoting *United States v. Ienco* (7th Cir. 1999) 182 F.3d 517, 526.)

For all of these reasons, the exclusionary rule forbids the use at trial of evidence obtained in violation of the Fourth Amendment. (*Arizona v. Evans* (1995) 514 U.S. 1, 10; *United States v. Leon* (1984) 468 U.S. 897, 906.) This rule applies to "primary evidence obtained as a direct result of an illegal search or seizure," and also extends to "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" (*Segura v. United States* (1984) 468 U.S. 796, 804.) Here the trial court erred in failing to exclude the primary evidence, consisting of the illegally obtained blood samples, as well as the DNA test results which were derived from the initial illegality. All of the described evidence should have been suppressed as it was obtained in violation of appellant's Fourth Amendment rights. (*Wong Sun v. United States* (1963) 371 U.S. 471, 485; *Mapp v. Ohio, supra,* 367 U.S. at p. 655.)

1. The Trial Court's Failure to Exclude the Evidence Cannot Be Upheld on the Basis of the Inevitable Discovery Exception to the Exclusionary Rule.

As noted above, the prosecution mentioned the doctrine of inevitable discovery in its written pleadings. However, this theory was subsequently abandoned and was not argued by the prosecution during the hearing on the

suppression motion. In any event, because no evidence supported a finding of "inevitable discovery," the trial court's failure to exclude the evidence cannot be upheld on this basis.

"Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means." (*People v. Robles* (2000) 23 Cal.4th 789, 800; see also *Murray v. United States* (1988) 487 U.S. 533, 539; *Nix v. Williams* (1984) 467 U.S. 431, 443-444.) "The burden of establishing that illegally seized evidence is admissible under the rule rests upon the government." (*People v. Robles, supra*, 23 Cal.4th at pp. 800-801; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 62; *Nix v. Williams, supra*, 467 U.S. at p. 444 [evidence may be admissible "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . ."].)

Proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." (*Nix v. Williams, supra*, 467 U.S. at p. 444 n. 5; see also *United States v. Ruckes* (9th Cir. 2009) __ F.3d __, No. 08-30088, 2009 WL 3719209.) This burden is met where the prosecution shows the evidence would have been uncovered by officers in carrying out "routine procedures." (*United States v. Reilly* (9th Cir. 2000) 224 F.3d 986; *United States v. Martinez Gallegos* (9th Cir. 1987) 807 F.2d 868, 870; *United States v. Andrade* (9th Cir. 1986) 784 F.2d 1431, 1433.)

In the present case one of the prosecution's claims with respect to the doctrine of inevitable discovery was as follows: "A search warrant for such evidence would have been sought in the normal course of the investigation of

that matter based on information already possessed by law enforcement prior to the seizure of defendant's blood on May 26, 1996." The inevitable discovery doctrine, however, does not operate to excuse law enforcement's failure to obtain a warrant. (*United States v. Reilly*, *supra*, 224 F.3d at p. 995.) In this regard it has been recognized that "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the Fourth Amendment." (*United States v. Echegoyen* (9th Cir. 1986) 799 F.2d 1271, 1280 n.7; see also *United States v. Boatwright* (9th Cir. 1987) 822 F.2d 862; *United States v. Mejia* (9th Cir. 1995) 69 F.3d 309, 320.)

Consequently, the existence of sufficient probable cause to obtain a warrant to search legally does not justify application of the inevitable discovery exception where the police theoretically could have but did not attempt to obtain a warrant. (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1072]; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1215-1216 ["we reject any assertion that the inevitable discovery doctrine applies here simply because the police had sufficient probable cause to obtain a warrant to enter the dorm room and to seize the evidence legally."]; *Hudson v. Michigan* (2006) 547 U. S. 586 [126 S.Ct. 2159, 2178] (dis. opn. of Breyer, J.) [government may not rely on inevitable discovery doctrine to "avoid suppression of evidence seized without a warrant . . . simply by showing that it could have obtained a valid warrant had it sought one."]; *People v. Robles*, *supra*, 23 Cal.4th at p. 801 [inevitable discovery exception inapplicable even accepting that police could have obtained a warrant based on plain view of stolen car in garage]; *United States v. Mejia*, *supra*, 69 F.3d at p. 320.)

Because the prosecution's justification for application of the inevitable discovery doctrine was that officers could have sought a warrant based upon information they possessed at the time of the illegal search, the trial court's failure to exclude the unlawfully obtained evidence cannot be upheld on the basis of the inevitable discovery exception to the exclusionary rule.

F. REVERSAL IS REQUIRED.

As discussed above, the seizure of appellant's blood was unconstitutional because there was no search warrant, no probation condition authorized the search in the absence of a warrant, and the prosecution failed to show that any exception to the warrant requirement justified the warrantless search. Similarly the prosecution failed to prove that any exception to the exclusionary rule applied. Consequently, the trial court erred in failing to exclude the blood and blood testing evidence obtained as a result of the unlawful search and seizure.

A trial court's erroneous failure to suppress evidence requires reversal of the judgment unless the state proves beyond a reasonable doubt that the error did not contribute to the verdict. (*Chambers v. Maroney* (1970) 399 U.S. 42, 52-53; *Bumper v. North Carolina* (1968) 391 U.S. 543, 550; *Chapman v. California* (1968) 386 U.S. 18, 23-24; *People v. Prince* (2007) 40 Cal.4th 1179, 1250.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, (1991) 500 U.S. 391, 403; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [the proper *Chapman* inquiry is whether the guilty verdict actually rendered in the trial at hand was surely unattributable to the error].)

In light of the significance of the DNA evidence with respect to the Anes/Magpali offenses, this burden cannot be met. No eyewitness testimony,

fingerprint evidence, or other physical evidence tied appellant to the crimes. In fact during pre-trial hearings relating to other motions, the prosecutor emphasized the importance of the DNA evidence stating: "This whole case, the murders of Sherry Magpali and Vincent Anes hinges upon the analysis of the DNA evidence in this case." (9 RT 1314.) The critical nature of the evidence was also reflected in the prosecutor's closing argument to the jury where the DNA test results were discussed extensively and the results relied on heavily. (23 RT 3433-3436.) Under these circumstances the prosecution cannot establish that the erroneous admission of the blood test evidence was "unimportant in relation to everything else the jury considered." The error cannot be regarded as harmless, and appellant's convictions on the counts relating to the Anes and Magpali offenses must be reversed.

III.

THE TRIAL COURT VIOLATED CALIFORNIA AND FEDERAL LAW BY REFUSING TO SEVER COUNTS RELATING TO THE ANES/MAGPALI INCIDENT FROM THOSE RELATING TO THE STERLING INCIDENT.

A. INTRODUCTION

After appellant was charged with the Sterling homicide (1 CT 1), the complaint was amended to add charges related to the Anes/Magpali incident. (1 CT 8-11). Prior to trial the defense moved to sever counts associated with the two separate and unrelated incidents in the interests of justice and to protect appellant's constitutional right to due process and a fair trial. (1 CT 225-238.) Although the trial judge recognized the potential for prejudice in joinder, he denied the motion to sever. (1 RT 105.)

When a defendant alleges prejudicial error in the denial of a motion to sever there are two levels of review. The first examines whether the trial court abused its discretion in denying the motion, and is judged by the information available at the time the motion was heard. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220; *People v. Ochoa* (1998) 19 Cal.4th 353, 409; *People v. Osband* (1996) 13 Cal.4th 622, 667.) If the reviewing court concludes the trial court did not abuse its discretion in initially denying the severance motion, a second level of review must be undertaken to determine whether the joinder of counts ultimately resulted in a gross unfairness based upon what actually occurred at trial. (*People v. Bean* (1988) 46 Cal.3d 919, 940.)

As discussed more fully below, here the trial court's ruling denying severance constituted an abuse of discretion, and the joinder resulted in gross unfairness amounting to a denial of due process.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR SEVERANCE.

Penal Code section 954 authorizes the joinder of "two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses . . . ." However, "'[t]he determination that the offenses are "joinable" under section 954 is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts "in the interest of justice and for good cause shown." '" (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 447.) Consequently, even where the statutory requirements for joinder are met, severance is required if the defendant makes a showing of potential prejudice. (*People v. Stitely* (2005) 35 Cal.4th 514, 531; *People v. Mendoza* (2000) 24 Cal.4th 130, 160.) Where the potential for substantial prejudice is clearly shown, a trial court's denial of a motion for severance constitutes an abuse of discretion. (*People v. Sapp* (2003) 31 Cal.4th 240, 248.)

"'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever . . . .'" (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) "'The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' [Citations.]" (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1220-1221.)

Generally, a trial "judge's discretion in refusing severance is broader than his discretion in admitting evidence of uncharged offenses .... In both cases the probative value of considering one alleged offense in light of another must be weighed against the prejudicial effect, but additional factors favor joinder. 'Joinder of unrelated charges . . . ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials.'" (*People v. Matson* (1974) 13 Cal.3d 35, 41.) Consequently, in ruling on a motion for severance the court must balance potential prejudice against countervailing considerations of efficiency and judicial economy. (*People v. Soper* (2009) 45 Cal.4th 759, 782; *People v. Alcala*, *supra*, 43 Cal.4th at p. 1220; *People v. Bean*, *supra*, 46 Cal.3d at pp. 938-939.)

In the present case the defense argued that all relevant factors weighed in favor of severance. First, evidence relating to the two incidents would not have been cross-admissible in separate trials. (1 CT 233; 1 RT 97.) Second, there was evidence in each case which was highly inflammatory and irrelevant as to the other. (1 CT 234-25; 1 RT 97-98.) Third, there was a danger the jurors would aggregate all of the evidence, and convict on multiple charges in a joint trial; whereas, in separate trials convictions might not be obtained on all charges. (1 CT 235-236; 1 RT 98-99.) Finally, a higher degree of scrutiny was required because the Anes and Magpali homicides were capital crimes and because the Sterling homicide would not have been a capital offense unless appellant was also convicted of one of the other murders.[17] (1 CT 236-237; 1 RT 99-100.) As will be discussed more fully below, the

---

[17] While felony-murder special circumstance allegations accompanied the Anes and Magpali homicides, the only special circumstance alleged as to the Sterling homicide was multiple murder.

defense was correct that each of the relevant factors weighed in favor of severance.

The prosecution conceded that evidence relating to the two separate incidents would not be cross-admissible, but argued that the defense had failed to prove prejudice would result from a joint trial. Essentially relying on a legislative presumption in favor of joinder, the prosecution contended that the potential for prejudice did not outweigh the benefits of joinder. (2 CT 387-391; 1 RT 100-103.) Summarizing his position, the prosecutor stated:

> They have alluded to prejudice. They haven't proven or even come close to making a strong showing that the defendant will be prejudiced by the joinder here. The statute provides for joinder. There are benefits that flow to the prosecution of cases in having them heard and tried together rather than serially. There's expenses involved. And since he can't show that he's going to be so greatly prejudiced by the joinder of these two charges, that he's going to be deprived a fair trial on either one, his motion should be denied.

(1 RT 103.) The prosecution's argument, however, applied an improper standard requiring the defense to *prove* prejudice *would* result from joinder — a burden virtually impossible to carry at the pre-trial stage — instead of the actual standard requiring the defense to define a *potential* for prejudice from joinder. Further, the prosecutor did not refer to any case specific benefits of joinder which would have been sufficient to outweigh the potential for prejudice and appellant's right to a fair trial, but merely referred to the general expenses involved in separate trials.

After hearing argument from both sides, the trial court denied the motion for severance, without substantial analysis, stating simply:

> In hearing your arguments and in reviewing your — your papers, it does appear to me that there is some potential prejudice. However, I don't think that that prejudice outweighs

> the benefits. And so without saying more, I'm going to deny the motion.

(1 RT 106.) This statement hardly reflects the heightened degree of scrutiny required in capital cases. Moreover, as discussed more fully below, the danger of substantial prejudice from a joint trial was apparent at the time the motion for severance was heard, and factors of judicial economy and efficiency — which were limited under the circumstances of this case — could not serve to outweigh the potential for prejudice. Considering all of the circumstances as they existed at the time of the ruling, severance was required, and the trial court abused its discretion in denying the defense motion.

1. The Danger of Substantial Prejudice from a Joint Trial Was Apparent at the Time the Motion for Severance Was Heard.

In general, "the potential for prejudice in joining unrelated offenses in a single trial lies in the introduction of 'other crimes' evidence from which the jury might infer that the defendant has a criminal disposition — a factor which the jury is not permitted to consider in determining his guilt of the charged offense." (*People v. Bean*, *supra*, 46 Cal.3d at pp. 935-936.) This court has described the prejudicial nature of other crimes evidence as follows:

> The harm which flows from allowing the jury to hear evidence of other crimes is too well known to require much restatement. In *People v. Thompson* (1980) 27 Cal.3d 303 . . ., this court rigorously enforced the rule that evidence of other crimes may never be admitted to show the accused's criminal propensity.
>
> As *Williams* stated, "In *Thompson*, we explained the rationale behind this rule thusly: 'The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. [Citation.] Rather, it is the insubstantial nature of the inference as compared to the "grave danger of prejudice" to an accused when evidence of an uncharged offense is given to a jury. [Citations.] As Wigmore

> notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." [Citation.] . . . . Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." [Citation.] . . . .'" (*Williams*, *supra*, 36 Cal.3d at pp. 448-449, fn. 5.)

(*People v. Smallwood* (1986) 42 Cal.3d 415, 428 [footnote omitted].)

Although Penal Code section 954.1 prohibits courts from refusing joinder based solely on the lack of cross-admissibility of evidence (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285), cross-admissibility remains a crucial factor in assessing prejudice (*People v. Valdez* (2004) 32 Cal.4th 73, 120). As this court has observed, "[i]f the two offenses are cross-admissible, there will probably be little or no prejudice from joinder. Conversely, if the offenses are not cross-admissible, the accused in most cases will be able to demonstrate at least some measure of prejudice from joinder." (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425-426.) For this reason, "'the first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others.'" (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1315-1316.)

Here, the prosecutor conceded: "[T]he People are not seeking any cross-admissibility of evidence for the purpose of 1101(b), which I think is the controlling statute for the cross-admissibility. There's no contention that any evidence is relevant to identity or to issues of intent or anything like that." (1 RT 100.) Thus, the prosecutor did not contend that any legitimate evidentiary purpose would be served by joinder, and the trial court did not base its ruling

denying the severance motion on the assumption that the evidence would be cross-admissible.

Once a trial court has determined whether evidence of joined offenses would be "cross-admissible," it must then assess the relative strength of the evidence as to each group of severable counts and weigh the potential impact of the jury's consideration of otherwise inadmissible other crimes evidence. In order to evaluate the scope of potential prejudice posed by other crimes evidence, courts consider factors such as whether the spillover evidence is likely to "'unusually inflame the jury against the defendant,'" and whether "a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges . . . ." (*People v. Osband*, *supra*, 13 Cal.4th at p. 666.) As this court has stated:

> [The] principal concern lies in the danger that the jury [] will aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges. Joinder in this case will make it difficult not to view the evidence cumulatively. The result might very well be that the two cases become, in the jurors' minds, one case which is considerably stronger than either viewed separately.

(*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.) Overall, "the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him." (*People v. Bean*, *supra*, 46 Cal.3d at p. 936.)

Here there was evidence in each case which was highly inflammatory and irrelevant as to the other and, consequently, more likely to influence jurors not otherwise convinced of appellant's guilt beyond a reasonable doubt to, nevertheless, convict him based upon improper factors. This was particularly true in light of the differing issues of fact to be resolved by the jurors as to each case. As defense counsel argued below:

> . . . [T]here are pieces of evidence in each case that are rather inflammatory.
>
> There's — and in my view, there's no way to separate out the — in the May killing of Mr. Sterling — the words that are being spoken prior to the killing, which appear to be of a gang nature. And all of the witnesses to that event — and they are laid out in the reports I attached to my motion — explain what the transaction was, the actual words between the defendant and Mr. Sterling. And there's no way to — to characterize that in any other fashion than it was a gang confrontation. So that evidence is going to come in in the Sterling case. That's going to prejudice the defendant's right to a fair trial in the double homicide. There would be no evidence of a gang name, gang membership, gang rivalry, none of that stuff, if the Sterling case were severed from the double murder.
>
> There's also inflammatory prejudicial evidence that flows from the double murder over to the Sterling matter. My read of the Sterling case — I think there's a viable defense argument that it's a heat-of-passion killing or even imperfect self-defense, depending on how the jury finds certain facts. But there certainly was a confrontation between two alleged gang members.
>
> * * * *
>
> Mr. Sterling has a relatively violent background, and apparently was shot at fairly close range outside of the apartment. So I think there's — based on those circumstances, the defense could reasonably argue heat of passion, manslaughter, or

> imperfect self-defense or even self-defense. And when the jury starts hearing about a rape of a 17-year-old female and a kidnapping of a 17-year-old female and the very ugly, gruesome nature of that double murder, it's going to impact the jury's decision on the Sterling murder and the viability of any kind of self-defense or heat-of-passion claim.
>
> So there is inflammatory aspects as to both cases that kind of spill over on each other. So we've kind of argued that sort of crossover that joining them — each case is hampered — the defense in each case is hampered because of the gang evidence in the one matter and the sexual nature of the — the youthful nature of the victim in the other matter.

(1 RT 97-99.) The defense, thus, identified evidence in each case which would have been inadmissible, inflammatory, and unduly prejudicial as to the other; and explained how the "spillover" effect of aggregate evidence on the two cases might well alter the outcome of some or all of the charges. (See, *People v. Osband, supra*, 13 Cal.4th at p. 666.)

As counsel explained, the Anes/Magplai incident involved the death of two teenage victims, a kidnapping and sexual assault of the female victim, and robbery of both victims. Evidence of sex crimes against young people has been widely recognized as especially likely to inflame a jury. (See, e.g. *Coleman v. Superior Court (People)* (1981) 116 Cal.App.3d 129, 138; *Williams v. Superior Court, supra*, 36 Cal.3d at p. 452.) Here there were serious questions to be resolved by the jury regarding whether the Sterling homicide was murder, manslaughter, or self-defense. Defenses relating to provocation, heat of passion, and/or self-defense could easily be prejudicially impacted by evidence regarding other crimes — particularly other crimes such as the sexual assault, kidnapping, robbery and double murder which were involved in the Anes/Magpali incident. Jurors exposed to evidence relating to the Anes/Magplai offenses would certainly be more likely to view appellant

as the aggressor in the Sterling incident, and to discount or disregard defense evidence or argument to the contrary.

Similarly, the gang evidence involved in the Sterling incident was likely to improperly influence the jurors' verdicts on the Anes/Magplai charges. "[G]angs are generally held in low regard among law-abiding citizens. It is common knowledge that gang members commit crimes, often with firearms." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 194.) California courts have repeatedly held that gang evidence uniquely tends to evoke an emotional bias against the defendant as an individual, and can deprive the accused of a fair trial. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396.) Curiously, in arguing for joinder the prosecutor here contended that, because gangs are well known and widespread throughout Southern California, gang evidence is not prejudicial. (1 RT 102.) However, this court has consistently recognized that gang evidence may have a "highly inflammatory impact" on a jury, and may create the risk the jury will infer guilt and criminal disposition merely from an accused's gang membership. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Cox*, *supra*, 53 Cal.3d at p. 660.) The primary issue with respect to the Anes/Magpali homicides was the identity of the killer. Jurors exposed to evidence regarding the unrelated Sterling incident, which included gang evidence and strong proof that appellant shot and killed Sterling, were more likely to conclude that appellant, rather than someone else, shot and killed Anes and/or Magpali based upon a perception that he was the type of person to have committed such a crime. Under these circumstances evidence regarding the Sterling incident was highly prejudicial and was likely to improperly influence jurors' verdicts on the Anes/Magpali counts.

Under the circumstances described above, the likelihood that jurors would be unduly influenced by and misuse other crimes evidence as proof of propensity was increased, and it was probable that the jury would be unable to decide one case exclusively on the evidence relating to that incident. Severance was required to avoid prejudice to appellant from prosecutorial bootstrapping of weak — but potentially sufficient — evidence together to overcome what might otherwise amount to reasonable doubt had the cases been tried separately. Based on the circumstances of the case as they were understood at the time the motion was heard, it was clear that substantial prejudice would result from the joinder. Balancing this potential for prejudice against the potential "benefits" of joinder demonstrates that the trial court abused its discretion in denying the motion for severance.

2. ***Factors of Judicial Economy and Efficiency Did Not Outweigh the Potential for Prejudice.***

This court has recognized that the benefits of judicial economy vary greatly from case to case. (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 427.) A trial court may not simply presume benefits of judicial economy, but must review the specific facts before it to determine the weight of this factor. Further, reviewing courts must determine whether any claimed benefits from joinder were real or theoretical. In other words, it is not sufficient for a court to merely recite a public policy favoring joinder or presume judicial economy to justify denial of severance. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 448.) The greatest advantages will often be those stemming from the avoidance of duplication of evidence, as where at least some of the same testimony, or testimony from the same witnesses, would be heard in each of the hypothetical separate trials. (See *Alcala v. Superior Court*, *supra*, 43 Cal.4th 1205, 1218 ["' "joinder prevents repetition of evidence and saves time

and expense to the state as well as to the defendant" '"].) In these cases, joint trials may serve not only the interests of the state, but those of third persons, most obviously by sparing one or more citizen witnesses from having to testify more than once. In each case, "[a]n individualized assessment of the benefits of joinder is required." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 426.)

Here, in arguing for joinder the prosecution mentioned generally "benefits that flow to the prosecution of cases in having them heard and tried together" (1 RT 103), without tying the argument to the specific circumstances of the case and without further discussion. In doing so the prosecutor tacitly conceded that there were no case-specific efficiencies to be served by a joint trial. Severance would not result in any duplication of efforts on the part of the prosecution since each case involved separate victims and lay witnesses, and even different expert witnesses. For example, although DNA evidence was presented in connection with the Anes/Magpali incident, there was no DNA evidence in the Sterling case. Additionally, the prosecution's fingerprint expert testified in the Anes/Magpali case only. (16 RT 2437 [fingerprint examiner Yolanda Perez].) Even the autopsies were performed by different pathologists. (16 RT 2332 [Anes/Magplai autopsies performed by Dr. Garber]; 17 RT 2567 [Sterling autopsy performed by Dr. Choi].) The crimes scenes were processed by different law enforcement personnel (13 RT 1842 [Anes/Magpali crime scenes processed by forensic technician James Potts]; 15 RT 2113 [Sterling crime scene processed by forensic technician Janet Whitford]), and even the investigating officers were different (13 RT 1969 [the investigating officer in the Anes/Magpali case was Michele Amicone]; 16 RT 2432 [the investigator in the Sterling case was Brian Fountain].) Overall, there was no overlap in witnesses, and the two cases were entirely independent of one another. Consequently, separate trials would

not have resulted in any duplication of effort in terms of the presentation of evidence.

Under these circumstances joint trial would gain little for the prosecution (other than the prejudicial effect of other-crimes evidence which could not otherwise be admitted). In the absence of case specific efficiencies general factors of judicial economy can not be elevated over a defendant's right to a fair trial — including the right to be tried only upon evidence the law allows the factfinder to consider. Such an ordering of priorities would be irreconcilable with the basic consensus on which our society rests, and would strike a blow at the requirement of due process of law. As this court has observed: "Where there is little or no duplication of evidence, 'it would be error to permit [judicial economy] to override more important and fundamental issues of justice. Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial.'" (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 427 [quoting *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 451-452].) Consequently, here, limited factors of judicial economy did not outweigh the potential for prejudice inherent in the joinder of offenses relating to the two separate incidents for trial.

3. ***Because the Case Involved Capital Offenses, a Higher Degree of Scrutiny Was Required.***

The final consideration "remains the fact that this case is a capital one, 'carrying the gravest possible consequences . . . ' [Citation.] This factor should have prompted the trial court to 'analyze the severance issue with a higher degree of scrutiny and care than is normally applied to a noncapital case.' [Citations.] (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431 [quoting *Williams v. Superior Court*, *supra*, 36 Cal.3d 441].) Both the Eighth

Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama* (1980) 447 U.S. 635, 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens* (1983) 462 U.S. 862, 885), and are not the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328).

Here, the record demonstrates that the trial court did not apply a heightened level of scrutiny in denying the severance motion. In fact the court's entire analysis was as follows:

> In hearing your arguments and in reviewing your — your papers, it does appear to me that there is some potential prejudice. However, I don't think that that prejudice outweighs the benefits. And so without saying more, I'm going to deny the motion.

(1 RT 106.) In view of the clear showing of potential prejudice, and in the absence of any case specific benefits of joinder, the circumstances as they existed at the time the motion was heard required severance. Even if the trial court's ruling could be justified in a less serious case, it was impermissible here where questions of life and death were at stake. Consequently, the trial court's order denying severance constituted an abuse of discretion.

C. THE JOINDER OF THE CHARGES DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL.

As noted above, even where it is determined that the trial court's ruling on a motion to sever was correct at the time it was made, a judgment must nevertheless be reversed if the "'joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 162.) In determining whether a due process violation

has occurred, the most important factor is whether joinder of counts allows otherwise inadmissible other-crimes evidence to be introduced. (See, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) Federal courts have long recognized the high risk of undue prejudice whenever joinder of counts allows evidence of other crimes to be introduced when such evidence would otherwise be inadmissible.[18] (*People v. Bean, supra*, 46 Cal.3d at pp. 935-936; *People v. Valdez, supra,* 32 Cal.4th at p. 120; *United States v. Lewis* (9th Cir. 1985) 787 F.3d 1318; *United States v. Daniels* (D.C.Cir.1985) 770 F.2d 1111, 1116.)

Courts have acknowledged that, in general, it is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts (see *United States v. Ragghianti* (9th Cir. 1975) 527 F.2d 586, 587), than it is to compartmentalize evidence against separate defendants joined for trial. In this regard, studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case. (See Tanford, Penrod & Collins (1985) *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behavior 319, 331-35; Bordens & Horowitz (1985) *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Human Behavior 339, 343, 347-351.)

---

[18] As is true under state law, in federal courts the government is prohibited from introducing evidence of a defendant's prior crimes to show that he or she has a bad character and is therefore likely to have committed the charged crime. (Fed.R.Evid. 404(b); *United States v. McKoy* (9th Cir.1985) 771 F.2d 1207, 1213.)

The "reluctance to sanction the use of evidence of other crimes stems from the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not for who he is. Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing." (*United States v. Lewis, supra*, 787 F.2d at p. 1326; accord *United States v. Hodges* (9th Cir. 1985) 770 F.2d 1475, 1479.)

Federal appellate courts have used two different approaches to severance where the admission of evidence relating to separate crimes would be inadmissible on some of the counts. Some have adopted a *per se* rule requiring severance whenever evidence relating to separate counts would not be cross-admissible. (See, e.g. *United States v. Busic* (3d Cir.1978) 587 F.2d 577, 585 [rev'd on other grounds, 446 U.S. 398, (1980)].) Other circuits have not adopted a *per se* rule, but instead examine the record for undue prejudice on a case-by-case basis. (See *United States v. Lewis, supra*, 787 F.2d 1318; *United States v. Daniels, supra*, 770 F.2d at p. 1118; *United States v. Valentine* (10th Cir.1983) 706 F.2d 282, 290; *Panzavecchia v. Wainwright* (5th Cir.1981) 658 F.2d 337, 341-42.)

The overall question to be answered in evaluating prejudice in the joinder of otherwise unrelated charges is whether, under the circumstances of the case, the jury could reasonably have been expected to "compartmentalize the evidence" so that evidence of one crime did not taint the jury's consideration of another. (*Bean v. Calderon, supra*, 163 F.3d at p. 1084;

United States v. Lewis, supra, 787 F.2d at p. 1323; *United States v. Johnson* (9th Cir.1987) 820 F.2d 1065, 1071.)

In making this determination courts have looked to the jury instructions given to determine whether the jurors were provided with limiting instructions cautioning them against considering the evidence cumulatively and for an improper purpose. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 588; *Bean v. Calderon supra*, 163 F.3d at pp. 1084-1086.)

In *People v. Albertson* (1944) 23 Cal.2d 550, 576-578, this court thoroughly explained the reasons for the cautious receipt of evidence of proof of other crimes. The opinion quotes from Wharton's Criminal Evidence including this passage: " '. . . It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge. . . .'" (*Id.* at p. 577.)

It stands to reason, if a trial court must exercise caution in submitting evidence of other crimes to jurors at all because they are unskilled and undisciplined in perceiving the limited purpose for which such evidence may properly be considered, then the extent to which jurors are cautioned against improper use, is an important consideration in determining whether jurors would have been capable of compartmentalizing the evidence in a joint trial. (See *People v. Grant, supra*, 113 Cal.App.4th at p. 588; *Bean v. Calderon, supra*, 163 F.3d at pp. 1084-1086; *Herring v. Meachum* (2d Cir.1993) 11 F.3d

374, 378 [finding that habeas petitioner had not made required showing of actual prejudice based partly on fact that jury "was instructed on three separate occasions that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other"].)

Even specific instructions regarding other crimes evidence have been found inadequate to eliminate the prejudicial effect of such evidence. Admittedly, courts "normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." (*Greer v. Miller* (1987) 483 U.S. 756, 764.) This presumption, however, is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) Specifically, courts have recognized that instructing jurors to ignore other crimes evidence when deciding a particular count "is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.)

Here, although evidence relating to the two separate cases was not cross-admissible for any legitimate evidentiary purpose, the trial court failed to caution the jurors against considering evidence relating to the Anes/Magpli incident when determining guilt in relation to the Sterling count, and vice versa. The only even remotely related instruction came at the very end of the guilt trial, when the court simply instructed the jury that each count was distinct and "[y]ou must decide each count separately."[19] (14 CT 3637.)

---

[19] Specifically the jury was instructed, pursuant to CALJIC No. 17.02 as follows: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty of any or all of the crimes

However, this brief and very general instruction did nothing to ameliorate the prejudice inherent in joinder.

While even specific instructions on other crimes evidence have intrinsic shortcomings, the general instruction given by the trial court here merely told the jurors to decide each count separately, and did not prohibit them from considering evidence relating to one incident when deciding guilt on counts involving the other. It also did not prohibit jurors from improperly utilizing the evidence as character evidence. Any impact this general instruction could possibly have had was diminished further by the fact it was given "in the waning moments of trial" (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084), after the jurors had heard all of the evidence in the combined case and the argument of counsel.

Unlike the situation in *Herring v. Meachum, supra,* 11 F.3d 374, where the jury "was instructed on three separate occasions that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other," the instructions here did nothing to assure the jurors would properly compartmentalize the evidence and base their verdicts as to each count solely on relevant and admissible evidence. In view of the absence of cautionary instructions, it is unlikely jurors would have properly compartmentalized the evidence relating to the separate cases and decided the charges as to each based solely upon relevant and admissible evidence. This is particularly true in view of the fact the prosecutor took advantage of the lack of cautionary instructions and argued the evidence cumulatively and for an improper purpose.

---

charged. Your finding as to each count must be stated in a separate verdict." (14 CT 3637.)

Another important factor in determining whether a due process violation has occurred as the result of joinder is whether the prosecution's argument made it more or less likely that the jurors would have been able to compartmentalize the evidence and decide the charges based only on relevant and admissible evidence. (See, e.g., *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 589-590; *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1086.) Here the prosecutor's argument made it less likely the jurors would have compartmentalized the evidence.

In urging the jury to convict appellant of all charges, the prosecutor combined inflammatory aspects[20] of the joint case to portray appellant as a cold-blooded killer (23 RT 3242), a predator (23 RT 3298), and a "psychopath" (23 RT 3289), and encouraged jurors to consider this character trait when evaluating critical elements of the charges. For example, in discussing appellant's defense to the Sterling homicide, the prosecutor urged jurors to consider that appellant was a person who "could coldly, callously murder and rape a young, trembling, scared woman." (23 RT 3345.) The prosecutor also encouraged jurors to consider evidence relating only to the Sterling case in determining whether appellant was the person who killed Anes and Magpali, arguing at one point: "circumstantial evidence and common sense tells you that it's this man that opens up this passenger side door, throws that young girl out on the ground, puts two bullets in her head. And he goes on to live another day and to kill again." (23 RT 3303.) Overall,

---

[20] Throughout closing argument, the prosecutor emphasized the youth of Anes and Magpali and described the offenses in dramatic fashion defining the incident as "a hellish nightmare," and telling jurors: "Neither you nor I can ever know the true horror and terror that these two young adults experienced and endured that night." (RT 3288.)

the prosecutor's argument made it less likely the jurors compartmentalized the evidence and decided the charges based solely on relevant and admissible evidence.

As discussed more fully above, the prosecution offered no case-specific countervailing considerations to outweigh the prejudice resulting from joinder. Under such circumstances, courts have found a due process violation. As the court in *Bean v. Calderon*, *supra*, held under similar circumstances:

> In addition, the State's defense of joinder in this case is exceedingly asthenic. Indeed, the only rationale the State could muster in support of joinder was that it was more convenient for the prosecution to try the disparate cases together. The State virtually concedes the absence of cross-admissibility, the lack of common modus operandi, and the possible prejudicial effect of joinder. Thus, if we were to adopt the State's theory, joinder would never be improper. Against serious concerns about the fundamental fairness of a capital trial, the shallow defense of prosecutorial expedience has a hollow ring.

(163 F.3d 1073.)

Here, joinder of the charges prejudiced appellant's chances for acquittal, and for conviction of lesser offenses, and his trial was therefore grossly unfair and in violation of his right to due process.

D. REVERSAL IS REQUIRED.

"[E]rror involving misjoinder 'affects substantial rights' and requires reversal . . . [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" (*United States v. Lane* (1986) 474 U.S. 438, 449; *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 771-772.) The issue is not whether the evidence is sufficient to support the convictions on the joined counts, independent of the evidence on other counts. "'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is

rather, even so, whether the error itself had substantial influence.'" (*United States v. Lane*, *supra*, 474 U.S. at p. 449.)

Here the primary effect of the trial court's ruling denying severance was to ensure that highly prejudicial and otherwise inadmissible evidence of other crimes would be before the jury as it decided each count. Some courts have "found no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials. . . ." (*Drew v. United States* (D.C.Cir.1964) 331 F.2d 85, 91.) This determination, however, hinges on the assumption that, if properly instructed, a jury can compartmentalize the evidence, rather than considering it cumulatively (see *United States v. Johnson*, *supra*, 820 F.2d at p. 1071; *Drew v. United States*, *supra*, 331 F.2d at p. 89), an assumption that cannot apply here, where the jury was not so instructed (see *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1086).

The present case is very similar to *Bean v. Calderon*, *supra*, where the defendant was tried and convicted for the murders of two victims. The murders occurred three days apart and under similar yet distinct circumstances. The court reversed the defendant's conviction for one of the murders, for several reasons. First, the evidence on the two murder charges was not cross-admissible, because there was insufficient evidence of a common modus operandi. Second, the prosecution repeatedly urged the jury to consider the two sets of charges in concert. Third, the court did not instruct the jury that it could not consider the evidence on one charge in determining the defendant's guilt on the other. Fourth, the evidence that the defendant murdered one was significantly stronger than the evidence that he murdered the other. Based on all these factors, the court held that the defendant had

been denied a fair trial. (163 F.3d 1073, 1084-1086.) These same factors are present here.

Joining the charges in the present case permitted the prosecution to avoid evidentiary restrictions prohibiting the use of other crimes evidence as proof of propensity. Although evidence relating to the two incidents was not cross-admissible, the prosecutor argued the evidence cumulatively and for an improper purpose as evidence of criminal disposition. This argument would have, at a minimum, reduced the jurors natural compunction about convicting appellant on questionable evidence, as well as impaired their ability to view the evidence of each offense objectively. Overall, joinder made it difficult, if not impossible, for jurors to view the two cases and applicable defenses separately, especially in light of the lack of adequate instructions and the prosecution's argument which encouraged the jurors to consider the evidence cumulatively. Under these circumstances the failure to grant the defense severance motion cannot be considered as harmless and reversal is required.

IV.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON UNREASONABLE SELF-DEFENSE WITH RESPECT TO THE STERLING HOMICIDE.

A. INTRODUCTION

Count 6 of the information charged appellant with the first degree murder of Michael Sterling, and the jury found him guilty of second degree murder on this count. (14 CT 3711.) Under the instructions provided by the trial court, the jurors were given the options of acquitting appellant of this charge based upon the theory of self-defense (14 CT 3592), or of finding him guilty of the lesser offense of voluntary manslaughter under a "sudden quarrel" or "heat of passion" theory (14 CT 3605-3606). However, the trial court refused the defense request for instructions explaining the concept of unreasonable or imperfect self-defense, concluding that there was no evidence to support this theory (22 RT 3234-3236), and thus failed to provide the jury the option of convicting appellant of voluntary manslaughter on this basis.

As trial counsel pointed out, a theory of unreasonable self-defense was supported by the evidence since jurors may have concluded that appellant actually believed in the need for self-defense, but that his belief was not objectively reasonable:

> [T]he jurors are being instructed on principles of self-defense, which basically is — the elements require an honest and reasonable belief. If the jurors conclude that one element is met, the honest belief but not reasonable belief, then . . . their findings would be to reject complete self-defense, but they would be finding imperfect self-defense.
>
> So imperfect self-defense is just the honest but unreasonable belief in the need to defend oneself. Complete self-defense is,

> it's got to be honest and reasonable. So I think if you're giving complete self-defense, you have to give imperfect self-defense.

(22 RT 3225.)

As the prosecution conceded during closing argument: "The evidence as to the death, killing, the murder of Michael Sterling, is at best conflicting." (23 RT 3290.) There was no clear eyewitness testimony as to the circumstances of the shooting.[21] In urging jurors to find appellant guilty of first degree murder based upon premeditation and deliberation, the prosecutor emphasized the verbal altercation which took place inside the apartment to argue that appellant was the aggressor. The prosecution's theory of the case, however, overlooked the fact that, after an initial display of bravado regarding Sterling's gang affiliation, which was likely for the benefit of appellant's younger companions, appellant calmed down, apologized to Sterling and Williams, shook Sterling's hand and hugged him before leaving the apartment. Considering appellant's actions, the incident would have ended there had Sterling and Williams not followed him from the apartment. Although there was no clear evidence as to what transpired outside, Williams' appearance when he returned after the shots were fired suggested he had been involved in

---

[21] At trial Williams' girlfriend Davinna Gentry testified that after Sterling and Williams left the apartment, she went outside and looked over the gate to see if she could see anything. Gentry claimed she could see shadows, and could tell Sterling was leaning on appellant's car. She testified that appellant told Sterling to get off his car. As Sterling stood up, she heard two shots fired together and then another shot three to four minutes later. (15 RT 2170.) With respect to this portion of the incident, Gentry's story varied widely from what she had earlier told police. (15 RT 2217-2219.) During closing argument the prosecution essentially conceded that Gentry's trial testimony on this point was not to be believed. (23 RT 3339-3340 ["What that testimony is about, where it came from, where her intention was with it, I don't know."].)

a physical altercation of some sort.[22] Additionally, Sterling's statement to Haynes that he would be going back to prison was an indication that he and Williams may have been the aggressors in a confrontation outside the apartment. Consequently, there was evidence supporting a conclusion that Sterling and Williams were the aggressors in the second altercation between the parties which turned physical and resulting in the shooting. Although the defense suggested that Sterling may have had a gun which was taken from the scene after the shooting, jurors could have concluded that Sterling and Williams were unarmed and that, therefore, appellant's actions were not objectively reasonable. This conclusion would have required them to reject theories of self-defense and heat of passion but would not have negated a theory of unreasonable self-defense.

Under these circumstances, as discussed more fully below, the trial court's failure to provide instructions explaining unreasonable self-defense prevented the jurors from fully considering appellant's defense to the Sterling homicide. Furthermore, the error cannot be regarded as harmless, and appellant's conviction on Count 6 must, therefore, be reversed.

B. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IF APPELLANT HAD AN HONEST BUT UNREASONABLE BELIEF THAT HE WAS IN IMMINENT PERIL, HE WAS GUILTY OF THE LESSER OFFENSE OF VOLUNTARY MANSLAUGHTER.

The due process clause of the Unites States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*In re Winship* (1970) 397 U.S. 358, 364; see also, *Carella v. California* (1989) 491

---

[22] Haynes testified that Williams was dirty and appeared to have been in a fight. (15 RT 2282 ["[H]e was dirty, like he had been fighting."].)

U.S. 263, 265 ["The due process clause of the Fourteenth Amendment denies states the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense."].) Consequently, a "defendant has a constitutional right to have the jury determine every material issue presented by the evidence." (*People v. Modesto* (1963) 59 Cal.2d 722, 730 [disapproved in part on other grounds in *People v. Sedeno* (1974) 10 Cal.3d 703, 720].)

Based upon these doctrines, a trial court must instruct the jury on every theory of the case supported by substantial evidence. (*People v. Edwards* (1985) 39 Cal.3d 107, 116; *People v. Geiger* (1984) 35 Cal.3d 510, 519; *People v. Flannel* (1979) 25 Cal.3d 668, 684.) This obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense are present. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 115; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) Additionally, if the defense requests an instruction on a particular defense or a lesser included offense, an instruction must be given so long as there is substantial evidence in support of the defense or lesser included crime. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324.)

For instructions on a lesser included offense to be required, there must be "evidence that would justify a conviction of such a lesser offense." (*People v. Hardy* (1992) 2 Cal.4th 86, 184.) The instructions are required if the evidence is substantial enough to warrant consideration by the jury. (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) In making the determination whether to instruct on a lesser included offense the "trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the

credibility of witnesses, a task exclusively relegated to the jury." (*People v. Flannel, supra*, 25 Cal.3d at p. 684.) "[T]he fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon." (*Ibid.*) Any doubts about whether the evidence is sufficient to warrant the instructions are resolved in favor of the defendant. (*Id.* at p. 685; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 372.) Even if the evidence in support of the instruction is "incredible," the reviewing court must proceed on the hypothesis that it is entirely true. (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1143.) In the present case the evidence warranted an instruction explaining the theory of unreasonable self-defense and its relationship to the element of malice necessary to support appellant's conviction for murder.

Murder is defined as the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) "Manslaughter is the unlawful killing of a human being without malice." (Pen. Code, § 192.) Thus, the distinguishing feature between murder and manslaughter is the presence of "malice." (*People v. Coad* (1986) 181 Cal.App.3d 1094, 1106.) Generally, the intent to unlawfully kill constitutes malice. (Pen. Code, § 188; *People v. Saille* (1991) 54 Cal.3d 1103, 1113; see *In re Christian S.* (1994) 7 Cal.4th 768, 778-780.) However, "[a] defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' [citation], or when the defendant kills in 'unreasonable self-defense' — the unreasonable but good faith belief in having to act in self-defense [citations]." (*People v. Barton, supra*, 12 Cal.4th at p. 199.)

When a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of

"imperfect self-defense" applies to reduce the killing from murder to voluntary manslaughter. (*People v. Cruz* (2008) 44 Cal.4th 636, 664; *People v. Michaels* (2002) 28 Cal.4th 486, 529; *In re Christian S.*, *supra*, 7 Cal.4th at pp. 771, 773.) In such a situation, unreasonable or imperfect self-defense is not a true defense, but instead is a shorthand description of one form of voluntary manslaughter, a lesser included offense of murder. (*People v. Barton*, *supra*, 12 Cal.4th at pp. 200-201.) "Accordingly, when a defendant is charged with murder the trial court's duty to instruct *sua sponte* . . . on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Id.* at p. 201.)

"Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder [citation]." (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 154-155 [emphasis omitted].) "[H]eat of passion and unreasonable self-defense, as forms of a lesser offense included in murder, thus come within the broadest version of the California duty to provide *sua sponte* instructions on all the material issues presented by the evidence. [Citation.] In the interests of justice, this rule demands that when the evidence suggests the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to 'consider the full range of possible verdicts — not limited by the strategy, ignorance, or mistakes of the parties,' so as to 'ensure that the verdict is no harsher or more lenient than the evidence merits.' [Citations.] The inference is inescapable that,

regardless of the tactics or objections of the parties, or the relative strength of the evidence on alternate offenses or theories, the rule requires *sua sponte* instruction on any and all lesser included offenses, or theories thereof, which are supported by the evidence. In a murder case, this means that both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support." (*People v. Breverman, supra*, 19 Cal.4th at pp. 159-160 [emphasis omitted].) The trial court here provided the jury with instructions relating to self-defense and heat of passion, but failed to provide instructions relating to unreasonable self-defense even though the evidence would have supported a conviction for voluntary manslaughter on this basis.

With regard to the theory of self-defense the jury was informed, pursuant to CALJIC No. 5.12, of the following:

> The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the other person will either kill him or cause him great bodily injury; and
>
> 2. That it was necessary under the circumstances for him to use in self-defense force or means that might cause the death of another person, for the purpose of avoiding death or great bodily injury to himself.
>
> A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of such fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-

> founded belief that it is necessary to save one's self from death or great bodily harm.

(14 CT 3590.) As this instruction makes clear, an acquittal based upon self-defense requires a finding the defendant's actions were objectively reasonable and immediately necessary to prevent death or great bodily injury.

The jurors were also provided with instructions relating to the lesser offense of voluntary manslaughter based upon "sudden quarrel" or "heat of passion." The trial court instructed the jurors on voluntary manslaughter as follows:

> A lesser included offense to that charged in Count 6 is the crime of voluntary manslaughter, a violation of Section 192(a) of the Penal Code.
>
> Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter in violation of Penal Code section 192(a).
>
> There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A human being was killed;
>
> 2. The killing was unlawful; and
>
> 3. The killing was done with the intent to kill.
>
> A killing is unlawful, if it was neither justifiable nor excusable.

(CALJIC No. 8.40; 14 CT 3605.) The concepts of sudden quarrel and heat of passion were defined for the jurors as follows:

> To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arose the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.
>
> The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.
>
> If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

(CALJIC No. 8.42; 14 CT 3606-3607.) As with self-defense, the doctrines of sudden quarrel and heat of passion also employ a reasonable man standard.

The concept of unreasonable self-defense, however, applies a subjective standard:

> A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary or involuntary manslaughter.
>
> As used in this instruction, an "imminent peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer.
>
> However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force attack or pursuit.

(CALJIC No. 5.17; refused 14 CT 3692.)

Here the evidence would have justified a conviction of voluntary manslaughter under a theory of unreasonable self defense. Even though Sterling and Williams followed appellant out of the apartment, and even though there was evidence from Williams' appearance that some sort of physical altercation took place outside of the apartment, and even though after he was shot Sterling told his girlfriend he would be going back to prison, because there was no direct evidence that Sterling was armed, the jury could have concluded that a reasonable person in appellant's position would not have believed Sterling was going to kill him or inflict great bodily injury upon him — in other words that appellant's actions were not objectively reasonable or necessary under the circumstances. However, in light of the evidence that Sterling belonged to a gang and the inference that appellant may have been affiliated with a rival gang, jurors could have concluded that although appellant's actions were not those of an average citizen or "reasonable" man,

they were understandable in the context of confrontations between gang members. In other words, jurors could have concluded that appellant killed Sterling in the actual belief he had to act to defend himself against imminent peril, even though a "reasonable person" in those circumstances would have behaved otherwise. Consequently, the jury should have been instructed on the theory of unreasonable self-defense. (See *People v. Barton, supra,* 12 Cal.4th at pp. 200-201 [where "substantial evidence" relevant to imperfect self-defense exists, the court must so instruct *sua sponte*].) Under the circumstances, the trial court's failure to provide the jury with the instructions requested by the defense on unreasonable self-defense, and its failure to afford the jurors the opportunity to convict appellant of the lesser offense of manslaughter under this theory, was error.

C. THE FAILURE TO GIVE LESSER INCLUDED OFFENSE INSTRUCTIONS VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND TO A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In *Beck v. Alabama* (1980) 447 U.S. 625, the United States Supreme Court held that a statute precluding the giving of instructions on lesser included offenses in capital cases was unconstitutional, and reversed the finding of guilt in that case on the grounds that the failure to instruct on a lesser offense made the verdict of guilt less reliable.

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense — but leaves some doubt with respect to an element that would justify conviction of a capital offense — the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

(*Id.* at p. 637.) As the Ninth Circuit observed in *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, "in a capital case, due process requires the court to give a lesser included offense instruction if the evidence would support a conviction on that offense." (*Id.* at p. 1081.)

Appellant has previously demonstrated that the evidence would have supported a verdict of voluntary manslaughter based upon a theory of unreasonable self-defense. Consequently, the trial court was required to give the jury this option both by *Beck* and by *Breverman*, and the trial court's failure to instruct on this theory fatally undermined the reliability of the jury's verdict in the guilt phase.

D. THE ERROR WAS PREJUDICIAL.

Under *Beck*, the error amounted to a denial of due process and, thus, was of constitutional dimension requiring reversal unless the prosecution can establish the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Additionally, because unreasonable self-defense operates to negate an element of the charged crimes, the failure to instruct on this concept was the equivalent of a misinstruction or failure to instruct on an element of the offense. In cases involving the failure to instruct on an element of an offense the *Chapman* standard of reversible error applies to the appellate court's determination to affirm or reverse.[23] (*Neder v. United*

---

[23] In *People v. Breverman*, *supra*, 19 Cal.4th at p. 149, this court indicated that failure to instruct on a lesser included offense is tested for harmlessness under the California Constitution's miscarriage-of-justice standard, or the so-called *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) test of whether it is reasonably probable the defendant would have achieved a better result absent the error. This conclusion cannot be squared with *Neder* and the other federal authorities cited above. If improper presumptions, misinstructions on elements, and the like are errors subject to the *Chapman* test, logically so must be an instructional error which deprives the defendant

States (1999) 527 U.S. 1, 8-9; *People v. Sakarias* (2000) 22 Cal.4th 596, 624-625; *People v. Flood* (1998) 18 Cal.4th 470, 492-507; *People v. Ramsey* (2000) 79 Cal.App.4th 621, 630-631; see *California v. Roy* (1996) 519 U.S. 2, 5.) The judgment in such a case may be affirmed "only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue." (*People v. Sakarias*, *supra*, 22 Cal.4th at p. 625.)

The jurors in the present case clearly rejected the prosecution's theory that appellant premeditated and deliberated the killing of Sterling. However, they may also have believed that appellant's actions were not objectively reasonable. In the absence of instructions on unreasonable self-defense, during closing argument the prosecutor stressed that: "it's a reasonable person standard that you have to employ in your determination as to whether or not the defendant's actions amounted to voluntary manslaughter or murder." (22 RT 3343; see also 22 RT 3344.) As discussed at length above, jurors could have concluded that although appellant actually believed self-defense was necessary, his actions were not objectively reasonable. Such a conclusion would have required them to reject the theories of self-defense and heat of passion, yet would have supported a finding of manslaughter under a theory of unreasonable self-defense. Consequently, the trial court's error in failing to properly instruct the jury on the theory of unreasonable self-defense cannot be regarded as harmless, and appellant's conviction on Count 6 must be reversed.

---

of an evidence-based opportunity to negate an element — which is effectively a misinstruction on an element of the offense. Thus, the error requires reversal unless the prosecution can establish the error was harmless beyond a reasonable doubt.

PENALTY PHASE ISSUES

V.

THE TRIAL COURT'S ADMISSION OF IRRELEVANT AND INFLAMMATORY VICTIM IMPACT EVIDENCE WAS CONTRARY TO CALIFORNIA LAW AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE DETERMINATION OF PENALTY.

A. INTRODUCTION AND OVERVIEW OF ARGUMENT

The defense objected to the victim impact evidence introduced in this case on several grounds. (14 CT 3788-3802; 15 CT 4080-4096.) First, the defense argued that the due process clause of the Fourteenth Amendment prohibits the introduction of unduly prejudicial victim impact evidence. Additionally, the defense argued that the scope of victim impact evidence under Penal Code section 190.3, subdivision (a), is limited to the victim's personal characteristics known to the defendant at the time of the offense, and that a more expansive interpretation of Penal Code section 190.3 would render the statute unconstitutionally vague under the Eighth Amendment of the United Sates Constitution and article I, section 17, of the California Constitution. The defense also argued that the prosecution's proposed victim impact evidence should be excluded under Evidence Code section 352 as more prejudicial than probative. The prosecution argued that a wide array of victim impact evidence was admissible. (14 CT 3804-3808.) Following a hearing on the matter, the trial court declined to impose any meaningful restrictions on the prosecution's victim impact evidence. (25 RT 3570-3571; 36 RT 5149-5159.)

The Eighth Amendment to the United States Constitution imposes limits on the scope of evidence and arguments to the jury in death penalty cases. In *Payne v. Tennessee* (1991) 501 U.S. 808, the court held that the Eighth Amendment does not prohibit evidence of the personal characteristics of the victim of a capital crime, or evidence concerning the emotional impact of the crime on members of the victim's family. The *Payne* Court determined that victim impact evidence may be admitted where it relates to "the specific harm" caused by the defendant's capital crimes, which is a legitimate sentencing consideration. However, the court did not hold that victim impact evidence must be admitted, or even that it should be. Rather the court merely held that, if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." (*Id.* at p. 827.) While *Payne* opened the door to victim impact evidence, it did not hold that such evidence was admissible without limitation. The court recognized that if, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the due process clause of the Fourteenth Amendment. (*Id.* at pp. 824-825.)

Independent of restrictions imposed by the Eighth and Fourteenth Amendments to the federal Constitution, California's death penalty law limits the scope of admissible evidence and permissible argument during the penalty phase of a capital trial. The prosecutor's case in aggravation is confined to the factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 775.) This list does not expressly include the specific harm caused by the crime, the victim's personal characteristics, or the emotional impact of the crime on the victim's family. Under state law, therefore, victim impact evidence relating to these matters is relevant and admissible only if falls

within the ambit of one of the listed factors.[24] (See *People v. Kelly* (2007) 42 Cal.4th 763, 798 ["[E]vidence offered in aggravation must be excluded if not relevant."].)

In *People v. Edwards* (1991) 54 Cal.3d 787, this court determined that, under Penal Code section 190.3, subdivision (a), some victim impact evidence may be admissible as "circumstances of the crime of which the defendant was convicted in the present proceeding. . . ." (*Id.* at p. 834.) *Edwards* held that section 190.3, subdivision (a), "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Ibid.*) The holding is limited to "evidence that logically shows the harm caused by the defendant." (*Ibid.*) *Edwards* warned that, "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*. . . ." (*Id.* at pp. 835-836.)

The prosecutor in the present case chose to explore and exceed the "outer reaches" of admissible evidence mentioned in *Edwards*. Much or all

---

[24] By statute, "[n]o evidence is admissible except relevant evidence." (Evid. Code, § 350.) Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) Overall, the trial court is vested with wide discretion in determining the relevance of the evidence. (*People v. Green* (1980) 27 Cal.3d 1, 19.) However, the court has no discretion to admit irrelevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) "'[T]he general test of admissibility of evidence in a criminal case is whether it tends logically, naturally, and by reasonable inference, to establish any fact material for the People or to overcome any material fact sought to be proved by the defense.'" (*People v. Durham* (1969) 70 Cal.2d 171, 186.)

of the victim impact evidence presented was irrelevant, unduly prejudicial, and, therefore, inadmissible under state law; and the improper admission of this evidence violated appellant's rights under the Eighth and Fourteenth Amendments.

An unusual amount of victim impact evidence was presented in this case. Several members of the victims' families testified concerning the impact of the crime and the loss of the victims. This testimony was lengthy, taking up approximately 59 pages of trial record. In addition to the large volume of evidence, the content of the testimony was deeply disturbing. The witnesses' descriptions of the emotional impact of the crimes were very upsetting. Family members of both victims described ongoing feelings of intense grief, despair and hopelessness which had continued unabated in the years between the crimes and their testimony at the penalty phase. The witnesses spoke of the victims, their sterling qualities, special talents, and the central role each of them had held in the family. The picture which emerged from all of this testimony was one of the complete devastation of two families.

As discussed more fully below, the victim impact evidence in this case was so prejudicial that it created a fundamentally unfair atmosphere for the penalty trial, and resulted in an unreliable sentence of death. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15 17 and 24; *Payne v. Tennessee*, *supra*, 501 U.S. 808; *People v. Edwards*, *supra*, 54 Cal.3d 787.) Further, the evidence was far in excess of what should be permitted under Penal Code section 190.3, subdivision (a), as a "circumstance of the crime." Additionally, the evidence should have been excluded under Evidence Code section 352 as more prejudicial than probative. The trial court arbitrarily and capriciously applied California's death penalty law by admitting irrelevant victim impact testimony which did not concern the circumstances of the crime,

thereby denying appellant a state created liberty interest as well as his state and federal constitutional rights to due process of law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) For all of the reasons discussed below, this court must reverse the judgment of death.

B. THE STANDARD OF REVIEW

The United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness, and a higher standard of reliability. (*Beck v. Alabama* (1980) 447 U.S. 625; *Lockett v. Ohio* (1978) 438 U.S. 586; *Monge v. California* (1998) 524 U.S. 721.) This court should, in accordance with these dictates, review *de novo* the trial court's admission of victim impact evidence in a capital trial. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1265.) A trial court's erroneous admission of victim impact evidence is analyzed under the harmless error standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Kelly, supra,* 42 Cal.4th at p. 799; *People v. Gonzalez* (2006) 38 Cal.4th 932, 960-961.)

C. TRIAL COURT RULINGS AND EVIDENCE PRESENTED

1. Defense Objections and Trial Court Rulings

Prior to the first penalty phase, appellant filed a motion to limit the amount of victim impact evidence introduced by the prosecution. (14 CT 3788-3803.) In support of the motion appellant argued, among other things, that the due process clause of the Fourteenth Amendment prohibits the introduction of unduly prejudicial victim impact evidence. (14 CT 3793.) Appellant further argued that the scope of victim impact evidence under Penal Code section 190.3, subdivision (a), is limited to the victim's personal characteristics known to the defendant at the time of the offense, and that a more expansive interpretation of Penal Code section 190.3 would render the

statute unconstitutionally vague under the Eighth Amendment of the United Sates Constitution and article I, section 17, of the California Constitution. (14 CT 3794-3799.) Appellant also argued that the prosecution's proposed victim impact evidence should be excluded under Evidence Code section 352 as more prejudicial than probative (14 CT 3799). The prosecutor argued that he should be permitted to introduce a wide array of victim impact evidence. (14 CT 3804-3808.) Following a hearing on the matter, the trial court declined to impose any restrictions on victim impact evidence other than: "they cannot give opinions as to what they — what they believe the appropriate punishment will be, nor can they specifically directly address the defendant." (25 RT 3570-3571.)

Prior to the second penalty phase trial, appellant's motion to exclude victim impact evidence was renewed (15 CT 4080-4096), and again the court declined to limit or exclude any of the victim impact evidence the prosecution intended to introduce (36 RT 5149-5159).

2. Victim Impact Evidence Presented to the Jurors

a. Sherry Magpali

Two victim impact witnesses testified with regard to Sherry Magpali — her sister Jasmine (39 RT 5695- 5712) and her brother Jeffrey (42 RT 6015-6019). They provided detailed testimony regarding Sherry's life and her hopes and dreams for the future, and recounted family members' reactions to her death and their continuing grief. The jury was shown numerous photographs of Sherry as a baby, a young child, and as a teenager. (39 RT 5702, 5704-5707.) Photos taken of Sherry with friends at the birthday party the night she died were also displayed to the jurors. (39 RT 5707.)

Jasmine explained that Sherry was generally a good student, and had graduated from high school, magna cum laude, the year before she died. (39

RT 5701.) Awards Sherry received for outstanding academic achievement and the honor roll were introduced into evidence. (39 RT 5701.) Jasmine also spoke of Sherry's accomplishments in graphic arts, animation, and writing poetry. (39 RT 5699-5701; 42 RT 6061.) Her hope was to become a professional artist, and a selection of Sherry's artwork was entered into evidence and displayed to the jurors. (39 RT 5700.) Sherry also liked to sing and even tried to interest Jeffrey and Jasmine in forming a band. (39 RT 5708.)

Jasmine and Jeffrey described in some detail how they learned of Sherry's death. They had been at a church retreat when their uncle arrived, took them into a room, and told them he needed to take them home, but would not tell them why. (42 RT 6017.) They arrived home to find their mother lying on the floor with other family members trying to comfort her after she had fainted. (39 RT 5709.) Jeffrey testified that he at first could not believe Sherry was dead since he had always seen her as so strong and thought she should have been able to fight off anyone. (42 RT 6017.) He also described his difficulty in attending Sherry's funeral, and explained that it has been difficult for him to deal with life without his sister since she had always helped him with his life experiences as he was growing up. (42 RT 6018.) He also described how their daily family life changed after the incident. They no longer go out together as a family, do not eat meals together, and their house is filed with sadness. (42 RT 6019.) Holidays are also different since the family now visits the cemetery, or puts things on an alter, to remember Sherry rather than celebrating. Jeffery told the jurors he hoped that his sadness over the loss of his sister would lessen in time, but he knew the pain would never go away. (42 RT 6019.)

b. Vincent Anes

Three victim impact witnesses testified with regard to Vincent Anes: his mother Pricila Severson (39 RT 5663-5684), his step-father Timothy Severson (39 RT 5685-5694), and his brother Dino Anes (42 RT 6020-6024). Their testimony was augmented by numerous photographs of Vincent as a young child and as a teenager.[25] (39 RT 5668-5672.) Mrs. Severson described Vincent as a sweet thoughtful boy who looked after his younger brother, and was never a problem. (39 RT 5667, 5681.) At the time of his death Vincent was a senior in high school, and had plans to go to into the military, then to college to become a dentist. (39 RT 5665.)

Mr. Severson related the poignant story of how Vincent wrote his mother a letter giving her his blessing to marry Mr. Severson. He described his close relationship with Vincent and reminisced about activities they shared including playing basketball, video games, and cards. He also recalled the times Vincent helped him work on his car. Mr. Severson explained that Vincent was always very nice, did what he was asked, and even volunteered to do things before being asked; he had no bad qualities, and had many friends. (39 RT 5688.) Vincent's brother Dino told the jurors of the close

---

[25] The jurors were shown approximately 11 photographs of Vincent as he was growing up. (39 RT 5667 [Vincent age 7 with brother Dino]; 5668 [Vincent grammar school age taken during trip with mother and brother to Hong Kong, Vincent in his physical education uniform, Vincent in 7th grade photo with mother]; 5669 [Vincent at his 13th birthday party, photo of Mr. Severson, Vincent and Dino taken in 1993]; 5670 [photo of Vincent and Dino at wedding of Mr. and Mrs. Severson, photo of Vincent in Santa hat taken on Christmas Day 1993]; 5671 [photo of Vincent with his car on his 16th birthday, Vincent at 17 on vacation in Reno, Vincent graduation from 8th grade, Vincent with a present from his girlfriend].)

relationship they shared, and described playing games together often. He also talked about Vincent helping him with his homework. (42 RT 6020.)

Mrs. Severson and Dino described their feelings and reactions on the night of the incident from the time Vincent's friends arrived at their home in a panicked state. Dino recalled hearing people asking about Vincent and immediately fearing something had happened to him. Dino recounted his feelings of helplessness as he watched his mother, crying and holding her stomach, run to the phone to call her parents. (42 RT 6021.) He remembered praying on the way to the park that his brother was still alive. (42 RT 6022.) Mrs. Severson described her feelings of confusion when they reached the park and she saw that no one was at the car helping her son, and her eventual realization that Vincent was dead. (39 RT 5678.)

Mr. Severson informed the jurors that he learned of Vincent's death when his wife telephoned him sobbing and essentially incoherent. He was unable to determine what had happened until her brother came on the line and told him that Vincent was dead. (39 RT 5689.) Since he was on active duty with the military at the time, Mr. Severson needed to obtain documents from the Red Cross, and permission from his superiors, before he could travel to California. (39 RT 5690-5691.) It took him a day to get permission to go, and he was able to stay in California for only a short time before he had to return to Nevada. (19 RT 5691, 5693.)

Mr. Severson described feelings of guilt in connection with Vincent's death, explaining that he blamed himself because he had sent his family to California in advance of his reassignment date, and had not been there with them when it happened. (39 RT 5694.) He also described how Vincent's death had changed the family. He indicated that they do not take vacations or

do things together now. His wife's personality has changed dramatically, and Dino has become morose. (39 RT 5693.)

Mrs. Severson echoed her husband's testimony and provided additional details about the changes to family members' lives since Vincent's death. For example, she was unable to recall any happy moments; the family had even stopped celebrating holidays, and had not put up a Christmas tree since that time. (39 RT 5680.) She told jurors of the pain she experienced visiting Vincent's grave at Christmas and on his birthday, which they now did instead of celebrating the holidays. (42 RT 6023.) She also explained how she had changed, and had become a more fearful person and an over-protective mother to Dino since his brother's death. She was afraid something would happen to Dino, and did not want him to go out at night. For a time she even turned off the ringer on the phone so his friends could not call and ask him to go out. (39 RT 5679-5680.)

Mrs. Severson lamented that Dino had become withdrawn after the incident (39 RT 5680), and Dino described his difficulties in dealing with Vincent's death and the way he died. It was painful for him to remember, but he would dwell on his brother's death at night when he could not sleep, and he wondered what things would be like if Vincent were alive. (42 RT 6022.) Dino explained to the jurors that his faith in God had been shaken; because his prayers for Vincent had not been answered, he began to believe that it was "stupid" to pray. One of the hardest things for Dino to deal with was that he had not had the opportunity to say goodbye to his brother. (42 RT 6024.)

The family moved from the area four months after the incident, and Mrs. Severson traveled three or four times a week to visit the cemetery for two years. At the time of trial, she told jurors, she was still having nightmares about the way Vincent died. (39 RT 5683.) She explained that she had saved

all of Vincent's belongings, all of his clothing, books, shoes, and even the last can of soda he shared with her. She even got rid of some of her own things to make room for Vincent's. (39 RT 5682-5683.) The family also kept Vincent's car which Dino continues to drive on occasion and think of Vincent when he does. (42 RT 6023.)

3. ***Prosecutor's Closing Argument***

After admonishing jurors they were not permitted to consider the effect the death penalty and appellant's execution would have on his family, and stressing to the jurors that they were not permitted to consider any sympathy they might feel for appellant's family,[26] the prosecutor urged the jurors to contemplate the pain and suffering endured by the Anes and Magpali families. In this regard the prosecutor made the following emotional appeal:

> They [Sherry and Vincent] had their whole lives ahead of them. They had done everything right, everything that was expected of them. Sherry was an honor student. She was going to RCC. She had a bright future. She liked to draw. She liked to laugh. Vincent was still in high school. Didn't get to go to his senior prom. Probably would have taken Sherry.
>
> . . . .
>
> They did everything right, and they didn't deserve what Richard Nathan Simon did to them. Nor did these people, the Magpalis. They are left with the never-ending agony. And along with Vincent's family, an infinite sadness that will never end.

---

[26] The prosecutor stated at one point: "You may feel some sympathy for his relatives who got up here and testified to the pain and the suffering that he's put them through. You may feel some sympathy for his grandmother having to come and plead for her grandson's life. [¶] But the instructions the Court gives you make a very specific and clear point. Sympathy for the defendant's family is not a proper factor for you to consider in mitigation." (46 RT 6533.)

You get to consider the impact the defendant's crimes have on their families. Sometimes it's analogizing the impact of a crime like this to a rock or a boulder that gets thrown into a body of water and you have this big splash in the center and then the ripples emanate outwards. And the crime and its immediate impact on the victim's family is that big splash in the center that devastates their lives and tears them apart. And the ripples emanate out to their close friends and their acquaintances, their neighbors, their relatives. Actually ends up touching out into the community.

And I thought about that. And I've used that analogy before. But it really doesn't fit. Because soon after you throw a rock or boulder into the water, once the splash and the ripples subside, the water is calm again and things return back to normal. And that's not what happens when crimes like this are committed.

A better analogy is to perhaps consider what occurs when a meteor strikes the surface of a planet. And recently there was a photo spread on the landscape of Mars that was in the "National Geographic" edition. And it showed the pockmarked surface of Mars with the impact of all the craters. And that's more a better analogy as to what effect crimes like the defendant's have on people's lives. It leaves a huge devastating hole in the victims' family's lives. A hole that will never be filled. A hole that will forever scar their lives.

It's been almost six years. You heard the testimony of some of the family members. And to some extent, perhaps, there's been dust that's been blown over that crater that the defendant has caused in their lives. But you can see that infinite sadness that remains. You get to consider and you should consider and you have to consider the devastation that the defendant has visited upon the lives and the families of Vincent and Sherry and Michael Sterling. You get to consider that impact because that's part of the crime. That's what Richard Nathan Simon has done.

(46 RT 6555-6557.)

D. THE VICTIM IMPACT EVIDENCE IN THIS CASE WAS PREJUDICIAL AND CONTRIBUTED TO A FUNDAMENTALLY UNFAIR PENALTY TRIAL.

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, a divided Supreme Court partially overruled two of its earlier decisions — *Booth v. Maryland*, *supra*, 482 U.S. 496 and *South Carolina v. Gathers*, *supra*, 490 U.S. 805 — and held that the Eighth Amendment is not a *per se* bar to all evidence or argument concerning the effect of a capital crime on the victim's family. The Supreme Court overturned *Booth* and *Gathers* to the extent those cases established a blanket prohibition on any evidence, testimony, or argument about the effects of the crime.

In *Booth* the court was presented with a Maryland statute that not only authorized, but required, the admission of a victim impact statement at a felony sentencing hearing. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 498-499 [citing Md. Ann. Code, art. 41, § 4-609(c)].) Such a statement was to be based on interviews with victims' families and was to include, among other things, statements by the family members about the victims, as well as about the economic and psychological impact their deaths had on them. (*Id.* at p. 499.) Booth received two first degree murder convictions for killing his elderly neighbors, Mr. and Mrs. Bronstein. Pursuant to the Maryland statute, a victim impact statement was prepared based on interviews with the Bronsteins' children and granddaughter. (*Ibid.*) "Many of their comments emphasized the victims' outstanding personal qualities, and noted how deeply the Bronsteins would be missed. Other parts of the VIS described the emotional and personal problems the family members have faced as a result of the crimes. The son, for example, said that he suffers from lack of sleep and depression, and is 'fearful for the first time in his life. [Citation.] He said

that in his opinion, his parents were 'butchered like animals.' [Citation.] The daughter said she also suffers from lack of sleep, and that since the murders she has become withdrawn and distrustful. She stated that she can no longer watch violent movies or look at kitchen knives without being reminded of the murders. The daughter concluded that she could not forgive the murderer, and that such a person could '[n]ever be rehabilitated.' [Citation.] Finally, the granddaughter described how the deaths had ruined the wedding of another close family member that took place a few days after the bodies were discovered. Both the ceremony and the reception were sad affairs, and instead of leaving for her honeymoon, the bride attended the victims' funeral. The VIS also noted that the granddaughter had received counseling for several months after the incident, but eventually had stopped because she concluded that 'no one could help her.'" (*Id.* at pp. 499-500 [footnote omitted].)

At the penalty phase hearing defense counsel moved to suppress the victim impact statements on the ground that the information was both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment. The trial court denied the motion. Booth's counsel, concerned that the use of live witnesses would increase the inflammatory effect of the information, then requested that the prosecutor simply read the statements to the jury rather than call the family members to testify. The prosecutor agreed to the arrangement. (482 U.S. at pp. 500-501.) Booth was ultimately sentenced to death, and the Maryland Court of Appeals affirmed the sentence. (*Booth v. State* (Md. 1986) 507 A.2d 1098, 1124 [vacated by 482 U.S. 496].) The Maryland court found that the victim impact evidence was properly admitted reasoning that victim impact testimony, in general, aids the sentencer in evaluating the harm caused by the crime. (*Ibid.*) The United States Supreme Court granted certiorari "to decide whether the

Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence." (*Booth v. Maryland, supra*, 482 U.S. at p. 501.)

Justice Powell, writing for a five to four majority, began with the following observation:

> It is well settled that a jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." [Citations.] Although this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion. [Citation.] Specifically, we have said that a jury must make an "individualized determination" whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." [Citations.] And while this Court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." [Citation.] To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." [Citation.]

(482 U.S. at p. 502.) The court ultimately concluded that, "because of the nature of the information contained in a VIS, it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." (*Id.* at p. 505.)

More specifically, the majority noted that although two victims may leave behind equally grieving families, those family members may articulate grief differently, and consequently, victim impact evidence could affect a jury differently. (482 U.S. at p. 505.) Alternatively, a victim could leave behind no family members, and thus there would be no victim impact testimony at all.

(*Ibid.*) Justice Powell emphasized the danger of focusing too much on the victim's character commenting that the court was "troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." (*Id.* at p. 506, fn. 8.)

The subject of victim impact evidence was next considered in *South Carolina v. Gathers*, *supra*, 490 U.S. 805, where the victim's family members did not testify. There, during argument to the jury, the prosecutor alluded to the victim's religious character and his commitment to his community, and read from some religious papers the victim had been carrying at the time of the offense. (*Id.* at pp. 808-809.) Although the victim had no formal religious training, the prosecutor referred to him as "Reverend," as he had called himself. (*Id.* at pp. 807-810.) Relying on *Booth*, and emphasizing that sentencing at the capital stage must reflect a defendant's "personal responsibility and moral guilt," the majority held that such statements were in no way related to the determination of such responsibility, and consequently should not have been considered by the sentencing jury. (*Id.* at pp 810-811.) Clarifying its holding in *Booth*, the court emphasized that defendants should not be punished for qualities of the victim they had no knowledge of. (*Id.* at p. 811.)

Two years later, in a six to three decision, the court partially overruled *Booth* and *Gathers* in *Payne v. Tennessee*, *supra*, 501 U.S. 808, and held that victim impact evidence, broadly speaking, was not *per se* inadmissible. (*Id.* at p. 830, fn. 2 [overruling *Booth* and *Gathers*].) In *Payne*, the defendant had attacked his girlfriend's neighbor and the neighbor's two young children. (*Id.* at pp. 827, 830.) The neighbor and one child were killed, but a son, Nicholas,

survived the attack. (*Ibid.*) After Payne was convicted of the two murders, the prosecution presented the testimony of Nicholas's grandmother about how the crime had affected him. The grandmother briefly explained:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

(*Id.* at pp. 814-815.) The jury sentenced Payne to death. (*Id.* at p. 816.) Although the Tennessee Supreme Court considered the grandmother's testimony "technically irrelevant," it nevertheless affirmed the sentence, holding that admitting the testimony was harmless error. (*State v. Payne* (Tenn. 1990) 791 S.W.2d 10, 18.) In affirming Payne's sentence, the United States Supreme Court reversed its position on victim impact testimony as set forth in *Booth* and *Gathers*.

These earlier decisions, the court reasoned, had been too restrictive as they "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' [citation], or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Id.* at p. 822.) Thus, the court determined that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Id.* at p. 825.)

The court in *Payne* did not hold that victim impact evidence must be, or even should be, admitted in a capital case, but instead merely held that if a

state decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." (*Id.* at p.827; see also *id.* at p. 831 [conc. opn. of O'Connor, J.].) While the federal Constitution does not impose a blanket ban on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) As Justice Souter explained in his concurring opinion in *Payne*:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned moral response'") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [] (O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case."

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837 [conc. opn. of Souter, J., citing *Burger v. Kemp* (1987) 483 U.S. 776, 785].)

Following *Payne* courts have held that the prosecution may introduce a limited amount of general evidence providing identity to the victim, but have also warned that special caution should be used in the introduction of detailed descriptions of the good qualities of the victim because such descriptions create a danger of the influence of arbitrary factors on the jury's sentencing decision. (See, e.g. *State v. Bernard* (La. 1992) 608 So.2d 966, 971; *State v.*

Nesbit (Tenn. 1998) 978 S.W.2d 872, 891; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.) Likewise, with regard to evidence concerning the impact of the victim's death on the victim's family, it has been recognized that family members should be limited to general statements describing the impact of the victim's death on their lives, and are not permitted to provide "detailed responses" or testify to "particular aspects of their grief. . . ." (*State v. Taylor* (La. 1996) 669 So.2d 364, 372.)

Courts have also imposed limits on the volume of victim impact evidence. As observed by the New Jersey Supreme Court: "The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant." (*State v. Muhammad*, *supra*, 678 A.2d at p. 180.) For this reason the New Jersey court concluded that, "absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness." (*Ibid.*; see also *People v. Hope*, *supra*, 702 N.E.2d 1282 [court interpreted provisions of Illinois law to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime."].)

This court has recognized that "the prosecution may present evidence for the purpose of '"'reminding the sentencer . . . [that] the victim is an individual whose death represents a unique loss to society'"' [citation], but . . . may not introduce irrelevant or inflammatory material that '"'diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" [Citation.]' [Citations.]" (*People v. Kelly*, *supra*, 42 Cal.4th at p.

794.) While the court has not established "bright-line" rules limiting victim impact evidence, it has recognized that there are outer limits to the amount and type of victim impact evidence allowable before due process is violated.

In *People* v. *Robinson* (2005) 37 Cal.4th 592, the victim impact evidence came from four witnesses whose testimony filled 37 pages of reporters transcript and focused on the attributes of each victim and the effects of the murders on the witnesses and their families. The prosecutor also introduced 22 photographs of the victims in life. (*Id.* at pp. 644-649.) While declining to reach the merits of the issue because there was no objection to the victim impact evidence at trial, the court suggested that the prosecutor may have exceeded the limits on emotional evidence and argument. (*Id.* at pp. 651-652.) Citing it as an "extreme example" of excessive victim impact evidence violating due process, the *Robinson* Court favorably quoted *Salazar* v. *State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 336:

> *[W]e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.* Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . . . Hence, *we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.*

(37 Cal.4th at p. 652 [emphasis in original].) Concurring in the result reached by the majority based upon the failure of the defendant to properly preserve the issue, Justice Moreno further addressed appropriate limitations on victim impact testimony and described two instances of improper testimony as follows:

> In the present case, I find parts of the victim impact testimony crossed the line between proper victim impact testimony and improper characterization and opinion by the victim's family. The prime example was that of Brian Berry's father, Jan

Stephan Berry, who testified: "'Even though [Brian] was 18 years old and now an adult, as a father you always feel that you are there to protect your children and it is very difficult to think that at the time when he most needed somebody I couldn't be there to help him. How can I ever escape the image of my son's terror as he defenselessly pleaded for his life and not by accident, not in anger, not in fear, but for a few hundred dollars someone could look my son in the eye, and without feeling or mercy, in a point-blank range shoot him in the face, then put the gun against the side of his head and shoot him again.'" [Citation.] The above passage is only minimally related to the valid purpose of reminding the jury "'that the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*Payne*, *supra*, 501 U.S. at p. 825.) Rather, it is quite plainly "the admission of a victim's family members' characterizations and opinions about the crime [and] the defendant," which violates the Eighth Amendment. (*Payne*, *supra*, 501 U.S. at p. 830, fn. 2.)

A similar statement was made by James White's mother, Kristine White. As she stated: "'All of these things that you have heard about replay in our minds like videotape, the events of what happened at Subway. I can see James and what his terror must have been like in seeing his best friend shot. How afraid he must have been on his knees asking for his life. I can feel the gun to his head. To this day I don't understand how I slept so soundly and didn't know. You'd think that you would. [¶] I don't understand anybody being able to do that. [¶] I can hear him moaning as he lay on the ground and bled from his wound and there wasn't anybody there to help him.'" [Citation.]

The above statement, again, is only minimally related to the purpose of victim impact evidence discussed above. Rather, it allowed the parent of the victim to invoke an imagined version of the crime, the version that was the most horrific, and that was in alignment with the prosecutor's theory of the murders.

(37 Cal.4th at pp. 656-657 [conc. opn. of Moreno, J.].) The described testimony is remarkably similar to the victim impact evidence improperly admitted in the instant case.

Here, five members of the Anes and Magpali families testified concerning the impact of the crime and the loss of the victim. This testimony was lengthy, taking up approximately 59 pages of reporter's transcript. In addition to the large volume of evidence, the content of the testimony was deeply disturbing. Family members recounted the life history of each of the victims, and illustrated their testimony with numerous photographs, many of which showed the victims as infants and young children. There were also photographs of the victims with various family members and friends. The witnesses descriptions of the effects the crimes had on them were very upsetting. Family members of both victims described ongoing feelings of intense grief, despair and hopelessness which had continued unabated in the years between the crime and their testimony at the penalty phase. The witnesses spoke of the victims and the central role each of them had held in the family. The picture which emerged from all of this testimony was one of the complete devastation of all of their lives as a result of the crime.

Much of this evidence was irrelevant (Evid. Code § 350), but its emotional impact was devastating nonetheless. In *Cargle v. State* (Okla. Crim. App. 1995) 909 P.2d 806, where similar life-history evidence was introduced through the testimony of a single witness, the court noted that "portraying [the victim] as a cute child at age four in no way provides insight into the contemporaneous and prospective circumstances surrounding his death" (*id.* at p. 829), and found that the probative value of the life-history evidence was substantially outweighed by its prejudicial effect (*id.* at p.830). (Cf. *United States v. McVeigh* (10th Cir.1999) 153 F.3d 1166, 1221 and fn.47

[noting that the prejudicial impact of the victim impact evidence had been minimized by the exclusion of wedding photographs and home videos]; *People v. Roddan* (2005) 35 Cal.4th 646, 732 [noting that the trial court properly excluded many plaques and certificates bestowed on the victim for community work.].)

Extensive life history evidence was addressed more recently by the Texas Court of Criminal Appeals in *State v. Salazar* (Tex. Crim. App. 2002) 90 S.W.3d 330.[27] There the court determined that the life history evidence was prejudicial because of its sheer volume (*id* at p. 337), and noted that a "'glimpse' into the victim's life and background is not an invitation to an instant replay" (*id.* at p. 336). The court recognized that "The punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id.* at pp. 335-336.)

The emotional and inflammatory nature of the victim impact testimony and argument in this case, and sheer quantity of this evidence, was so out of proportion to the "quick glimpse of the life" of the victim envisioned in *Payne* as to shift the focus of the jury from "a reasoned *moral* response" to appellant's personal culpability and the circumstances of his crime (*Penry v. Lynaugh, supra,* 492 U.S. 302, 319) to a passionate, irrational, and purely subjective response to the sorrow of the victims families. (See *Cargle* v. *State* (Ok.Cr.App. 1995) 909 P.2d 806, 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a

---

[27] *State v. Salazar*, *supra*, was a non-capital case, but the court applied the principles governing the admission of victim impact testimony in capital cases. (See *id.* at p. 335 and fn. 5.)

'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."].) The emotionally charged and detailed testimony introduced in this case was precisely the type of evidence that *Payne* and progeny recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective responses from the jury. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *People* v. *Edwards, supra,* 54 Cal.3d at p. 836.) Introduction of this evidence violated appellant's rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for rationality and reliability in the application of the death penalty mandated by the Eighth Amendment.

E. THE VICTIM IMPACT EVIDENCE ADMITTED IN THIS CASE WAS FAR IN EXCESS OF WHAT SHOULD BE PERMITTED UNDER PENAL CODE SECTION 190.3, SUBDIVISION (A), AS A "CIRCUMSTANCE OF THE CRIME," AND SHOULD HAVE BEEN EXCLUDED.

Unlike some jurisdictions, "victim impact" evidence is not included among the list of factors which may be considered in California capital sentencing decisions. Under our state law, the prosecution's case in aggravation is confined to the factors listed in Penal Code section 190.3. (*People v. Boyd, supra,* 38 Cal.3d at p. 775.) Because, this provision does not expressly list the specific harm caused by the crime, the victim's personal characteristics, or the emotional impact of the capital crime on the victim's family, the jury may consider these matters in making its penalty determination only if they fall within the ambit of one of the listed factors. (*People v. Kelly, supra,* 42 Cal.4th at p. 794 [holding that "evidence offered in aggravation must be excluded if not relevant. In this regard, the rules are similar whether the evidence is offered in mitigation or in aggravation. When

offered for either purpose, the evidence must be relevant to the penalty determination."].)

As noted above, in *People v. Edwards, supra,* 54 Cal.3d 787, this court determined that some victim impact evidence and argument could properly be admitted under Penal Code section 190.3, subdivision (a), which provides for consideration of the "circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." (*Id.* at pp. 835-836.) While the court held that some victim impact evidence could be admitted as a circumstance of the crime, it made clear that its holding "only encompasses evidence that logically shows the harm caused by the defendant." (*Id.* at p. 835.) The court also noted broadly that there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and the prejudicial. . . . [I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

Neither *People v. Edwards* nor any subsequent case specifically defines the scope of admissible victim impact evidence and argument under California law. In fact in *Edwards* the court stated: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that [Penal Code section 190.3] factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . . ." (*Id.* at pp. 835-836.) Despite this language in *Edwards*, more recent opinions contain statements which might be read as equating the scope of victim impact evidence admissible as a "circumstance of the offense" with evidence which does not violate due process guarantees. For example, in *People v. Zamudio* (2008) 43 Cal.4th 327, the court stated:

> "In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendment[] to the federal Constitution. [Citation.]" [Citation.] "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.' [Citation.] State law is consistent with these principles. Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." [Citations.]

(*Id.* at p. 364.) However, as discussed more fully below, limitations beyond "fundamental unfairness" are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statute, and to avoid expanding aggravating circumstances to the point that they become unconstitutionally vague. In the present case the trial court erred under state law by allowing victim impact evidence that was statutorily irrelevant and unduly prejudicial.[28]

General rules of statutory construction govern the interpretation of the meaning of the phrase "circumstances of the crime" as used in Penal Code section 190.3, subdivision (a). The intent of the enacting body is the paramount consideration in construing statutory provisions. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 91.) To determine that intent, one looks first to the language of the statute, giving the words their ordinary meaning.

---

[28] Appellant acknowledges that some of the contentions raised by trial counsel below, and reiterated here, have been summarily rejected by this court in recent cases. (See, e.g. *People v. Zamudio, supra,* 43 Cal.4th at pp. 364-365 [and cases cited therein]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057 [and cases cited therein].) Appellant presents these arguments to alert the court to the nature of each claim and its federal constitutional implications, and to provide a basis for the court's reconsideration of each argument.

(*People v. Broussard* (1993) 5 Cal.4th 1067, 1071; *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198; *People v. Weidert* (1985) 39 Cal.3d 836, 843.) "[I]f no ambiguity, uncertainty, or doubt about the meaning of a statute appears, the provision is to be applied according to its terms without further judicial construction. [Citation.]" (*In re Antiles* (1983) 33 Cal.3d 805, 811, [overruled on other grounds in *In re Joyner* (1989) 48 Cal.3d 487, 495].)

Another canon of statutory construction requires interpretation of a statute in a manner so as to avoid an unconstitutional reading.

> Both the United States Supreme Court and the California courts have pointed out on numerous occasions that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which avoids any doubt concerning its validity. [Footnote omitted.] [Citations.] In *United States v. Delaware & Hudson Co., supra,* the Supreme Court explained the scope and the rationale of this established canon of constitutional adjudication: "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. [Citation.] And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

(*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 148-149 [overruled on other grounds in *People v. Anderson* (1987) 44 Cal.3d 713, 747] [quoting *United States v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407-408].)

The *Edwards* opinion stated that the specific harm caused by the defendant in a case could be considered because the "word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, 'circumstance,' first definition.)" (*Id.* at p. 833.) Justice Mosk decried the language of *Edwards* in his dissent in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 492, fn.2, asserting that the court had potentially rendered the capital sentencing statute unconstitutionally vague.

He was not the only one. Justice Kennard, in her concurring and dissenting opinion in *People v. Fierro*, *supra*, 1 Cal.4th 173, artfully deconstructed the *Edwards* opinion's approach to the rephrasing of section 190.3, subdivision (a). She noted that the language of *Edwards* was far too broad and illogical:

> In *People v. Edwards*, *supra*, 54 Cal.3d 787, the majority . . . relied primarily on a dictionary definition of the word "circumstance" as meaning " '[t]hat which surrounds materially, morally, or logically.' " (*Id.* at p. 833, quoting 3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.) The majority concluded that the specific harm caused by the crime surrounds it "materially, morally, or logically," and therefore is a "circumstance of the crime" within the meaning of that phrase in section 190.3.
>
> Other accepted definitions are somewhat narrower than the one on which the majority relied. For example, a legal dictionary defines "circumstances" as "[a]ttendant or accompanying facts, events, or conditions." (Black's Law Dict. (6th ed. 1990) p. 243.) A federal court has defined "circumstances" as "'facts or things standing around or about some central fact.'" (*State of Maryland v. United States* (4th Cir. 1947) 165 F.2d 869, 871.)

> And a state court has defined "circumstances of the offense" as "'the minor or attendant facts or conditions which have legitimate bearing on the major fact charged.'" (*Commonwealth v. Carr* (Ct. App. 1950) 312 Ky. 393, 395 [227 S.W.2d 904, 905].)
>
> The majority's construction of "circumstances of the crime" makes this factor so broad that it encompasses all of the other factors listed in section 190.3. [footnote omitted.] To say that the "circumstances of the crime" includes everything that surrounds the crime "materially, morally, or logically," is to say that this one factor includes everything that is morally or logically relevant to an assessment of the crime, or, in other words, every fact or circumstance having any legitimate relevance to the penalty determination. This expansive definition makes all the other factors listed in section 190.3 unnecessary, because all are included within the "circumstances of the crime" as defined by the majority. For this reason, the construction adopted by the majority is improbable and should be disfavored.

(*People v. Fierro*, *supra*, 1 Cal.4th at pp. 262-263 [conc. and dis. opn. of Kennard, J.].)

In her *Fierro* opinion Justice Kennard suggested, in place of the language of the majority opinion of *Edwards*, a more reasonable and understandable interpretation: "As used in section 190.3, '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 proof of the charges adjudicated at the guilt phase." (*Id.* at p. 264.) This definition "appears most consistent with the rule of construction . . . and with the United States Supreme Court's understanding of the term as reflected in its opinions," and also "reduces the overlap with other factors and thus . . . most accurately reflects legislative intent." (*Ibid.*)

Turning to United States Supreme Court's decisions for assistance in defining the "circumstances of the crime" in this context, Justice Kennard noted that in *Booth v. Maryland*, *supra*, 482 U.S. 496, the majority expressly rejected the state's argument that evidence of the victims' personal characteristics and the reactions of their family members came within the "circumstances of the crime." (*People v. Fierro, supra*, 1 Cal.4th at pp. 259-260 [conc. and dis. opn. of Kennard, J.].) Similarly, in *South Carolina v. Gathers*, *supra*, 490 U.S. 805, the United States Supreme Court held that it was error to admit evidence of a religious tract the victim was carrying because there was no evidence that the defendant was aware of or had read the tract. As in *Booth*, the high court in *Gathers* again reasoned that the "circumstances of the crime" did not include personal characteristics of the victim that were unknown to the defendant at the time. (*People v. Fierro*, *supra*, 1 Cal.4th at p. 260 [conc. and dis. opn. of Kennard, J.].)

Justice Kennard recognized that, although it partially overruled *Booth* and *Gathers* in *Payne*, the Supreme Court had not revised the definition of "circumstances of the crime" used in those earlier cases. Rather, the *Payne* Court found that certain victim impact evidence was admissible not as a circumstance of the crime but as its own independent factor characterized as the "harm caused by the crime." (*People v. Fierro*, *supra*, 1 Cal.4th at p. 260, [conc. and dis. opn. of Kennard, J., citing *Payne v. Tennessee*, *supra*, 501 U.S. 808].) Following *Payne* a state could, consistent with the Eighth Amendment, draft a statute allowing the jury to consider the victim's personal characteristics and other circumstances which the defendant was unaware of. This type of victim impact, however, would need to be authorized by a different statutory provision than one permitting the jury to consider the "circumstances of the crime."

As noted by Justice Kennard, the court in *Payne* expressly reaffirmed the distinctions it had drawn in its earlier cases, *Booth* and *Gathers*, concerning the victim's personal characteristics which the defendant knew or could readily observe, and those which were not apparent at the time of the crime. *Payne* not only fails to authorize but actually prohibits the admission of this type of victim impact evidence as a "circumstance of the crime." The *Payne* court held that evidence about the victim's personal attributes was permissible to counteract similar evidence proffered by the defense in mitigation of the penalty — not because this evidence was a circumstance of the crime.[29] Noting the unfairness that would result if only the defendant were allowed to present evidence of personal characteristics, the court referring to defense mitigation testimony stated "[n]one of this testimony was related to the circumstances of Payne's brutal crimes." (*People v. Fierro, supra,* 1 Cal.4th at p. 261 [conc. and dis. opn. of Kennard, J., citing *Payne v. Tennessee, supra,* 111 S.Ct. at pp. 2608-2609].) Based on the Supreme Court's construction of "circumstances of the crime," and the plain meaning of that phrase, Justice Kennard concluded that "[a]s used in Penal Code section 190.3(a), 'circumstances of the crime' should be limited to those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the underlying charges adjudicated at the guilt phase." (*People v. Fierro*, *supra*, 1 Cal.4th at p. 264 [Kennard, J., conc. and dis. opn.].) A more expansive definition would render

---

[29] The capital sentencing jury in *Payne* heard testimony of defense witnesses offered in mitigation of the death penalty about the defendant's church affiliations, his affectionate and kind relationship with his girlfriend's children, his good character as attested to by several witnesses, and his low I.Q.

Penal Code section 190.3 unconstitutionally vague under the Eighth Amendment of the United States Constitution as well as article I, section 17, of the California Constitution.

The United States Supreme Court has held that California's death penalty statute, including section 190.3, subdivision (a), is not unconstitutionally overbroad or void for vagueness. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976; *People v. Bacigalupo, supra*, 6 Cal.4th 457, *cert. denied*, 512 U.S. 1253 (1994).) However, a statute that is facially valid may be unconstitutional in its application. A distortion of section 190.3, subdivision (a), to include extraneous classes of victim impact evidence, such as the evidence introduced in the present case, as "circumstances of the crime" raises serious state and federal constitutional concerns of vagueness and the arbitrary application of California's death penalty statute. (U.S. Const., Amends. V, VIII, XIV; Cal.Const., Art. I, §§ 7, 15, 17, 24.)

The United States Supreme Court has always been concerned with arbitrariness in capital sentencing schemes. Indeed, as far back as *Furman v. Georgia* (1972) 408 U.S. 238, the court held that the death penalty may not be imposed in an arbitrary fashion. In *Gregg v. Georgia* (1976) 428 U.S. 153, 189, the court reiterated this principle: [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." In other words, when a state wishes to establish a death penalty, it must tailor its law so that the sentencer's discretion is limited. Juries must receive adequate guidance so that sentences are, among other things, "rationally reviewable." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303.)

In the cases of *Godfrey v. Georgia, supra*, 446 U.S. 420, and *Maynard v. Cartwright, supra*, 486 U.S. 356, the Supreme Court reviewed the constitutionality of two similar death penalty sentencing statutes. The Georgia statute permitted imposition of the death penalty if the offense "was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim." (*Godfrey, supra*, 446 U.S. at p. 422 [quoting Georgia Code].) The Oklahoma statute at issue in *Maynard* allowed a jury to consider as an aggravating factor whether the murder was "especially heinous, atrocious, or cruel." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 359.) In both cases the statutes were deemed unconstitutionally vague under the Eighth Amendment.

In *Godfrey*, the court scrutinized the language of the statute (as well as the Georgia Supreme Court's interpretation of that language) to see whether it provided any meaningful guidance to jurors in the difficult task of distinguishing which defendants should be executed and which should be spared. The court concluded that:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

(*Godfrey v. Georgia, supra*, 446 U.S. at pp. 428-429.) In other words, "[t]here [wa]s no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." (*Id.* at p. 433.) The court reached the same result in *Maynard* emphasizing that the *Godfrey* opinion "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in

themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. at p. 363.)

In *Stringer v. Black* (1992) 503 U.S. 222, the court revisited the constitutionality of the "especially heinous, atrocious or cruel" language. This time the phrase was included in one of Mississippi's aggravating factors. Like California, Mississippi is a "weighing state." That is to say, having made a determination that a defendant is eligible for the death penalty, capital juries in Mississippi are required to weigh aggravating factors and mitigating factors to determine whether death is the appropriate penalty. "That Mississippi is a weighing State," the court stressed, "only gives emphasis to the requirement that aggravating factors be defined with some degree of precision." (*Id.* at p. 229.) After quickly condemning the statute as unduly vague, Justice Kennedy went on to explain the importance of clearly defining aggravating and mitigating factors:

> A vague aggravating factor used in the weighing process is, in a sense, worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that, when the weighing process has been infected with a vague factor, the death sentence must be invalidated.

(503 U.S. at pp. 235-236.)

The court reviewed another vague aggravating factor in *Richmond v. Lewis* (1992) 506 U.S. 40. Striking down an Arizona statute which listed "especially heinous, cruel, and depraved" murders as circumstances in aggravation, the court reiterated its concerns about vague aggravating factors:

> First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. [Citations.] Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain. [Citations.] Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error.

(*Id.* at pp. 46-47.)

The court focused its attention on Penal Code section 190.3, subdivision (a), in 1991 when it remanded *People v. Bracigalupo* [(1991) 1 Cal.4th 103] to this court with directions to reconsider the constitutionality of the statute in light of *Stringer*, *supra*. (*Bacigalupo v. California* (1992) 506 U.S. 802.) On remand this court upheld section 190.3 against an Eighth Amendment vagueness challenge. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 464.) However, in doing so the court defined subdivision (a) circumstances of the crime according to the United States Supreme Court's accepted definition of the phrase. Significantly, the majority opinion does not mention *People v. Edwards*, *supra*, 54 Cal.3d 787, or its broad construction of subdivision (a). Indeed, Justice Mosk's concurring and dissenting opinion suggests that: "the majority *sub silentio* overrule[ed] *People v. Edwards* . . .." (6 Cal.4th at p. 492, fn. 2.)

The United States Supreme Court ultimately upheld section 190.3 in *Tuilaepa v. California* (1994) 512 U.S. 967. There the court specifically approved subdivision (a) after concluding that the term "circumstances of the crime" had a "common sense core meaning" that jurors could easily understand and apply. However, the court based that determination upon its own traditional (and relatively narrow) definition of the term. It did not

address *Edwards* or its assertion that jurors could consider a broad array of victim impact evidence as part of the circumstances of the crime.

This court has summarily rejected vagueness challenges to subdivision (a) of section 190.3 based upon *Tuilaepa*. (See e.g. *People v. Pollock* (2004) 32 Cal.4th 1153, 1183; *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Catlin* (2001) 26 Cal.4th 81, 175.) However, in *People v. Boyette* (2002) 29 Cal.4th 381, the court expressly recognized that the United States Supreme Court has not addressed whether subdivision (a) is unconstitutionally vague to the extent it "is interpreted to include a broad array of victim impact evidence . . . ." (*Id.* at p. 445, fn. 12.) Appellant asks this court to revisit the matter in light of the expanded definition of circumstances of the offense currently employed by the courts of this state.

Subdivision (a) of Penal Code section 190.3 permits a capital jury to consider the circumstances of the crime as an aggravating factor. Narrowly construed, the statute is constitutional. However, under the broad construction currently applied by the courts of this state, including the trial court in the present case, subdivision (a) is unconstitutionally vague. In order to preserve the constitutionality of section 190.3, it must be given a narrow construction, one that provides a "common sense core meaning" that the jury can easily understand and be guided by. Justice Kennard's sensible approach provides the narrow construction that *Edwards*' broad dicta does not. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 257-265 [Kennard, J., conc. and dis. opn.].) Consequently, victim impact evidence admitted as relevant to the circumstances of the crime should be limited to those facts or circumstances either known to the defendant when he or she committed the crime or properly adduced in proof of the underlying charges adjudicated at the guilt phase.

Under this definition the victim impact evidence in this case was inadmissible and should have been excluded.

F. THE VICTIM IMPACT EVIDENCE SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352 AS MORE PREJUDICIAL THAN PROBATIVE.

In addition to the errors discussed above, the trial court abused its discretion in failing to exclude the victim impact evidence pursuant to Evidence Code section 352. Under this section: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." Evidence Code section 352 requires the trial judge to strike a careful balance between the probative value of proffered evidence and the danger of prejudice, confusion and undue time consumption. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) "This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*Ibid.*)

Under section 352, the trial court's discretion must be exercised "'within the context of the fundamental rule that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted.'" (*People v. Williams* (1970) 11 Cal.App.3d 970, 977.) "[H]ow much 'probative value' proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity)." (*People v. Delgado* (1973) 32 Cal.App.3d 242, 249.)

In *People v. Edwards*, this court emphasized the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence: "Our

holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett, supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] 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.' [Citations.]" (54 Cal.3d at p. 836.)

As discussed at length above, the emotionally charged and detailed evidence introduced in the present case was unduly prejudicial for several reasons. First, the testimony was not limited to a single witness. Rather the prosecution was permitted to call several of the victims relatives, and these witness were permitted, in turn, to describe the impact of the incident on other family members. The quantity of victim impact testimony in this case, thus, far surpassed what courts have found to be within acceptable limits and reached prejudicial proportion.

The substance of the testimony was also particularly prejudicial given that the evidence was not limited to a "brief factual profile of the victim." Rather, the various witnesses were permitted to relate emotional details and specific instances concerning the victims' lives. Additionally, numerous photographs of the victims were introduced. These photographs did not simply provide the jury with an image of the victims at the time of their deaths, but rather spanned a number of years.

Additional prejudice ensued when the evidence relating to the impact of victims' deaths was not limited to a brief factual account of the effect of the crime on family members. Instead the witnesses were permitted to provide detailed responses to emotionally charged questions, and to provide specifics regarding particular aspects of their grief. They described emotional reactions to the news of their loved ones' deaths, and related subsequent feelings of depression, sadness, and emptiness. The witnesses' testimony was punctuated with descriptions of nightmares, and grief stricken behavior.

Overall, while having little bearing on appellant's "moral culpability and blameworthiness," and less still to do with the "circumstances of the offense," the "victim impact" evidence permitted here was bound to intensify natural feelings of sympathy for the victims and their families and may have encouraged a desire for retribution against appellant inviting an emotional and purely subjective response. The evidence was far more prejudicial than probative and should have been excluded for this additional reason.

G. THE ERROR WAS PREJUDICIAL AND REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

The trial court erred under state law by allowing victim impact evidence that was statutorily irrelevant and unduly prejudicial. (§ 190.3, subd. (a).) The error violated appellant's right to due process and to a reliable penalty determination under the Eighth and Fourteenth Amendments. Overall, the excessive quantity and highly emotional content of the victim impact evidence erroneously admitted during the penalty phase created an atmosphere of prejudice in which emotion prevailed over reason. (*Gardner v. Florida* (1977) 430 U.S. 349, 358; *Gregg v. Georgia, supra*, 428 U.S. 153, 189.) As a consequence appellant was deprived of his rights under the federal constitution, as well as rights guaranteed to him under California law.

Accordingly, the error must be reviewed under the standard set forth in *Chapman v. California*, *supra*, 381 U.S. at pp. 24), holding that reversal is mandated unless the state can show that the error was harmless beyond a reasonable doubt. When a violation of the constitution occurs in the penalty phase of a capital case, a reviewing court must proceed with special care. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258 ["[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer."].) In evaluating the effects of the error, the reviewing court does not consider whether a death sentence would or could have been reached in a hypothetical case where the error did not occur. Rather, the court must find that, in that particular case, the death sentence was "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.)

Here, in light of the highly prejudicial nature of the victim impact evidence, the prosecution cannot show that the error was harmless beyond a reasonable doubt. Initially it should be noted that the evidence regarding choice of penalty was closely balanced in this case which is reflected in the fact that jurors in the first penalty phase were unable to reach a unanimous verdict after three closely divided ballots.[30] (See *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055 [fact that first jury was unable to reach verdict considered significant is evaluating prejudice].) The defense presented a strong case in mitigation including evidence of appellant's mental disabilities resulting from the brain injuries he suffered as a child from a beating and as a young adult from being shot in the head, as well as extensive life history

---

[30] Prior to declaring a mistrial, the court inquired as to the state of deliberations and was informed that three votes had been taken resulting in splits of 5 to 7, 6 to 6, and 7 to 5. (33 RT 4770.)

evidence including the mental and physical abuse appellant suffered at the hands of his step-father. In order to counter this evidence, the prosecution's argument included an emotional appeal based upon the character of the victims and the immense suffering of their family members which had been detailed by numerous witnesses. (46 RT 6555-6657.) The fact that the prosecutor emphasized and relied upon the improperly admitted victim impact evidence in urging the jurors to return a verdict of death, confirms the prejudicial nature of the error. (See *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775-776 [conviction reversed where "the prosecutor relied fairly heavily" on improperly admitted evidence.].) Under these circumstances it cannot be said that the death sentence was "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.) Consequently, reversal is required.

VI.

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE.

The trial court is responsible for insuring that the jury is correctly instructed on the law. (See *People v. Murtishaw* (1989) 48 Cal.4th 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court must instruct sua sponte on the principles which are openly and closely connected with the evidence presented and necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

In the present case, defense counsel did not request an instruction regarding the appropriate use of victim impact evidence. However, the lack of a specific request did not relieve the trial court of its responsibility to provide the jurors with the guidance they needed to properly consider the victim impact evidence in this case. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore should have been given on the court's own motion. (See generally *People v. Murtishaw*, *supra*, 48 Cal.4th at p. 1022; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; see also *People v. Stewart* (1976) 16 Cal.3d 133, 139-139 [defective request for instruction alerted court to its sua sponte duty].).

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the

jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich, supra*, 776 A.2d at p. 181;[31] *State v. Nesbit, supra*, 978 S.W.2d at p. 892; *Turner v. State, supra*, 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required cautionary instruction varies in each state, depending on the role victim impact evidence plays in that state's statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors. An appropriate instruction would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate

---

[31] In *State v. Koskovich, supra*, the New Jersey Supreme Court held: "We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard." (776 A.2d at p. 177.)

> punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(See *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159; see also *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)[32]

In *People v. Ochoa* (2001) 26 Cal.4th 398, 445, this court addressed a different proposed limiting instruction, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, which was also given in this case (23 CT 6351). However, CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. For example, it does not tell the jury why victim impact evidence was introduced, and does not caution the jury against an irrational decision.

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against

---

[32] The first four sentences of this instruction come from the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on the decision of the New Jersey Supreme Court in *State v. Koskovich*, *supra*, 776 A.2d at page 177.

being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

In every capital case "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction appellant proposes here would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision.

The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., Amends. 6th, 8th & 14th; Cal. Const., art. I, §§ 7, 15, 16 & 17.) The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that they affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the volume of victim impact evidence admitted in this case (see Argument V, *supra*), and the prosecution's argument to the jury, the trial court's instructional error cannot be considered harmless, and therefore reversal of the death judgment is required.

VII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL REBUTTAL EVIDENCE.

A. INTRODUCTION

Appellant's mother testified about appellant's childhood and the family violence he was witness to and a victim of from a very young age. The defense also presented expert witness testimony regarding brain injuries appellant sustained in his youth. Finally, several of appellant's relatives testified regarding appellant's difficult child hood and their loving and close relationships with him. At the conclusion of the defense case, the prosecutor sought to introduce as rebuttal evidence a letter appellant allegedly wrote to his wife while he was incarcerated. (45 RT 6405-6406.)

The prosecutor argued that the letter was admissible "to rebut the character evidence that's been presented," claiming that the letter showed appellant's "violent character and the true nature of his disposition to violence." (45 RT 6406.) The defense objected to the evidence on the ground of relevance, and under Evidence Code section 352 as the contents were more prejudicial than probative arguing that, under the circumstances, admission of the letter would violate appellant's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.(45 RT 6406-6407.) As defense counsel pointed out the letter was not directly related to any defense evidence: "So I don't think that we have a jury that's sitting there thinking that he's not violent, and I haven't put on any evidence that he's not a violent person. So while there's been some presentation of evidence of positive character traits or good deeds that he's done, I haven't

gone into his character trait for violence. That's really what this whole letter goes to, and this specific passage goes to." (45 RT 6410.)

After hearing argument on the matter, the trial court overruled appellant's objection on all grounds. (45 RT 6408.) The prosecution subsequently read the letter to the jurors as follows:

> If I can't get you, I'm getting the closest thing to you, bitch. You stole my cars and clothes, now I'm stealing you from you, and those kids. Fuck you, hoe. You stank bitch, get my cars to my grandma, or I'm smokin you, and I'm startin with that little dirt bitch you trust so much.
>
> If you move, I will force you back to L.A. I'm going to get you, bitch. You know what I do to fools that steal from me. You ain't no different than nobody else. You got a mother fuckin nigga drivin my shit like it's yours. I wouldn't care if it was yo punk ass daddy driving my shit. I'm the only person being a man that's to be behind the wheel of my shit. You surrounded by bunch of busters. And I'm going to bust on they ass. Talking bout you scared to walk down the street in Mo Vall. I'm the one to be scared of. You disrespected me and my dead uncle. If Norman was any kind of man, he wouldn't be driving another man's car. That just proves what I always knew. I'm the mother fucka named Mike that everybody wants to be like. You sistas even want they punk ass man to be like me, but I'll never be a snitch or a backstabber.
>
> Bitch ass Mike Mike damn near cried when he thought I wasn't going to get him and his buddies out of jail. You crossed the final line. See you at the crossroads, bitch. If I don't get all my shit, I'm taking all your shit, bitch. I'm already a dead man walking, so can't shit — so can't shit you say or do hurt me. But I can do a whole lot to hurt you. Get your sister's boyfriend and husbands all together and tell them I know who it is that recently caught a case that no one knows about but me. And the way I found out is because their name popped up in some new paperwork of mine. You know who you are. Why you didn't tell nobody you went to jail, don't deny it. I got it in black and white. Stop what you're doing because if you come to the penn

with me, I'm going to put lipstick on you, fuck, and make you my bitch, and your 30 pound boxes will be mine. I'm the real rider and you know that. You have been warned, don't slip and go to the penn. Tell Mike Mike I know what happened in Mule Creek when he was there. I'll be in Centinela groovin with the race riots.

You are now considered road kill, bitch, and if you run from it, your best friend takes your place. I know more than you think I know and I'm going to prove it.

I'm a fuck yo unclean ass off just for sending me through this bull shit.

Until doomsday, yours that is;

Nate, (rides again).

Bitches tuck their tails. Me, I'm a mutt, I've seen it all.

You been visiting fool in L.A. County, and he went to jail in my car. Guess what, L.A. County is my jail. I'm going to have that fool talked to. You fucked over the wrong person. I'll have yo head spent around, bitch. Did you think I wouldn't find out you got another man playing daddy to my baby. Cuz you went out like a sucka and don't even know it. You better hope I never get out. Because if I do, they're going to bury you. They're going to slide your ass right in that wall. When you go to Club Paradise, the home boy from Shotgun is going to put hands on you for me. He has spoken to you before so has my Jamaican home from schoolyard. Ta'bernay and her — Ta'bernay and her only is your shield of safety. She's the only reason you ain't been touched. And I will be pressing charges on that fool for G.T.A., stealing my car. Then they will bring me to L.A. to go to court, and they better not put me next to him in L.A. because I'll put dick in him, and I ain't gay. That's why you didn't want to put me in contact with the little homies because you were out there tricking, and you knew or thought they would check yo stupid ass.

> You ain't the only person I know out there, but I'm sure you figured that out by now. By the way, I was going to send Tabby a birthday card but the jail wouldn't let me."

(45 RT 6500-6502 [spelling and other errors in original].) This letter was then relied upon heavily by the prosecution throughout his closing argument. (45 RT 6523, 6526, 6548, 6560-6561.)

As discussed more fully below, the trial court committed reversible error in admitting this evidence which exceeded the proper scope of rebuttal, because the defense did not "open the door" to it. Accordingly, the evidence was improper, because nothing in the defense case made it "necessary." (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1302; *People v. Thompson* (1980) 27 Cal.3d 303, 330.) Admitting this improper "rebuttal" evidence also violated appellant's rights to have reasonable limits placed on the admission of aggravating evidence (U.S. Const., 5th, 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586; Cal. Const., art. I, §§ 7, 15, 27), to receive due process and a fair trial (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [federal constitutional error to deprive defendant's interest in having state adhere to specific methods prescribed for deciding whether to impose death penalty]; *Estelle v. McQuire* (1991) 502 U.S. 62; Cal. Const., art. I, §§ 7, 15]), and to a reliable penalty determination. (U.S. Const., 8th and 14th Amends.; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gardner v. Florida, supra,* 430 U.S. 349; Cal. Const., art. I, §§ 7,27.)

Reversal of the death judgment is thus required both under California law and the federal and state Constitutions.

B. THE LETTER WAS INADMISSIBLE BECAUSE REBUTTAL TESTIMONY MUST RELATE TO AN ISSUE RAISED BY THE DEFENDANT.

Rebuttal evidence is only proper when made necessary by the defendant, "'in the sense that he has introduced new evidence . . . .'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 330, quoting from *People v. Carter* (1957) 48 Cal.2d 737, 753-754; *People v. Jackson* (1980) 28 Cal.3d 264, 333 (diss. opn. of Bird, C. J.), revd. on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889.) "[T]he usual rule [on rebuttal evidence] will exclude *all evidence which has not been made necessary by the opponent's case in reply.*" (7 Wigmore, Evidence (Chabourne rev. 1978) §1873 [emphasis in original].)

Generally, a defendant who places his character in issue by presenting mitigating evidence opens the door to "prosecution evidence tending to rebut that 'specific asserted aspect' of [his] character." (*People v. Mitcham* (1990) 1 Cal.4th 1027, 1072; *People v. Hart* (1999) 20 Cal.4th 546, 653.) However, "[t]he scope of [penalty phase] rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn 24; *People v. Jones* (1998) 17 Cal.4th 279, 307; *People v. Carpenter* (1997) 15 Cal.4th 312, 408-409.)[33] As this court has observed:

---

[33] This rule that rebuttal evidence must actually respond to the defendant's case also applies in prosecutions under the federal death penalty statute. Thus, *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 896-896, held that it was error to admit victim impact evidence to rebut evidence about the defendant's troubled background and good qualities, because it was not "reasonably tailored" to meet the defendant's evidence. *Stitt* points out that there must be a "reasonable nexus between the purported rebuttal evidence and the evidence it seeks to rebut." (*Id.* at p. 897, citing *United States* v. *Curry* (4th Cir. 1975) 512 F.2d 1299, 1305.)

> [W]e have firmly rejected the notion that "any evidence introduced by defendant of his 'good character' will open the door to any and all 'bad character' evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." [Citation.] In particular, "[e]vidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct." (*In re Lucas* (2004) 33 Cal.4th 682, 733.) When a witness does "not testify generally to defendant's good character or to his general reputation for lawful behaviors, but instead testifie[s] only to a number of adverse circumstances that defendant experienced in his early childhood," it is error to "permit[] the prosecution to go beyond these aspects of defendant's background and to introduce evidence of a course of misconduct that defendant had engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination." (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1193; see also *In re Jackson* (1992) 3 Cal.4th 578, 613-614, disapproved on another point by *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

(*People v. Loker* (2008) 44 Cal.4th 691, 709-710.)

In the present case the mitigating evidence presented by the defense did not relate generally to appellant's character. Appellant's mother described appellant's childhood and the family violence he was a witness to and a victim of from a very young age. Other family members testified about their loving relationships with appellant. The defense also presented an expert witness who discussed appellant's mental disabilities. The letter was not directly relevant to any of this evidence.

The prosecution argued the letter was proper rebuttal to the defense evidence as follows:

> The defendant has presented evidence that the — he's a person of such character that he's important for his family members to maintain a relationship with him, maybe someone they can go

> to for advice. This conveys to the jury that he is somewhat of a person of good character and that perhaps these crimes that he committed were an aberration perhaps due to the brain injury that he suffered in 1989.
>
> This letter tends to show that the defendant is not only a violent predator who would engage in further acts of violence given the opportunity, not only to his wife but to somebody who happens to come across his path in prison should he have the opportunity to come acrossed [sic] this one person in jail or somebody related to him, I would suggest, that he would take out vengeance upon that person for some wrong that he feels he has befallen by that person's hand or some relationship that person had with his ex-wife.
>
> That section there shows what kind of violence the defendant is not only contemplating but capable of, and I think it's relevant to put before the jury the true character of the defendant, that not only would he consider doing violence to his wife for cheating on him but to other individuals that he may come across in the jail he thinks have wronged him. It paints a true character of the defendant's propensity to violence and how dangerous he actually is, and I would ask that part be left in.

(45 RT 6408-6409.) In essence, the prosecutor argued that the letter was proper rebuttal to ***all*** of the defense mitigating evidence because it showed appellant's character for violence.

However, as noted above, penalty phase rebuttal is restricted to "aspects of the defendant's background on which [he or she] introduced evidence." (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1191, 1193; *In re Jackson* (1992) 3 Cal.4th 578, 613.) Thus, in *Ramirez* this court found it was error to admit rebuttal evidence concerning a "course of misconduct that defendant engaged in throughout his teenage years that did not relate" to his mother's mitigation testimony about his difficult childhood. (50 Cal.3d at p. 1193.) Similarly, because the defense in the instant case did not introduce any

evidence relating to appellant's character for non-violence, evidence purporting to show appellant's character for violence constituted improper rebuttal.

While this court has on several occasions upheld the admissibility of various types of penalty phase rebuttal evidence, those cases are crucially distinguishable from appellant's, because they all involved evidence that ***did*** respond directly to specific mitigating character evidence offered by the defense. For example, in *People v. Carpenter*, *supra*, because the defendant offered evidence that he was respectful to women and "good with his children," it was proper to rebut that testimony with evidence that he encouraged a 14-year-old girl to engage in prostitution. (15 Cal.4th at pp. 408-409.) Similarly, in *People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1071-1072, the rebuttal evidence at issue directly contradicted proffered mitigation in that evidence about the defendant's "calculated and purposeful" behavior while committing an uncharged robbery, and about his involvement in juvenile misconduct, was admitted to counter assertions that he "act[ed] out of character and under the influence of PCP" in committing the charged crimes, and was "general[ly] a well behaved youth." (*Id.* at pp. 1071-1072.) *Carpenter* and *Mitcham* involved reasonable applications of the *Ramirez* standard, because in those cases the defendants "open[ed] the door to prosecution evidence tending to rebut" their specific character evidence. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1072; see *People* v. *Siripongs* (1988) 45 Cal.3d 548, 576-578 [proper to rebut evidence of defendant's truthfulness and honesty with evidence of prior convictions involving dishonesty].) The same is not true here because the defense did not offer evidence of good character and more specifically did not offer evidence of a

non-violent character. The trial court, therefore, erred in admitting the letter which was argued to show appellant's violent nature into evidence.

C. PREJUDICE

The trial court's error in admitting the letter violated appellant's rights to have reasonable limits placed on the admission of aggravating evidence (U.S. Const., 5th, 8th and 14th Amends.; *Lockett v. Ohio*, *supra*, 438 U.S. 586; Cal. Const., art. I, §§ 7, 15, 27), to receive due process and a fair trial (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [federal constitutional error to deprive defendant's interest in having state adhere to specific methods prescribed for deciding whether to impose death penalty]; *Estelle v. McQuire*, *supra*, 502 U.S. 62; Cal. Const., art. I, §§ 7, 15]), and to a reliable penalty determination. (U.S. Const., 8th and 14th Amends.; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; see also *Gardner v. Florida*, *supra*, 430 U.S. 349; Cal. Const., art. I, §§ 7,27.) Admitting this improper rebuttal evidence was certainly not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is also required under the *Watson* standard, because it is reasonably probable the jury would have reached a more favorable verdict without this improper testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecutor's strategy was to convince the jurors that appellant was a "sadistic killer" and thus among the "worst of the worst" who deserve the death penalty. (See, Strang, *The Rhetoric of Death,* 1998 Wis. L. Rev. 841, 853 [the death penalty must be "reserved for the worst of the worst"].) The letter was a crucial component of that strategy, and was repeatedly mentioned by the prosecutor during closing argument. In fact the prosecutor referred to the letter in arguing that appellant, rather than Curtis Williams, was the shooter. (45 RT 6526.) The prosecutor also relied on the contents of the letter

to negate mitigating evidence regarding appellant's brain injury: "Yes, he has brain damage. But you know what? So what? It's not an excuse for the crimes he committed. It's not a causal effect of the crimes he committed. And it didn't diminish his ability to appreciate how wrong his crimes were. [¶] How he thinks and how he feels and who he is is evident in that last letter that was introduced to you in my rebuttal. That shows you the true character of Richard Nathan Simon. So when you hear that factor and you discuss the defendant's brain damage, know that but for the fact — actually, that's what it comes down to. You cannot say that these crimes would not have occurred but for his brain damage. Brain damage did not play a factor or a part in the commission of these crimes. And there's no evidence that they did." (45 RT 6548.) Discussing the letter in more detail, the prosecutor argued:

> Who and what the defendant really is, what he's all about, and what his character is is so clear from this letter that he wrote that was in an unmarked envelope included with a letter to his cousin, Terri Richardson, in March of 1997, seized by Sergeant O'Harra.
>
> You have this letter, People's Exhibit 58, in evidence. Look at his handwriting. I know I couldn't read the slang very well. Read it and you will see what this defendant is all about. There's no remorse in this man. There's none whatsoever. You cross him, you're dead.
>
> He writes to Keisia. "If I can't get you, I'm getting the closest thing to you, bitch. You stole my cars and clothes. Now I'm stealing you from you and those kids." He's threatening to kill his wife Keisia because she stole his cars.
>
> "Fuck you ho. You stank bitch get my cars to my grandma or I'm smokin' you. And I'm startin with that little dirt bitch you trust so much."

> He's willing to kill other people. He wants to kill other people to get even with his wife for a wrong that she's done to him. This is his character. This is who the defendant is. This is who they want you to find value in saving, to live a life incarcerated so that they can talk to him on the phone and he can provide advice to his 17-year-old daughter.
>
> "I'm going to get you bitch. You know what I do to fools that steal from me. You ain't no different than nobody else."
>
> No remorse in this man. He's gotten even with people before, and he knows she knows it.
>
> "You got a motherfucka" -- I can't even say this. "You got a motherfuckin nigga drivin my shit like it's yours. . . . Talking bout you scared to walk down the street in Mo Vall. I'm the one to be scared of. You disrespected me and my dead uncle. . . . I'm the motherfucka named Mike that everybody wants to be like. You sistas even want their punk ass man to be like me."
>
> He is proud of the badass criminal that he thinks he is.

(45 RT 6560-6501.)

Clearly the prosecutor relied heavily upon the letter in arguing that appellant deserved the death penalty. However, this improperly admitted evidence was "not of the type which should influence a life or death decision." (*People v. Boyd, supra*, 38 Cal.3d 776.) Thoughts expressed in letters are too ephemeral and unreliable to provide a fair basis for a death sentence. Yet, this inadmissible letter undoubtedly left a very negative impression on the jury, and was used to unfairly undermine all of the mitigating evidence presented by the defense. Consequently, there is a strong likelihood that the evidence affected the jury's decision and appellant's death sentence must, therefore, be reversed.

VIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO COUNSEL AND TO DUE PROCESS AT THE PENALTY PHASE BY REFUSING TO ALLOW DEFENSE COUNSEL TO REFER TO OTHER PROMINENT MURDER CASES DURING CLOSING ARGUMENT IN ORDER TO GIVE JURORS A FRAME OF REFERENCE IN EVALUATING THE GRAVITY OF THE OFFENSES, AND BY PRECLUDING THE JURY FROM CONSIDERING APPELLANT'S CASE IN LIGHT OF OTHER MURDER CASES.

A. INTRODUCTION

The prosecution focused heavily on the circumstances of the crime in arguing in favor of the death penalty, and bolstered the argument by incorrectly informing jurors they were not permitted to compare the facts of the case to those of other murder cases. Defense counsel sought to rebut the prosecution's argument by referring to well-known cases in order to give jurors a frame of reference in evaluating the gravity of the crimes. Although counsel's argument comparing the facts of the case to other well-known murder cases was entirely proper, the trial court sustained the prosecutor's objection and precluded counsel from making the argument.

It is well settled that counsel is allowed wide latitude in closing argument, and may refer to matters of common knowledge or illustrations drawn from experience, history, or literature. In this vein numerous cases have approved references to notorious individuals such as Adolf Hitler, Charles Manson, Timothy McVeigh, the Boston Strangler, and even the Marquis De Sade, during argument. It is also generally recognized that during penalty phase closing argument counsel may discuss other cases and crimes in order to assist jurors in exercising sentencing discretion. In a number of cases courts have permitted counsel to comment on and compare the

circumstances of the case with those existing in notorious cases, but have imposed limitations when counsel has sought to go further and discuss the sentences imposed by other jurors. In these situations courts have been concerned that any meaningful discussion of the sentence imposed in another case would require a time consuming review of all of the factors in mitigation and aggravation present in that case, and have exercised discretion to limit counsel to a reasonable time and to ensure that argument did not stray unduly from the mark.

While this court has noted that arguments discussing ***sentences*** received by defendants in other cases, based on different facts and evidence not before the jurors, is of dubious relevance, it has also recognized the propriety of arguments referring to the ***facts*** of well known cases in order to make the point that there have been murder cases involving more shocking, heinous, cruel or callous facts than the case before the jurors. There is a clear difference between reference to the facts of other well known cases in order to put the circumstances of the crime in context and an argument that the penalty in a given case should be determined by examining the penalty imposed in other cases. Here the excluded argument related to the facts of well known cases, and was intended to assist the jurors in their assessment of the gravity of the crimes in the present case. Counsel made no attempt to mention or discuss the sentences imposed in other cases.

The trial court's ruling was not based upon a finding that counsel's proposed argument related to a matter of dubious relevance or would have been overly time consuming. Instead it was based upon an erroneous conclusion, which was communicated to the jurors by both the prosecutor and the trial court, that jurors were not permitted to compare the facts of the case to those of other cases. Contrary to the argument of the prosecution, and the

ruling of the trial court, jurors are not precluded from comparing the facts of the case to those of other criminal cases they might be aware of in order to determine if death is the appropriate punishment. By eliminating a common point of reference and the principal tool by which jurors could determine what weight to give to the circumstances of the crime, the trial court skewed the weighing process in favor of the prosecution. These errors resulted in the denial of appellant's constitutional rights to due process, a fair trial, the effective assistance of counsel, and a reliable penalty determination.

B. PROCEEDINGS BELOW

The prosecutor relied heavily on factor (a) of Penal Code section 190.3, the circumstances of the crime,[34] to convince jurors their verdict should be death. He bolstered this argument by urging jurors to consider the gravity of the offenses in isolation, and incorrectly informing them they were not permitted to compare the facts of the case to those of other murder cases:

> And what you're asked to consider is not a comparison of him to other killers, not a comparison of his crimes to other crimes, but to look at the crimes that he did commit and his participation in them and why he committed those crimes, how he committed those crimes, what he did after those crimes, and his background and his history.

(46 RT 6526.) He closed his remarks with the following: "There's an old quote that is fitting and appropriate. It says, quote, 'Punishment is the way in which society expresses its denunciation of wrongdoing. And in order to maintain respect for the law, it is essential that the punishment inflicted for

---

[34] More specifically Penal Code section 190.3 states: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1."

grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. The truth is that some crimes are so outrageous that society insists on adequate punishment simply because the wrongdoer deserves it.'" (46 RT 6561-6562.)

Defense counsel sought to counter the prosecution's argument by putting the facts of the case in perspective, pointing out that there were far worse crimes:

> We're not asking ourselves is Mr. Simon one of worst thieves out there? We're asking ourselves, we're up in this upper category, is he among that select group that deserves the death penalty?
>
> And think about, I mean, you've all read cases, you're all familiar with the types of cases where you may have a feeling that the death penalty is warranted because those cases are usually in our media, the Timothy McVeighs the Charles Mansons, those types of people. You're free to consider that. You're free to consider what types offenders you've read about are deserving of the death penalty.

(46 RT 6582.) The prosecutor immediately objected to counsel's reference to other murder cases, prompting the following discussion outside the presence of the jurors:

> [DEFENSE COUNSEL]: There is a case, I don't have it with me, it is in my materials in the car. Prosecutor argued that this defendant was like Adolph Hitler and like Charles Manson, and the defense objected. The court overruled the objections, and the California Supreme Court said it was a valid argument because it helped the jurors put into context what kind of offenders deserve the death penalty.[35]

---

[35] Here counsel accurately describes *People v. Milwee* (1998) 18 Cal.4th 96, discussed at length below.

> [PROSECUTOR]: I'm not familiar with that case, but it is a comparison. All of the cases hold, and death penalty case law is set up and the whole statute is set up on the individual determination of the defendant's guilt for the crimes and conduct he engaged in. It's the special circumstances that qualify him for the death penalty.
>
> THE COURT: Right.

(46 RT 6583.) The prosecutor continued: "When he starts trying to compare, he is not as bad as Timothy McVeigh. He is not as bad as Charles Manson. That's what is improper." (46 RT 6584.) In support of his position that defense counsel's argument was inappropriate, the prosecutor argued: "In *People v. Jenkins*, a 2000 case at 22 Cal.4th at 900, page 1052, it says: 'Jury's consideration of the circumstances of the crime under factor (a) is an individualized function and not a comparative function.'" (*Ibid.*) The trial court ultimately agreed that defense counsel's argument was improper. (46 RT 6585-6588.)

After the objection was sustained, defense counsel continued his argument to the jurors and attempted to make his point in a more general way:

> The point I'm trying to make is that we have a category of offenders up here in the top of this pyramid, and the law reserves the death penalty for those that are the worst among that group, and I've invited your attention to some cases where those offenders are probably deserving of that penalty. It doesn't mean that their case is exactly the same as Mr. Simon's. It's just merely to help guide you in understanding the kind of people we're talking about in this category. So to that extent you are making a comparative analysis.

(46 RT 6587-6588.) The prosecutor again objected and, in sustaining the objection in open court, the trial judge stated: "I think comparative analysis is improper, I agree." (46 RT 6588.)

C. DISCUSSION

The right to counsel under both the state and federal constitutions includes the right to have counsel present closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 858-865; *People v. Marshall* (1996) 13 Cal.4th 799, 854.) Moreover, due process requires that defendants be given a fair opportunity to rebut the prosecution's argument for death. (*Simmons v. South Carolina* (1994) 512 U.S. 154 [failure to allow rebuttal of future dangerousness]; *Gardner v. Florida* (1977) 430 U.S. 349; *People v. Bandhauer* (1967) 66 Cal.2d 524, 531 [recognizing "that each side should have an opportunity to rebut the argument of the other."]; see also *People v. Robinson* (1995) 31 Cal.App.4th 494, 505 [in non-capital trial, reversible error for prosecutor to withhold argument until his rebuttal in order to deny defense chance to reply].)

Defense counsel is allowed wide latitude in closing argument, particularly in capital cases. (See *People v. Guzman* (1975) 47 Cal.App.3d 380, 392; *People v. Woodson* (1964) 231 Cal.App.2d 10, 16; *People v. Keenan* (1859) 13 Cal. 581, 585.) Generally, "[c]ounsel may illuminate his argument by illustration which may be as various as the resources of his talents" (*People v. Kynette* (1940) 15 Cal.2d 731, 757), and may refer to "matters of common knowledge or illustrations drawn from experience, history, or literature" (*People v. Farmer* (1989) 47 Cal.3d 888, 922).[36] In fact,

---

[36] See also *People v. Sandoval* (1992) 4 Cal.4th 155, 193; *People v. Thornton* (1974) 11 Cal.3d 738, 763 [holding that it was not improper for the prosecution to refer to the Marquis de Sade during guilt phase closing argument: "The prosecutor certainly had a right to point out to the jury that modest behavior at one time and place, i.e., in the courtroom, is not inconsistent with depraved conduct under other circumstances, and his recourse to history and literature to make this point was not improper in the circumstances."]; *People v. Travis* (1954) 129 Cal.App.2d 29, 37-38 [""""His

it is an abuse of discretion for a trial court to bar defense counsel from making a closing argument based on well known incidents which pertain to his client's defense. (*People v. Travis, supra,* 129 Cal.App.2d at pp. 37-39 [abuse of discretion to bar defense counsel from reading articles on confessions coerced from American POWs during the Korean War where defense based on argument that defendant's confession was coerced]; accord *People v. Love* (1961) 56 Cal.2d 720, 730; see also *People v. Guzman* (1975) 47 Cal.App.3d 380, 392 [abuse of discretion to bar reading of article on false identifications where defense based on theory of misidentification].)

More specifically, this court has held that during penalty phase closing argument counsel may discuss "other cases and crimes in order to assist jurors in exercising sentencing discretion." (*People v. Milwee, supra,* 18 Cal.4th at p. 153.) This court has also rejected the notion that penalty phase closing arguments may not include an inter-case proportionality analysis, and has recognized that closing arguments are "not governed by the settled rule that our death penalty law does not encompass inter-case proportionality review." (*People v. Marshall, supra,* 13 Cal.4th at p. 854.)

In *Milwee* the prosecutor compared the defendant to well known murderers such as Adolf Hitler and Charles Manson, and contrasted the case with other murder cases which the prosecutor characterized as more deserving of leniency. (*People v. Milwee, supra,* 18 Cal.4th at p. 153.) The trial court's action in overruling the defense objection to this line of argument was upheld on appeal. In considering the matter, this court concluded that the remarks were proper in that they "made it clear that death was not automatically or

---

illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination."""].

necessarily appropriate in every first degree murder case, even those involving special circumstances, and that life imprisonment should be rejected based on the particular facts of this case." (*Id.* at pp. 153-154.) The argument defense counsel sought to make in the present case was functionally identical.

Here counsel sought to refer to other well known cases in order to put the facts of this case in context by showing that appellant was not one of the "worst of the worst." The argument disallowed by the trial court was clearly acceptable under *Milwee*, and was entirely consistent with the overriding principle that the death penalty must be reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens* (1983) 462 U.S. 862, 877 n.15.)

The sole case cited by the prosecution in favor of a prohibition on the proposed line of argument did not relate to the permissible scope of closing argument, but instead addressed an entirely different issue. The prosecution relied on *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1052, to argue: "Jury's consideration of the circumstances of the crime under factor (a) is an individualized function and not a comparative function." (46 RT 6585.) However, the portion of the *Jenkins* opinion referred to by the prosecutor related to the constitutionality of the death penalty statute in light of a vagueness challenge. The issue under discussion was summarized as follows:

> Defendant contends section 190.3, factor (a), permitting the jury to consider the circumstances of the crime in aggravation, has been applied "in such a wanton and freakish manner," without the application of any reasonable limiting construction by this court, that it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Defendant contends the provision is unconstitutionally vague as applied, because it has permitted prosecutors to argue that any conceivable circumstance of a charged crime should be considered in aggravation. He points out that rather

> contradictory circumstances may be considered in aggravation in different cases, and contends that prosecutors point to circumstances of the crime that "cover the entire spectrum of [facts] inevitably present in every homicide." He urges that the provision is applied in an arbitrary and capricious manner so as to violate the federal guarantee of due process of law.

(*Id.* at pp. 1050-1051.) With regard to this challenge, the paragraph containing the statement referred to by the prosecution reads as follows:

> Defendant's claim essentially is that section 190.3, factor (a) is so vague and open-ended that it has resulted in prosecutors making inconsistent or overinclusive arguments with respect to the significance of circumstances of the charged crime. This result is not improper in view of the circumstance that factor (a) provides adequate guidance to the jury in selecting the appropriate penalty. It is not so vague as to risk "'wholly arbitrary and capricious action'" [citation]; the jury is engaged in an individualized sentencing process [citation], and the jury appropriately has very broad discretion in determining whether the death penalty should be imposed. [Citation.] A jury should consider the circumstances of the crime in determining penalty [citation], but this is an individualized, not a comparative function. The jury may conclude that the circumstance that a murder was committed with cold premeditation is aggravating in a particular case, while in another case another jury may determine that the circumstance that a murder was committed in a murderous frenzy is an aggravating factor. The ability of prosecutors in a broad range of cases to rely upon apparently contrary circumstances of crimes in various cases does not establish that a jury in a particular case acted arbitrarily and capriciously. As with the factor of the defendant's age, the adversary process permits the defense, as well as the prosecution, to urge the significance of the facts of the charged crime. Defendant fails to persuade us that these circumstances deprive him of due process of law.

(22 Cal.4th at pp. 1052-1053.) The statement relied upon by the prosecution was clearly taken out of context, and *Jenkins* in fact does not support the limitation imposed by the trial court on defense counsel's argument.

A trial court does have discretion to limit counsel to a reasonable time, and to ensure that argument does not stray unduly from the mark. (*People v. Marshall, supra*, 13 Cal.4th at p. 854; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1185; *Herring v. New York, supra*, 422 U.S. at pp. 860-862.) Consistent with these principles, this court has upheld limitations on the discussion of other well known cases when counsel has sought to argue that the defendant should not receive the death penalty based upon whether or not the defendants in other, either comparable or worse, cases were sentenced to death. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 109-111 [trial court prohibited defense counsel from arguing "that Buono got life without parole, and if that's what he got then from that jury down there that by contrast Mr. Benavides should get the same thing . . . ."]; *People v. Hughes* (2002) 27 Cal.4th 287, 398-400 [trial court prohibited discussion of other cases by defense counsel "in order to illustrate his thesis that defendant was not the 'worst of the worst,' and therefore he did not deserve the death penalty when others who had committed worse crimes were not also given the death penalty."]; *People v. Sakarias* (2000) 22 Cal.4th 596, 639-640 [trial court sustained objection to defense counsel's statement that Charles Manson and Sirhan Sirhan live today]; *People v. Marshall, supra*, 13 Cal.4th at pp. 853-855 [trial court prohibited detailed argument regarding the facts and circumstances of other notorious cases in which the death penalty was imposed]; *People v. Sanders* (1995) 11 Cal.4th 475, 554-555 [trial court prohibited counsel from referring "'to the fact that Charles Manson lives, is going to continue to live, and he's not as bad as Charlie Manson.'"].) These cases differ significantly from the present case in that here counsel was not seeking to discuss sentences imposed in other cases in order to argue for a particular result in this case, but instead was seeking only to refer to other

cases in order to give the jurors a frame of reference in evaluating the primary factor in aggravation relied upon by the prosecution — the gravity of the circumstances of the offenses.

The rational behind exclusion of argument based upon the sentences imposed in other cases is made clear in *People v. Hughes*, *supra*, 27 Cal.4th at pp. 399-400. There defense counsel was precluded from discussing other well known cases that had not resulted in the death penalty in order to argue that Hughes similarly should not be sentenced to death. As the prosecutor noted, "there were various reasons why these and other similar cases did not result in an enforced death penalty (e.g., the *Baca* case resulted in a plea agreement; and in the *Sirhan* case, a jury did impose the death penalty, but the law later was declared unconstitutional). The prosecution stated further that if such argument were allowed, he should be allowed to inform the jury of the facts of each of the cited cases and explain to the jury why the death penalty was not imposed in each particular case." Under these circumstances, the trial court's exercise of discretion to curtail the argument as too time consuming was upheld on appeal. (*Id.* at p. 400.)

In light of the factors mentioned in *Hughes*, sentences received by notorious defendants in other cases, based on different facts and evidence not before the jurors, is of dubious relevance. (*People v. Roybal* (1998) 19 Cal.4th 481, 529.) However, there is a clear difference between an argument that the penalty in a given case should be determined by examining the penalty imposed in other well known cases and an argument urging jurors to evaluate the gravity of the circumstances of the offense factor in context of other well known cases. While arguments based upon the sentence imposed in other cases have been found to have been appropriately excluded, courts have

universally permitted arguments making reference to well known cases in an effort to put the circumstances of the offense in perspective.

For example, in *People v. Marshall*, *supra*, 13 Cal.4th 779, the trial court held that counsel could permissibly comment on and compare the circumstances of the case with those existing in the other well known cases. However, the court ruled that it would be improper for defense counsel to refer to what the juries in those cases did. (*Id.* at p. 854.) On appeal, this court upheld the trial court's ruling as a proper exercise of discretion recognizing that meaningful discussion of the sentences imposed in other cases "cannot be made solely on the basis of the circumstances of the crime, without consideration of the other aggravating and mitigating factors. Yet the trial court could properly conclude that to allow counsel to argue all such factors would consume too much time and draw the jury's focus away from the instant case. In any event, counsel was granted the latitude to argue, as he sought, that this case lacked the cruelty and callousness found in other murder cases." (*Ibid.*) Accordingly, "[t]he trial court's ruling fell within its discretion to control the scope of closing argument and did not preclude defendant from making his central point: that there have been murder cases involving more shocking, heinous, cruel or callous facts than those present here." (*Id.* at p. 854.)

Similarly, in *People v. Benavides*, *supra*, 35 Cal.4th 69, the trial court permitted counsel wide latitude in discussing the facts of other well known cases during argument, but prohibited reference to the sentences imposed in those cases. On this point the trial court ruled:

> I have no problem with your talking about Charlie Manson . . . Adolf Hitler . . . the Boston Strangler . . . in general terms . . . suggesting that it is the people who commit crimes of such atrocity who are entitled to the death penalty. . . . And suggest

> then that by comparison an individual who has taken the life of an infant or someone who has gone in and shot two people while in their sleep ought not to receive the death penalty. [¶] But . . . you cannot appropriately single out one, two or three cases, talk about the facts in general and say this person killed nine nurses, fourteen nuns, did whatever, left them and then turned around and got life without parole. . . . . [C]ounsel, if your intent was to say that Buono got life without parole, and if that's what he got then from that jury down there that by contrast Mr. Benavides should get the same thing, I am not going to let you do it.

(*Id.* at pp. 109-110.) On appeal, this court found no abuse of discretion. In so ruling the court again noted that any meaningful discussion of the sentence imposed in another case would require "a time-consuming inclusion of all of the facts in mitigation and aggravation," and concluded that the trial court had not abused its discretion in precluding the defense from discussing the sentences imposed by jurors in other cases. In finding no abuse of discretion the court recognized that the trial court did not preclude the defense "from arguing that there were other murderers worse than he." (*Id.* at p. 110.)

The type of argument counsel was prevented from making in the present case was ***permitted*** by the trial courts in *Marshall* and *Benavides*. It was only when counsel in those cases sought to go further and discuss the penalties imposed in well known cases — to argue that because the defendants in those cases did not receive the death penalty that the defendant in their cases similarly should not be sentenced to death — that the trial courts stepped in and limited the arguments. Here the trial court issued an outright ban regarding any discussion of other cases and prevented counsel from making the central point that there were murder cases involving more shocking, heinous, cruel or callous facts. In upholding the rulings in *Marshall* and

Benavides this court found it significant that counsel in those cases had been permitted to make this exact argument.

Further, unlike the rulings in *Marshall* and *Benavides*, the trial court's ruling here was based not upon a finding that counsel's proposed argument was overly time consuming, but rather upon an incorrect interpretation of the law. Contrary to the argument of the prosecution, and the ruling of the trial court, jurors are not precluded from comparing the facts of the case with those of other criminal cases they might be aware of in order to determine if death is the appropriate punishment. (See *People v. Marshall*, *supra*, 13 Cal.4th at p. 854; see also *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1277 fn. 6, dis. opn. of Broussard, J. ["I know of no authority that a juror, in deciding the weight to be given to the circumstances of the crime, or whether death is the appropriate penalty, may not mentally compare the facts of the case to those of other cases."].) The trial court's ruling, therefore, can not be upheld as an appropriate exercise of discretion since a decision "that transgresses the confines of the applicable principles of law is outside the scope of discretion" and is an abuse of discretion. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; see also *Penner v. County of Santa Barbara* (1995) 37 Cal.App.4th 1672, 1676 [legal conclusions are reviewed de novo]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 [holding that judicial discretion can only truly be exercised if there is no misconception by the trial court as to the basis for its action].) Because the ruling was based upon an incorrect interpretation of law, and can not be upheld as an appropriate exercise of discretion, the trial court's limitation on the scope of counsel's argument constituted an improper interference with appellant's right to counsel and a denial of due process.

The trial court's error in limiting defense counsel's argument was compounded by the fact the jurors were incorrectly informed, by both the prosecutor and by the trial judge, that comparisons with other cases were improper. The jurors were, thus, deprived of a point of reference with which they were familiar in assessing whether or not appellant was one of the "worst of the worst." The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any of the circumstances of the offense the defendant proffers as a basis for leniency. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1196.) "[A] juror faced with making the requisite 'individualized' determination whether a defendant should be sentenced to . . . death is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to 'each and all' of the relevant factors." (*People v. Brown* (1985) 40 Cal.3d 512, 541; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 470; *People v. Hardy* (1992) 2 Cal.4th 86, 202.) Jurors arrive at their decisions about the appropriate penalty through the subjective assignment of weights to the penalty phase evidence. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1230; *People v. Boyde* (1988) 46 Cal.3d 212, 253.) When the circumstances of the crime is the factor being assessed, a juror will subjectively assign weight to that evidence according to that juror's perception of the crime in the context of other grave crimes of which the juror is aware. The trial court's statement precluding the jurors from this reasoning was improper.

In *Benavides*, the trial court admonished the jurors: "'In your deliberations you are not to go back and to consider what other jurors may or may not have done in any particular case at any particular time because you were not there. . . . [T]he decision is yours. And in making that decision you

ought not to attempt to rely on what some other jurors may have done in any other case, one way or the other.'" (*People v. Benavides*, *supra*, 35 Cal.4th at p. 110.) This court determined that the trial court's admonition was not overly broad since "the court did not prohibit the jury from having a point of reference with other cases with which they were familiar while assessing whether or not defendant was the 'worst of the worst,' but correctly told the jury that each case is to be considered independently, and they were not to speculate as to what was before the jury in another particular case where the defendant did not receive the death penalty when assessing what was before them in this case." (*Ibid.*) Unlike *Benavides*, in the present case both the prosecutor and the trial judge incorrectly informed the jurors that they were not permitted to compare the facts of the case to other well-known cases.

The trial court not only prevented defense counsel from comparing the facts of the case to the facts of other well known cases, but also prevented the jurors from evaluating the gravity of the offense in light of other cases. This error violated appellant's rights to due process and to a reliable penalty determination.

D. CONCLUSION

Defense counsel's argument comparing the gravity of the offense to other well-known murder cases was entirely proper, and the trial court erred in precluding him from referring to matters of common knowledge in order to illustrate the worst of the worst cases and give the jurors a point of reference in assessing the circumstances of the offense. By refusing to allow counsel to discuss other well known cases the trial court improperly deprived him of an appropriate means of rebutting the prosecution's argument that the facts of this case were so egregious as to make death the only just result. The

ruling, therefore, constituted an improper limitation on the scope of trial counsel's closing argument, an aspect of the right to counsel.

This error was compounded by the fact that the jurors were incorrectly informed by the prosecution, and by the trial judge, that they were not permitted to consider the facts of other murder cases in evaluating the gravity of the charged offenses. A juror cannot properly vote for death unless the juror "upon completion of the 'weighing' process . . . decides that death is the appropriate penalty under all the circumstances." (*People v. Brown, supra*, 40 Cal.3d at p. 540; see *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1019; *People v. Mickey* (1991) 54 Cal.3d 612, 699.) By eliminating a common point of reference, and the principal tool by which jurors could determine what weight to give to the circumstances of the capital crime for which appellant was convicted, the trial court skewed the weighing process in favor of the prosecution. Together the errors resulted in the denial of appellant's constitutional rights to due process, a fair trial, the effective assistance of counsel, and a reliable penalty determination. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, § 15; *Simmons v. South Carolina, supra*, 512 U.S. 154; *Beck v. Alabama* (1980) 447 U.S. 625; *Herring v. New York, supra*, 422 U.S. 853; *Wardius v. Oregon* (1973) 412 U.S. 470.)

The circumstances of the crime was the primary factor relied upon by the prosecution, and it cannot be said beyond a reasonable doubt that the errors did not affect the jury's sentencing decision. (*Chapman v. California* (1967) 386 U.S. 18.) There is a reasonable possibility that but for the errors the outcome of the penalty trial would have been different. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Accordingly, appellant's death sentence must be reversed.

IX.

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

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.

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 United States 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) 548 U.S. 163 [126 S.Ct. 2516, 2527, fn. 6];[37] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme

---

[37] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser

criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

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

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As this court has recognized:

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

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make ***all*** murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offenses charged against appellant the

statute contained 27 special circumstances[38] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.[39]

In California, almost all felony-murders are now special circumstance cases, and felony-murder 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* (1984) 34 Cal.3d 441.) Section 190.2's reach 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.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the

---

[38] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 35.

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

legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and prevailing international law.[40] (See Section E. of this Argument, *post*).

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3, SUBDIVISION (A), AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Penal Code, section 190.3, subdivision (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.

---

[40] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

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 this provision 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.[41] The court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[42] or having had a "hatred of religion,"[43] or threatened witnesses after his arrest,[44] or disposed of the victim's body in a manner that precluded its recovery.[45] 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 of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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)

---

[41] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3 and CALCRIM No. 763(a).

[42] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10 [*cert. den.*, 494 U.S. 1038 (1990)].

[43] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [*cert. den.*, 112 S. Ct. 3040 (1992)].

[44] *People v. Hardy* (1992) 2 Cal.4th 86, 204 [*cert. den.*, 113 S. Ct. 498].

[45] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35 [*cert. den.* 496 U.S. 931 (1990)].

512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law 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. at pp. 986-990 (dis. opn. of Blackmun, J).) Factor (a) is used to embrace facts which 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 inevitable variations of every homicide — into aggravating factors which 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 upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Penal Code section 190.3, subdivision (a), allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or 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 inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," 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 a fellow human to death.

1. *Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.*

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 statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." This pronouncement, however, has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [hereinafter *Cunningham*].

In *Apprendi*, the high 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, supra*, 530 U.S. at p. 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*, *supra*, 536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring*, *supra*, 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. ***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 nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

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." (*Blakely*, *supra*, 542 U.S. at p. 299.) The State of Washington set forth 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. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.) In reaching this decision, the Supreme Court stated 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; "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." (*Id.* at p. 304 [emphasis in original].)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth 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.)

In *Cunningham,* the high court rejected this court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California*, *supra*, 549 U.S. 270.) In so doing, it explicitly rejected the reasoning used by this court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this court does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality relied upon as an aggravating circumstance — and even in that context the required finding need not be unanimous. (See *People v. Fairbank* (1997) 16 Cal.4th 1223; see also *People v. Hawthorne*

(1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Penal Code section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[46] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was provided to the jurors in the present case (23 CT 6399), "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.*" (CALJIC No. 8.88 [emphasis added].) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury, and before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[47] These factual determinations are

---

[46] This court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[47] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, 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, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State

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.[48]

This court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p. 1254.) However, the

---

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. 460)

[48] This court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

United States Supreme Court explicitly rejected this reasoning in *Cunningham.*[49]

In *Cunningham* the principle that any fact which exposes a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (25 Cal.4th at pp. 6-7.) That was the end of the matter. *Black*'s interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation]." (*Id.* at p. 13.) *Cunningham* then examined this court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to

---

[49] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black*: "Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Cunningham, supra,* 25 Cal.4th at p. 8 [citing *Black, supra*, 35 Cal.4th at p. 1253].)

> punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* 25 Cal.4th at p. 13.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Penal Code section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is simply wrong.

As Penal Code section 190, subdivision (a)[50] indicates, the maximum penalty for ***any*** first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual

---

[50] Penal Code section 190, subdivision (a), provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense." (*Cunningham, supra*, 25 Cal.4th at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected the argument: "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring, supra*, 124 S.Ct. at p. 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of 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, supra*, 530 U.S. at p. 604.) Penal Code section 190, subdivision (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance. (Pen. Code, § 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances

exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; CALJIC No. 8.88 (7th Ed., 2003).) "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*, *supra*, 530 U.S. at p. 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." (*Blakley*, *supra*, 124 S.Ct. at p. 2551 [emphasis in original].) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by Penal Code section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors — a prerequisite to imposition of the death sentence — is the functional equivalent of an element of capital murder, and is therefore subject to the protections of

the Sixth Amendment. (See *State v. Ring* (Az. 2003) 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* (Nev. 2002) 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 [noting that all features the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death].)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[51] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2442-2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

---

[51] In its *Monge* opinion, the United States Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[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.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. ***The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.***

a. Factual Determinations

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.)

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 Clause of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 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; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) 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 the Eighth Amendment.

b. Imposition of Life or Death

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. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra*, 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the United States Supreme Court reasoned:

> [I]n 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. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "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.] 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 impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jurors]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State 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*, *supra*, 428 U.S. at p. 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.

In *Monge*, the United States Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof

requirement to capital sentencing proceedings: "*[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.' ([*Bullington v. Missouri*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].) 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.

3. ***California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.***

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. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 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.4th 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.)

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; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) 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.) 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. 267.)[52] The same analysis applies 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. (Pen. Code, § 1170, subd. (c).) Capital defendants are entitled to ***more*** rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 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 generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section 4, *post*), the sentencer in a capital

---

[52] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

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.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 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. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code 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 would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. 163 [statute treating 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.

4. *California's Death Penalty Statute as Interpreted by this Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility 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 [emphasis added].)

California's 1978 death penalty statute, as drafted and as construed by this court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, *supra*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of Penal Code section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman*

v. Georgia, supra. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*, 548 U.S. 163), this absence renders the scheme unconstitutional.

Penal Code section 190.3 does not require that either the trial court or this court undertake a comparison between the case at bar and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro, supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. ***The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.***

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;

State v. Bobo (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented, over defense objection (25 RT 3572-3586; 36 RT 5166-5167), evidence regarding unadjudicated criminal activity relating to possession of "shanks" allegedly committed by appellant (42 RT 5976-6007), and devoted a portion of its closing argument to arguing these alleged offenses (46 RT 6540-6544).

The United States Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. ***The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.***

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. ***The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.***

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 mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) 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* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) 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 (for example, 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:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. [Citations.] Indeed, "*no reasonable juror could be misled by*

> *the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" [Citation.]

(*People v. Morrison* (2004) 34 Cal.4th 698, 730 [emphasis added].) This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.* at pp. 727-729.) This court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

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* (1985) 38 Cal.3d 765, 772-775) — and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during

penalty phase closing argument. At various times the prosecutor argued that appellant deserved the death penalty based upon evidence offered in mitigation which did not fit within any aggravating factor. (46 RT 6557 [argument that appellant deserved the death penalty because he understood what it was like to have a family member murdered]; 46 RT 6561-6562 [argument that appellant deserved the death penalty because he was capable of loving relationships with his family].)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State — as represented by the trial court — had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the pattern jury instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. 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.) 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.) A state may not create a classification scheme which 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; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State 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 *Prieto*,[53] as in *Snow*,[54] this court analogized the process of determining whether to impose death to a sentencing court's traditional discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of affording 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., Pen. Code, §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.420(e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[55]

---

[53] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[54] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

[55] In light of the Supreme Court's decision in *Cunningham*, *supra*, 25 Cal.4th 926, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C(1) - C(2), *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C(3), *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[56] (*Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 530].)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*, 536 U.S. 584.)

---

to be made beyond a reasonable doubt by a unanimous jury.

[56] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra*, 536 U.S. at p. 609.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed.

135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100; *Atkins v. Virginia* (2002) 536 U.S. 304, 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21 [citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4].) More recently, in finding that the Eighth Amendment now prohibits the execution of offenders under the age of 18, the Court observed: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality

does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.' [Citation.]" (*Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 1198]).)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[57] Categories of criminals that warrant such a comparison include persons

---

[57] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra*, 536 U.S. 304.)

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 reasons set forth herein, the judgment of conviction and sentence of death must be reversed.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I hereby certify that, according to my word processing program, this brief contains 74,006 words exclusive of this certification and the tables.

_____

Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over 18 years of age, employed in the county of Westmoreland, Pennsylvania, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 425, Ligonier, Pennsylvania. I served the Appellant's Opening Brief by placing a copy in an envelope for the addressee named hereafter, addressed as follows:

The Honorable Gordon R. Burkhart, Judge
Superior Court
P.O. Box 431
Riverside, CA 92502

Sharon L. Rhodes
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186

Michael Lasher, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Richard Nathan Simon
P.O. Box T34821
San Quentin, CA 94974

District Attorney
4075 Main Street
Riverside, CA 92501

Each envelope was then sealed and with postage thereon fully prepaid deposited in the United States mail by me at Ligonier, Pennsylvania, on March ___, 2010.

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

Executed on March ___, 2010, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove