IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARCUS ADAMS, Defendant and Appellant.	No. S118045 Los Angeles County Superior Court NO. BA181702-01

APPELLANT'S OPENING BRIEF

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

The Honorable Lance Ito, Judge

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PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S118045
Plaintiff and Respondent,	)	
	)	Los Angeles
	)	County
v.	)	Superior Court
	)	NO. BA181702-01
	)	
MARCUS ADAMS,	)	
	)	
Defendant and Appellant.	)	
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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, Marcus Adams, (hereinafter "appellant"), in Los Angeles County Superior Court, on July 30, 2003. The appeal is taken from a judgment that finally disposes of all issues between the parties. (CT 13 CT 3564-3565; 37 RT 6579-6582.)

STATEMENT OF THE CASE

On September 7, 1994, Dayland Hicks, Trevon Boyd, and Lamar Armstrong, all members of the Rollin' 60's, a Los Angeles Crip street gang, were shot to death in Hicks' car on the corner of 47th and Western.. On October 7, 1994, appellant was arrested for the murders, but on June 22, 1995, the charges against appellant were dismissed. (18 RT 3059.)[1] On February 17, 1999, close to four years later, the murder charges were refiled against appellant. (1 CT 1-4; 15 RT 2593-2598; 18 RT 3214, 3219.) Appellant was arraigned on April 21, 1999, and pleaded not guilty to each murder charge. The Los Angeles County Alternate Public Defender's Office was appointed to represent appellant. (1 CT 15-18; 44-45.)

On May 5, 1999, the People filed an Amended Felony Complaint alleging that appellant murdered Dayland Hicks (Count 1), Trevon Boyd (Count 2), and Lamar Armstrong (Count 3) on September 7, 1994, in violation of Penal Code section 187(a), and alleging the special circumstance of multiple murder under Penal Code section 190.2(a)(3). The Amended Complaint also alleged that appellant attempted to murder Luis Hernandez on October 3, 1994, in violation of Penal Code section 664/187(a), and inflicted great bodily injury on Mr. Hernandez, in violation of Penal Code section 12022.7(a) (Count 4), and that appellant committed the crime of carjacking against Socorro Gonzalez on October 3, 1994, in violation of Penal Code section 215(a) (Count 5). The Amended Complaint also alleged that in the commission of the carjacking, appellant personally used a firearm, within the meaning of Penal Code sections

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[1] "RT" refers to the Reporter's Transcript on Appeal. "CT" refers to the Clerk's Transcript on Appeal.

1203.06(a)(1) and 12022.5(a)(1), causing the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8) (1 CT 48-54.)[2]

A Preliminary Hearing was held on August 20, 1999 (1 CT 84-216), at the conclusion of which appellant was held to answer on all five counts of the Amended Complaint. (1 CT 214-215; 218.). On September 3, 1999, the People filed an Information in Superior Court, alleging the same five counts that were contained in the Amended Complaint. (1 CT 220-223.) Appellant was arraigned in Superior Court that same date, and denied guilt on all five counts. (1 CT 224-226.)

On March 20,2000, trial counsel filed a Notice of Motion To Suppress Statement in Violation of Miranda, relating to a police interview of appellant conducted on January 6, 1999, before the instant murder charges were refiled. (2 CT 251-255; Exhibit #1 [transcript of the interview] 2 CT 256-342.)

On September 25, 2000, the People announced that they would seek the death penalty. (2 CT 357.) On January 23, 2001, trial counsel filed Materials Regarding Defendant's Background, including letters from counsel to the District Attorney requesting that the People accept appellant's offer to plead guilty in the case in exchange for a sentence of life without the possibility of parole. (2 CT 364-372.) On February 23, 2001, the People informed the Superior Court that they were not willing to accept a plea. (2 CT 375.) On January 15, 2002, the People again stated they were rejecting appellant's offer to plead guilty. (2 CT 389.)

On August 27, 2002, the People filed their Opposition to Defendant's Motion to Suppress Defendant's Statements. (2 CT 400-408.). On January 31, 2003, the Superior Court heard argument on the motion to suppress. (2 CT 440; 442; 3 RT 119-176.) On February 25, 2003, the Superior Court overruled

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[2] Hereinafter, all references to California statutes are to the Penal Code, unless otherwise noted.

the defense motion to suppress. (3 RT 185; the Court's ruling, however, is not reflected in the Minute Order for February 25, 2003 [2 CT 451].) On February 27, 2003, trial counsel filed a Motion to Exclude Statement - Miranda, relating to an interrogation of appellant by police on October 7, 1994. (2 CT 460-463.) On March 3, 2003, the Superior Court heard argument on the motion to exclude the October 7, 1994 statements, and overruled the motion. (2 CT 473; 3 RT 219-232.)

Jury selection began on March 13, 2003 (2 CT 516; 4 RT 310), and concluded on April 2, 2003. (12 CT 3242B; 14 RT 2280-2282.) The guilt trial commenced on April 2, 2003. The prosecutor presented his opening argument (12 CT 3242C; 14 RT 2308-2325), followed by trial counsel. (14 RT 2326-2332.) The prosecution presented twenty-two (22) witnesses and concluded its presentation of evidence on April 9, 2003. (12 CT 3277-3278.) That same date, the defense presented four (4) witnesses. (12 CT 3278; 19 RT 3289-3415.) The prosecution called two rebuttal witnesses and rested. (12 CT 3281.) The defense also rested. (Ibid; 20 RT 3437.) Outside the presence of the jury, the trial court asked appellant whether he understood that he had the right to testify, and the right not to testify. Appellant stated he had elected not to testify, after consultation with his attorneys. (12 CT 3281; 20 RT 3408-3409.)

On April 11, 2003, the court gave the jury opening instructions (12 CT 3283; 21 RT 3490-3554), and the prosecution then presented its closing argument. (12 CT 3283; 21 RT 3556-3594.) Defense counsel presented their closing argument. (21 RT 3599-3652.) The prosecution presented rebuttal argument. (21 RT 3655-3685.) The court then gave the jury concluding instructions. (21 RT 3686-3693.) The jury retired at 4:16 p.m. to begin deliberations. (12 CT 3284; 21 RT 3693.)

On April 14, 2003, the jury resumed deliberations at 9:10 a.m., and at 11:21 a.m., the court received a request for a readback of the testimony of three prosecution witnesses, which occurred at 1:35 p.m. The jury resumed deliberations at 2:42 p.m, and recessed for the day at 4:00 p.m. (12 CT 3287-3288.) On April 15, 2003, the jury resumed deliberations at 9:08 a.m., then requested further readbacks of testimony. The jury resumed deliberating at 11:16 a.m., requested further readbacks, and after a noon break, resumed deliberations at 1:30 p.m. The jury returned a verdict at 1:50 p.m. The jury found appellant guilty of first degree murder on counts 1, 2, and 3, guilty of attempted murder on count 4, and guilty of carjacking on count 5. The jury found the multiple murder special circumstance allegation to be true. (12 CT 3346-3348; 22 RT 3734.)

The penalty phase trial began on April 28, 2003. Both parties presented opening arguments. (12 CT 3357-3358; 23 RT 3864-3893.) The prosecution presented testimony by fifty-six (56) witnesses from April 28 through May 7, 2003. (12 CT 3358-3359, 3362-3367, 3370-3386; 23 RT 3896 -30 RT 5344.) The defense called nine (9) witnesses in support of appellant's case in mitigation from May 7 through May 9, 2003. (12 CT 3387B-3389, 3392-3393; 30 RT 5357 - 32 RT 5937.) On May 9, 2003, the prosecution called one rebuttal witness, and rested. (12 CT 3395; 33 RT 5971-5976.)

On May 14-15, 2003, both parties presented closing arguments. (13 CT 3456, 3459; 35 RT 6226 - 36 RT 6416.) On May 15, 2003, the court instructed the jury (36 RT 6416-6422), and the jury retired at 10:18 a.m. to begin deliberations. (13 CT 3459; 36 RT 6422.) After various recesses during the day, the jury recessed for the day at 4:00 p.m. (13 CT 3460.) On May 16, 2003, the jury resumed deliberations at 8:32 a.m. At 11:28 a.m. the jury requested a readback, and the jury recessed for the day at 11:30 a.m. (13 CT 3464.) The jury resumed deliberations at 9:10 a.m. on May 19, 2003. At 9:25

a.m., Alternate Juror 2 was chosen to replace Juror Number 1. The jury was instructed to resume deliberations from the beginning. (13 CT 3466-3467; 36 RT 8453-8456.) Requested testimony was read back to the jury during the morning, and the jury resumed deliberations at 11:11 a.m. (13 CT 3467.) After recessing at noon, and resuming deliberations at 1:37 p.m., the jury reached a penalty verdict at 3:30 p.m. The trial court sealed the verdict for reading on May 20, 2003 (13 CT 3467: 36 RT 6461.) On May 20, 2003, the verdict was read. The jury sentenced appellant to death. (13 CT 3470; 36 RT 6464.) The jurors were individually polled and confirmed their votes. (13 CT 3471; 36 RT 6464-6466.)

On June 11, 2003, appellant filed a motion to reduce the penalty to life without the possibility of parole (13 CT 3477A-3477B), and a motion for a new penalty phase trial. (13 CT 3477C-3477G.) On June 18, 2003, the trial court heard arguments on the defense motions, and then denied the motion for a new penalty trial and denied the motion to reduce the penalty. (13 CT 3478; 37 RT 6474-6486.) On July 30, 2003, the trial court once again denied the motions for new trial and for reduction of sentence, and imposed a sentence of death on counts 1, 2 and 3 and the special circumstance of multiple murder. (13 CT 3562-3564; 37 RT 6582-6583.) The court also sentenced appellant to a determinate term of nine (9) years on count 5 (carjacking) and a term of life with the possibility of parole on count 4 (attempted murder). (13 CT 3462-3563; 37 RT 6579-6582.) The court filed its order of commitment/judgment of death that same day. (13 CT 3564-3565.)

STATEMENT OF THE FACTS

GUILT TRIAL

Murders of Dayland Hicks, Trevon Boyd and Lamar Armstrong

Murder Charges Filed in 1994, Dismissed in 1995, Refiled in 1999

As noted in the Statement of the Case, appellant was arrested on October 7, 1994, for the murders of Dayland Hicks, Trevon Boyd, and Lamar Armstrong on September 7, 1994. Hicks, Boyd and Armstrong, all Rollin' 60's Crip gang members, were shot at close range while sitting in Hicks' Cadillac parked near Ford's Liquor Store at the intersection of 47th and Western in Los Angeles.

Lewis Dyer allegedly witnessed the murders, and initially identified appellant, a Blood gang member, as the shooter. The Bloods and Crips are rival street gangs. Dyer failed to identify appellant subsequently in a live lineup, however, and no forensic evidence or weapon otherwise tied appellant to the murders. On June 22, 1995, the murder charges against appellant therefore were dismissed. (18 RT 3059.) Nearly four years later, on February 17, 1999, the murder charges were refiled against appellant, after Dyer recanted his statements that he was inside Ford's Liquor Store at the time of the shootings and identified appellant as the shooter. (15 RT 2593-2598; 18 RT 3214, 3219.)

Crime Scene Ballistics Evidence

Police collected four shell casings at the crime scene. (14 RT 2344.) Ballistics testing indicated that all four casings were fired from the same gun. (14 RT 2425.) That gun has never been located.

Autopsy Evidence

Dayland Hicks died of multiple gunshot wounds. He suffered a wound to his arm and a wound to his head. The wound to his arm could have been caused by him putting his arm up defensively. (15 RT 2453-2463.)

Lamar Armstrong died from a gunshot wound to the chest. This wound was not immediately fatal, and Armstrong was taken to the hospital where surgery was performed. The bullet was recovered during the surgery. Armstrong died at 4:12 p.m. that same day. Armstrong also suffered a gunshot wound to his right forearm. (15 RT 2618-2620.) The wound to his chest was probably a secondary wound, with the bullet first entering and exiting his forearm, then puncturing internal organs in his chest, and going through the right ventricle of his heart. No drugs or alcohol were detected in Armstrong's blood. (15 RT 2620-2627.)

Trevon Boyd also died from a gunshot wound to the chest. Boyd also suffered wounds to his forearm before the bullet entered his chest and went through his liver and his heart. Boyd was also hit by a second bullet to the chest, and he suffered a graze wound to his left hand ring finger as well, which possibly was from one of the two bullets that hit him. No drugs or alcohol were detected in Boyd's blood. (15 RT 2631-2638.)

Testimony and Statements of Eyewitness Lisa Mallard

On September 7, 1994, at about 1:40 p.m., Lisa Mallard saw Lewis Dyer and Zenia Meeks standing next to each other in front of Mallard's hair salon located across the street from Ford's Liquor Store at the corner of 47th and Western in Los Angeles. She then went into Ford's Liquor Store. (14 RT 2364; 14 RT 2372; 2378-2379; 2386-2387.) About five minutes later (14 RT 2385), Mallard heard three or four gunshots outside and then a boy, later identified as victim Trevon Boyd, ran into the store. Boyd passed out on the floor, and died. (14 RT 2366-2369.) He was dressed in blue jeans and a blue shirt. (14 RT 2378.) The gunshots sounded to Mallard like they only came from one gun. (14 RT 2375.) When Mallard came out of the store, she again saw Zenia Meeks. (14 RT 2379.)

Mallard was interviewed by Los Angeles Police Department Lt. Felicia Hall-Brown on September 14, 1994. Mallard told Lt. Hall-Brown that she saw Lewis Dyer run past the front of the liquor store immediately after the shooting. She also said the driver of the vehicle in which the victims were shot (Dayland Hicks) had just been inside the liquor store and bought beer before the gunshots were fired. (17 RT 3033-3035.)

Testimony of Lewis Dyer

On September 7, 1994, at 1:45 p.m., Lewis Dyer was standing on the street across from Ford's Liquor Store at 47th and Western talking with Zenia Meeks. Dayland Hicks, Trevon Boyd and Lamar Armstrong pulled up near Ford's Liquor Store in Hicks' Cadillac. Hicks started walking toward the liquor store and Dyer walked across the street and joined him. Dyer talked with Hicks as they walked. Hicks went into the liquor store and bought a beer, then they both went over to Hicks' car. Dyer leaned into the car through the front passenger side window talking with Trevon Boyd. Armstrong was in the back seat. (15 RT 2493-2495.)

Dyer then saw appellant, whom he knew from the California Youth Authority (CYA) Stark Youth Training School in 1992-1993, and was about to ask what he was doing there, when appellant pulled out a gun and started shooting. When the shooting began Dyer thought he was hit and he crawled to the front of the car. He stood up, and saw appellant shooting into the car. Appellant leaned inside the car and fired several shots. Appellant did not say anything before he began shooting and no one inside the car said anything to him. Dyer ran away down the street. (15 RT 2495-2497.)

Dyer knew appellant at CYA as "Little Sonny." Appellant belonged to the "6 Deuce Brims," a Bloods gang. Dyer belonged to the 46th Street Crips. The three men in the car belonged to the Rollin' 60's Crips. The neighborhood was a 46th Street Crip neighborhood. (15 RT 2498-2499.)

After the shooting stopped, Dyer came back to the car, but he did not see where appellant went. He saw Trevon Boyd go into the liquor store, holding his right side. He said he was shot. Lamar Armstrong walked to the corner and then fell. Dayland Hicks was still in the car. When the police started coming, Lewis ran down the street. (15 RT 2501-2503.)

Dyer saw the paramedics work on Armstrong and on Boyd. Hicks fell out of the car dead when the police opened the car door. After the shooting Dyer did not call the police. Instead, he called Greg Shoaf, Hicks' uncle, from a pay phone and told him Hicks had been shot. Shoaf then met Dyer in front of the church near the liquor store and Dyer told him what had happened. (15 RT 2504-2505.)

Dyer did not talk to the police the day of the shooting because he did not want to be "involved." Because of the "life he was living," he believed a person should not talk to police when a crime happened. Dyer at the time was in the gangs, living a "wild lifestyle," and things like this shooting happened all the time. Dyer asserted that if he had talked to the police, he would have gotten labeled a "snitch" and he would have been targeted by other gang members or anyone who found out he was a snitch. This would happen, he claimed, even if he told the police about a crime that occurred against one of his own gang members. The situation didn't matter. In prison, if you are labeled a snitch or a rat, you get stabbed or beaten up. (15 RT 2505-2507.)

Dyer remained silent about the shootings for a week. On September 15, 1994, the police contacted him. At first Dyer did not want to say anything, but then he started feeling bad about his friends having gotten killed. He knew the families of Hicks and Boyd well and thought he had to tell them what had happened. So Dyer went to Hicks' house and told the family that he knew who did the shooting. Later, at the police station, Dyer saw Hicks' aunt and uncle and Boyd's mother. They talked with Dyer and told him to tell the police what

he knew. Dyer decided to talk to the police, but he still did not say anything to them for a while, because of his lifestyle and because he was on parole. He thought he would get violated for being around "this type of situation." (15 RT 2507-2509.)

Dyer then decided he couldn't lie in front of Hicks' family. He then told the police what he had seen (that is, what he had just testified to in court). The police showed Dyer a six-pack photo lineup (People's Exhibit 13) and he identified appellant as the shooter. Subsequently, Dyer violated his parole that had been imposed for an attempted robbery he had committed in 1990 when he was 16, and he was sent to Los Angeles County Jail. On February 27, 1995, while Dyer was in the county jail, he was asked to view a live lineup that included appellant. Appellant was also in custody at the county jail at that time. Dyer did not identify appellant. This was because, he claimed now, he was in custody and he did not want to be labeled as a snitch. Dyer only saw appellant once before the lineup occurred, and appellant did not say anything to him then. They only looked at each other. (15 RT 2510-2515.)

After the lineup was conducted, Dyer encountered appellant one time in an office at the jail. According to Dyer, appellant told him that he should not say anything. Appellant showed Dyer a copy of the witness statement that Dyer had originally made to police in September 1994 identifying appellant. Appellant told Dyer that the Deputy Sheriff who had brought Dyer down to the office was his cousin and he could have Dyer moved to any facility he wanted. Dyer was concerned that appellant would show the police report containing his 1994 statement around the jail. Dyer told appellant he had not identified him at the lineup and he was not cooperating with the police. Appellant said he was just making sure, and that he could get Dyer moved to a facility where nobody would get to him, as long as he did not say anything to the police. (15 RT 2515-2517.)

Dyer acknowledged that he had decided he was not going to cooperate with the police as soon as he got incarcerated, before he had this conversation with appellant. (15 RT 2518.) Dyer also acknowledged that in the summer of 1995, a female defense investigator visited Dyer at CYA, and that he had told investigator that he was inside the liquor store at the time of the shooting and that he did not see anything. (15 RT 2518.)

Dyer also acknowledged that he had told the investigator that the police had forced him to say things and that Hicks' family members had pressured him. Dyer now maintained that he had not told the investigator the truth, because at that time he felt he "couldn't be going back to county jail" and "going through the whole thing again." So he had hoped that by saying he knew nothing, "they would just leave him alone." Dyer was also concerned because the investigator told Dyer that appellant had told her that Dyer and appellant had committed the murders together. Dyer feared that people might be saying this on the "street" and that people might believe it. (15 RT 2518-2520.)

Later in 1995, Dyer was released on parole from CYA. In 1998, two investigators from the Santa Barbara County District Attorney's Office contacted Dyer.[3] They told him they wanted to talk with him about the shooting at 47th and Western. Dyer was no longer incarcerated and he had been trying to get out of the gang lifestyle. Dyer told them about the conversation he had with appellant in county jail and that he had been threatened by appellant. Dyer decided then that he wanted to cooperate and testify against appellant regarding the 47th and Western shooting. Officers from the Los Angeles Police Department (LAPD) then contacted Dyer, and on

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[3] Appellant was being investigated for committing a credit union robbery and murder in Santa Barbara County on August 8, 1997. Evidence regarding this crime was presented at length in the penalty phase of the trial. (27 RT 4638 through 28 RT 4817.)

August 12, 1999, he identified appellant in a LAPD lineup as the shooter in the 47th and Western murders. (15 RT 2520-2523.)

On August 20, 1999, Dyer testified at the Preliminary Hearing in this case. According to Dyer, he provided the same testimony at that hearing as he had just testified to in court. Dyer asserted that he had now changed his life around, that he was out of the gangs, that he had a job, and that he was taking care of his kids. He was a care provider for the mentally disabled, and he was working on having a career in this field. Dyer stated that there was no doubt in his mind that appellant shot and killed Hicks, Boyd and Armstrong. (15 RT 2523-2525.)

Dyer admitted that on June 24, 2001, he was arrested for possession of marijuana, and that he was also arrested on a DUI charge that year. Dyer denied he was in a gang house or was arrested with gang members on either occasion, and he denied that in fact he had been in possession of marijuana or that he had been intoxicated while driving. He admitted that his gang name was "Quacc." (15 RT 2533-2535.)

On September 7, 1994, Dyer had been at home before he arrived at 47th and Western around 1:45 p.m. He was with Zenia Meeks, but he did not know if Meeks was high. He denied that he was high. He saw a Cadillac pull up with three Rollin' 60's Crips in it. He did not know their gang names, but he had seen Lamar Armstrong the night before at Dyer's house. Dyer walked into the liquor store with Dayland Hicks. The last place he saw Zenia Meeks was standing on the corner across the street from the Cadillac. (15 RT 2536-2540.)

On September 15, 1994, Dyer initially told the police (1) that he had not given Hicks' relatives a name as the person who was the shooter, (2) that he did not know who did the shooting or what happened, and (3) that he was not standing next to the car at the time the shootings occurred. Dyer agreed that he had stated instead that he was inside the liquor store when the shootings

occurred. Dyer denied that he told Hicks' relatives that he was not afraid of anyone in connection with this case. Confronted with his statement in the September 15, 1994 interview telling Hicks' relatives that he was not afraid of anyone, Dyer responded only that he did not remember this. Dyer confirmed that immediately after the murders he was already concerned that people might think he was involved (not just later in 1995 after the defense investigator interviewed him in the CYA facility). (15 RT 2593-2598.)

Dyer claimed now that he lied when he told the defense investigator who visited him at CYA that the police had brought him to the police station in 1994 in handcuffs, and that the police had threatened to violate his parole or claim he was part of the shooting if he did not cooperate then. (15 RT 2543-2545.) Dyer admitted that he told the investigator that he did not see the shooter, but denied that he told the investigator that the reason he identified appellant to the police was that the word on "the street" was that appellant had done it. (15 RT 2547.)

Dyer maintained that appellant was about five feet away from him when he first saw appellant. He did not immediately see appellant approaching because there was a camper truck parked behind the Cadillac and appellant stepped out from behind it. Appellant started shooting at Dyer and then at the car. He shot at Dyer once. Dyer did not remember what appellant was wearing. (15 RT 2548-2551.) Dyer did not remember telling the police the parked vehicle was a van; he maintained the parked vehicle had been a camper, which got moved away after the shooting. Dyer acknowledged that his written statement from 1994 also said appellant shot at him twice, not once, and that appellant was wearing green khaki pants and a green and white striped shirt. (15 RT 2551-2553.)

Dyer claimed that when appellant was with him in county jail in 1995, he told Dyer he had given him a "pass," which to Dyer meant he could have

killed Dyer but he didn't. Dyer denied that he heard any rumors on the street that appellant had given him a pass. (15 RT 2553-2555.) Dyer acknowledged that he did not see appellant before the lineup in county jail occurred, that he was not injured or attacked while he was in the jail, and that he was not threatened by anyone before the lineup took place. Dyer admitted that he had not told any jail officer that he had been threatened while he was inside the jail. (15 RT 2555-2558.)

At the Stark CYA facility in 1992-1993, Dyer saw appellant every day. They played football against each other. Dyer did not have any kind of a relationship with appellant there, and he neither liked nor disliked appellant then. Dyer claimed he had no "beefs" with him. Confronted with his statement to the police in 1994 that he did not like appellant from when they were in CYA together, Dyer responded that he said that then because he was mad at appellant for what happened to Hicks, Boyd and Armstrong. Dyer admitted that he and appellant did have one verbal argument while they were at CYA, but Dyer maintained it "wasn't nothing big." (15 RT 2590-2592.)

Dyer maintained that "Quacc" was his gang name and that "TK/TKO" was his rapper name. He admitted some people did call him "TK," and he confirmed he had a tattoo of a little "TK" or "TKO," but he insisted this was his rapper name only. (15 RT 2587-2589.) Dyer agreed that at the preliminary hearing held in 1999, he had to the contrary denied that he ever used the initials "TK" or "TKO," and that he had also denied that anybody ever called him by these initials. (15 RT 2604.)

Dyer asserted on redirect examination that he felt his life was in danger that day as he testified, even though he did not live in the same neighborhood now as he lived in at the time of the shooting. (15 RT 2614.)

CYA Commitment Records of Appellant and Lewis Dyer

California Youth Authority (CYA) records indicated that appellant and Lewis Dyer were at the same CYA facility, the Stark Youth Training School in Chino, in 1992 and 1993. (15 RT 2443.) They were housed in the same group for three weeks to a month. (15 RT 2447.) Appellant was committed to CYA on April 22, 1988, and was last discharged on May 19, 1995. Dyer was committed to CYA on January 25, 1991 and was last discharged on October 9, 1998. (15 RT 2442-2443.) Dyer was in the CYA for car theft, for attempted robbery, and also for shooting someone. (15 RT 2541-2542.)

Testimony of Gregory Shoaf

Gregory Shoaf, Dayland Hicks' uncle, received a phone call on September 7, 1994, from Lewis Dyer telling him his nephew had been shot and to go to 47th and Western. Shoaf arrived there before the police, and met with Dyer, who told him that Hicks had been shot by "Little Sonny" from the "6 Deuce Brims." (16 RT 2717-2722.)

Shoaf later gave Dyer's name to the police as a witness. A week after the murders Shoaf was at the police station with his sister Temple, Trevon Boyd's mother, detectives, and Dyer. At the police station, Dyer was reluctant to talk to the police. Shoaf and the other family members spent a long time trying to convince Dyer to talk to the police. At the end of the conversation, Dyer picked appellant out of a six-pack photo lineup as the shooter. (16 RT 2725-2727.)

Testimony of Zenia Meeks

On September 7, 1994, at 1:45 p.m., Zenia Meeks was standing near a pay phone booth on the corner of 47th and Western, talking to Lewis Dyer. (16 RT 2757.) The area was gang-affiliated and a "shooting zone." A yellow Cadillac pulled up with three people in it. No one got out of the car. Dyer went over to the car to talk to someone inside. While Dyer was talking, Meeks

waited by the hood of the car. (16 RT 2756-2760.) Meeks then saw someone walk up to the car who blended into the Crip neighborhood because he was not wearing any red, burgundy or brown. According to Meeks, Crips did not wear red, burgundy or brown, they wore blue or black. The man, whom Meeks identified in court as appellant (16 RT 2775), stopped approximately six feet from the car and started shooting. He did not say anything first to the people in the car or to Dyer. Meeks did not see where the gun came from. (16 RT 2760-2762.)

The man stood with both hands on the gun, pointing it straight ahead, and fired from right to left. Meeks remembered hearing three shots, but there could have been more. When he stopped shooting, the man went back toward the alley, and got into the passenger seat of a four-door red car that went to the left down 47th Street heading away from Western. (16 RT 2763-2766; 2813.) Meeks just stood there. She thought this was the best thing to do when the shooter stopped and walked back toward the alley. During this time, Dyer ran toward the back of the Cadillac and took off. (16 RT 2763-2764.)

After the shooting stopped, Trevon Boyd, who had been sitting in the front passenger seat, ran into the liquor store. Meeks ran across the street to the pay phone to call 911, but she didn't, and instead she ran into the liquor store and talked to Boyd, who had been shot. Boyd said to call for an ambulance. Meeks went back to the pay phone to call 911, then she went back to the car. She saw one person in the driver's seat and one in the back seat behind the driver. The police arrived and took her to the police station. (16 RT 2766-2768.)

When she was at the police station, Meeks told the police someone had been with her when the shooting started, but she would not give the police the person's name. She also told the police she could not identify the shooter. At trial, Meeks testified she had been uncooperative because she was trying to

protect Lewis Dyer. Meeks testified now that she did see the shooter at close range. He looked at her and she looked at his face. But Meeks did not want to identify the shooter in 1994 because she did not want to get involved. She said that she had been scared for herself and for her family. Consequently, she told the police then that she had been high and on her psych meds and that she could not identify anyone. (16 RT 2768-2770.)

Meeks admitted that she was using crack and PCP at the time of the shootings, and that she had used drugs earlier in the day on September 7. She now said she nonetheless remembered what happened. Meeks also acknowledged that she had convictions for petty theft, and that she had used a number of aliases. (16 RT 2754-2756.)

Early in 1995, the police contacted Meeks to testify at a preliminary hearing. She refused to cooperate or to testify, and she "cussed out" the detective who contacted her, telling him "to not fuck with her and she didn't know anything." She thought if she acted hostile maybe the police would leave her alone. Meeks admitted that she was periodically taking drugs at that time also. (16 RT 2772-2773.)

In 1998 Meeks attended a new live lineup, and she recognized the person who had shot the three victims in 1994, but again she did not identify anyone, because she was still afraid for her family. After another preliminary hearing was scheduled, Meeks told the prosecutor that she could not identify anybody. At the preliminary hearing, Meeks testified but she was not asked if she recognized anyone, though she in fact did recognize the shooter, who was at the hearing. In court, Meeks identified appellant as the shooter. (16 RT 2773-2775.)

In December 2001, Meeks went to prison in Chowchilla and enrolled in a drug rehab program. The program got her off drugs, taught her self-esteem and how to be a law-abiding citizen. She became a Christian, and she

was still involved in the rehab program outside of prison. The program was designed to help her reunite with her child. (16 RT 2775-2777.)

While Meeks was in prison in Chowchilla, a detective interviewed her. Meeks was no longer hostile and she decided to talk to the detective. She told him she had turned her life around and that it was time to tell the truth. She then told him she knew who did the 1994 shooting, and she identified appellant in a photo lineup (People's Exhibit 19). The detective told Meeks that if she testified he would put her and her family into a witness relocation program. Her family was still concerned about her testifying, and some family members were still telling her not to testify. She maintained that no one forced her to identify appellant. At the time Meeks made the photo lineup identification in 2001, she had not seen or spoken to Lewis Dyer since 1999, when they had been in court together. (16 RT 2778-2782.)

On cross-examination, Meeks admitted that on the day of the shooting she appeared cooperative and gave police a statement at the police station. She knew she was being tape-recorded at the time. She maintained that she gave only the information she wanted the police to know, and that she gave a false description of the suspect. (16 RT 2783-2785.) In 1999, Meeks went to a live lineup, and Lewis Dyer was there also.[4] At that lineup, Meeks did not pick anyone out. Meeks claimed that Dyer did not tell Meeks at that time which person he picked. She first picked out a photo in 2002 from a photo lineup when the detective interviewed her in prison at Chowchilla. (16 RT 2802-2803.)

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[4] Detective William Smith testified that the live lineup Meeks and Dyer viewed occurred on August 12, 1999, and that appellant was "No. 6" in that lineup. (18 RT 3212-3214; People's Exhibit 33 is a photo of that lineup.)

Arrest of Appellant on October 7, 1994

LAPD Officer Thomas Kimrey and his partner arrested appellant on October 7, 1994, as a murder suspect. They recovered a .9 mm blue steel handgun (People's Exhibit 12) from appellant. Appellant had the handgun in his waistband and while Kimrey was pursuing him, appellant threw the gun on the ground. The gun was loaded and had a bullet in the chamber, so it was ready to fire. (15 RT 2479-2484.)

After appellant threw the gun down, he continued to run, but Kimrey's partner detained appellant as he tried to climb a chain link fence. Appellant was taken into custody without further incident. (15 RT 2484-2487.) The gun that was in appellant's possession was not the weapon used in the triple murder that occurred on September 7, 1994. (16 RT 2892-2895.)

Videotaped Interview of Appellant on October 7, 1994

After appellant was arrested, LAPD Lt. Hall-Brown and two other detectives interviewed him that same day.[5] At the beginning of the interview, the detectives discussed different murders that had occurred. (17 RT 3035-3038.) According to Lt. Hall-Brown, the detectives were trying to get appellant to talk about the triple murder at 47th and Western. The detectives used "interview tactics" while questioning him. Their strategy was to give appellant an opportunity to tell what happened, even if it was self-serving. But appellant did not admit to any involvement in the September 7, 1994 murders.

In the videotaped interview, appellant waived his right to remain silent and to have an attorney present. (People's Exhibit 27-A, p. 2.) The detectives questioned appellant about homicides that he knew about. Appellant talked about the murders of "Lump" and "G Brown" by a "60's" gang member named Chico. Regarding the shooting of the three Crip gang members at 47th and

[5] A transcript of the interview (People's Exhibit 27-A) was provided to the jury, and a videotape (People's Exhibit 27) was played to the jury. The video is more than two hours long. (17 RT 3041-3042.)

Western, appellant stated a member of the Van Ness Gangsters (VNG) put on blue khakis and a blue shirt, then walked up to the car and "smoked" the Crip gang members. Before the shootings, appellant saw the VNG member leave the house appellant was at and drive off with one other person in a stolen red Honda Accord. Appellant described the VNG member's height and weight, but he would not identify him. After the shootings, the car was burned and the gun that was used was taken apart and different "homies" got rid of the parts in different areas of the neighborhood. (People's Exhibit 27-A, pp. 11-16.)

Appellant stated the VNG member who did the shooting came back to the house after the shootings and told appellant and the others who were there to turn on the news. The guy told them he walked up to the car and "cussed" the people inside, they cussed back, and he shot them. The VNG member said one other guy saw him and got away. The VNG member said he shot four people, but the news said only three got shot. (People's Exhibit 27-A, pp. 39-41.)

The detectives later returned to questioning appellant about the shootings at 47th and Western, and appellant continued to refuse to give the name of the shooter. Appellant stated that he was not present when the shootings occurred. He explained he did not want to give the name of the shooter because the guy had taken care of appellant when he was in CYA and in prison, sending him money and looking out for appellant. (People's Exhibit 27-A, pp. 50-52.) The shooter told appellant that the fourth guy was also a Crip, that he shot at him but missed, and that the shooter and the fourth guy had been in jail together before. (People's Exhibit 27-A, pp. 52-54.)

Appellant also stated that the "60's" gang might be after him, because they had killed his brother "Big Sonny" in 1986, and after that appellant had stabbed a "few" members of the "60's" gang while he was in the county jail and in state prison. (People's Exhibit 27-A, pp. 23-24.)

Later in the interview, Detective Nicol arrived, and Nicol stated directly to appellant that the police investigation revealed that appellant was the person responsible for the triple homicide at 47th and Western. Nicol stated that witnesses had picked appellant out in photo lineups as the shooter, so a warrant had been issued for appellant's arrest, and that was why the patrol officers picked him up. (People's Exhibit 27-A, p. 68.) The detectives then attempted to persuade appellant to state that he committed the murders, but he restated that he was not present and did not commit the murders. (People's Exhibit 27-A, pp. 68-84.) Appellant did talk at length about how the murder of his brother "Big Sonny" severely impacted his life and the lives of his grandmother, mother and other family members, and caused appellant to "hate 60's." (People's Exhibit 27-A, pp. 85-88.)[6] The detectives continued attempting to get appellant to admit to the murders which they said they knew he committed, but he remained adamant, stating finally, "you will never, never get me to admit to those murders." (People's Exhibit 27-A, p. 104.)

During the interview, appellant told Lt. Hall-Brown that he wanted to have a lineup, and he was put in a lineup on February 27, 1995. (18 RT 3074-3075.) Lewis Dyer viewed this lineup when he was in custody at the county jail, and did not identify anyone. According to Lt. Hall-Brown, appellant looked different in the photos taken in 1995, because he had more hair on his head than he did in 1994 and his facial hair was different. (18 RT 3078; People's Exhibit 29 is a photo of the 1995 lineup; People's Exhibit 30 is a close-up photo of appellant in that lineup.)

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[6] Several years before, appellant's older brother, John C. Jones, had been murdered. (18 RT 3219; 3185-3187.) On January 3, 1990, Mark Anthony Harris had been convicted of the murder. (18 RT 3220; 19 RT 3266-3267.) The parties stipulated that John C. Jones was a Blood gang member known as "Big Sonny." (19 RT 3267.)

Testimony of Kipchoge Johnson

Kipchoge Johnson was a member of the "Van Ness Gangsters," a Blood gang whose area was 54th Street and Van Ness. He had entered prison in September 2002, and was in prison at the time he testified, but he stated he was going to be released in a month. According to Johnson, "Brims" are Bloods but there is a neighborhood distinction. Johnson was close with the "6 Deuce Brims," the gang appellant belonged to. The area of the 6 Deuce Brims was a few blocks away from the Van Ness Gangsters, and the two gangs were "best friends." Johnson joined the Van Ness Gangsters when he was 14, and he knew appellant, who was known as "Little Sonny." Johnson was not close with appellant, who was a couple of years older than Johnson. He mostly just saw appellant in the neighborhood. Johnson looked up to appellant as a leader of the gang when he was younger. (15 RT 2646-2649.)

In September 1994, there was a lot of gang activity going on between the Brims and the Crips. Johnson went to a lot of funerals of his gang members, or "homies." Johnson went to funerals for "G Brown" and "Lump," a Blood from a different neighborhood. (15 RT 2649-2650.) Johnson was at a wake with appellant for "Lump" when appellant got a phone call that one of his fellow gang members, "G Brown," had been killed while on a bus. Appellant stormed out and punched out a window of his car. He then left. The gang thought "G Brown" had been murdered by a guy from the Rollin' 60's gang named "Chico." (15 RT 2650-2653.)

A couple of days later appellant came over to a gang hangout on 54th and Van Ness with a copy of a newspaper article about the murders that happened on September 7. He threw the newspaper on the ground, and said, "I did that for the homies." Johnson did not know at the time if appellant was showing off or "clowning around or whatever." (15 RT 2653-2655.) But Johnson felt appellant was telling the other gang members that he had killed

the people described in the article and that the rest of the gang needed to start retaliating against the Crips for all the deaths. (15 RT 2656.)

Someone in the room asked appellant if he had killed the people described in the news article, and appellant responded, "I ran up on them, like I domed all three of them niggers. I had five shots and I domed all three of them." Johnson explained "doming" meant shooting a person in the head. Appellant said that he came up behind the three who were sitting in a car and one other guy was leaning over talking into the car. Appellant told the guy leaning into the car to run and then he domed the three in the car. Johnson thought appellant said the car was a Cadillac. Appellant said he first drove by the car and threw the Rollin' 60's Crip gang sign and the people in the car acknowledged him with the same sign. Appellant said he then parked around the corner and ran up on the car. (15 RT 2656-2658.)

Johnson thought appellant must have used a .38, which holds 5 shots, but he could not say for sure if appellant told him what kind of gun he used. Johnson thought appellant said a .38. Johnson explained that it gave more status in the gang if you kill with a gun that holds less bullets and if you shoot the victims in the head. (15 RT 2664-2666.)

The next time Johnson saw appellant was a few months later. Appellant and Johnson were on a county jail bus going to court, and appellant told Johnson he was in court because of the three murders. Appellant said that the guy he had let get away at the scene was "telling on him." He said, "I should smoke that nigger, too." Appellant told Johnson he knew the guy that he let get away from CYA. When appellant and Johnson arrived at the courthouse they passed a holding cell with Crips in it. Appellant yelled that he was going to beat this case and when he got out he would kill more Crips. The Crips recognized appellant's voice and said, "Forget you, Little Sonny." Johnson and appellant laughed and then they were separated. (15 RT 2660-2663.)

When Johnson and appellant were on the bus, appellant had had a handcuff key and he uncuffed himself and Johnson, in case they got into a fight. Certain people in the jail had handcuff keys, though Johnson did not know how to get one. (15 RT 2663-2664.)

After Johnson got out of jail, at some point he saw appellant in the neighborhood, and he assumed appellant had beaten his case. When appellant had been in jail with Johnson, he was confident he was going to beat the case. (15 RT 2666.) Johnson thought appellant was confident because gang members would put pressure even on their own gang members not to testify, so that everyone could be released from jail. This was to keep the killing on the streets going. (15 RT 2666-2668.)

At some point, according to Johnson, he became disgusted with this lifestyle and the killing back and forth. Also, Johnson met Lamar Armstrong's brother, Ladell (Hayes), who showed him a tattoo on his arm that had his brother's name on it. Johnson, however, could not remember Ladell's last name or the name on the tattoo that supposedly so moved him. (15 RT 2668-2669.) [7]

Ladell told Johnson that appellant had killed his brother. Johnson became friends with Ladell, and then he began to feel bad about Ladell's brother having been killed, because Ladell was "a good guy and a churchgoing guy." When Johnson was incarcerated in August 2003, he decided to tell the police what he knew. Some detectives came to see him on another case and he mentioned he knew appellant. The detectives said appellant was still fighting the triple murder case, and they asked Johnson if he knew about the case. Johnson said that he did, because he felt bad about Ladell and about Ladell's brother, whom Ladell said had just been in the wrong place at the

[7] Doris Hayes, Lamar Armstrong's mother, testified that her other son, Ladell Hayes, had tattooed her son Lamar Armstrong's name, date of birth, and date of death on his arm. (15 RT 2750.)

wrong time. (15 RT 2670-2671.) Other detectives then came to see Johnson and he told them about the conversations with appellant that he had just testified to in court. (15 RT 2671-2672.)

On cross-examination, Johnson testified that he was a Blood gang member from approximately 1987 to 2000, and that his gang name was "Lil' Bill." When he joined the Bloods, the Bloods and the Crips were at war. According to Johnson, gangs retaliated against each other as gangs, not as individuals, so it did not matter if you killed the person who committed the original crime. Any gang member would do. In 1994 the gang war was particularly intense. The Rollin' 60's were a particularly notorious gang for shooting people and were known as killers. (15 RT 2673-2675.)

When Johnson talked with the detectives in 2003, he told them that appellant said in 1994, "Yeah, I got a .38, six shots, killed three of them. I domed them," and that he gave the guy at the car a pass by making a gesture to him to leave. Johnson did not explain why he testified now that appellant said he used only five shots, but he agreed he had told the detectives that appellant said he had used six shots. Johnson confirmed that when appellant came by the gang hangout in 1994, there were girls there who were interested in appellant's "exploits." (15 RT 2678-2681.)

Johnson denied that he was getting any benefit from anybody for testifying. He denied that he was fighting any case at that time. He admitted that he had been convicted more than twice for possession of drugs for sale, and that he had also been convicted of being a felon in possession of a gun. (15 RT 2686-2687.)

According to Johnson, in gang culture, a gang member would not take credit for a murder of a member of another gang that he did not commit. If he did, the gang would discipline that person or kick him out of the gang. Based on his knowledge of appellant, Johnson thought he would not take credit for

a murder he did not commit. Johnson said, "If he said he did it, he did it." Appellant had the nickname "Sissyhawk," for stalking the Rollin' 60's. Johnson explained the derogative name for the "60's" was "ÒSissies." In Johnson's opinion, appellant hated the Rollin' 60's. (15 RT 2687-2690.) Johnson denied that he had any concerns about his personal safety for being a witness in this case. (15 RT 2693.)

Testimony of Christopher Fennelle

At the time Christopher Fennelle testified, he was in prison for the sale of narcotics, and he had six months left to serve. Fennelle also had convictions for arson, receiving stolen property, and second-degree burglary. Fennelle had belonged to the "6 Deuce Brims," a Blood gang that appellant also belonged to. Fennelle knew appellant by his gang nickname "Little Sonny." Fennelle joined the gang when he was 15, and he used to hang out with appellant's older brother, "Big Sonny," who was younger than Fennelle. Appellant would have been around 15 also when he joined the gang, which was before Big Sonny was killed. (18 RT 3185-3187.)

In 1995, appellant came over to Fennelle's house and asked for a gun. Fennelle was living in a Crip neighborhood at the time, and appellant told Fennelle he felt uncomfortable that Crips were living next door to Fennelle. (18 RT 3187-3188.) This started appellant talking about three Rollin' 60's who were killed at 47th and Western in 1994. (18 RT 3194.) Appellant told Fennelle that he had shot the three Crips. He said he saw a Cadillac parked with Crips inside, and one standing outside on the passenger's side. When the one on the outside saw appellant walking up, he took off running. Appellant said he started firing shots at the guy and that he shot everyone in the car. (18 RT 3189-3190.)

When appellant told Fennelle about committing the 1994 murders, he talked "casually" about it, like it was an everyday event. According to

Fennelle, among gang members, a person did not try to take credit for something another gang member might have done. If someone did that, something bad would happen to him. Fennelle had never known appellant to be somebody who would try to take credit for something he didn't do. (18 RT 3198-3199.)

Fennelle claimed he did not receive anything in exchange for his testimony. He had been sentenced a few years before, which was before he talked to the police about appellant's case. (18 RT 3194-3195.) Fennelle confirmed that he was Chauncey Bowen's brother, but that he had not been on good terms with Bowen since 1998, when he testified against Bowen in another matter.[8] Fennelle asserted the problem between them was what Bowen had done. (18 RT 3195-3196.)

On cross-examination, Fennelle testified that the conversation with appellant took place toward the end of 1995, shortly after Fennelle had gotten out of prison. Appellant only talked to Fennelle about the murders this one time. (18 RT 3200-3201.) Fennelle acknowledged that the first time he talked to the police about this conversation with appellant was not until three years later, in 1998. He claimed he had not heard about the shootings before appellant told him about them. (18 RT 3202-3204.)

Witness Special Protection and Relocation

Detective William Smith arranged for special precautions to protect Kipchoge Johnson and Christopher Fennelle while they were testifying during the trial. (18 RT 3214-3215.) Both Johnson and Fennelle were offered witness relocation after their releases from prison. This was different from

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[8] Fennelle was referring to Bowen's trial on the robbery of the Vandenberg Credit Union in Lompoc and the murder of bystander Christine Orciuch, which appellant also participated in. As noted previously, the Vandenberg Credit Union robbery was described in great detail during the penalty trial. (27 RT 4638-4719; 28 RT 4723-4749, 4758-4827.)

witness protection, in that once the witness is moved, they continue on with their lives with their same names. (18 RT 3215-3216.)

Defense Case: Murders on September 7, 1994

Lt. Hall-Brown, recalled as a defense witness, testified that the Los Angeles Times ran an article on the triple murder at 47th and Western on September 8, 1994 (Defense Exhibit B), which did not mention what the caliber was of the gun used, but did state that all three victims suffered head wounds, as Kipchoge Johnson testified appellant had claimed when he showed the newspaper article to Johnson and others in September 1994. (18 RT 3086-3090.) In fact, the newspaper article was incorrect, as only one of the victims (Hicks) had suffered a head wound.

Kipchoge Johnson had testified that the three Rollin' 60's were killed on September 7, 1994, in retaliation for the murder of Blood gang member "G Brown" or "Lump." (15 RT 2685.) Lt. Hall-Brown was shown a Long Beach Press Telegram newspaper report about the murder of Anthony Brown on a bus in a gang related incident on September 11, 1994 (Defense Exhibit C). Lt. Hall-Brown then agreed that "G Brown" could have been Anthony Brown, and that Anthony Brown had been killed several days *after* the murder of the victims in this case. (18 RT 3090-3094.)

Regarding the police interview of Lewis Dyer on September 15, 1994, Lt. Hall-Brown stated that she and Officer Nicole tape-recorded the interview and that Dyer was in the room with Gregory Shoaf, Temple Shoaf, and Trevon Boyd's mother. An excerpt from this interview was played in court (Defense Exhibit M-1), and the transcript was distributed to the jurors (Defense Exhibit M-2). (19 RT 3307-3310; 3314-3316.)

On the audiotape, in response to being asked "ÒMan, what happened?" Dyer stated at the outset that "I'm telling you I don't want to be involved." (Defense Exhibit M-2, p. 1.) At one point, Dyer confirmed that he had spoken

with family members of the victims the day before, but he denied that he told them who did the shooting. (Defense Exhibit M-2, p. 25.) Despite many exhortations from the family members and from the detectives on the audiotape to say what happened and to identify the shooter, Dyer reiterated, "I don't know what happened" and he denied that he had been at the car at the time of the shootings. He denied that he was protecting anybody (Defense Exhibit M-2, p. 30), and he denied that he was scared of anyone. He stated that he was inside the liquor store when the shootings happened. (Defense Exhibit M-2, p. 32.) Dyer also stated he was concerned that people were saying he had something to do with the shooting, that he set it up. (Defense Exhibit M-2, p. 36.)

Prosecution Rebuttal Case

The prosecution recalled Lt. Hall-Brown, and played the rest of the interview of Lewis Dyer conducted on September 15, 1994 (People's Exhibit 34-A).[9] On the audiotape, Dayland Hicks' family members ask Dyer many times to identify the shooter, but Dyer's concern was that people were talking that Dyer had something to do with the shootings. (People's Exhibit 34-B, p. 56.) Dyer also stated he had heard a rumor that the shooter had said to tell Dyer that he had given Dyer "a pass" because he knew Dyer in jail. But Dyer then said he did not believe this rumor. (People's Exhibit 34-B, pp. 61-62.) The detectives also pressed Dyer to identify a shooter, offering to relocate Dyer, and suggesting that he would not have to testify in court and that Dyer's name would not even "come up anywhere else other than this" (i.e., identifying the shooter so the case against the shooter could be further investigated). (People's Exhibit 34-B, pp. 63-69.)

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[9] The transcript of the interview was also distributed to the jurors (People's Exhibit 34-B). This portion of the audiotape was about 80 minutes long. (20 RT 3417-3417.)

Dyer then described how the shooting occurred, and identified "Little Sonny" from "60's Brim" as the shooter. He stated Little Sonny shot at him twice but missed, and that he ran away across the street toward the liquor store, then came back after the shooting stopped and saw Trevon Boyd get out of the car. He stated he knew Little Sonny from being in CYA with him. (People's Exhibit 34-B, pp. 71-73.) The detectives then showed Dyer a photo array of Blood gang members nicknamed "Sonny," and Dyer identified No. 2 (appellant). (People's Exhibit 34-B, pp. 75-77.)

Attempted Murder of Luis Hernandez on October 3, 1994

Testimony of Luis Hernandez

On October 3, 1994, Luis Hernandez was providing security for the parking lot where the Santa Monica branch of the Telephone Employees Credit Union and other businesses were located. Hernandez patrolled the parking lot on foot and he was not armed. A car pulled up next to Hernandez with three black males inside (17 RT 2989-2991; 3015), and Hernandez did not see any cars pull in behind this car. (17 RT 3010.) The passenger in the right front seat asked him where Santa Monica College was. As Hernandez pointed, the man said "Don't move," and began to pull a black gun out of the glove compartment. Hernandez began running toward the Credit Union. Hernandez heard four shots, and he believed one hit him. He fell to the ground, got back up, and ran inside the Credit Union. Then he heard more shots. (17 RT 2991-2993.)

Hernandez was hit by three bullets in all, and he heard a total of approximately eight shots. He fell down inside the bank, but did not feel a lot of pain, only a burn. He showed his bullet wounds to the jury (one was near his lower right stomach area, another was near his heart on the right, and the third was in his lower left back area). He did not remember what the car looked like, and he did not recognize the person who shot him, because it all

happened so fast. He spent one week in the hospital, and was off work for two months. He changed security companies afterwards because he was afraid to go back to work at the Telephone Employees Credit Union. (17 RT 2993-2997; 3002.)

On cross-examination, Hernandez testified that the passenger with the gun did not get out of the car. Hernandez saw the man's face, but he did not remember what he looked like. Once he began running, he did not look back. He described the car to the police as a two door, but he was not sure it was. He told the police he could not identify the remaining people in the car. (17 RT 2998-3003.)

On April 1, 1999, Hernandez was shown photographs at the Santa Monica Police Department, but he did not recognize anyone, and on August 12, 1999, he went to a live lineup at the Los Angeles County Jail, but again he did not recognize anyone. (17 RT 3003-3006.)

Testimony of Yasmine Greene

At 10:30 a.m. on October 3, 1994, Yasmine Greene was at the Telephone Employees Credit Union cashing a check. (17 RT 2922.) From where she was standing as she walked away from the teller, Greene could see out the double doors of the Credit Union. She saw a car pull up, and a man step out and start shooting at the security guard outside. (17 RT 2925.) She saw the security guard (Luis Hernandez) run past the window and the door. (17 RT 2923.) Greene heard more gunshots and then she saw Hernandez run inside the credit union. Hernandez came through the doors, fell down, got up and then fell down right in front of Greene. She saw a bullet wound on his lower back and put compresses on it. (17 RT 2924.)

After Hernandez fell, she saw the man who did the shooting get back in the car and take off. She got a good look at the man. He was light skinned, about 5 foot, 10 inches tall, in his early twenties, he had a bald head with a

little bit of hair, and he was wearing a white T-shirt. The car was a two-door yellow Cadillac, older model 1976 or 1977, with possibly a white interior. Greene saw the man shoot at the security guard several times. Greene thought there were three people, all African-American, in the Cadillac, including the man who was shooting. One man was in the back seat. The gun was black like a .9 mm or a .45. The Cadillac took off going toward Pico Blvd. (17 RT 2925-2927.)

More than four years later, in February 1999, Greene looked at photos of possible suspects (People's Exhibit 25), and identified "No. 3" (appellant) as the man she believed did the shooting.[10] In August 1999, Greene went to a live lineup, and picked a different person out, but she said that person's hair was longer and his face was darker than she remembered. Greene thought that between the live lineup and the photo lineup the more accurate identification she made was from the photo lineup, because the live lineup occurred several years after the incident, whereas the photo of appellant used in the photo lineup was taken much earlier in time. (17 RT 2928-2931.) Greene then identified appellant in court as the person she saw shoot Hernandez. (17 RT 2937.)

On cross-examination, Greene acknowledged that she only looked up through the credit union windows a few seconds before she turned her attention to Hernandez. Greene saw the shooter get out of the car but not close the door. She could not remember if she told the police on the day of the incident that the man got out of the car. (17 RT 2942-2944.)

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[10] Santa Monica Police Detective Gary Steiner testified that the six-pack photo lineup viewed by Yasmine Greene included Chauncey Bowen ("No. 2") as well as appellant ("No. 3"), but Greene identified appellant as the person who shot at Luis Hernandez. (18 RT 3127-3128.)

Greene insisted she told police on the day of the shooting that the Cadillac was a two door, a Coupe DeVille. Greene did not remember telling police that the car could have been either a Fleetwood, a four door, or a Coupe Deville, a two door. Greene agreed her statement to the police was that the man was shooting from the passenger seat of the car, and that he did not get out. Greene also agreed she originally told the police four people were in the car, but she insisted her recollection now was that there were only three people in the car. Greene also agreed that she told police that day that the driver was light skinned, possibly Hispanic, and that she had also said the Cadillac was clean, with no visible signs of damage. (17 RT 2948-2954.) Greene did not see any other cars follow the Cadillac out of the parking lot. (17 RT 2966.)

Santa Monica Credit Union Crime Scene Ballistics Evidence

Several expended .9 mm shell casings were found in the Telephone Employees Credit Union parking lot. (16 RT 2868-2869.) Ballistics testing indicated that all the shell casings were fired from the same gun. (16 RT 2888.) In 2000, the casings were compared to the .9 mm pistol that had been in appellant's possession when he was arrested on October 7, 1994 (People's Exhibit 12), and they were found to have been fired from that pistol. (16 RT 2896.)

Carjacking of Socorro Gonzales on October 3, 1994

Testimony of Socorro Gonzalez

On the morning of October 3, 1994, the same day Luis Hernandez was shot at in the Telephone Employees Credit Union parking lot, Socorro Gonzalez drove her 1989 grey Mercury Sable to a friend's house on Oak Street in Santa Monica. (16 RT 2845-2847.) Gonzalez stopped in the street, waiting to pick up her friend. This location is about four to five blocks south of the Telephone Employees Credit Union. (18 RT 3113.) As her friend walked toward her car, another car came toward her from the opposite direction and

stopped next to hers. The car was yellowish and looked old. She saw two Black males in the front seats. The driver got out and pulled out a gun, pointed it at her, and said, "Bitch, get out of the car." She got out of the car, walked away and turned her back to the car. She did not see what the man did next because she was afraid to turn around. She just heard "burning tires." (16 RT 2847-2851.)

When Gonzalez did turn around both cars were driving off in the same direction. She did not see a third car. The man with the gun was tall and well built, had a short-cropped haircut, and was wearing a white T-shirt and beige jacket. He was clean-shaven. The gun was dark colored and small, like a handgun. (16 RT 2852-2853; 2858.) Gonzalez could not identify People's Exhibit 12 (the handgun taken from appellant on October 7, 1994) as the gun she saw, but it was the right color. (16 RT 2859-2960.) In August 1999, Gonzalez went to the Los Angeles County Jail to view a live lineup, but she was unable to make an identification. (16 RT 2861-2862.) [11]

Testimony of Jerry Flannery

On October 3, 1994, Jerry Flannery was living on the 2400 block of Oak Street. At approximately 11:15 a.m., Flannery parked his car and was crossing to the sidewalk, when a female driver pulled up next to Flannery's car, facing east, and honked her horn. Her engine was idling. Flannery then heard a car approaching from the east at a high rate of speed and slam on its brakes next to the car idling in the street. The driver of the second car got out, walked around the back of his car to the front of the female's car, and yelled at her several times to get out of her car. The man said, "Get the fuck out of

[11] In addition to Ms. Gonzalez being unable to identify anyone at the live line up, SMPD Sergeant Gary Steiner testified for the defense that on July 13, 1999, he showed a six-pack photo lineup (Defense Exhibit L) to Ms. Gonzalez, she picked out "No. 4" (who was not appellant), and wrote, "This could be the person that took my car." (19 RT 3302-3303.)

the car." He then opened her car door and said, "Get the fuck out of the car, bitch." (17 RT 2970-2973.)

The man then dragged the female out of her car by the hair. The man had a .9 mm Beretta semi-automatic in his hand. Flannery was familiar with the Beretta Model 92. Flannery started to help the woman, but the man pointed the gun at him, and Flannery hid behind a car. (17 RT 2973-2974.)

Flannery ran between the apartment buildings and knocked on three or four doors trying to get someone to call the police. When he came back out, he saw the woman sitting on the curb and the two vehicles driving away. The car the man arrived in had made a U-turn and both cars were now headed east. Flannery did not see any other cars following them. Flannery got in his car and attempted to follow them for three or four blocks, but he was unable to find them. (17 RT 2975-2976.)

According to Flannery, the man with the gun was a black male, in his late twenties, and had been driving the car before getting out of it. The car the man arrived in was a beat-up older car in bad shape; it had faded paint and a sagging rear end. Flannery thought three people were in the car, a driver, a passenger and a person in the back seat. Flannery could not describe the other males in the car. He thought they were African American, but he was not sure. Flannery could not identify the person with the gun, because he had been diving for cover, and had looked at the barrel of the gun, not the man's face. (17 RT 2976-2977.)

Interview of Appellant on January 6, 1999

In 1999, SMPD Detective Gary Steiner was assigned to re-investigate the October 3, 1994, shooting of the security guard at the Telephone Employees Credit Union and the carjacking of Socorro Gonzalez. On October 6, 1994, Ricky Washington was stopped while driving Gonzalez' car and arrested. Other persons were in the car but got away. Washington was

convicted of receiving stolen property. When Steiner got the cases in 1999, there were no other identified suspects in the carjacking or in the attempted murder. (18 RT 3112-3114.)

On January 6, 1999, Detective Steiner interviewed appellant after hearing that he had some information he wanted to provide regarding the two cases.[12] In the interview appellant stated that Chauncey Bowen paged appellant on the morning of October 3, 1994, and used the ruse that a gang member had been shot to get appellant to come see him. When appellant saw Bowen, Bowen told appellant he planned to rob a credit union in Santa Monica and wanted appellant to go into the credit union with him during the robbery. Appellant refused to do so, but stated he would "watch [Bowen's] back" for him while sitting in a separate car. That morning Bowen drove to the credit union with three other African-American males in a big two-door American car that Bowen had stolen the night before, and appellant followed in a blue Toyota Camry which was being driven by a girl whose name he did not want to give. (People's Exhibit 32-B, pp. 10-16.)

Appellant stated to Detective Steiner that he was carrying a gun with him, a chrome .45 automatic. Bowen had a .9 mm black Smith and Wesson handgun with him. Appellant would not name the other men in Bowen's car, but appellant gave Bowen's name because appellant wanted to see Bowen "get what he deserved." Appellant believed at the time of the interview that Bowen was trying to kill appellant. (People's Exhibit 32-B, pp. 17-20.)

Appellant stated he later bought the black .9 mm gun from Bowen for $250 or $300, and this was the gun he had in his possession when he was arrested on the murder charges (on October 7, 1994). (People's Exhibit 32-B,

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[12] A redacted transcript of the interview (People's Exhibit 32-B), was distributed to the jury and the redacted taped interview was played in court (People's Exhibit 32-A). The tape was about one hour long. (18 RT 3114-3119.)

pp. 21-22; see also, p. 36.)

Appellant described how Bowen originally intended to rob one credit union but abandoned the plan after finding out that people could enter the credit union only by being "buzzed in," and Bowen then changed the plan to robbing a bigger credit union nearby (the Telephone Employees Credit Union in Santa Monica). Appellant told him this credit union "was too big" and had "too many people" to rob, but Bowen insisted they could "do it," and appellant agreed to follow him in the blue Camry. (People's Exhibit 32-B, pp. 23-27.)

Bowen was in the front passenger seat of the first car. Appellant observed Bowen's car stop in the parking lot outside the credit union, and Bowen get out and say something to the security guard. Then the security guard started running and Bowen started shooting. Appellant told the girl driving the blue Camry to back up and leave, but another car had come into the parking lot behind them. Appellant saw Bowen's car start to drive through the parking lot toward the other end, and the girl drove that way too. As they drove by the security guard, appellant could "see the blood on the security guard's back." Bowen's car then stopped again, and Bowen fired more shots at the security guard as the guard stumbled into the credit union. Bowen's car then took off and drove out into the street. The girl driving the blue Camry stopped at the street to wait for traffic to clear, and a white guy in another car "flew" past them chasing Bowen's car. Appellant told the girl who was driving to follow the white guy's car. (People's Exhibit 32-B, pp. 28-30.)

Appellant saw that the white guy was on a cellular phone, and appellant's car pulled up to the white guy when he slowed down for stop sign. Appellant showed him the .45 handgun and said to him, "Man, what are you doing?" Appellant thought the guy must not have seen him, however, because he continued to follow Bowen's car. So appellant told the girl to get in front of the guy's car and then slow down and not let him pass her, which she did,

and eventually the guy turned off. (People's Exhibit 32-B, pp. 29-31.)

Appellant and the girl then turned a corner following Bowen's car and saw Bowen making a woman get out of her car. Bowen and two of the men with him got into the woman's car and took off. Then everyone in the three cars drove back to Los Angeles to the area near Crenshaw they called "The Jungle." Appellant's car drove first because Bowen said he didn't know where he was at. When they all got out of their cars, Bowen was laughing. Appellant was "pissed" and told Bowen that he had "fucked up" and that appellant was not "fucking with you all and shit like this no more if you acting like that, man." (People's Exhibit 32-B, pp. 32-34.)

Appellant then described how later he was riding in the car that had been carjacked from the woman with Bowen and others when the police started chasing them around 62nd and Vermont. The driver ran into the curb and Bowen, appellant and others jumped out and ran. A guy named Ricky was sitting in the back seat of the car. Detective Steiner told appellant that Ricky had been caught, had served his sentence, and had been released from prison. Nonetheless, appellant would not identify Ricky further, stating he did not want to talk about anybody except Bowen. (People's Exhibit 32-B, pp. 35-40.)

Appellant subsequently in the interview described Chris Fennelle, Chauncey Bowen's brother, as a "gun fanatic" and stated that he had watched Fennelle murder somebody at Wilton and 54th Street in September 1994. This was the same day that Anthony Brown was killed, around September 10 or 11. Appellant then described the shooting by Fennelle in detail, and stated that as far as he knew, Fennelle had never been charged with this murder. (People's Exhibit 32-B, pp. 54-58.)

Following the playing of the audiotaped interview, Detective Steiner explained the "Ricky" whom appellant talked about on the tape was Ricky Washington. Steiner also testified that appellant indicated to him that he had

been in the car when the police pulled it over, and he was one of the persons who got away. Appellant told Steiner that Washington was caught because he had a pre-existing gunshot wound to his foot and he couldn't run as fast as the other people who ran. (18 RT 3128-3129.)

On cross-examination, Detective Steiner testified that appellant told him he wanted to get Chauncey Bowen in trouble because Bowen had tried to kill appellant and his girlfriend. (18 RT 3134-3135.) Appellant said that after the car crashed during the police chase, he and Bowen ran into a woman's apartment whom they knew, and they saw LAPD and SMPD officers looking for them. (18 RT 3138-3142.)

Appellant also said that on the day he was arrested for murder (October 7, 1994), he had the gun with him that was used to shoot Luis Hernandez. Prior to this interview, Steiner did not know that the gun appellant had been arrested with had been used in another crime. Steiner agreed that appellant thus freely implicated himself in the other crime. After he interviewed appellant, Steiner attempted to interview Bowen, but he refused to talk to Steiner. (18 RT 3144-3148.) At the time, Bowen had another case pending and in Steiner's opinion, it was likely he did not want to talk to Steiner for this reason. (18 RT 3164.)

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When appellant had been arrested in October 1994, he would not identify whom he bought the gun from. Steiner did not view appellant as lying at that time, he just did not identify whom he bought the gun from. Appellant then told Steiner, however, that he bought the gun from Bowen. (18 RT 3155.) [13]

Defense Case: Attempted Murder of Luis Hernandez on October 3, 1994

SMPD Officer Carl Heublein testified that he responded to the Telephone Employee's Credit Union shooting on October 3, 1994, and interviewed Yasmine Greene at the crime scene. (19 RT 3270-3271.) What Greene told Heublein contradicted particular points in the testimony Ms. Greene gave at trial.

Greene described the car the shooter was in to Heublein as a Cadillac, either a Fleetwood or a Coupe Deville, but she could not remember if it had two or four doors. Greene thought there were four people inside the car and she described the driver as light skinned, possibly Hispanic. She described the car as clean with no distinctive damage or unusual customizing. She observed "the male black in the passenger seat of the Cadillac shoot at the security guard approximately four times." Greene did not say the shooter was ever outside the car. (19 RT 3272-3275.)

SMPD Officer Kathleen Keane testified that she spoke to Luis Hernandez at the UCLA Hospital after the shooting, and obtained a statement

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[13] Regarding this statement by appellant to Sergeant Steiner, Chris Fennelle testified that it was fairly common for guns to be passed between gang members. But according to Fennelle, if someone wanted a gun from another gang member, he would borrow the gun, not buy it. According to Fennelle, Bowen and appellant had been close friends for a long time. When appellant came to Fennelle and requested a gun, Fennelle was going to give it to him. Again according to Fennelle, if a person were buying a gun from someone who was not one of his own gang members, the price for a .9 mm gun would be $100. (18 RT 3196-3198.)

from him. Hernandez said he came in contact with a yellow car occupied by five male Blacks, and had a conversation with the right front seat passenger, who asked for directions to Santa Monica High School. Hernandez told him that Santa Monica College was closer. He then saw a gun and started running from the car. He turned back and saw the right front seat passenger get out of the car and start shooting at him. He described the car as possibly a two door, with tinted windows and a dull finish. It was dirty looking. (19 RT 3290-3294.)

Hernandez said he saw the shooter taking the gun out of the glove compartment, and he started to run. The shooter got out of the car. He was 5 foot, 10 inches tall. Hernandez was shot twice, once before he fell and a second time after he fell and got up. When Hernandez fell, he thought the man would shoot him again, so he got up and was shot again as he was trying to run into the bank. (19 RT 3294-3295.)

Daniel Gonzalez testified for the defense that he was sitting in his car at the Telephone Employees Credit Union on October 3, 1994, and saw the security guard standing by a yellow pole in the parking lot talking to a black male. The black male was not in a car and Gonzalez did not know if he was associated with any particular vehicle. Gonzalez saw the security guard start running toward the doors of the Credit Union and the man he had been talking with start shooting a gun at the guard. The man shooting the gun then got in an older American car with three occupants and he began shooting toward the security guard again. Gonzalez did not see the shooter during the second round of shots, it happened too fast. The shooter was in the right front passenger seat of the car. The driver had a Jheri curl haircut. (19 RT 3329-3336.)

The driver tried to leave the parking lot, but he was blocked by traffic and then the traffic cleared. The car crossed Pico and Gonzalez followed in

his car. No cars were following Gonzalez. Gonzalez called 911 while he was following the car. He followed the car for less than 45 seconds when the people in the car noticed they were being followed. They started braking the car and slowing down. Gonzalez decided it wasn't worth it to keep following and he went back to the bank. He did not think he would recognize any of the people in the car now. Gonzalez did not recognize anyone in the courtroom. (19 RT 3338-3341.)

On cross-examination by the prosecution, Mr. Gonzalez said he described the shooter to the police as a black male, 25-30 years, six feet tall, stocky, with very short hair or a shaved head, medium complexion, clean shaven, wearing a white T-shirt and light-colored pants. (19 RT 3345-3348.)

PENALTY TRIAL

Opening Statements of Prosecutor and Defense Counsel

The prosecutor argued that appellant's life of crime was like a violent and horrible television mini-series, and the jurors in the guilt phase heard only a part of that life of crime. Appellant had committed other violent crimes before and after the triple murder in September 1994, including robbing a credit union in Lompoc in 1997 in which another robber shot a customer in the leg and murdered a second customer. (23 RT 3864-3878.)

Defense counsel argued that the jurors would decide appellant was not the worst of the worst and did not deserve the death penalty, after they heard the mitigating evidence. Counsel argued that appellant's killing of three gang members happened because of experiences appellant had with people and events over which he had no choice or control. His mother did drugs and drank, she did not obtain prenatal care, and she beat him, he did not have a

father around and in his life, and his grandmother was crazy and violent, and abused everyone, including him. (23 RT 3883-3887.)

Defense counsel argued that appellant had problems as a child with behavior and school work, and at age seven he entered a special education facility. He grew up in gang territory, and his older brother, "Big Sonny," was a notorious gangster. Appellant suffered from Attention Deficit Disorder, and at age fourteen was diagnosed as severely emotionally disturbed. At age sixteen, his brother "Big Sonny" was murdered. Appellant suffered from a brain dysfunction in his frontal lobe area, causing him to have poor impulse control, and making his decision-making skills comparable to someone with borderline intelligence. He also lacked the 4 repeat MAOA allele, a gene that otherwise helps a person cope with violence around him and with violent impulses. (23 RT 3887-3893.)

Prosecution's Case in Aggravation

Crimes Committed by Appellant As a Juvenile

The prosecution presented evidence of two violent crimes that appellant committed as a juvenile. On January 21, 1988, Alice Rox parked her car on her way to the Slauson Swap Meet, and when she got out of her car a man whom she later identified as appellant pointed a gun at her and demanded her keys. She tossed them to him, and appellant then took her car. Rox recovered her car a couple of days later. (24 RT 4167-4171.)

On February 4, 1988, around 1:00 a.m., Dwain Edwards drove his 1977 Z-28 Camaro to a gas station on Slauson and Crenshaw. A man whom Edwards later identified as appellant came up to the car and told Edwards to throw him the keys and to run away from the gas station. Edwards did so, because appellant had a gun that looked like a machine gun, with a foot long barrel that had holes in it. The police recovered Edwards' car the next day; it was not damaged. (24 RT 4178-4182.)

In the afternoon of that same day, appellant was arrested at John Muir High School after he was detained by campus security. The police later seized an Intratec .9mm with a fifty round clip that had forty bullets in it which appellant had been seen hiding at a location near the Slauson railroad tracks. (25 RT 4287; 4290-4294.) On February 12, 1988, appellant was interviewed by a police investigator. After being advised of his rights, appellant confessed to robbing Alice Rox and Dwain Edwards of their cars. Appellant admitted robbing Edwards with a .9mm Uzi. (28 RT 4913-4921.)

Appellant's 1993 Conviction and Incarcerations for Parole Violations

On September 2, 1993, appellant was convicted of discharge of a firearm with gross negligence, and he received a sentence of 16 months in state prison to be served at a Youth Authority facility. Appellant entered prison on September 27, 1993, and was paroled a year later, on September 3, 1994, four days before the murders of Dayland Hicks, Trevon Boyd and Lamar Armstrong on September 7. Appellant was arrested on October 7, 1994, on suspicion of murder, and then remained incarcerated until he was paroled on October 7, 1995. On October 24, 1995, he was placed in custody again, and he returned to state prison on February 22, 1996, as a parole violator. He was released on parole once more on July 15, 1997, and parole was suspended again on August 8, 1997, and appellant was returned to prison. (24 RT 4132-4142.)

Robbery of Pacific Marine Credit Union in Oceanside in September 1994

On September 27, 1994, three weeks after the triple murder, appellant participated in the robbery of the Pacific Marine Credit Union in Oceanside. Approximately $161,600 was taken. (23 RT 3896-3898.) Melissa Lopez was the assistant manager of the credit union; all of the people working that day were women and no security guard was present. Ms. Lopez testified that the credit union received a large shipment of "brick" money (money straight from

the federal reserve) that day. At approximately 11:30 a.m., the credit union's doors flew open and three or four people came running in. (23 RT 3962-3968.)

Two African-American males hurdled the teller counters and ordered the tellers to the ground. One of the males, whom Ms. Lopez identified in court as appellant, ordered Ms. Lopez to get up. He took her to the vault area by her arm and told her to open the vaults. The men were pointing black semiautomatic handguns at her and at the tellers. Appellant took Lopez to the vault and pointed a gun at her head. He said she wasn't opening the vault fast enough and if she didn't open it right away he would shoot her. Appellant then placed his gun on top of the vault and proceeded to clean out the cash. The other man remained in the lobby area yelling at the tellers to open their money drawers. Lopez then heard him say, "Come on, let's get out of here." Appellant put the money in what looked like a currency bag and left. (23 RT 3968-3974.)

Michael Loughran worked for a company whose office was inside the credit union but had a separate door. Loughran heard a commotion in the bank and he looked around the door. He saw a man, whom Loughran identified in court as appellant, point a gun. Appellant told him to come into the bank and to go over and lie down by the tellers, which Loughran did. After a few minutes Loughran heard yelling going on in the vault area. Appellant then jumped over the counter, right next to Loughran, holding a bag. When appellant landed, he kneeled on Loughran's chest and asked him if he had any money. Loughran reached into his top pocket, where he kept his cash, but pulled out his business cards by accident. Appellant threw them down, hit Loughran in the head with his pistol, and said, "Give me all your money, white boy." Appellant pointed the gun at Loughran's face. Loughran then remembered his money was in his left pocket and he gave appellant two one

hundred dollar bills. (23 RT 4061-4067.)

Ms. Lopez had worked at the credit union for three and a half years, she loved working there and she had a strong future. After the robbery, she immediately started looking for a different job, and she found employment in a different field. She had six months of post-traumatic syndrome therapy, seeing a therapist twice a week. She was still frightened by doors opening quickly or by anyone who looked suspicious. She was afraid to be out after dark, she had nightmares, and she no longer trusted anybody. Appellant's face was forever ingrained in her head, and she "freaked out" whenever she saw someone who looked like him. (23 RT 3999-4000.)

On January 6, 1999, Santa Monica Police Department detective Gary Steiner interviewed appellant about several matters, including the Oceanside credit union robbery. Appellant told Detective Steiner that he and Chauncey Bowen had robbed a credit union in Oceanside in September 1994 of close to $200,000. (People's Exhibit 56-A, pages 70-71.) Appellant described his role in the robbery. (People's Exhibit 56-A, pages 78-79.)

Detective Steiner confirmed on cross-examination that he did not have any information about specific suspects in the Oceanside credit union robbery until he was told about the robbery by appellant. Appellant said Chauncey Bowen had the chrome gun and appellant had a black gun. According to Detective Steiner, Mr. Loughran testified that he was hit with a chrome gun, and Mrs. Lopez, the assistant bank manager, testified the man with her in the vault had a chrome gun. (26 RT 4456-4458.) This suggested that Chauncey Bowen was the person who threatened Mrs. Lopez and who confronted Mr. Loughran.

Shooting of George Minor in Los Angeles in October 1995

George Minor, who admitted he was a drug dealer, testified that on October 21, 1995 (two weeks after appellant was paroled from state prison the

second time), he was standing in front of his house around 9:30 p.m. when appellant and two other black males approached him. Appellant pulled out a .9 mm handgun and began shooting at Minor. One of the other males began shooting as well. Minor was hit in the arm and in the leg before he ran behind his car parked in the driveway. Both shooters "unloaded" their guns into the car and at Minor's house. (23 RT 3906-3911.)

The three Black men then left, and Minor ran into his house. Someone called 911, and a neighbor tied a tourniquet around Minor's leg. Minor spent a couple of weeks in the hospital, and he still had problems with his arm. Four or five bullets went through his house. Minor's sister and her children were in the house, but none of them were hit by the bullets. (23 RT 3911-3915.) When Minor was at the hospital, he picked appellant out of a six-pack photo lineup; there was no question in his mind that appellant was the person who shot him. (23 RT 3929-3930.)

After he got out of the hospital, Minor received some phone calls about this incident but no one said they would harm his family if he went to court. (23 RT 3934-3936.) The phone caller told Minor not to come to court, but he did not threaten him. Minor's wife felt their safety was in jeopardy. Before appellant started shooting at Minor, he said that he was "East Coast," which was the rival gang of Athens Park, another local gang. (23 RT 3941-3943.)

Minor did not tell the shooters there were children in his house. Minor denied that when he was in the hospital, the investigating detective put his thumb on a photograph of appellant or told Minor who he was supposed to identify in the photo lineup. (23 RT 3936-3940.)

Saudia Minor, George Minor's wife, testified that she saw some people shooting at her husband as she pulled up to her house in a car. Appellant was one of the shooters. At the hospital afterwards, Saudia was shown pictures of possible suspects but she didn't want to look at them then. (23 RT 3946-

3951.) She was subpoenaed as a witness regarding the shooting, and then began receiving strange phone calls from a girl and a guy. One time the guy called and said he knew where her daughter went to school and that Saudia worked at IHOP. He told her he knew a lot of information like this, which made Saudia scared. She did go to court but when she saw appellant behind a window, it startled her and she walked out of the courtroom. Saudia talked to George Minor about being worried about her family's safety. (23 RT 3952-3955.)

Saudia denied that her view of the shooting was very brief. She did not remember telling anyone that the detectives in the hospital room were pointing to a picture and telling her husband to identify that person. The police came to her house with "mug shot" looking pictures, and they did not tell her husband which picture to pick out. She denied telling anyone that the police were hinting that appellant was the suspect, or that she told anyone that she told her husband which picture to pick. (23 RT 3956-3959.)

Los Angeles County Deputy Sheriff Angel Jaimes testified he was working patrol with his partner a block away from 122nd Street on October 21, 1995, when they heard about ten gunshots coming from the south at approximately 9:30 p.m. Deputy Jaimes turned onto 122nd and a man standing in the middle of the street flagged him down. The man said he saw the men that had done the shooting and that they had headed west towards San Pedro. Jaimes let the man in his rear seat and drove towards San Pedro. They saw a white Cadillac with two black males inside turning west on 124th Street. The man got excited and pointed, saying "That's him, that's him." Jaimes followed behind the car and requested assistance. (24 RT 4079-4084.)

Deputy Jaimes then stopped the car and ordered everyone to get out. One of the men in the car was appellant. Jaimes searched the car and found two handguns hidden inside a tear in the passenger seat. One was a .9mm that

had only three rounds in it (People's Exhibit 41). The other was a .380 automatic that had no bullets in it (People's Exhibit 42). (24 RT 4084-4090.) After appellant was arrested, Jaimes administered a gunshot residue (GSR) test to appellant's hands. (24 RT 4115.) The test was positive for GSR. (25 RT 4252-4259.) A ballistics expert testified that four expended cartridge cases found at the scene of the George Minor shooting matched the .9mm handgun, and six of the expended .380 cartridge cases at the scene matched the .380 automatic handgun. (28 RT 4853–4859.)

Robbery of Vandenberg Federal Credit Union in Lompoc in 1997 and Murder of Credit Union Customer Christine Orciuch

On August 8, 1997, Jasper Altheide, a teller at the Vandenberg Federal Credit Union in Lompoc, saw four men come into the credit union and rob it. One robber, whom Altheide identified as Chauncey Bowen, came into the credit union first and pretended to be writing a deposit slip. Then another man, whom Altheide identified in court as appellant, ran up to the counter with a shotgun and began screaming, "Get the fuck down or I'll shoot you." Altheide also identified a picture taken by a credit union security camera that day (People's Exhibit 63) as a picture of appellant. (27 RT 4638-4643.)

Moira Philley, another teller, also identified appellant as the man holding the shotgun. He pointed the shotgun at Philley, and she got on the ground. (27 4684-4688.) Appellant began yelling for the manager, and when no one spoke up, he said he would shoot someone. Philley told appellant that the manager was in the back, and appellant told her to get up and show him where the manager was. He kicked her foot hard and "smushed" her face in the ground. Philley's foot was stuck in a chair and she fell trying to get up. (27 RT 4688-4691.) Philley led appellant to where the manager was, and she thought appellant was going to shoot her when he found out the manager did not have the vault keys. (27 RT 4691-4695.)

While the robbery was in progress, Octavio Gallardo entered the credit union. He was on crutches because he had a broken leg. Christine Orciuch, another customer, opened the front door for him. He walked inside and a man pointed a gun at him and told him to get on the ground. Gallardo was going to throw himself on the ground when the man shot him in his right thigh. Ms. Orciuch ran out of the credit union, and the man with the gun told her to stop. (28 RT 4735-4739.)

Altheide heard a gunshot by the front door, then heard a second gunshot, and people started screaming to call 911. (27 RT 4643-4648.) Appellant did not fire either of the shots. (27 RT 4662.) After Ms. Altheide heard the first gunshot, she heard appellant say, "What the fuck?" After the second gunshot, appellant ran back over the counter and all the robbers left. Altheide went to the front door to lock it and saw a man lying on the ground outside who had a brace on one leg and was shot in the other leg. There were crutches on the ground next to him. The manager brought out a little boy (Quentin Orciuch) who was looking for his mother, and then Altheide noticed another person lying on the ground outside. Altheide told the manager to keep the boy inside, and she went over to the woman lying on the ground (Christine Orciuch) while another woman went to the man lying on the ground (Octavio Gallardo). The woman's lips were blue and she didn't say anything. The boy kept wanting to come out outside and see his mother, but Altheide kept telling them not to let him out. The paramedics arrived and attempted to treat the woman. (27 RT 4649-4656.)

The robbers took about $11,000 from the tellers' drawers. (27 RT 4719.) Moira Philley saw Chauncey Bowen stop and take items from around Christine Orciuch's body as he ran away through the parking lot. (27 RT 4706.) Deputy Milton Baldwin, who was assigned as the investigating officer of the credit union robbery for the Lompoc Police Department, obtained

camera footage from the surveillance cameras. Baldwin identified a picture of appellant taken at the credit union during the robbery (People's Exhibit 66). (28 RT 4758-4764.)

Christine Orciuch died of a gunshot wound through the left side of her chest. The entry wound was in her back on the left side. The bullet traveled through her heart and exited out through her left breast. Ms. Orciuch had abrasions on her knees consistent with her falling to her knees due to sudden loss of blood pressure. (27 RT 4613-4624.) Ms. Orciuch's injury was rapidly fatal. (27 RT 4635.)

Quentin Orciuch testified that he was 11 years old on August 8, 1997, and went with his mother to the credit union that day. Mrs. Orciuch parked their car in front and Quentin remained in the car while she went inside. He looked up when he heard two gunshots, and he heard his mother scream his name. He jumped out of the car and ran to the side doors by the drive-up teller, banged on them, and screamed that his mother had been shot. He didn't run to his mother because he saw three men running and he didn't know what was going on. (27 RT 4672-4675.)

Quentin saw his mother lying face down on the ground in front of the flower beds by the pay phone outside the credit union. Some ladies opened the side door and took him into the bank. He was crying. He tried to page his father but he was crying too hard. He tried to run outside to see his mother but a fireman stopped him. He could not get hold of his father so a fireman took him to the hospital to wait for his father and his sisters to arrive. (27 RT 4676-4679.)

When his father arrived at the hospital he told Quentin that his mother was dead. Quentin was devastated. He went in to see his mother and prayed. Everything was harder without his mother. It was harder for him than if she

had died of an illness, because he didn't get to say goodbye. He had to go into counseling for a year and a half because of the incident. (27 RT 4679-4680.)

Chester Orciuch, Christine's husband, testified that when he got to the Lompoc hospital he was told his wife had died. Mr. Orciuch and his children went in to see Christine and pray for her. It had been hard since her death being a single dad, because his wife had been the caretaker for the family. His three children felt a lot of anger about the death. Mr. Orciuch had nightmares, and he did not have the balance of having a spouse supporting him in raising the children. (28 RT 4807-4817.)

Octavio Gallardo, after being shot in the thigh, was in the hospital for three days. (28 RT 4739-4744.) He was afraid to leave his apartment for a week after the incident. He still had problems with his leg when it was cold. (28 RT 4747-4748.)

Ms. Altheide also had a hard time after the robbery because she had the keys to the money and did not immediately give the money to the robbers. She had a hard time also because she had not let the boy see his mother. Altheide had nightmares afterwards. She underwent counseling but she did not work much because she did not like being at the credit union after that. She stated the innocence of living was gone. She still saw Christine Orciuch's family members at the bank, and she still felt responsible every time she saw them because she had had the keys. (27 RT 4656-4659.)

Moira Philley said the incident almost cost Philley her marriage because she was so "freaked out." She went to trauma counseling, but had unbelievable nightmares. Philley went to church with Christine Orciuch's family. She felt guilty because she got to raise her kids and Christine Orciuch was not there to raise hers. Philley had a hard time working at the credit union after the robbery, because she would have panic attacks. She could not walk by the flower beds where Christine Orciuch had been shot. Orciuch's husband

put a memorial there and for years he would come every day and light candles. It was terrible for Philley to watch the man grieving for his wife, and his kids also, who often came with him. (27 RT 4699-4703.)

Christopher Fennelle testified that he had a conversation with his brother, Chauncey Bowen, and appellant a few weeks before the Lompoc robbery/murder. Bowen and appellant were planning an armed robbery of a bank. They said they needed cars and there was going to be a lot of money. Fennelle made it clear he was not going to participate, and spent five hours trying to talk them out of it. Fennelle told them if someone was killed they would be responsible, but appellant said he didn't care. (28 RT 4888-4893.)

Appellant was arrested after the robbery, and interviewed by police. Appellant stated that he had been present during the robbery, but that no one was supposed to get shot and that the robber who shot people had "fucked up." Appellant stated he was upset that Christine Orciuch's son had to watch the shooting, and he said that the guns were just to make sure everyone listened and no one was supposed to get shot. (28 RT 4799-4801.)

Appellant's Escape from Santa Barbara County Jail in March 1998

Appellant and Chauncey Bowen were incarcerated in Santa Barbara County Jail after their arrests for the Lompoc credit union robbery. On March 10, 1998, appellant, Bowen and another inmate escaped. Jane Overbaugh, who was working at the Santa Barbara Department of Social Services adjacent to the jail, looked out her window toward the parking lot at 11:20 a.m. and saw three African American men coming down the hill from the jail area, wearing inmate clothing and disrobing while they were walking. The men surrounded a car that was leaving the parking lot, yanked a woman out, and took the car. (25 RT 4353-4364.)

Matilde Ulrich was driving the car, a Honda Civic hatchback. The men pulled her by the arm out of the car, and drove off. (25 RT 4368-4377.)

Ulrich was scratched when she was pulled out and was thrown to the ground, but she did not have any lasting effects from the event. (25 RT 4378-4386.)

Glen Monk, an officer in the Santa Barbara Sheriff's Department, was driving home when a blue Honda passed him at a high rate of speed about a half-mile from the jail and almost took his front bumper off. Officer Monk pulled alongside the car and saw three black males inside. Realizing he was outnumbered, he drove home to call the car in. The car was heading south on Highway 101. He told the Watch Sergeant the license plate number, the direction the car was traveling, and where the car was likely to be at that point. (25 RT 4392-4397.)

Louis Simon, a Santa Barbara Sheriff's Department helicopter flight officer, received a call about a jail escape and a carjacking. He began flying southbound away from the jail. The CHP picked up the car about nine miles south of the jail. Simon caught up to the CHP about five miles after that. Simon videotaped the car chase and subsequent arrests (People's Exhibit 54). The police used a spike strip to stop the car. The men inside the car did not try to run away when it stopped, but put their hands out the windows with nothing in them. The 22-minute long videotape of the chase and arrest was played to the jury. (25 RT 4403-4409.)

Daniel Osuna, a deputy with the Santa Barbara Sheriff's Department, assisted in the pursuit. He testified that the driver of the car was Chauncey Bowen, appellant was sitting on the passenger's side, and the last person to get out of the car was a county jail inmate named Mac Bonds. (25 RT 4413-4416.) David Rocha, the floor officer at the Santa Barbara County Jail on the day of the escape, found a ladder in the jail yard and a hole in the ceiling of the yard, which was apparently how appellant, Bowen and Bonds escaped. (26 RT 4508-4510.)

Mark Liddi investigated the escape and interviewed appellant after his recapture. Appellant said that everything Bowen did that day had been forced on him by appellant. Bowen did not want to have anything to do with the escape, but appellant punched Bowen in the head and made him go along. (26 RT 4525-4528)

Testimony of Kipchoge Johnson

Kipchoge Johnson had known appellant for ten years. Appellant bragged about the September 1994 credit union robbery in Oceanside, saying, "I was on the counter. I laid them down. I should be the Coca Cola Man, just, you know, be the model." Appellant bought a Thunderbird automobile after this robbery, paying between $7,000 and $10,000. According to Johnson, appellant did not have a job; his job was being a gangster. Appellant did not drink or do drugs, which was unusual among gang members; he had "a natural high." (24 RT 4192-4194.)

Johnson testified that appellant was "a live wire," he was "hyper" and "always on the go." He acted "crazy but he was not crazy." He did "crazy stuff." (24 RT 4195-4196.) The "crazy stuff" appellant did was "kill people, rob banks, you know, brag about it," go to prison and get out and "do the same stuff again." (24 RT 4196.) Johnson thought appellant was not "crazy" because he didn't do drugs and he didn't receive a disability check from Social Security. One time appellant asked Johnson to help him get money and then appellant robbed a McDonald's in the neighborhood on his own, and got away with it. (24 RT 4196-4198.)

Incidents of Violence While Appellant Was Incarcerated

On March 10, 1994, Antoine Phillips, a Blood gang member, got in a fight with appellant at Avenal State Prison. According to Phillips, the fight occurred because one of Phillips' "homies" had killed one of the "homegirls" from appellant's gang set. Appellant confronted Phillips and they fought. A

few weeks later, on the yard, appellant came up and kicked Phillips in the mouth while Phillips was laying on the grass. They fought again that night and appellant broke Phillips' jaw. (24 RT 4205-4210.)

On November 28, 1997, in the Santa Barbara County Jail, Deputy Brian Parker told appellant to take down some items from his cell wall. Appellant became verbally abusive and challenged Deputy Parker to go in his cell and fight him. Appellant called Parker a "Punk bitch motherfucker," and Parker took appellant's challenge to fight as a threat. (28 RT 4752-4753.) Parker did not remember if he actually went into appellant's cell and removed the pictures, but he thought most likely he did. If he did, appellant would have been secured in handcuffs before he went in. Deputy Parker agreed that name-calling was "part of the job." As punishment appellant was served a cold sack meal instead of a hot meal. For infractions, the staff could change meals and take away phone privileges. (28 RT 4754-4755.)

On November 17, 1998, in the Santa Barbara County Jail, appellant took a plastic coat hanger, smashed it, and began sharpening one of the pieces on the concrete floor. The plastic pieces were confiscated as contraband without incident. (26 RT 4533-4538.)

On February 17, 2001, appellant was housed on the disciplinary row in the Los Angeles County main jail. Appellant handed Deputy John Hermann a note and told him to post it to make sure everyone could see it. Specifically, appellant wanted Deputy Lindenmayer to see it. The note depicted five different stages in a stick figure cartoon. (People's Exhibit 75.) The fifth panel in the cartoon depicted appellant beating Deputy Lindenmayer up, and Lindenmayer lying on the ground dead. Deputy Hermann took the cartoon as a threat to Lindenmayer. He did not know who drew the cartoon. (29 RT 5050-5057.) Hermann did not tell Lindenmayer about the cartoon. Lindenmayer was not working on that shift; he was told about the cartoon the

next day. (29 RT 5064.) When Lindenmayer saw the cartoon, he took it as a threat to his safety. (29 RT 5067.) Deputy Lindenmayer's "relationship" with appellant was hostile, uncooperative, and threatening. Lindenmayer's reaction to the cartoon was partly due to this relationship with appellant. (29 RT 5069-5070.)

On July 18, 2001, a deputy searching appellant's cell at the Los Angeles County main jail found a "club" made out of newspaper with cloth wrapped around it to form a handle. The club was seized as contraband because it could be used as a weapon. People's Exhibit 60, a photograph of the "club," was shown to the jury. (26 RT 4586-4589.)

On September 8, 2001, appellant was housed in a lock down single cell module in the Los Angeles County main jail. After he was escorted to a medical appointment, he refused to re-enter his cell until some pictures of gang members flashing gang signs that had been taken out of his cell while he was gone were returned. Such pictures are contraband. Appellant began "cussing" and saying he wasn't going back in his cell. He was in waist and ankle chains. Appellant agreed to go back in his cell, but then as he was being unhandcuffed, he pulled his waist chain into the cell and began threatening to tear up his cell. He was swinging the chain and hitting the door and walls. The door was secured so appellant could not hit any deputies with the chain. It took an hour to talk appellant into giving back the chain. During that time he was cussing and threatening people. The entire jail was placed on lockdown to free up deputies to form an extraction team. (26 RT 4547-4555; also 4589-4591.)

On September 27, 2001, appellant was housed in administrative segregation at the Los Angeles county jail. When the evening meal was passed to appellant through the food slot, he threw a white watery liquid at a deputy that landed on his face and upper body. Appellant stated, "Take that, fuckin' deputy." Another deputy sprayed pepper spray into the cell to allow the first

deputy to shut the food port. Appellant threw more of the liquid at the second deputy, which also landed on the deputy's face and upper body. Appellant attempted to throw more liquid at the deputies, and another burst of pepper stray was sprayed into his cell. After appellant threw the liquid, he stated, "You fuckin' bitches." The deputies then left the area and notified their sergeant. The first deputy had not spoken to appellant before he threw the liquid on the deputy, so the incident was unprovoked. The deputy was not sure what kind of container the liquid had been in, but it was maybe a milk carton. (26 RT 4567-4575.)

The liquid did not come from the tray opening, but through an opening at the top of the cell door. Deputies called incidents like this "gassing," and the substance is usually urine or feces. However, in this instance, the liquid did not smell like urine, nor look or smell like feces. (26 RT 4575-4579.)

On June 10, 2002, when appellant was housed in the Los Angeles county jail's "high power" module, he reached through the bars with his left hand and across the right side of Douglas Lance's neck. Lance, a 45-year-old white inmate, was picking up trash in the module. Lance started yelling for help and said appellant had cut him. Lance suffered a laceration two and one-half inches long from under his right ear to his neck, about a quarter inch deep. (28 RT 4928-4934.) Appellant flushed the toilet in his cell, and jail stuff assumed he flushed a razor down the toilet. Lance was taken to the Emergency Room, and received stitches on his neck. (28 RT 4935-4938.)

On January 7, 2003, when appellant was still housed in the Los Angeles county jail's "high power" module, Deputy Mat Taylor, sitting in the control booth, heard a loud thud against the wall of the module. Taylor looked down the row and didn't see anything at first. Only inmate Richard Aguirre was supposed to be out of his cell at that time. Deputy Taylor started hearing noises like an assault was happening. He stood up and saw appellant on top

of Aguirre striking him, and blood was flying everywhere. Aguirre was 5'5" and 160 lbs. Appellant was 6'1", about 230 lbs. Aguirre was rolled up in a ball on the floor and appellant was striking him side to side. When Taylor saw the blood, he knew there was a jail-made shank involved. (29 RT 5161-5171.)

Taylor alerted his partner and they went down the row and ordered appellant to stop. He continued the assault, and Taylor emptied his canister of OC pepper spray on appellant and Aguirre. Additional personnel arrived and appellant sprinted back to his cell. Taylor did not did not find any weapons on Aguirre, who was covered in blood. The staff could not treat Aguirre's injuries in the jail, and took him to University of Southern California Medical Center. (29 RT 5172-5183.) The weapon appellant used was never recovered. Sometime after this incident, appellant told Deputy Taylor that he wished he had "finished the job" on Aguirre, and that he should have done the job right the first time. (29 RT 5182-5195.) Richard Aguirre was a validated associate of the Mexican Mafia, which was a large Hispanic prison gang that killed people inside and outside the jail. (29 RT 5196-5199.)

On March 20, 2003, a Deputy Sheriff at the Los Angeles county jail searched appellant before he was brought to court. Inmates in appellant's module were segregated so they did not come in contact with other inmates in the general population. While searching appellant, the deputy found a handwritten note on a page of transcript. (29 RT 5116-5120.)

The handwritten note (People's Exhibit 77) read "Breezo is a rat . . . . Breezo and Marlo need to die." It was signed Sonny, Lil Sonny, Loko II, Sissyhawk, Westside Brims, and "UBN" (which stood for United Blood Nation). (29 RT 5120-5221.) In addition, the name "Sabrina Johnson" was crossed out, and the nickname "Breezo" was also crossed out. According to Officer Harry Heidt, an officer with the Lompoc Police Department who had been assigned to investigate the Vandenburg Credit Union robbery/murder, in

gang writings, crossing out a gang name and replacing it with another indicated that a person wanted to kill another person. (29 RT 5132-5134.)

Officer Heidt also testified that on December 16, 1997, he had spoken on the telephone and in person to Sabrina Johnson, that her nickname was "Breezo," and that her boyfriend's nickname was "Marlo." The police had tape recorded and transcribed the telephone conversation, and a copy of the transcript had been given to defense counsel in the Lompoc trial. During the phone conversation, Sabrina Johnson told Heidt about a conversation that had taken place at her house between appellant, Chauncey Bowen, and Chris Fennelle. (29 RT 5127-5132.)

Officer Heidt also testified that Sabrina Johnson had not testified in the Lompoc case, and neither had her boyfriend "Marlo." To Heidt's knowledge, no harm had been done to Sabrina Johnson or her boyfriend "Marlo." (29 RT 5141-5142.)

Victim Impact Testimony: Dayland Hicks

Gregory Shoaf was Dayland Hicks' uncle. Hicks was 22 years old when he was killed, and had been a very respectful person who was close to his sister Jamise. Their mother had died in 1988. She was Shoaf's favorite sister and Shoaf had loved Hicks like a son. Hicks had liked to play basketball, football, and Playstation games, and he had liked dancing, rapping, and singing. Hicks went to church and had been a good Christian youth. Shoaf was in shock when he received the news that Hicks had been shot dead. (25 RT 4317-4322.) Hicks did not get the chance to straighten his life out, but Shoaf believed he was on the path to doing the right thing. (25 RT 4322-4323.)

Hicks had a son who was only four or five months old when Hicks was killed. The family visited the gravesite on Hicks' birthdays. Since the murder,

Shoaf had grown closer to Hicks' son. When the son got older, Shoaf explained to him about his father dying. (25 RT 4328-4332.)

Jamise Shoaf, Dayland Hicks' sister, was nine when Hicks was killed. They had fun together, though Dayland was a lot older. Jamise's grandmother told Jamise when she picked her up from school that Dayland was dead, and she started crying. He was her only sibling. It was hard to go on without him, it was hard to go to the funeral. She missed Dayland's laugh most. She thought about him every day. (29 RT 5096-5104.)

Victim Impact Testimony: Lamar Armstrong

Doris Hayes, Lamar Armstrong's mother, testified that Armstrong had enjoyed football, baseball, running track, and cooking. He was 19 years old when he died. He was going to continuation school to get his GED and worked at Home Base. Mrs. Hayes went in to see her son at the hospital after she was told he was dead. She didn't believe it at first, and she had nightmares. She missed everything about her son. All holidays were painful for her, and she hadn't celebrated her own birthday since he died. She hurt all the time. (30 RT 5332-5344.)

Dan Hayes, Lamar Armstrong stepfather, testified that Armstrong had been a "good kid" who was athletic and liked things that would challenge his mind. Hayes had raised Armstrong since he was an infant, and had treated him like his son. Armstrong had two daughters that he never got to see. Hayes expressed that it was not normal for a parent to outlive a kid; it left an empty feeling. The hardest thing for Hayes after Armstrong's death was holding his family together, as his wife had problems because of her son's death. Father's Day was hard for Armstrong's daughters. Hayes still thought about his stepson every day. (26 RT 4463-4469.)

Milika McCoy testified that on September 7, 1994, she was eight months pregnant with Lamar Armstrong's child. The night before he was

murdered they went to a Lamaze class. Armstrong was working at a Home Base store, and was excited that McCoy was pregnant. Armstrong was sweet; they liked to go to the movies and talk about their future. Armstrong wanted to start a college fund for the baby and buy McCoy a house. Armstrong used to make sure that McCoy ate healthy things for the baby. McCoy collapsed when she heard Armstrong was dead. She viewed his body in the hospital. Their daughter Cherish has a hard time on Father's Day. It was hard for McCoy raising Cherish by herself; she believed that Armstrong would have been a good father. McCoy thought about Armstrong every time she looked at her daughter. He had been McCoy's best friend. (28 RT 4962-4971.)

Victim Impact Testimony: Trevon Boyd

Carolyn Boyd, Trevon Boyd's mother, testified that Boyd was 20 years old when he died, and that he had been a beautiful person who was loving and caring. He had liked to write music, play sports, go fishing, and dance. He got along great with his family, which included two brothers and a sister. He meant a lot to Mrs. Boyd. A neighbor told Mrs. Boyd that her husband was at the hospital with Trevon. When she got to the hospital her husband told her Trevon was dead. After his death, it was hard for her to eat or sleep. She missed everything about Trevon, and she thought about him every day. Her family would never be whole again. (29 RT 4998-5005.)

Defense Case in Mitigation

Testimony of Family Members and Acquaintances

Reginald Campbell knew appellant since he was seven; they were like brothers. They played together until they were teenagers, then they went their separate ways. Campbell and appellant went to different schools. Campbell did not join a gang. His mother and aunt kept him out, but he did not see appellant's mother doing the same. They lived in a rough neighborhood, and there were a lot of gangs. Gang members actively recruited, and they would

beat Campbell and appellant. They used to beat appellant up all the time, and take his money when he came home from school. There was a lot of violence in the neighborhood, and Campbell and appellant both saw shootings and stabbings. Appellant's older brother, Sonny, was ten years older than Campbell. He was in the Brims, he had gang tattoos, and he was well-known in the neighborhood. Campbell saw Sonny shoot a man in the head and one time he shot at appellant, when Campbell was 12 years old. Sonny didn't hit appellant when he shot at him. (30 RT 5357-5367.)

According to Campbell, to get protection, a person had to join a gang. Appellant got protection from his gang family and his brother. Appellant highly admired his brother, both as a brother and as a father figure. Campbell only remembered appellant having a step-dad around; he met appellant's "real dad" only once. Appellant changed after his brother Sonny was killed. It took "a big chunk out of his life." Appellant's mother began smoking cocaine. (30 RT 5367-5370.) Campbell never saw appellant using drugs. Appellant's mother and stepfather used to hit him a lot. Campbell saw appellant's mother hit appellant, though he did not ever see appellant's grandmother hit him. To a certain extent appellant's family turned their backs on him. Appellant was hyperactive as a child, and Campbell thought he should have been on medication to calm him down. Appellant liked to go swimming at Harvard Park, which was a center of gang activity. When they were eight years old, appellant saved Campbell's life at the park when he was drowning. (30 RT 5370-5378.)

Appellant took the gang name "Little Sonny" because he wanted to follow in his brother's footsteps. (30 RT 5382.) Big Sonny looked out for appellant, but people still picked on him, it didn't matter who his brother was. Campbell was picked on by the 5-8's, a neighborhood Crip gang, and the 5-8's also picked on appellant. Appellant did not like Crips, and he hated one

particular individual who used to pick on them. This was before Sonny was killed. After Sonny's murder, appellant hated even more Crips. (30 RT 5382-5386.)

Campbell did not see appellant for a good while after appellant went to Juvenile Hall. (30 RT 5386-5392.) Campbell heard that appellant did well in school. Appellant was smart, he could communicate, solve problems, and play video games. Appellant had a lot of male friends, but only a few were not in a gang and were trying to better themselves. Campbell tried to help appellant straighten up his life, and others tried to help appellant as well. Appellant's girlfriends tried to get him to change, but he didn't listen. (30 RT 5393-5394.)

Raylene Bell, appellant's half sister, had the same father as appellant, Frank "Too Sweet" Jennings. Ms. Bell first met appellant when he was nine years old. Frank Jennings was not a part of appellant's life, and appellant did not like this fact. Bell and appellant did activities together, like going to the movies, when they were young. Bell lived in a different neighborhood, and she wished appellant hadn't lived where he did, because there were a lot of gangsters there. Appellant was an energetic kid; he loved his mother Pearl a lot and would do what she told him to do. Appellant did not talk a lot. Bell tried to influence him to grow up right. (30 RT 5398-5402.)

Ms. Bell was 16 or 17 years old when she met appellant. Appellant wasn't a "Òchitter-chatter kid." Appellant was a cute little kid who was always happy, he seemed like a normal kid, just quiet. He was like everybody else; Bell didn't notice anything odd about him. Appellant had to obey his mother, and Bell did not see any violent behavior from him. (30 RT 5407-5410.) Appellant's best friend as a kid was his brother Sonny. If Bell wanted to know something about appellant, she would ask Sonny. Appellant's friends were polite, and would try to get him to find a career. When appellant was paroled from the Youth Authority in 1993, he lived with Bell for two months.

Then he left because they had an agreement that he would get a job or go into the military. Bell thought she pushed him too fast, and they had no hard feelings. Appellant was arrested not too long after that and went to prison. Bell had not spoken to appellant since that time in 1993. She had tried to be a good influence on him. (30 RT 5410-5415.)

Linda Woods first met appellant when he was 9 years old, and she knew appellant well until he was 16 or 17. He used to play with her children, including at her house, and Woods mothered him like she did her other children. Appellant was not getting guidance at home; his mother had a drug problem and appellant had to be the man of the house. Appellant's mother's drug problem manifested after Big Sonny was killed. (31 RT 5540-5544.)

Mrs. Woods recalled that appellant joined a gang several years before his brother Sonny was killed. Sonny was trying to keep appellant out of the gang. Mrs. Woods also recalled several occasions on which appellant had been incarcerated as a child. She did not see appellant for quite a while after Sonny died. When she did see him, she felt that emotionally something was missing, it was like a part of him had died. Appellant wrote letters from time to time. Woods tried to help him, and told him to go to school, eat a balanced diet, exercise, stay out of trouble, and so on. Appellant was always polite, and never complained about being abused. His sisters did not complain about being abused. He complained about having a lot of responsibility, and having to take care of his sisters when his mother was not around. Woods thought that appellant would have told her if he was having a problem with being abused at home. Woods met appellant's grandmother once. She was fussy, but she was trying to steer her grandkids in the right direction. (31 RT 5553-5559.)

Pearl Thomas, appellant's mother, testified that she lived with her grandparents until she was 9 years old. Her mother, Amy Parks, was around

"here and there," but her father was not around. Pearl moved in with her mother in Los Angeles when she was nine, and Parks remarried when Pearl was eleven, to Thomas Parks. Pearl had two half sisters and one half brother. Thomas Parks did not have a good relationship with her mother. When Pearl was twelve, her mother accused her of sleeping with Thomas Parks. Pearl ran away from home when she was fifteen, and she went into a Youth Authority facility for eight months. After John Jones (Big Sonny) was born, Pearl was arrested for shoplifting and assault. (31 RT 5570-5575.)

Pearl had several arrests for shoplifting, and several felony convictions (Defense Exhibit W, Pearl Thomas Probation Report), and used a number of aliases when she was arrested. She was arrested six times between 1966 and 1970, and she spent six months in jail when appellant was two and a half years old. Her mother took care of appellant while she was in jail. (31 RT 5575-5583.) Pearl was 22 or 23 years old when she conceived appellant. At the time, she was taking "Red Devils," a sleeping pill, but she stopped before she found out she was pregnant with appellant. She also did not drink. Pearl claimed a statement in her Probation Report that she was drinking and doing drugs when she was pregnant with appellant up until the day he was born was a lie. She also claimed the statements contained in a CCWF Reception Center report dated September 4, 1992 (Defense Exhibit X) that she had been doing rock cocaine since 1986 and was a social drinker were not true. According to Pearl, she had a normal birth with appellant. (31 RT 5584-5591.)

Pearl did not know who appellant's father was, and she put the person she was dating at the time (Johnny Adams) on the birth certificate as appellant's father. In fact, Frank Jennings was appellant's father, but Pearl never married him. He only lived with her for a week before appellant was conceived. Jennings was not in appellant's life very much; he was a heroin

addict. In 1971, Pearl married Ronald Biggles and they had a daughter, Larhonda Biggles. (31 RT 5591-5595.)

Pearl supported her kids with welfare and by stealing. She did not take "Red Devils" for recreation, but because she was in pain since she was twelve because of back surgery. She did not have a prescription, however. She only held a regular job once for a year. She had been arrested around 47 times for stealing, and went to prison in 1974 and in 1976. She went to jail quite a bit, but the longest time she spent in prison was three years. (31 RT 5595-5602.) In 1975, she was found guilty in a case, but she did not show up for sentencing. Instead, she went to Texas but did not take appellant with her. He stayed with his grandmother. Pearl took her daughters and her boyfriend James Wright with her. (31 RT 5602-5608.)

Pearl was arrested on a warrant in 1976 and went to prison for three years. Appellant was five years old, and stayed with his grandmother while Pearl was in prison. Pearl and her mother did not have a good relationship, and Mrs. Parks was not happy about taking car of Pearl's children. In school, appellant had learning problems, and went to special education classes. (31 RT 5609-5612.)

When appellant was seven or eight, he had problems starting fires, and Pearl sent him to the Kedrin Center, a live-in facility. She took appellant out of the facility against his doctor's advice because she didn't understand the treatments they were giving him, and also because she missed him. Appellant was also leaving home without telling her, and he was stealing. He cried all the time; he would cry long and hard and sometimes for no reason. Pearl took appellant to a doctor because of his hyperactivity and other types of behaviors. He was put on Mellaril and Ritalin. The Mellaril was to sedate him so he wouldn't be "hyper." The drugs made appellant like a zombie. (31 RT 5612-5615.) He would drool while he was on the medication, but the school said he

had to be on the medication to attend. After two years, Pearl moved to Texas and took appellant off the medication. Except when she was in prison, Pearl always made sure there was food in the house and that the house was clean. While she was in prison, Pearl accepted Christ and changed her life. (31 RT 5616-5618.)

Pearl testified she did not know how to be a good mother. She used to beat and spank appellant. She raised her kids the way she was raised. Appellant went to the Slauson Learning Center when he was 14 or 15. He was not in any gangs. When Pearl took appellant off his medication, he started getting in trouble again. Appellant's brother Sonny was hardcore in his gang, but he stayed away from appellant because he didn't want him to be gang affiliated. (31 RT 5618-5621.) Two days before Sonny was killed, appellant was arrested for throwing glass at a marked police surveillance truck that was involved in looking for Sonny. The truck was parked across the street from Sonny's house. Sonny was killed in a gang related shooting, and Pearl was with him in the hospital when he died. (31 RT 5622-5629.)

Pearl asked for appellant to be released from jail to attend Sonny's funeral, and he was in chains at the funeral. (31 RT 5629.) Sonny had been shot four times in the head and seven times in his body, and appellant was very upset at the funeral. (31 RT 5657.) When appellant was sentenced for the throwing glass incident, the sentence was for one year but that turned into seven years. After Sonny's murder, Pearl began doing rock cocaine. She went back to prison four times over the next twelve years. When appellant was paroled in 1993 and in 1994, Pearl was in prison. In 1995, she was out of prison and rented an apartment for them. At that time Pearl was not doing cocaine or stealing. Appellant was arrested two weeks later, and she began doing cocaine and stealing again. When appellant was paroled in 1997, Pearl was again in prison. Pearl claimed she had been clean for the past six years.

She was working at the New York New York Hotel in Las Vegas. (31 RT 5630-5633.)

Pearl denied that she drank when she was pregnant with appellant. She got drunk once when she was fifteen, but it had made her sick and she never drank again. Pearl was taking "Red Devils" at the beginning of her pregnancy with appellant, but she stopped before she found out she was pregnant. Pearl did not notice appellant's problem with starting fires until she came home from prison the first time. Appellant was starting fires every day. (31 RT 5634-5638.) The Kedrin Center was a good school that provided family counseling once a week, but she took appellant out of Kedrin because she didn't like the way they were treating him. He was still starting fires when she brought him home. She moved to Culver City so appellant could go to the special education program at Vista Del Mar school. Appellant later did well at the Slauson Learning Center. (31 RT 5638-5641.)

When appellant was doing well in school, he was on medication. Pearl took him off medication when they were in Texas because she couldn't afford it. Appellant was 13 or 14 at the time. He did not start getting into serious trouble until they came back from Texas. He did not become gang related until Sonny was killed. (31 RT 5641-5646.)

Appellant was religious as a child. He went to church regularly with a neighbor when he was eight. Pearl went to church when appellant was baptized, he witnessed to her, and she accepted Christ a month later. Appellant was taught what the right and wrong things to do were. Appellant got along with his sisters, and they were close in the early years, up until recently. Two of his sisters were nurses and were doing well. (31 RT 5652-5654.)

Beverly Parks, the wife of Amy Park's son, Thomas Parks Jr., met appellant in 1976 when he was six, and she moved in with appellant's

grandmother. Pearl Thomas was in prison at the time. Appellant lived with his grandmother for most of his childhood. There were a lot of gangs and much violence in the neighborhood, and most of the time Pearl Thomas was in jail. Appellant did not get a lot of attention from his mother when she was out of jail, so he was mostly on his own. Appellant was very "hyper" as a child. The first time Parks babysat appellant, he almost set the closet on fire, from striking matches. When he was seven or eight, appellant stole his grandmother's gun and ran down the street with it. (32 RT 5769-5773.)

Appellant was beaten almost every day by Amy Parks, his uncle Thomas Parks, and his aunt Crystal Parks. They would lash his back while he was lying on the floor screaming. They would use their hands, extension cords, belts, and switches from a tree. These beatings were long, hard, and excessive. Beverly was not sure if appellant's mother ever beat him. (32 RT 5773-5776.)

Appellant would cry for his mother while he was being beaten. He would cry himself to sleep, crying for his momma. Amy Parks hated appellant and his younger sister Larhonda, but she adored appellant's older brother Sonny. Larhonda was also beaten. In Beverly's opinion, Amy Parks was evil. She drank a lot and had blackouts. She was wild and brutally violent; Beverly had a scar from being cut with a knife by Amy. Beverly thought Amy Parks was crazy. Amy thought she could do "voodoo" on people. She mentally abused the children, and used to call appellant "a crazy little motherfucker" and other terms. Twice Beverly witnessed Amy turning the lights off in the house and chasing appellant and Larhonda around the house with a 16-inch knife. Beverly thought Amy was drunk when she did this. (32 RT 5776-5780.)

Appellant was between 7 and 10 years old during this time. Amy also tried to stab Pearl Thomas with a knife, and she slashed Thomas Park's arm

in front of Beverly. Amy liked to boil water to throw on people when she got angry. Beverly saw a lot of physical altercations between Pearl Thomas and Amy Parks that happened in front of appellant. Pearl and Amy would roll on the floor fighting. Appellant did not have any guidance when he was growing up. All he saw was what Beverly had described, violence and a lot of wild behavior, cursing and sickness. As a teenager, appellant started getting into some trouble from running wild. (32 RT 5781-5783.)

Appellant's brother Sonny was a big time gang member in the Bloods gang. Appellant would watch Sonny and idolize him, so his death affected appellant. Beverly Parks did not attend the funeral, because she was scared. (32 RT 5783-5785.)

During the time Beverly lived at Amy Parks' house, she tried to love Amy, but the nicer she was to Amy the meaner Amy would be to her. (32 RT 5786-5789.) Amy hated appellant, and would beat him for doing simple little things, like making a mess or being bad. Amy owned the house they all lived in, and her husband worked at the airport as a mechanic. Amy and her husband provided for everyone in the house; they never starved anyone. (32 RT 5789-5793.) Despite the craziness in the house when appellant was growing up, he was not a mean and hateful person. He was sweet. (32 RT 5810-5811.)

Linda Gavin had known appellant since he was born, and was his Godmother. His mother Pearl Thomas was like a sister to Linda. Linda took care of appellant when he was a child on the weekends or during the week. When he was three he cried a lot. Appellant began setting fires and breaking antennas off of cars when he was five. He began receiving psychiatric care when he was seven. Appellant fought a lot and stole, and was very "hyper" as a child. He wanted to stay with Linda when Pearl Thomas went to prison.

Appellant's grandmother, Amy Parks, was evil. In Linda's opinion, she was a witch from hell. (32 RT 5814-5820.)

Appellant looked up to his brother Sonny; he idolized him. Pearl Thomas had a number of men in her life, and appellant disliked them. Ronnie Biggles, Larhonda's father, physically abused appellant, who was just a toddler at the time. Biggles was not a father figure to appellant. When appellant was seven or eight, he brought Linda into the church, and she still attended. Linda was around appellant until he was twelve or thirteen. As he got older, appellant became hard to communicate with. Linda attempted to discipline him when he was a kid, but it did not have any effect. Linda did not see appellant much after he turned fifteen. (32 RT 5823-5826.)

Linda knew appellant's father, Frank Jennings. Jennings was rude and had a drug problem, and Linda did not like him. He was a heroin addict. Linda never saw him do heroin but she had seen him under the influence. (32 RT 5835-5836.)

Appellant started getting in fights when he was six or seven, and Linda's own sons were afraid of him. He was fighting even while attending church. The church tried to teach right from wrong, and he knew what was right and wrong. When Linda would try and talk to him about stealing and hitting, he wouldn't talk to her. He would keep doing the same things. Linda's husband tried to talk to appellant, and Pearl Thomas tried to talk to him as well. Linda also heard neighbors try and talk to appellant about his behavior. He didn't listen. Nevertheless, Linda loved him. (32 RT 5830-5834.)

Expert Testimony of Nancy Cowardin, Ph.D.

Dr. Nancy Cowardin, who had a Ph.D. in Educational Psychology/Special Education, assessed appellant on February 24, 2003. She also reviewed appellant's education and background, including Individual

Education Programs (IEP's) from the Los Angeles Unified School District in grades 8 and 9 (Defense Exhibit Q). (31 RT 5451-5458.) From 9 to 12 percent of students needed an IEP. Appellant was diagnosed at that time as seriously emotionally disturbed (SED), as having attention deficits and learning disabilities, and also suffering from Attention Deficit Disorder (ADD). (31 RT 5458-5462.) A SED diagnosis indicated the student had emotional disabilities that caused very big behavior problems at school and interfered with learning. Appellant had learning disabilities in reading and in math. At the time of the first IEP, appellant was almost 14 years old. (31 RT 5462-5465.)

The 9th grade IEP was done at the Slauson Learning Center in June 1985. The diagnosis again was SED. Handwritten notes indicated that appellant had been prescribed Ritalin but was off the medication. The Slauson Learning Center was a non-public school for children with compound problems like appellant's. Appellant also spent time at the Kirby Center, which was run by the Los Angeles County Probation Department for kids who were on probation with SED diagnoses and learning problems. (31 RT 5466-5468.)

A Youth Authority report (Defense Exhibit R) noted that appellant displayed impulsive behavior and lacked sound decision-making skills. Appellant received a psychological evaluation at the Reception Center for the Youth Authority (Defense Exhibit S) when he was 17 years old. Appellant was evaluated as having a hyperactive condition and ADD. Another Youth Authority document (Defense Exhibit T) documented appellant as having a learning disability, as attending special education classes, and as having a clear diagnosis of ADD. (31 RT 5471-5476.)

Dr. Cowardin also reviewed a neuropsychological evaluation by Dr. Kyle Boone (Defense Exhibit U). Dr. Cowardin's own assessment was that

appellant displayed evidence of ADD, but that the symptoms were more subdued now and appellant was able to control the ADD for short time periods. She found appellant also had an auditory processing problem that probably accounted for his learning disabilities in reading and writing. As an adult, appellant had pulled up his reading and written language scores but not his math scores. (31 RT 5477-5480.)

Appellant had disabilities that still affected him. He had these problems throughout his school life, and they led to self-control problems. However, appellant was also competent in many ways. Appellant suffered from "mental disorganization" and lapses in mature executive decision making functions, but these problems could be subtle. Appellant also had subtle cognitive immaturities. Appellant's IQ score was average but he had extreme deviations, for example, his non verbal score was 110 and his verbal score was 90. (31 RT 5480-5487.) Appellant upgraded his reading ability while incarcerated by reading in his cell, which was typical of incarcerated people, but he still wrote at a fourth grade level. Appellant's current relative literacy did not contradict his learning disabilities as a child. (31 RT 5488-5495.)

Appellant had long-standing behavior problems that had been identified all his life. Appellant recollected being in special education classes since the first grade, but Dr. Cowardin did not have records documenting this. The first record to show special education coursework was from Vista Del Mar in the 5th grade. Appellant got good grades at the Slauson Learning Center. A teacher comment indicated that appellant could do better in all areas if he improved his behavior problems. (31 RT 5515-5519.) Appellant's test results as an adult showed he had deficits in quick decision-making and in adaptability under stress. Dr. Cowardin did not find him to be manipulative. (31 RT 5533-5534.)

Expert Testimony of Dr. Arthur Kowell

Dr. Arthur Kowell, a specialist in Neurology, also evaluated appellant. Appellant underwent a "BEAM" test on August 10, 2000. Three parts of the test (the standard EEG, the EEG spectral analysis and the "auditory evoked potential" test) had normal results. (32 RT 5676-5681.) The "visually evoked potential" test had abnormal results, showing some abnormal functioning of the brain in three areas, the vertex, the right parietal region, and the right frontal region. The right frontal lobe deals with impulse control, the ability to plan and carry out a sequence of events. According to Dr. Kowell, this abnormality here might indicate the patient has a short fuse or short temper, and possibly he may also have a form of attention deficit disorder. (32 RT 5681-5684.)

To be considered abnormal, a patient's data had to differ from the control group by at least three standard deviations. However, the tests conducted were not predictive of behavior. (31 RT 5684-5693.) Records from appellant's childhood indicated he suffered from ADD and had a history of learning disabilities, which would be consistent with appellant's brain having the abnormality already in childhood that the testing by Dr. Kowell revealed. (32 RT 5693-5698.)

Appellant also had a "PET" scan on November 5, 1998, conducted by Dr. Joseph Wu, who concluded the PET scan was abnormal. The pattern of abnormalities was comparative to brain damage associated with conditions such as a head injury, though there were many things that could have caused the abnormalities. Dr. Kowell did not see in his study the abnormalities identified on the PET scan, but both tests showed the same areas of the brain were involved. (32 RT 5699-5703.)

In a follow up to Dr. Wu's testing, appellant underwent an MRI exam, but no evidence of any structural abnormality was found. The MRI is a

structural test, whereas the PET and BEAM are functional tests, and the results of the MRI did not make the results of the other two tests incorrect. Appellant also underwent a PET scan on March 24, 2000, conducted by Dr. Brian King, that was normal. (31 RT 5703-5706.)

A neuropsychological work-up done by Dr. Kyle Boone showed abnormalities that were consistent with the abnormal functioning in the parts of appellant's brain that Dr. Kowell's own testing showed. Dr. Boone found that appellant had select executive problem-solving skills as well as divided attention and sequencing problems that would implicate problems in the frontal lobe. Dr. Boone's testing indicated that appellant suffered from deficits in judgment, planning, and control of violent impulses. (32 RT 5707-5711.)

In Dr. Kowell's opinion, appellant's decision-making skills were comparable to those of someone with mental retardation or borderline intelligence, despite appellant's otherwise having normal intelligence. The historical evidence from school IEP reports, Youth Authority reports, and so on fit with the results of Dr. Wu's PET scan, which fit with the results of Dr. Boone's neuropsychological testing, and fit with the BEAM study that Dr. Kowell did. All showed that appellant had abnormal brain functioning. Appellant's mother took Red Devils, a barbiturate drug, while she was pregnant with appellant. This drug use would have some type of effect on the brain of the fetus and later the child, so this barbiturate use was a possible source of the later brain dysfunction found in appellant. (32 RT 5711-5716.)

The tests done on appellant were not designed to look at major brain malfunctions; some of them were used to look at subtle brain dysfunctions. If appellant's mother used drugs during the first trimester of pregnancy, this would affect appellant's nervous system. He might not initially show signs of this; it might not show until early childhood. (32 RT 5717-5720.) Dr. Kowell did not think appellant had gotten "better" between the 1998 and the 2000 PET

scans; he thought the methodology used was different between the two tests, and this explained the different results. (32 RT 5721-5723.)

Appellant's test results were "abnormal" within the confines of statistics. There were people walking around with abnormal PET scans or BEAM test results who functioned well throughout most of their lives. (32 RT 5724-5728.) Appellant had a brain dysfunction that was a condition; this was not a diagnosis. Appellant's psychological testing showed that he had problems with executive problem-solving skills. (32 RT 5735-5738.)

Expert Testimony of Dr. Carl Osborn

Dr. Carl Osborn, a forensic psychologist, testified that testing of appellant (Defense Exhibit GG) showed that he had inherited a particular type of gene, the 3 repeat allele MAOA gene, that had recently been shown to be associated, in concert with childhood maltreatment, with severe antisocial behavior later in life. In Dr. Osborn's opinion, appellant had been severely maltreated as a child. (32 RT 5855-5860.) Recent studies showed the relationship between having this gene, experiencing maltreatment as a child, and displaying adult antisocial behavior was equivalent to the correlation between having high cholesterol and having heart disease. However, there was not a "Òcausal" relationship between the 3 repeat MAOA gene and violence. (32 RT 5865-5872.) Having the 3 repeat allele was not a genetic defect, but it was a risk factor. (32 RT 5879-5880.)

I.

APPELLANT'S CONVICTIONS FOR MURDER MUST BE REVERSED BECAUSE THE PROSECUTION ELICITED "WITNESS INTIMIDATION" EVIDENCE AND ALLEGED THAT APPELLANT INTIMIDATED WITNESSES WITHOUT PRESENTING SUFFICIENT EVIDENCE THAT APPELLANT PERSONALLY ACTED TO INSTILL FEAR IN ANY WITNESS, OR DIRECTED OR AUTHORIZED OTHERS TO ATTEMPT TO INTIMIDATE ANY WITNESS

To succeed, the prosecution's case against appellant for the murders of the three Rollin' 60's gang members had to overcome a major evidentiary hurdle -- both of the prosecution's alleged eyewitnesses, Lewis Dyer and Zenia Meeks, not only had criminal backgrounds that raised credibility issues, but each witness also previously failed to identify appellant as the shooter at live lineups – Dyer in 1995 (15 RT 2514) and Meeks in 1998. (16 RT 2774.)

There was no physical evidence, and no weapon in appellant's possession or control that tied appellant to the triple murder. Therefore the eyewitness identifications of appellant as the shooter constituted the primary evidence against him. The prosecutor had to convince the jurors that Dyer's and Meeks' recantations of their denials that they could identify the shooter, made years later, were now to be believed. The prosecutor's tactic to achieve this was clear, but improper – his witnesses did not identify appellant because they had been intimidated by appellant. This tactic was improper because it was not supported by the evidence.

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A. The Prosecutor's "Witness Intimidation" Arguments

The prosecutor this theme of witness intimidation from the outset of the trial to its conclusion. He put this theme front and center as he launched into his opening statement:

> In addition to the theme of violence that will be apparent to you during the course of this trial, there is also a couple other themes that you will hear during the course of the testimony, and the themes will include threats and intimidation and they will include fear.
>
> You will hear of witnesses having been threatened. You will hear of witnesses being afraid to tell the truth. And you will hear of the effect that that fear and intimidation has had on their past statements and in some instances even their identifications.

(14 RT 2308.)

Later in his opening argument, the prosecutor further developed the theme that the People's evidentiary problems in this case could be explained away by threats and intimidation of witnesses:

> Now, you probably may be wondering why this case has taken so long. This happened back in 1994. And this is where the theme of threats and intimidation comes in, ladies and gentlemen.
>
> Mr. Dyer was very reluctant to come to the police. It was only at the urging of the victim's family to do the right thing that he finally came forward and came to the police. He didn't want to get involved, like many people in these types of neighborhoods.
>
> And Mr. Dyer himself is a gang member. He didn't want to get involved. He didn't want to go to the police, but he did.
>
> And shortly after the crime, I think on September 15th, he was shown a group of six photographs, one of those including the defendant, and he picked out the defendant positively as being the person he knows as Little Sonny from the 6 Deuce Brims and the person who killed the three victims in this case.

> Now, after that point, talking now about Mr. Dyer, Mr. Dyer was asked to go to a lineup. The case was filed. The defendant was arrested. I am going to jump forward a little bit. And Mr. Dyer was asked to go to a lineup.
>
> And unfortunately for Mr. Dyer, at the time that the lineup occurred, he was in custody because he had violated his juvenile parole and he was going to go back to the Youth Authority. So he was in custody with the defendant. And at that time he was very afraid, because being in custody and attempting to testify against another inmate is very dangerous. People can get killed.
>
> And because of that fear and intimidation, *the intimidation occurred because he ran into the defendant on a couple of occasions. And in fact, the defendant at one point tried to tell him that he had a relative who was a deputy sheriff and that made Mr. Dyer even more afraid.*
>
> So when Mr. Dyer went to the lineup in 1995, he did not pick out the defendant because of this fear.
>
> Now, at that point he was very, very afraid and wanted nothing to do with it. And in fact, later on Mr. Dyer was sent back to the California Youth Authority. And when a defense investigator came up to talk to him, he said the same thing. He said, "Oh, I made it all up. I didn't know anything. I was in the marked when it happened. I didn't see who did it." And he told the defense investigator a number of lies because he was afraid, he was in custody and he did not want to be involved in the case.
>
> (14 RT 2316-2317; emphasis added.)

The prosecutor then told the jurors that subsequently Dyer was released from custody, and some years later investigators from Santa Barbara County spoke with him about an unrelated case. According to the prosecution, Dyer mentioned to them that "he had been threatened and he was very—and he explained to them why he refused to identify the defendant at the lineup, and also explained the threats and intimidation he felt." (14 RT 2318.)

The prosecutor told the jurors that Dyer now "felt bad" about not identifying appellant in 1995, because "the victims were friends of his." So Dyer then told the investigators he "would be willing to cooperate in the future." (*Ibid.*)

The prosecutor then said to the jurors:

> Now, in the interim, I have to also point out that because Mr. Dyer basically wanted to change his testimony and he refused to identify at the lineup, the case was dismissed in 1995, because he was uncooperative. He didn't want to come to court.
>
> Among other things – and I will talk about Zenia Meeks because she ties into that, too, in just a moment.
>
> In fact, Miss Meeks was also – was also very afraid back in 1994 and 1995 and she in fact was also very reluctant to talk to the police and at that time she was doing a lot of drugs. She was one of those people that was a street person. She just did not want to have anything to do with the case. She didn't even want to get Lewis Dyer involved. She didn't even tell the police that Lewis Dyer was at the scene.
>
> Now, Miss Meeks had a change of heart, too, and I will explain that in just a moment.

(14 RT 2318-2319.)

The prosecutor then told the jurors that Zenia Meeks subsequently had been sent to prison on a drug charge, and while she was in prison, "she began to change her life around. In fact, she changed her life completely around," so when detectives came to talk to her in prison, she told them, "'I know why you are here. I have to do the right thing and I know who did the shooting because the person was just a few feet away from me.'" (14 RT 2319.)

The prosecutor stated that Meeks was then shown a photographic lineup and she "positively picked out the defendant and said that this is the one and

she also indicated that she was afraid to do it in the past because of several reasons." (*Ibid.*)

The prosecutor then gave as the reasons:

> Her family had been threatened back in 1994 and 1995. They had found out – someone had found out her address of her cousin and where her cousin lived and they received phone calls, and it was made quite clear to her that she not say anything when she went to court. And she kept that promise until she went to prison, got off of drugs and got back straightening her life up, and now she has indicated the identification of the defendant.
>
> This is what I am – this is something you will have to understand, this concept of fear and retaliation, because it will come up even with respect to some of the other witnesses.

(14 RT 2320.)

The prosecutor then explained the "other witnesses" he was referring to were Kipchoge Johnson and Christopher Fennelle. (*Ibid.*) Subsequently, Detective William Smith testified, over defense objection, that special precautions had been taken to protect Kipchoge Johnson and Christopher Fennelle during the trial. (18 RT 3214.)

The prosecutor's concluding remarks in his opening statement also focused on the theme of intimidation of witnesses. The prosecutor stated:

> And I ask you to pay very close attention to all the evidence and be mindful of the themes that I indicated to you will be presented during the course of this trial, and this is premeditated violence and planned violence, threats and intimidation and fear.
>
> Because, ladies and gentlemen, you will see some of that from the testimony – you may see witnesses that are very afraid to testify. You may see witnesses who may not even want to testify. But you have to understand that in the nature of these types of cases, this is going to be the recurring theme, and this is what we expect to present to you during the course of the trial.

(14 RT 2324-2325.)

The prosecutor by this hyperbolic jeremiad of an opening statement effectively poisoned the jurors against a fair assessment of appellant's obvious defense that neither Lewis Dyer nor Zenia Meeks were credible witnesses, and neither Kipchoge Johnson nor Christopher Fennelle presented credible testimony about appellant's alleged admissions of guilt.

The prosecutor also unfairly vouched for his witnesses with his "change of heart" hagiography of the lives of Lewis Dyer and Zenia Meeks. He did not state that Dyer and Meeks claimed they had changed their lives and their hearts, he asserted that they *had* done so, and so their changed *testimony* should now be believed. Further, and most importantly, the prosecutor asserted that appellant was personally involved in this campaign of intimidation, particularly with regard to Lewis Dyer before Dyer failed to identify appellant in the live lineup, and he certainly implied that appellant was behind the phone calls that Zenia Meeks alleged she had received. Because these accusations of intimidation against appellant were in fact never substantiated, appellant was irretrievably prejudiced by them and must be granted a new guilt trial on the three homicides.

B. Unsubstantiated "Intimidation of Witnesses" Testimony Unfairly Prejudices A Defendant and the Unfairness Cannot Be Rectified

In *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, the appellant was convicted of aiding a bank robbery for which two co-defendants were also convicted. A third actual participant in the bank robbery, Pointer, testified for the prosecution in exchange for a reduced sentence. Pointer and the two co-defendants had actually staged the robbery. Dudley was accused of supplying a "switch getaway car" and other involvement. His defense was that he had

only been in the wrong place at the wrong time in the wrong car. (854 F.2d at pp. 968-969.)

The appellate court reversed Dudley's conviction, because the prosecutor elicited testimony from the co-defendant turned witness Pointer that he had received some phone calls the night before he testified that were intended for him and his mother, and he did not know who made the calls, and the prosecutor had followed up by asking, "Are you afraid for your girlfriend and your aunt if you testify?" Pointer responded, "Yes." Asked why, Pointer responded that he was afraid that whoever had made the phone calls might threaten or harm his mother, "or anything." (*Id.* at p. 969.)

Trial counsel moved to strike this whole exchange and moved for a mistrial, on the ground that the State was trying to prejudice the defendants by linking the anonymous threats to them. Counsel argued that there was no evidence showing that the defendants had anything to do with the alleged "phone call threats." The defense motions were denied. (*Ibid.*)

On appeal, Dudley argued the admission of this testimony violated his Fourteenth Amendment protections because the threats admittedly came from an unknown source and were not linked to Dudley or his codefendants except by "prejudicial innuendo." (*Ibid.*)

The Court of Appeals agreed, citing Indiana state cases that hold that a witness's testimony concerning threats the witness has received "when no connection is shown between the defendant and the threats, can amount to an 'evidential harpoon.'" (*Id.* at p. 970.)

The Court of Appeals quoted *Keyser v. State* (1974) 312 N.E.2d 922, 924: "[S]uch evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." The Court of Appeals noted that the court in *Keyser* found such testimony so

prejudicial there that even an instruction to disregard it "was not sufficient to expiate its effect" and that error, combined with others in the case, had led the *Keyser* court to reverse. (854 F.2d at p. 970.)

The Court of Appeals also cited *Cox v. State* (1981) 422 N.E.2d 357, in which a witness testified that he had received threats, but no evidence was presented that the defendant was responsible for or even knew about the threats. The state appellate court ruled that the "threat" testimony should have been excluded, stating: "Since threats tend to show guilty knowledge or an admission of guilt on the part of the defendant, a proper foundation must be laid showing the threats were made either by the defendant, or with his or her knowledge or authorization....Barring such a showing, the highly prejudicial nature of such testimony requires its exclusion." (854 F.2d at p. 970, quoting *Cox v. State*, 422 N.E.2d at p. 362.)

The prosecutor argued at trial, and the State on appeal, that Pointer's testimony about the threats was admissible to explain Pointer's "nervousness" and demeanor as a witness. The Court of Appeals viewed the situation differently, stating:

> The record strongly suggests that the evidence of threats was intended more to prejudice the defendants, including petitioner, than to explain away any nervousness of the witness. We believe that more was at issue in the present case than a mere abuse of discretion as found by the state supreme court. This error appears to us to be of constitutionally significant proportions. When the prejudicial effect of the testimony is weighed against its necessity, even assuming the witness's nervousness was extreme, which seems to exaggerate the record, we find that the resulting prejudice mandates relief....The admission of this threat testimony could not but deprive petitioner of his right to present an alibi defense to a jury free from "evidential harpoons." We find the error amounts to a violation of the petitioner's fourteenth amendment right.

(854 F.2d at p. 972.)

The Court of Appeals concluded that this "evidential harpoon" error could not be considered harmless where "Òit could totally undermine the defense offered. Viewed as a whole, the petitioner's trial was constitutionally unfair." (*Ibid.*) The same error rendered the trial of appellant for the murders of the Rollin' 60's gang members constitutionally unfair, as appellant will show below.

In *People v. Weiss* (1958) 50 Cal.2d 527, this Court also held that a defendant needs to be protected from the prejudice stemming from unsubstantiated "threat and intimidation" evidence. In *Weiss*, a witness who had an abortion illegally performed on her was granted immunity from prosecution and led the police to the location where the abortion had taken place. The next day she received a telephone call from an individual purporting to be the attorney for one of the defendants. The caller asked if she had been contacted by an investigator from the State Medical Board or if she had been asked to identify the house where the abortion had been performed. At trial, the witness was allowed to recount the "telephone call incident." (50 Cal.2d at p. 535.)

Trial counsel moved to strike the testimony on the ground that it damaged the defense case by innuendo. On appeal, the People defended the testimony on the ground that the evidence was admissible to show that the witness had been impliedly intimidated by an agent of the defendants. This Court held that it was error "to receive such testimony based on a theory of an attempted suppression of evidence." (*Id.* at p. 537.)

This Court stated the following rule:

> Efforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. (Citation.) Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. (Citation.) However, if the defendant has

> authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant.

(*Id.* at pp. 537-538.)

This Court found no evidence of authorization had been presented, and therefore it was error to admit the "telephone incident" evidence (although the error was not prejudicial there in light of the overwhelming evidence of the defendants' guilt). (*Id.* at p. 538.)

This Court applied the rule set out in *People v. Weiss* again in *People v. Hannon* (1977) 19 Cal.3d 588, there reversing the appellant's convictions of attempted robbery and assault with a deadly weapon because the trial judge not only admitted unsubstantiated "threat" testimony but also gave a "consciousness of guilt" instruction based on that testimony. (*Id.* at p. 603.) This Court stated in reversing that "an allegation that a defendant has attempted to suppress adverse evidence, if not entirely refuted, may not only destroy the credibility of the [defense] witness but at the same time utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (*Ibid.*) For this reason, such allegations must be substantiated or they fundamentally impair the fairness of the trial.

The prosecutor in his opening statement here directly sought to "emasculate whatever doubt" the defense would have been able to establish on the question of appellant's guilt for the triple murder based on the alleged eyewitnesses' ever changing stories.[14] The prosecutor's allegations of threats and intimidation of witnesses by appellant constituted an egregious violation of appellant's rights to due process and a fair trial under the Fourteenth

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[14] Judge Ito accurately noted, outside the presence of the jury, that over time Lewis Dyer had wound up giving "five or six different versions of the events of September 7" (the day of the triple murder). (15 RT 2470.) Judge Ito also noted, again outside the presence of the jury, that Zenia Meeks "has said different things to other people." (15 RT 2707.)

Amendment because the prosecutor failed to substantiate during the trial that appellant engaged in, directed or authorized any instance of intimidation against any prosecution witness.

For the same reason, appellant's right to due process was violated, as in *People v. Hannon*, because the trial court instructed the jurors – without an adequate basis for the instruction in the evidence presented -- that if appellant tried to suppress evidence, such as by intimidating a witness, the jury could find this a circumstance "tending to show a consciousness of guilt." (21 RT 3552.)

Further, after the trial court gave this consciousness of guilt instruction premised on witness intimidation, the prosecutor stated to the jurors that Lewis Dyer

> was threatened and intimidated by the defendant in jail. He was in jail during the live lineup and he refused to identify because it was going to jeopardize his life. He later had a conversation in county jail which further intimidated him and when he went to the juvenile camp, the defense investigator came and talked to him, made him even more afraid and he basically told a number of lies to the defense investigator.
>
> Later on, several years later, he was interviewed by detectives from the – or by an investigator from the Santa Barbara County District Attorney's Office, and in talking to that investigator, told them that he had been threatened and intimidated and that's why he had gone back on his original statements.

(21 RT 3575-3576.) [15]

The prosecutor did not state the facts correctly either in his opening statement or here in his closing statement, because Lewis Dyer by his own

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[15] The prosecutor did accurately state to the jurors that Lewis Dyer was the prosecution's "primary witness" in the murder prosecution. (21 RT 3574.)

testimony was not intimidated by appellant before he failed to identify appellant in the live lineup in 1995, and in any case, if Dyer *felt* threatened, it was not due to any act by appellant, or due to any act directed or authorized by appellant, so far as the evidence at trial showed. At most, all that could be argued was that the gang culture that Dyer was immersed in at the time he failed to identify appellant in the live lineup in 1995 did not support cooperating with the police about any matter. This would hardly prove that Dyer could have identified appellant at the live lineup in 1995, or that he was "lying" when he was interviewed later in the Youth Authority by the defense investigator and said he had been *inside* the liquor store at the time of the shootings.

Appellant has a federal and state due process right to a fair trial. (*People v. Williams* (1997) 16 Cal.4th 635, 653.) The prosecutor's arguments that appellant personally engaged in threats and intimidation of witnesses is simply not supported by the evidence at trial, and therefore the prosecutor in making these accusations violated appellant's due process right to a fair trial.

C. The Unsubstantiated "Intimidation" Testimony of Lewis Dyer Requires Reversal of Appellant's Murder Convictions

Lewis Dyer testified that he did not talk to the police the day of the triple murder because he did not want to be "involved." Dyer was a gang member, living a "wild lifestyle." (15 RT 2505.) He was a member of the Crips, the rival of appellant's gang, the Bloods, so Dyer was necessarily an enemy of appellant, and therefore necessarily a biased witness whose testimony was inherently unreliable.

His trial testimony that appellant shot the three Rollin' 60's gang members also contradicted his own statements made in 1994 and 1995, as well as his failure to identify appellant as the shooter when he viewed the live lineup in 1995.

Dyer initially told the police on September 15, 1994, that he had not told relatives of Dayland Hicks who the shooter was, that he did not know who did the shooting or what happened, and that he was not standing next to the car at the time the shootings occurred. He had stated that he was inside the liquor store when the shootings occurred. In the September 15, 1994 interview he told Hicks' relatives that he was not afraid of anyone. After the murders, he was primarily concerned that people might think he was involved in the murders. (15 RT 2593-2598.)

Dyer also testified that a female defense investigator visited Dyer at CYA in the summer of 1995, and that he told the investigator that he was inside the liquor store at the time of the shooting and that he did not see anything. (15 RT 2518.) Dyer further testified that he had told the investigator that the police had forced him to say things and that Hicks' family members had pressured him to identify appellant when he did so at the police station earlier. (15 RT 2518-2519,)

Dyer might have had reason, because of his immersion in gang culture, to not want to be involved in any way with the police investigation of the three murders. Testimony about his reluctance to be involved for this reason was admissible. However, the prosecutor impermissibly argued, as shown above, that appellant personally acted to intimidate Dyer while both were incarcerated at the Los Angeles County Jail, and *this* was the reason Dyer failed to identify appellant at the live lineup in 1995. (14 RT 2316-2317.)

Dyer's testimony did not support the prosecutor's allegation. Dyer testified that he had decided he was not going to cooperate with the police as soon as he got incarcerated. (15 RT 2518.) Thereafter, Dyer only saw appellant once before the lineup occurred, and appellant did not say anything to him then. They only looked at each other. (15 RT 2510-2515.) Dyer offered no testimony that anyone else at the jail threatened him or even spoke

to him about appellant's case.

As this Court stated in *People v. Hannon*, *supra*, in reversing the defendant's conviction there, "an allegation that a defendant has attempted to suppress adverse evidence, if not entirely refuted, may not only destroy the credibility of the [defense] witness but at the same time utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (19 Cal.3d. at p. 603.) For this reason, if an allegation of witness intimidation has been made by the prosecution, the allegation must be substantiated or it fundamentally impairs the fairness of the trial and cannot be harmless error. (See, *Chapman v. California* (1967) 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705).

D. The Unsubstantiated "Intimidation" Testimony of Zenia Meeks Requires Reversal of Appellant's Murder Convictions

The jury had good reasons to not accept anything Zenia Meeks testified to. At the outset of her testimony, she admitted that she was abusing drugs in September 1994, including on the morning of the shooting, and that as a result of her drug problems, she was convicted "quite a few times" (as the prosecutor put it) for theft offenses. (16 RT 2754.) She also admitted using aliases, and to smoking crack cocaine and PCP, which in turn led to her using Haldol and Cogentin. (16 RT 2755.)

Meeks specifically acknowledged that she had smoked some "sherm" (PCP) at 2:00 a.m. the morning of the shooting. (16 RT 2793.) Meeks maintained that she was not "high" at the time of the shooting, but she confirmed that she had testified to the contrary at the preliminary hearing in this case in 1999. On that occasion, she testified that she had been high on PCP, crack, her psych meds, and alcohol on the day of the shooting. Meeks claimed at trial that she had been lying then, but she was not lying now.

Meeks also agreed that she had also told the police when she was at the police station on September 7, 1994, that she was under the influence of drugs at the time of the shootings. She claimed at trial that she had been lying "from the get go" because she did not want to get involved. (16 RT 2793-2794.) The jurors could just as easily have felt that Meeks was a junkie liar who bent one way and then the other with the wind.

Meeks was not a good enough liar though to make her account of the shootings match the account given by Lewis Dyer. According to Meeks, no one got out of the Cadillac after it pulled up, nor did Dyer go into the liquor store after the car pulled up. According to Meeks, she and Dyer crossed the street together walking to the car. Meeks did not recall seeing a van on the street parked behind the car, or a truck associated with a hubcap business. This was consistent with her testimony at the preliminary hearing in 1999, at which Meeks testified that there was no van parked behind the car. Meeks recalled that testimony, but now testified she did not recall whether or not there was a van parked behind the victims' car on the street. (16 RT 2789-2792.)

Ms. Meeks testified that in fact she was right in the middle of the shooting as it was going on. She was standing next to the front hood of the car when the shooter walked up. (16 RT 2759.) She testified, "I was amazed I didn't get shot." (16 RT 2763.) That *would* be amazing, if she were really standing where she now said she was standing.

According to Meeks, again in contradiction to the testimony of Lewis Dyer, the shooter started shooting right into the car, and he did not shoot first at Dyer. (16 RT 2804.) Nor did the shooter say anything to Dyer or gesture at him. (16 RT 2807.)

Meeks claimed at trial for the first time that she had paid attention to the man who walked up and started shooting. She agreed that in her 1994

statement to the police she had said that she could not remember how the shooter looked and that she was not paying attention to him. Meeks maintained at trial that she had been lying then. (16 RT 2794-2795.)

Meeks had been pretty emphatic in her "lying" at the time the police interviewed her at the police station after the shooting. Meeks acknowledged that she had been "very uncooperative" and had "cussed" the police out "and everything." When Officer Bill Smith asked her to come to court, she had told him, "Don't fuck with me. I don't want you fucking with me. Just leave me the fuck alone. I don't know nothin'. I am not going to come. Kiss my ass. I am not going. Fuck you." (16 RT 2773.)

Meeks also admitted that she sometimes heard voices, and that she took Haldol for this, but she maintained at trial, contrary to her previous statements to the police and to her testimony given at the preliminary hearing in 1999, that she had not been taking her medication at the time of the shootings. Meeks agreed again that she had told the police otherwise. She also confirmed that she had had psychiatric hospitalizations for her mental condition, but denied she had any hospitalizations in 1994. Meeks claimed that from 1990 to 1994, she was only an occasional drug user, not a heavy drug user. She confirmed, however, that she began stealing in 1990 to support both her drug habit and her "spending" habit. Meeks confirmed that she had been sent to prison for selling drugs. (16 RT 2796-2798.)

Regarding whether Meeks spoke or didn't speak with Lewis Dyer about the shooting, and whether he told her he picked out "No. 2" in the photo lineup, before or during the live line up she viewed in 1999, Meeks gave thoroughly confusing responses. (16 RT 2798.) Meeks agreed that in 1998, she had been interviewed by a Santa Barbara Police Department detective. She denied she told that detective that Dyer had told her he picked out "No. 2" from the photo lineup. She agreed that she did not identify a person in the

photo lineup, but now asserted that Dyer saw the same lineup and he told her the number he had picked, "number such and such." She claimed that the detective did not tell her that Dyer picked out "No. 2." Meeks then confirmed that Dyer did tell her what number he picked, and she then told the detective what Dyer had told her. Meeks then abruptly changed her testimony again to say she now remembered that Dyer told her what number he had picked when the police showed them a photo line up in 1994, right after the murders happened. She testified that Dyer told her what number he picked, but she did not recall what number it was. She testified now that was not cooperating then and she had refused to testify. (16 RT 2799-2801.)

Meeks agreed that in her 2002 interview, she had stated, contrary to the testimony she had just given, that Dyer and she were sitting together during the 1999 line up, and Dyer said to her, "He's there. That is the mother fucker up there." Meeks claimed now, however, that Dyer at that time did not say which person in the lineup he was talking about. (16 RT 2802-2804.)

Meeks claimed that at the time of the shooting she was in "close range." The shooter looked her in the face and she looked at him in the face. (16 RT 2769.) However, at the police station after the shooting, Meeks did not identify the shooter. (*Ibid.*)

The prosecutor asked why, and Meeks responded, "Because I didn't want to get involved. I was scared for myself and my family." (*Ibid.*) The prosecutor then crossed the line of fair questioning about the fear a resident of a gang-ridden neighborhood might possess about being involved in a police investigation. He asked, "Now, were you afraid of – were you afraid for your family from immediately after the shooting or did something else happen?" Meeks responded, "No. It wasn't immediately after the shooting. Something else happened. My family was contacted and the person said that they --" At this point, trial counsel objected to the answer, on hearsay grounds, and the

trial court admonished the jurors that he was going to allow the question and answer "not because in fact what was stated by someone else was true, but how it affects this witness' willingness to testify in the case. That is the only relevance and that is the limited purpose for which I am going to allow this testimony." (16 RT 2770.)

Thereafter, the prosecutor asked, "So did something happen that you made you [sic] fear for your family?" Meeks responded, "Yes, it did. It was a phone call made to my family stating that I said I did not know anything and they know that I do know, but I said that I didn't know anything." (16 RT 2771.) Meeks explained that, "In other words, that *they* know how to get in contact with me, like if I say anything." (Emphasis added.) The prosecutor asked, "So the message at that point was so far you haven't said anything, but they know where your family lives?" Meeks responded, "That's correct." The prosecutor asked, "So you took that to mean you better keep your mouth quiet?" Meeks responded, "That's correct." (*Ibid.*)

The prosecutor asked if Meeks remembered "when in the sequence that that call occurred?" Meeks responded she did not, but she then confirmed that the call occurred "later on" after she had already talked to the police and had "not told them anything." (*Ibid.*)

This exchange shows (1) that Meeks had already denied being able to identify the shooter before she allegedly received the threatening phone call, (2) there was zero evidence presented that appellant initiated, authorized or knew about the phone call that Zenia Meeks testified she received, (3) and therefore the issue of admissibility goes way beyond the hearsay problem initially identified. The admonishment the trial court gave only heightened the unfair prejudice to appellant that Meeks' describing the phone call engendered. The trial court specifically admonished the jurors that it was allowing the question and answer to show how the phone call affected "this witness'

willingness to testify in the case." (16 RT 2770.)

The trial court erred in allowing this question and answer as well as the follow up questions and answers about the fear caused by the phone call, for the same reasons the "threat" phone calls in *Dudley v. Duckworth* were inadmissible and testimony about them so prejudicially tainted the defendant's right to a fair trial that it required reversal of Dudley's conviction. What the *Dudley* Court stated applies equally in appellant's case: "The admission of this threat testimony could not but deprive petitioner of his right to present an alibi defense to a jury free from 'evidential harpoons.' We find the error amounts to a violation of the petitioner's fourteenth amendment right." (854 F.2d at p. 972.)

Because the admission of "threat testimony" that the prosecutor never substantiated as coming from, being directed by, or being authorized by appellant, violated appellant's due process right to a fair trial under the state and federal constitutions, this Court must reverse appellants three convictions for first-degree murder. The Court must in turn reverse appellant's penalty sentence of death.

E. Improper Testimony about Special Precautions Taken to Protect Kipchoge Johnson and Christopher Fennelle

As appellant stated previously, the trial court admitted over defense objection testimony by Detective William Smith that special precautions had been taken to protect Kipchoge Johnson and Christopher Fennelle during the trial. (18 RT 3214.) But Fennelle himself testified he was not concerned about his safety because of testifying. (18 RT 3204-3205.) The trial court erred in admitting Detective Smith's testimony, and the prosecutor violated appellant's due process right to a fair trial by alleging that appellant had engaged and was continuing to engage in a campaign of witness intimidation that included trying to intimidate Kipchoge Johnson and Christopher Fennelle.

As in the cases of Lewis Dyer and Zenia Meeks, no evidence was introduced demonstrating that appellant was personally attempting to intimidate witnesses Johnson or Fennelle, or that appellant had personally directed or authorized others to attempt to intimidate these two witnesses.

People v. Williams, *supra*, stands in contrast to appellant's case. This was also a prosecution of a "Blood" gang member for killing a "Crip" gang member, and extensive evidence was offered that the defendant attempted to intimidate a witness, Patricia Lewis. The evidence of this was most striking – someone fired more than 80 bullets into the house of the witness. The Court stated that because of the shooting and various threatening phone calls, the witness "became afraid for her life and testified falsely at the preliminary hearing" that she did not know who fired the shot that killed the "Crip" gang member. (16 Cal.4th at p. 181.) Williams challenged the admissibility of the "intimidation" evidence alleging the prosecution had failed to show that Williams directed or authorized the attack on the witness's home. (*Id.* at p. 197.)

This Court rejected the argument because it found the prosecution had presented sufficient evidence to ground the allegation that Williams had authorized the attack on the witness's home. (*Id.* at p. 201.) A prosecution witness, Simmons, testified that another person, who had admitted involvement in the shooting up of Ms. Lewis's house in juvenile court proceedings, told him that the defendant had told the person to scare "the lady on 87th Street who was going to court on him" so that "she doesn't go to court." (*Id.* at p. 199.)

This Court stated that Simmons' testimony "suggested defendant authorized the shooting," and noted that another prosecution witness, Cox, testified that the defendant told him while they were in jail together that he (the defendant) was "going to get some witness shot" in order to "beat this case."

Cox had further testified that the defendant said "he was going to get Curtis [Thomas] to shoot one on of the witnesses," whom the defendant specifically identified as Patricia Lewis. (*Id.* at p. 201.)

This Court correctly found in *Williams* that the prosecution had sufficiently demonstrated the defendant's involvement in the shooting attack on the eyewitness's home. But absent such evidence of involvement, it is improper to allow the prosecution to "explain away" a witness's prior testimony that is inconsistent with the witness's trial testimony. Such evidence is absent in appellant's case.

The reason for this Court's restriction on presenting "fear of retaliation" testimony to explain prior inconsistent testimony of a witness without also presenting substantial evidence that the defendant was involved in creating the fear of retaliation is clear. If a prosecutor could present "fear of retaliation" testimony without also showing that the defendant was involved in creating that fear, "intimidation of the witness" would become the all-purpose, always winning, "explanation" for prior inconsistent statements and testimony. This tactic for explaining away such inconsistencies is doubly prejudicial, because the testimony not only explains away the contrary statements or testimony, but it also strongly suggests a consciousness of guilt on the part of the defendant. Guilt by innuendo cannot be allowed.

For all the above reasons, this Court must reverse appellant's convictions for murder, and in turn, reverse appellant's sentence of death.

* * * * * *

II.

THE PROSECUTOR COMMITTED MISCONDUCT IN THE PENALTY PHASE BY ARGUING THAT APPELLANT'S MITIGATING EVIDENCE OF CHILDHOOD ABUSE BY HIS GRANDMOTHER WAS UNRELIABLE BECAUSE HIS SISTERS DID NOT TESTIFY TO THIS, WHERE THE PROSECUTOR KNEW THEY HAD CONFIRMED THIS ABUSE IN THE STARKEST TERMS

Appellant presented evidence in mitigation through Beverly Parks that he was severely mistreated and abused by his maternal grandmother, Amy Parks. (32 RT 5773-5783.) The prosecutor committed misconduct when he argued, regarding this evidence, that it was suspect and unreliable because neither of appellant's sisters (Nakei Powell and Larhonda Biggles, who did not testify) testified that "the grandmother mistreated the defendant." (35 RT 6233.) The prosecutor implied that had the sisters testified, they would not verify the abuse. The prosecutor, however, knew this was untrue.

The prosecutor knew this because on August 13, 2002, trial counsel provided to the prosecutor in discovery the report of an interview of appellant's youngest sister, Nakei Powell, conducted on June 9, 2000, which confirmed the mistreatment of appellant by his grandmother Amy Parks. Trial counsel also provided in discovery that same date the report of an interview of appellant's older sister, Larhonda Biggles, also conducted on June 9, 2000, that likewise confirmed the mistreatment of appellant by Amy Parks. [16]

Nakei Powell stated to defense investigator Olive Brown on June 9, 2000, that Amy Parks, her maternal grandmother, was a very violent person, "who would beat them [Nakei, Larhonda and appellant] and cuss at them every

[16] These interview reports were appended as Exhibits A and B to trial counsel's Application For New Trial – Penalty Phase (Penal Code Section 1181), filed on June 11, 2003. (13 CT 3477C-3477P.)

chance she got." Nakei felt strongly that their grandmother "hated them" and she said that Amy Parks "took every opportunity to let them know how she felt." (13 CT 3477J.) Their grandmother hardly ever called the children by their names. She called Nakei and her sister Larhonda "little black bitches," "cows," and "whores," and she called appellant a "crazy little motherfucker." Her grandmother accused Larhonda of sleeping with her grandfather; at the time of this accusation, Larhonda was seven years old. (*Ibid.*)

Nakei stated that their grandmother "would beat them for the slights [sic] thing that they did." Amy would make them go the backyard, get a switch from a tree, take it to her, and then she would beat them with it. (*Ibid.*) Nakei also stated that on one occasion when she was four years old (appellant would have been eight years old), her older brother "Big Sonny" had done something wrong, and her mother, Pearl Thomas, spanked him. "Big Sonny" was her grandmother's favorite child, and when Amy Parks found out about the spanking, she "jumped Pearl, and threw hot water on her." There was a big fight after that between Amy and Pearl, with broken glass everywhere. (13 CT 3477I.) This was just one of many fights that occurred between Pearl and her mother Amy. Nakei said that all of the physical violence and verbal violence was witnessed by all of the children in the house, including appellant. (13 CT 3477J.)

Larhonda Biggles stated to investigator Brown on June 9, 2000, that her grandmother was "a very violent person, who even went as far as stabbing her own daughter, Linda, because she thought she was sleeping with her father" (Amy Parks' husband). Larhonda stated that during the time she, Nakei and appellant lived at their grandmother's house, their grandmother would "stalk" them. She would wait until they were at the dining table "and then she would come after them with a large butcher knife." It was routine for their grandmother "to chase them from room to room with the knife, turning off the

lights as she pursued them." Larhonda said this kind of behavior by her grandmother had left "a lasting impression on her," so that to that day, "she cannot sleep without a night light and does not like being alone without having an adult present." (13 CT 3477N.)

Thus the prosecutor knew that if either Nakei Powell or Larhonda Biggles had testified, they would have confirmed the testimony given by Beverly Parks that her mother-in-law Amy Parks severely abused all of Pearl Thomas' children, including appellant. According to trial counsel, the prosecutor had no evidence whatsoever in hand to challenge the testimony of Beverly Parks as he did. As trial counsel argued in his Application For New Trial, "[T]he prosecutor did nothing to check the veracity of our reports; rather he waited until after the close of evidence to falsely imply that defense witnesses were lying." (13 CT 3477E.)

A prosecutor commits misconduct where he argues inferences that he knows in fact to be false. The United States Supreme Court made this clear in *Berger v. United States* (1935) 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, overruled on other grounds by *Stirone v. United States* (1960) 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252, finding misconduct where the prosecutor invited the jury to conclude that a witness knew the defendant well but only pretended on the witness stand to not know him, and that this fact "was within the personal knowledge of the prosecuting attorney." (295 U.S. at p. 88.) The Supreme Court thereafter enunciated the oft-cited rule on the boundary between vigorous prosecution and prosecutorial misconduct: "[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Ibid.*)

In *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, the Court of Appeals reversed the defendant's conviction of being a felon in possession of a gun because the prosecutor in closing argument asked the jury to infer that Blueford had fabricated his alibi in certain telephone calls with witnesses in the weeks just before the trial, when in fact the prosecutor was aware of evidence that contradicted some of these assertions. (*Id.* at p. 964.) The Court stated, "It is certainly within the bounds of fair advocacy for a prosecutor...to ask the jury to draw inferences from the evidence that the prosecutor believes in good faith might be true. But it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt." (*Id.* at p. 968.)

This Court, in *People v. Hill* (1997) 17 Cal.4th 800, reversed the defendant's convictions for robbery and first-degree murder because of prosecutorial misconduct, including that the prosecutor in closing argument suggested that a defense witness had an undisclosed motive for lying because she was friends with another woman who had the same last name as the defendant, and therefore was possibly a relative of the defendant, where no evidence had been introduced that the female friend was in fact any relative of the defendant. This Court stated, "It was blatantly improper for [the prosecutor] to invite the jury to infer Smith would lie because her friend, Linda Hill, was a probable relative of defendant. There was no evidence at all of this purported relation, so Morton's argument raised the possibility the jury would assume Morton had some undisclosed knowledge of such a relation. Morton thus committed misconduct." (*Id.* at p. 829.)

The prosecutor's misconduct here is also similar to the misconduct found in *People v. Daggett* (1990) 225 Cal.App.3d 751, where the appellate court reversed the defendant's child molestation conviction because the prosecutor's closing argument misled the jury about a fact that the prosecutor

knew to not be true. In *Daggett,* the prosecutor argued in closing that even if the complaining witness had himself molested other children, this was behavior that he learned from being molested by the defendant. In fact, the prosecutor knew that the complaining witness had previously been molested by someone else. The Court of Appeal stated that a prosecutor may not mislead a jury in this manner. The court stated, "Vigorous advocacy is admirable, but when it turns into a zeal to convict at all costs, it perverts rather than promotes justice." (*Id.* at p. 757.)

Similarly, in *People v. Varona* (1983) 143 Cal.App.3d 566, the court reversed where the prosecutor argued in closing that no proof had been offered that the complaining witness was a prostitute, when the prosecutor knew that in fact the complaining witness *was* a prostitute, because he had seen official records establishing that fact. Thus the prosecutor committed misconduct by knowingly "arguing a falsehood." (*Id.* at p. 570.)

Here, the prosecutor knew it was false to imply that Nakei Powell and Larhonda Biggles would testify to a different portrait of the way Amy Parks treated appellant than Beverly Parks had testified to. A prosecutor can properly argue that the aggravating evidence outweighs the mitigating evidence, as the prosecutor did here, but it is fundamentally unfair to argue that the aggravating evidence outweighs the mitigating evidence because the mitigating evidence presented was false, where the prosecutor knows it is not false. The latter argument, because it depends for its force on a falsehood, and because it is so prejudicial to the entire case in mitigation if believed by jurors, constitutes a denial of Due Process and of the Eighth Amendment right to a fair and reliable penalty determination.

Finally, the prosecutor's argument here also constituted misconduct because it deprived appellant of his Sixth Amendment right to confront and cross-examine witnesses (where the prosecutor treated the non-testifying

relatives as if they were his witnesses and he knew what they would testify to if called as witnesses). (*People v. Gaines* (1997) 54 Cal.App.4th 821, 825.) In *Gaines*, the court held that a prosecutor commits misconduct when he purports to tell the jury why a defense witness did not testify and what the testimony of that witness would have been. (*Id.* at p. 822.) The court stated,

> The prosecutor was in plain effect presenting a condensed version of what he was telling the jury would have been Mr. Hicks's testimony. When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights to confrontation and cross-examination. (E.g., *People v. Harris* (1989) 47 Cal.3d 1047, 1083, 255 Cal.Rptr. 352, 767 P.2d 619; *People v. Bolton* (1979) 23 Cal.3d 208, 215, 152 Cal.Rptr. 141, 589 P.2d 396, fn. 4 ["The prosecutor, serving as his own unsworn witness, is beyond the reach of cross-examination."].) Because this error has federal constitutional magnitude, it requires reversal unless we are satisfied beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705; *People v. Harris, supra.*)

(54 Cal.App.4th at p. 825.)

Appellant was prejudiced by the prosecutor's similar misconduct here, requiring the Court to reverse appellant's verdict of death. The prosecution presented substantial aggravating evidence at the penalty trial, in addition to the aggravating circumstances of the triple homicide itself, but appellant also presented substantial evidence in mitigation. He established not only that his childhood was horrific, that his teen years continued that horror when his older brother, whom he idolized, was viciously murdered, but also that he was diagnosed as seriously emotionally disturbed (SED) by the Los Angeles Unified School District before he was even 14 years old. (31 RT 5458-5462.)

Appellant also suffered from abnormal brain functioning, which in turn likely contributed to his suffering from Attention Deficit Disorder (ADD), poor impulse control and inability to control his anger. (32 RT 5681-5684.)

Further, appellant inherited the 3 repeat allele MAOA gene that has been shown to be associated, in concert with childhood maltreatment, with severe antisocial behavior later in life. (32 RT 5855-5860.) For all these reasons, it is reasonably probable that the jury would have reached a different penalty verdict had the prosecutor not committed misconduct in asking the jurors to make inferences that appellant's sisters, had they testified, would have contradicted the testimony of Beverly Parks about the extreme abuse appellant suffered from his grandmother Amy Parks, knowing that both of appellant's sisters in fact would have confirmed and elaborated on that abuse had they testified.

* * * * * *

III.

THE PROSECUTOR COMMITTED MISCONDUCT IN THE PENALTY PHASE BY ARGUING THAT THE DEATH OF CHRISTINE ORCIUCH WOULD BE A "FREEBIE" IF THE JURY DID NOT RETURN A VERDICT OF DEATH

The prosecutor twice argued in closing that appellant needed to be punished by a verdict of death for the murder of Christine Orciuch that occurred during the Lompoc credit union robbery in Santa Barbara County on August 8, 1997. This argument constituted misconduct because the prosecutor was improperly arguing that appellant should be punished by death for his factor (b) crimes, and that a life without the possibility of parole verdict would amount to giving appellant a "freebie" for the death of Mrs. Orciuch, as well as for all his other factor (b) crimes. As a result of the prosecutor's argument, this Court cannot reliably determine whether the jury sentenced appellant to death because of the triple homicide on October 7, 1994, or because of the heartrending murder of Mrs. Orciuch by another person during the Lompoc credit union robbery.

The prosecutor told the jurors, regarding the Lompoc robbery and the shooting of Christine Orciuch, "[I]f you choose the other direction [i.e., a penalty of life without the possibility of parole], then you are basically saying this [the shooting of Mrs. Orciuch] is a freebie, we are not going to impose any additional punishment on this defendant for the murder of Christine Orciuch. We are still going to give him life in prison without the possibility of parole. This is a freebie." (35 RT 6271.)

Subsequently, the prosecutor argued, "And as I mentioned before, all these other additional crimes, the additional crimes that – of the robberies, the carjackings, the other bank robberies, all of these are just additional, an additional, additional and additional crimes. And if you are to decide that life

without the possibility of parole is the correct verdict, you are basically going to say, as I mentioned before, this is a freebie, the defendant gets this free. The murder of Christine Orciuch, we are just going to ignore that." (35 RT 6284.)

Later in his final argument, the prosecutor also stated that appellant was death eligible because he had committed two murders on October 7, 1994, so the prosecution was seeking the death penalty, but "the defense wants to say, no, just give him the minimum, just give him a freebie, give him a freebie on the third murder, on the attempted murders, on the robberies, on all of the other crimes of violence, we are not going to punish you anymore. We will just stop at the two murders." (36 RT 6410.)

Trial counsel argued in his Application For New Trial that appellant should be given a new trial because of the "misdirection" created by the prosecutor's argument above. Trial counsel pointed out that factor (b) evidence "is not admitted so defendant can be punished for it; it is admitted as aggravating evidence to help the jury determine the appropriate penalty for the murders in this case [i.e., the triple homicide of October 7, 1994]." (13 CT 3477F.) As trial counsel argued, "The death penalty is the punishment for the crime of murder in the first degree with special circumstances. It is not the penalty for factor (b) violence." (*Ibid.*) This is exactly what this Court stated in *People v. Stanley* (1995) 10 Cal.4th 764, at p. 822 ("Evidence of prior ... violent conduct is admitted not to impose punishment for that conduct....")

Trial counsel also pointed out that the prosecutor improperly argued that appellant would escape punishment for the murder of Mrs. Orciuch unless the jury returned a verdict of death. As trial counsel stated, the prosecutor's argument "was patently false as the prosecutor was well aware that defendant had been convicted of that crime [the Lompoc credit union robbery and the murder of Mrs. Orciuch] and had received an LWOP sentence." (*Ibid.*)

At the hearing on trial counsel's Application For New Trial, counsel argued both these aspects of the prosecutor's misconduct: "First of all, it wasn't true that it [the Lompoc credit union robbery and the murder of Mrs. Orciuch] was a freebie, which was well-known to the District Attorney. And we can't really separate out whether or not the penalty was for her death as opposed to the Rollin 60's [triple homicide] in this case." (37 RT 6476.)

Regarding trial counsel's first point, appellant pointed out in his previous claim of error that a prosecutor commits misconduct when he argues inferences based on facts that he knows to be not true, or makes factual statements that he knows are not true. (*People v. Hill, supra*, 17 Cal.4th at p. 829; *Berger v. United States, supra*, 295 U.S. at p. 88.)

Regarding trial counsel's second point, he correctly pointed out that because of the improper argument made by the prosecutor, "[i]t is impossible to tell if the death verdict was reached as punishment for the Santa Barbara crimes, defendant's juvenile crimes, the credit union robberies or the jail incidents, rather than as punishment for the killing of the gangsters. The prosecutor misdirected the jury from their rightful task of setting the appropriate penalty for Counts 1–3, to an improper decision where the defendant's other crimes deserved the death penalty. This misdirection was especially harmful in conjunction with the false implication noted above that defendant had a 'freebie' regarding the death of Mrs. Orciuch." (13 CT 3477G.)

In *People v. Rogers* (2009) 46 Cal.4th 1136, the defendant was convicted of two first-degree murders and one second-degree murder. The prosecutor argued the third murder would be a "freebie" if the jury did not return a verdict of death. This Court held that the prosecutor's argument was not improper. (*Id.* at p. 1174, and fn. 23). While it may be appropriate to make such a "freebie" argument with regard to a third murder directly committed by a

defendant (an argument that the prosecutor specifically did make here, at 35 RT 6251-6252), it is improper to make this "freebie" argument with regard to factor (b) crimes, as the prosecutor also did here. It was clearly established that appellant was not the person who shot Mrs. Orciuch. (27 RT 4662; 28 RT 4799-4801.) Therefore, the prosecutor was improperly arguing that the jurors should punish appellant with death for the murder of Mrs. Orciuch, a factor (b) crime, where such conduct "is admitted not to impose punishment for that conduct," as this Court stated in *People v. Stanley, supra*, 10 Cal.4th at p. 822.

Appellant was prejudiced by the prosecutor's misconduct here, requiring the Court to reverse appellant's verdict of death. As appellant noted in the previous misconduct argument, the prosecution presented substantial aggravating evidence at the penalty trial, in addition to the aggravating circumstances of the triple homicide itself, but appellant also presented substantial evidence in mitigation. He established that his childhood was horrific, his mother was repeatedly incarcerated during his youth, and his grandmother, Amy Parks, abused him daily. He was diagnosed as seriously emotionally disturbed (SED) by the Los Angeles Unified School District (31 RT 5458-5462), and he was traumatized as an adolescent by the brutal murder of his older brother, John C. Jones ("Big Sonny") whom he idolized.

Appellant also suffered from abnormal brain functioning, Attention Deficit Disorder (ADD), poor impulse control and inability to control his anger. (32 RT 5681-5684.) Further, appellant's genetic makeup included the 3 repeat allele MAOA gene that accentuated the risk, through no fault of his own, that he would engage in antisocial behavior as an adult. (32 RT 5855-5860.)

For all these reasons, it is reasonably probable that the jury would have reached a different penalty verdict had the prosecutor not committed misconduct in suggesting that the jurors punish appellant with death for his

involvement in the murder of Christine Orciuch and his other factor (b) crimes. Further, the Court must reverse appellant's sentence of death because it cannot determine – due to the prosecutor's improper closing argument -- whether the jury sentenced appellant to death for the murders of the three gang members or for the murder of Mrs. Orciuch. If the jury sentenced appellant to death for the latter murder, the verdict was obviously not properly reached, and must be reversed.

* * * * *

IV.

THE TRIAL COURT ERRED IN OVERRULING TRIAL COUNSEL'S OBJECTION TO ADMISSION OF VICTIM IMPACT EVIDENCE PROVIDED BY MELISSA LOPEZ, JASPER ALTHEIDE, MOIRA PHILLEY, QUENTIN ORCIUCH AND GEORGE ORCIUCH

Trial counsel repeatedly objected on due process grounds as well as under the Eighth and Fourteenth Amendments to the federal constitution to the admission of victim impact evidence that went beyond the bounds of admissible evidence under *Payne v. Tennessee* (1991) 501 U.S. 808. (23 RT 3996-3997; 25 RT 4426-4430; 27 RT 4665-4669.) The victim impact evidence at issue related to the testimony of a victim of the Pacific Marine Credit Union robbery in Oceanside, Melissa Lopez, about the negative impacts of witnessing the robbery on her life (23 RT 3999-4000), the testimony of two victims of the Vandenberg Federal Credit Union robbery in Lompoc, Jasper Altheide and Moira Philley, about the negative impacts of witnessing the robbery and the murder of Christine Orciuch on their lives (27 RT 4656-4659; 27 RT 4699-4703), and the testimony of Christine Orciuch's son, Quentin Orciuch (27 RT 4679-4680), and her husband, Chester Orciuch (28 RT 4807-4817), about the negative impacts on their lives of Christine Orciuch's murder (which appellant did not personally commit).

The trial court overruled all these objections, relying on *People v. Garceau* (1993) 6 Cal.4th 140 and *People v. Mickle* (1991) 54 Cal.3d 140. This Court upheld the admissibility of such testimony recently in *People v. Brady* (2010) 50 Cal.4th 547, where the prosecutor presented the testimony of dozens of witnesses who were the victims of numerous armed robberies introduced under § 190.3(b) who described the negative impacts of the robberies on their lives. The Court held that the impact of factor (b) conduct on the victims of

that conduct is properly admitted as a circumstance of the factor (b) offense.

The Court should revisit and reject its decision in *Brady,* because *Payne* does not support such a broad admission of victim impact testimony. The United States Supreme Court in *Payne* removed the absolute prohibition on victim impact evidence established in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805. *Payne* held that the Eighth Amendment is not a *per se* bar to all "evidence about the victim and about the impact of the murder on the victim's family." (*Payne v. Tennessee, supra*, 501 U.S. 808, at pp. 825, 827.) The Supreme Court stated that victim impact information could serve legitimate purposes in capital sentencing, where the defendant had up to that time been the sole focus of the proceeding. In the Supreme Court's view, allowing the jury to receive some information about the victim would counterbalance the defense evidence in mitigation and prevent further depersonalization of the victim. In light of the wide array of mitigation evidence available to the defendant, the Supreme Court declared that the state should not be "barred from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Id.* at p. 822.)

In *Payne*, a mother and her two-year-old daughter were killed with a butcher knife in the presence of the mother's three-year-old son who survived critical injuries sustained in the attack. The victim impact testimony was a single response to a question posed to the grandmother of the surviving child. When asked about what she had observed in the child since he had witnessed his mother's and sister's murders, the grandmother testified that the boy cried for his mother and that he missed her and his sister. In closing argument, the prosecutor argued that the boy would never have his "mother there to kiss him

at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Id.* at p. 825.)

While the Supreme Court removed the absolute bar to this form of evidence, nothing in the *Payne* opinion suggests that the states may freely admit any and all quantity or variety of victim impact evidence. To the contrary, the Supreme Court in *Payne* expressly advised that victim impact evidence was subject to limits under the Eighth Amendment. (*Id.* at p. 824.) The Supreme Court also commented on the capital defendant's due process rights, stating: "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." (*Ibid.*)

Payne v. Tennessee expanded the range of admissible aggravating evidence but did not change the fundamental character of capital sentencing. In the penalty phase of a capital case the defendant must be the focus of attention. The sentencer (be it court or jury) must be able to consider mitigating factors involving the defendant's character or record and/or the circumstances of the offense. (*Lockett v. Ohio* (1978) 438 U.S. 586.) Where the sentencer is prevented from considering the defendant's individual characteristics and circumstances, the resulting sentence is unconstitutional. (*Green v. Georgia* (1979) 442 U.S. 95; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) Unduly emotional victim impact evidence and testimony tends to inflame the jury and diverts jurors' attention from the task at hand, i.e., choosing the appropriate penalty for the defendant. Where victim impact evidence and testimony inclines jurors to select the sentence based on emotion rather than reasoned judgment, this violates the Eighth Amendment's guarantee of reliability in capital sentencing and the Fourteenth Amendment's guarantee of due process of law. (*Caldwell v. Mississippi* (1985) 472 U.S.

320; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

The victim impact testimony presented in appellant's case regarding the impacts on victims of factor (b) violence, and especially regarding the impacts on family members of Christine Orciuch, who was not shot by appellant himself, sits outside the boundary of admissibility set by the United States Supreme Court in *Payne v. Tennessee*. In particular, the victim impact testimony of Chester Orciuch and Quentin Orciuch was so emotionally devastating that it certainly caused the jurors to determine appellant's sentence based on emotion rather than reasoned judgment, and in addition, was about the impacts on family members of a murder that appellant did not personally commit, which also distinguishes this evidence from the victim impact evidence ruled admissible in *Payne* about the impact on a child of the murder of his mother and of his sister *by* the defendant.

For all the reasons stated above, the admission of the victim impact testimony of Melissa Lopez, Jasper Altheide, Moira Philley, Quentin Orciuch and Chester Orciuch, over defense objection, violated appellant's right to due process as well as his right to a reliable penalty verdict under the Eighth and Fourteenth Amendments to the federal constitution, requiring this Court to reverse the jury's verdict of death and grant appellant a new penalty trial.

* * * * *

V.

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

At the conclusion of the penalty phase, the trial judge instructed the jury pursuant to CALJIC No. 8.85. (CT 931-932; RT 1973-1976.) As discussed below, this instruction is constitutionally flawed. This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnham* (2002) 28 Cal.4th 107, 191-192), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein.

A. The Trial Court's Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of Capital Punishment

The instructions given failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See CT 931-932; RT 1973-1976.) This Court has concluded that each of the factors introduced by a prefatory "whether or not"– factors (d), (e), (f), (g), (h), and (j) – are relevant solely as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1141, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769770; *People v. Davenport* (1995) 41 Cal.3d 247, 288-289.) But the jurors here were left free to conclude on their own with regard to each "whether or not" sentencing factor that any facts deemed relevant under that factor were actually aggravating. The jurors here

were not even instructed pursuant to CALJIC 8.85.6 that the absence of a statutory mitigating factor "does not constitute an aggravating factor." For this reason, appellant could not receive the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1982) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. at p.280.)

By instructing the jury in this manner, the trial judge ensured that appellant's jury could aggravate his sentence upon the basis of what were, as a matter of state law, mitigating factors. The fact that the jury may have considered these mitigating factors to be aggravating factors infringed appellant's rights under the Eighth Amendment, as well as state law, by making 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.)

The impact on the sentencing calculus of the trial judge's failure to define mitigating factors as mitigating will differ from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is presented, the evidence must be construed as mitigating. In other cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as allowing jurors to treat as aggravating any evidence presented by appellant under that factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different sets of aggravating circumstances because of differing constructions given to CALJIC

No. 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (lead opn. of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Accordingly, the trial court, by reciting the standard CALJIC No. 8.85 violated appellant's Eighth and Fourteenth Amendment rights.

B. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as a Barrier to Consideration of Mitigation by Appellant's Jury

CALJIC No. 8.85 provides, pursuant to Penal Code section 190.3, that jurors may consider certain factors to be mitigating only if they also find the factors to be "extreme" or "substantial." More specifically, the jurors in this case were instructed that they could consider "[w]hether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance," and "[w]hether or not the defendant acted under *extreme* duress or under the substantial domination of another person." (CT 931-932; RT 1974-1975 [emphasis added].)

These modifiers impermissibly raised the threshold for the consideration of mitigating evidence and risked misleading the jurors into believing that evidence of emotional disturbance or duress that was not extreme, or evidence of domination that was not substantial, could not be considered in mitigation. Adjectives such as "extreme" and "substantial" in the list of mitigating factors rule out the possibility that lesser degrees of the disturbance, duress, or domination can be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments. *(Stringer* v. *Black, supra,* 503 U.S. 222; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio, supra,* 438 U.S. 586.)

In the instant case, there was evidence that appellant was an emotionally disturbed individual. As trial counsel argued, but could not be heard, because of the "extreme" modifier to "mental or emotional disturbance," appellant's sentence should be mitigated because his mother Pearl Thomas used drugs and drank during her pregnancy with appellant, and she did not obtain prenatal care. Appellant did not have a father or positive male role model in his life at any time. His mother was in and out of jail throughout his childhood and youth. Nor did appellant have a loving extended family; to the contrary, his grandmother was unpredictable and violent, and abused appellant and his siblings when they were in her case. When Pearl Thomas was at home and not in jail, she also beat him. (23 RT 3883-3887.)

Further argued, appellant had problems as a child controlling his behavior and doing his school work, and at age seven he started attending a special education facility, but then his mother, who was not in jail at the time, removed him because she missed him. Appellant grew up living in gang territory in Los Angeles, and his mother was not a good role model to keep him out of gangs. She was in and out of jail numerous times because she was a professional shoplifter, and kept getting caught. Appellant's older brother, "Big Sonny," was a notorious gangster.

Appellant did not do well in school because he suffered from Attention Deficit Disorder. At age fourteen, he was diagnosed as severely emotionally disturbed. At age sixteen, "Big Sonny" was murdered. When appellant was released from CYA in 1993, his mother was again in prison. Additionally, appellant suffered from a brain dysfunction in his frontal lobe area. Because of this, his decision-making skills were comparable to someone with borderline intelligence, and he had poor impulse control. Appellant also

lacked a specific gene, the 4 repeat MAOA allele, that helps a person cope with violence around him and with violent impulses. (23 RT 3887-3893.)

In light of this evidence, the instruction in factor (d) that jurors were not to consider whether appellant committed the crime while he was under the influence of a mental or emotional disturbance unless the disturbance was "extreme" violated appellant's right to have the jurors consider that evidence as mitigating.

Such wording as "extreme" and "substantial" also renders these factors unconstitutionally vague, arbitrary, capricious, and incapable of principled application. *(Maynard v. Cartwright* (1988) 486 U.S. 356, 361-64; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) The jury's consideration of these vague factors, in turn, introduced impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Appellant recognizes that there are a plethora of cases holding that the word "extreme" need not be deleted from this type of instruction (see, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308 [no substantial explanation]; *People v. Benson* (1990) 52 Cal.3d 754, 803-804), as well as cases holding that the language of factors (d) and (h) is not impermissibly restrictive. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) However, these holdings are based on the assumption that jurors will utilize the "catchall" instruction provided by factor (k) to consider evidence that may not be "extreme" or "substantial."

But the "catchall" provision of factor (k) does not serve to cure this defect. First, factor (k) makes no reference whatsoever to mental or emotional disturbance or duress and, in light of the more specific language of factors (d) and (g), factor (k) would not be understood by any reasonable juror as superseding those factors. In addition, by its terms, factor (k) refers only to "any *other* circumstances" not previously listed in CALJIC No. 8.85, and no

reasonable juror would therefore understand it to include factors already included in the instruction.

For these reasons, the instructions contained in CALJIC No. 8.85 are constitutionally flawed. Because CALJIC No. 8.85 fails to comply with constitutional requirements, appellant's death sentence should be reversed.

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VI.

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

At the penalty phase jury charge, the trial judge instructed the jury pursuant to CALJIC 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> 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 injuries consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in

comparison with the mitigating circumstances that it warrants death instead of life without parole.

(CT 933-934; RT 1976-1978.)

This instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. For all these reasons, reversal of appellant's death sentence is required.

Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

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A. In Failing to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life Without Possibility of Parole, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code § 190.3.)[17] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction only addresses directly the imposition of the death penalty, and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required

[17] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violates the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346-347.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [emphasis in original].)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[18]

[18] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas*

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn*

(1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

(1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle to appellant in the instant case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as – if not more – entitled as noncapital defendants to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman v. California, supra,* 386 U.S. at p. 24, reversal is required.

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B. In Failing to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979; *People v. Brown, supra,* 40 Cal.3d at pp. 538-541 [holding jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].) The jurors in this case were never informed of this fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was *ipso facto* the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation – and even if they found no mitigation whatever. As framed, then, CALJIC No. 8.88 had the

effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

Clearly, in appellant's case the overall impact of the penalty phase instructions, and in particular CALJIC No. 8.88, the concluding instruction, was to falsely give the jurors the impression (1) that the trial judge wanted the jurors to impose a sentence of death, and (2) that jurors did not "have the right to just as easily give Life without Parole." (*Ibid.*)

Since these defects in the instructions deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law (see *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see also *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

C. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Is Unconstitutionally Vague and Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3

Under the standard CALJIC instructions, the question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." (13 CT 3420; 35 RT 6166-6167.)

The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the

context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391; see *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.) Regarding the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance"; "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. [Footnote.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where a "murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions," is unconstitutional and, thereby, unenforceable.

(*Arnold v. State*, *supra*, 224 S.E.2d at p. 392 [brackets in original].)[19]

There is nothing in the words "so substantial . . . that [the aggravating] evidence warrants death" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 429.) These words do not provide meaningful guidance to a

[19] The United States Supreme Court has specifically praised the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 202.)

sentencing jury attempting to determine whether to impose death or life. The words are too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

D. By Failing to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden and Reversal Is Required

As noted above, CALJIC No. 8.88 informed the jury that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (13 CT 3420; 35 RT 6166-6167.) Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) CALJIC No. 8.88 does not adequately convey this standard; it thus violates the Eighth and Fourteenth Amendments.

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To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.[20] Clearly, just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate.

The instructional deficiency is not cured by passing references in the instructions to a "justified and appropriate" penalty.[21] The instructions did not mention the concept of weighing or in any way inform the jury that aggravation must amount to something more than the mitigation before death became appropriate. Thus, the instructions did not inform the jurors of what circumstances render a death sentence "appropriate."

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[20] "Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something; (b) to authorize (the doing of something)." (*Webster's Unabridged Dictionary* (2d ed. 1966) 2062.) In contrast, "appropriate" is defined as, "1. belonging peculiarly; special. 2. Set apart for a particular use or person. [Obs.] 3. Fit or proper; suitable; . . . ." (*Id.* at p. 91.) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" (*ibid*), while the verb "warrant" is synonymous with broader terms such as "justify, . . . authorize, . . . support." (*Id.* at p. 2062.)

[21] The trial court instructed that "[i]n weighing the various circumstances you determine under the relevant evidence *which penalty is justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (13 CT 3420; 35 RT 6166; CALJIC No. 8.88 [emphasis added].)

E. The Instruction Is Unconstitutional Because It Fails to Set Out the Appropriate Burden of Proof

(1) The California Death Penalty Statute and Instructions Are Constitutionally Flawed Because They Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor or of Proving Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3; *People v. Cudjo* (1993) 6 Cal.4th 585, 634). However, under the California scheme, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.

Appellant submits that the failure to assign a burden of proof renders the California death penalty scheme unconstitutional and appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments. Although this Court has rejected similar claims (*see e.g. People v. Stanley* (1995) 10 Cal.4th 764, 842 and *People v. Ghent* (1987) 43 Cal.3d 739, 773-774, cert. denied (1988) 485 U.S. 929), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three recent opinions, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in

California capital cases. As the United States Supreme Court has observed, "*in 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." (*People v. Monge* (1998) 524 U.S. 721, 732 [citations and interior quotation marks omitted; emphasis added].)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable-doubt standard in the penalty phase of a capital case. If any doubt remained about this, the Supreme Court laid such doubts to rest by the series of cases that began with *Jones v. United States*.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended the holding of *Jones* to the states through the Fourteenth Amendment, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is

> exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, quoting *Jones*, *supra*, 526 U.S. at pp. 252-253.)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied the principles of *Apprendi* in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) It considered Arizona's capital sentencing scheme, where the jury determines guilt, but has no participation in the sentencing proceedings,

and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*:

> Capital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings "necessary to . . . put [a defendant] to death," regardless of whether those findings are labeled "sentencing factors" or "elements" and whether made at the guilt or the penalty phase of trial. (*Ring v. Arizona*, *supra,* 536 U.S. at p. 609.)[22] The Court observed:

> 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. We hold that the Sixth Amendment applies to both.

(*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." *(People v. Ochoa* (2001) 26 Cal.4th 398,. 454.). The Court reasoned that "once a jury has determined the

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[22] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Id.* at p.610 (con. opn. of Scalia J.).)

existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Id.* at p. 454.) However, post *Ring*, this holding is no longer tenable.

Read together, the *Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi*, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" *(Ibid.)* The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings both that aggravation exists and that it outweighs mitigation must be made.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first-degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus a finding that the aggravating factor or factors outweigh any mitigating factors, and that death is "appropriate." These additional factual findings increase the punishment beyond "that authorized by the jury's guilty verdict" and are "essential to the imposition of the level of punishment that the defendant receives." They thus trigger *Apprendi* and the requirement that the jury be

instructed to find the factors and determine their weight beyond a reasonable doubt.

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination or balancing test, the reasoning in *Apprendi* and *Ring* requires that this most critical "factual assessment" be made beyond a reasonable doubt.[23]

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[23] It cannot be disputed that the jury's decision of whether aggravating circumstances are present and whether the aggravating circumstances outweigh mitigating circumstances are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ("the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard").)

In addition, California law requires the same result.[24] The reasonable doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, such as that the defendant was armed during the commission of an offense, must be proved beyond a reasonable doubt. (See CALJIC No. 17.15.) The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in the defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently . . . . unless it has 'some rational basis, announced with reasonable precision' for doing so."].)

Accordingly, appellant submits that *Apprendi* and *Ring*, and consistent application of California precedent both require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

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[24] The practice in other states also supports this conclusion. In at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See J. Acker and C. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 Crim. L. Bull. 19, 35-37, and fn. 71-76 (1995), and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

(2) The Fifth, Sixth, Eighth and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

The penalty phase instructions given here not only failed to impose a reasonable doubt standard on the prosecution (see preceding argument), the instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1236), it has also held that a burden of persuasion at the penalty phase is inappropriate given the "normative" nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant submits that this holding is constitutionally unacceptable under the Fifth, Sixth, Eighth, and Fourteenth Amendments and urges this Court to reconsider that ruling.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination will also vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, *some* burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that

the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments – "wanton" and "freakish" (*Proffitt v Florida* (1976) 428 U.S. 242, 260) and the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. at p. 374) – that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state, while another assigns it to the accused or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant.

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and at least one special circumstance. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code §190.3) and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4(e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and "make a determination as to whether the jury's findings and verdicts that the

aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[25]

A fact could not be established – a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (See Cal. Rules of Court, rule 420, subd. (b) (existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence); Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to non-capital 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, supra,* 897 F.2d at p. 421.)

(3) The Trial Court's Failure to Instruct on the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances Resulted in an Unfair, Unreliable and Constitutionally Inadequate Sentencing Determination

By failing to provide a sua sponte instruction on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no

[25] Of course, the Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

particular burden to prove mitigating factors and that the jury was not required unanimously to agree on the existence of mitigation), the trial court impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) "There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armontrout* (8th Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be

unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal constitution. (See *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443.) Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be warranted. (*Ibid*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Eighth and Fourteenth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

(4) Even if It Is Constitutionally Acceptable to Have No Burden of Proof, the Trial Court Erred in Failing to So Instruct the Jury

Appellant further submits in the alternative that even if it were permissible not to have any burden of proof at all, the trial court still erred

prejudicially by failing to articulate to the jury that there was no such burden. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) The reason is obvious: without an instruction on the burden of proof, jurors may not use the correct standard; and each may instead apply the standard he or she believes appropriate in any given case. Such arbitrary and capricious decision-making in a capital case is contrary to the Eighth Amendment.

The same error occurs if there is no burden of proof but the jury is not so informed. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase would continue in this erroneous belief with no other guidance. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof, rendering the failure to give any instruction at all a violation of the Eighth and Fourteenth Amendments.

(5) The Absence of a Burden of Proof Is Structural Error Requiring That the Penalty Phase Verdict Be Reversed

The burden of proof applicable to a particular case reflects society's estimation of the "consequences of an erroneous factual determination" (*In re Winship*, *supra*, 397 U.S. at pp. 370-373 (conc. opn. of Harlan, J.)), and the consequences of an erroneous factual determination in a capital penalty phase can be the most severe of all. There can be no explanation why the most important and sensitive fact-finding process in all of the law – a penalty phase jury's choice between life and death – could or should be the only fact-finding process in all of the law completely exempted from a burden of proof. The absence of any burden of proof in the capital sentencing process is the

antithesis of due process and of the Eighth Amendment principle that there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 427 U.S. at p. 305; see also *Caldwell v. Mississippi*, (1985) 472 U.S. 320 at p. 341; *California v. Ramos* (1983) 463 U.S. 992, 998-999.)

The notion that a burden of proof is not required at all for proof of the facts at the penalty phase of a capital trial also violates the fundamental premise of appellate intervention in capital sentencing – the need for reliability (see *Ford v. Wainwright* (1986) 477 U.S. 399, 414) and "genuinely narrowed" death eligibility (*Zant v. Stephens*, *supra*, 462 U.S. at p. 877), rather than unbridled discretion. (See *Furman v. Georgia*, *supra*, 408 U.S. at p. 247.)

Even in the administrative arena, "[d]ue process always requires, of course, that substantial evidence support sanctions imposed for alleged misconduct. . . ." (*Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 154, fn. 16; see also, *Simms v. Pope* (1990) 218 Cal.App.3d 472, 477 [trial court may overturn property assessment board's decision only where no substantial evidence supports it, otherwise action is deemed arbitrary and denial of due process]; *In re Estate of Wilson* (1980) 111 Cal.App.3d 242, 247 [determination that decision is supported by substantial evidence is a "procedure reasonably demanded by developing concepts of due process"], citing *Jackson v. Virginia* (1979) 443 U.S. 307 and *Bixby v. Pierno* (1971) 4 Cal.3d 130.)

Since any and all factual determinations by any and all entities acting on behalf of the public must be made under some burden of proof to be consistent with due process, even if that is nothing more than "rational basis," as with legislative decisions (see, e.g., *Webster v. Reproductive Health Services* (1989) 492 U.S. 490), it is self-evident that the reliability required of decision-making in capital sentencing also requires some burden of proof. To

hold otherwise would ignore this well-established principle of Eighth Amendment jurisprudence.

The absence of the appropriate burden of proof prevented the jury from rendering a reliable determination of penalty. The error was structural and interfered with the jury's function, thus "affecting the framework within which the trial proceeds," and rendered the trial fundamentally unfair. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 310; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.)

Even if the error did not amount to a structural defect, the constitutional harmless error standard should apply. It is reasonably possible that the error adversely affected the penalty determination of at least one juror. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 448-449.) It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment must be reversed.

F. The Instruction Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted; regarding the reasons for the sentence – a single juror may have relied on

evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant submits that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, and slanted the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirement of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[26]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo*, particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640, should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made

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[26] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

by the jury." (*Id.* at pp. 640-641.) First of all, this is not the same as holding that unanimity is not required. Secondly, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California* (1998) 524 U.S. at 721, at p. 732; accord, *Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida* (1977) 430 U.S. 349 at p. 359 (plur. opn. of White, J.); *Woodson v. North Carolina* (1977) 428 U.S. 349 at p. 305), the Fifth, Sixth, and Eighth Amendments similarly are not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also, *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to

noncapital cases.[27] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (Pen. Code §§ 1158, 1158(a), 1163.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) would, by its inequity, violate the Equal Protection Clause and by its irrationality violate

[27] It should also be noted that the federal death penalty statute provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. §848(k).) In addition, 14 of the 22 states like California that vest in the jury the responsibility for death penalty sentencing require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20© (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions.

G. The Instruction Violated 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 version of CALJIC No. 8.88 given at appellant's trial was also constitutionally flawed because it failed to require explicit findings by the jury identifying which aggravating factors it relied upon in reaching its death verdict. The jury should have been required to state the findings on which it relied in its sentencing determination. (See *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) The failure to require the jury to give a statement of reasons for imposing death violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 24 of the California Constitution.

In all noncapital felony proceedings, the sentencer is required by California law to state on the record the reasons for the sentence choice in order to provide meaningful appellate review. (See *People v. Martin* (1986) 42 Cal.3d 437, 449; *People v. Lock* (1981) 30 Cal.3d 454, 459; Pen. Code § 1170.) It is only when the accused's life is at stake that this Court excuses the sentencer from providing written findings. Such disparate treatment of similarly situated individuals denies appellant his right to equal protection of the laws. (See *Reynolds v. Sims* (1964) 377 U.S. 533, 565; U.S. Const., Amend. XIV; Cal. Const., art. I, § 7.) Because capital defendants are entitled under the Fifth, Eighth, and Fourteenth Amendments to more rigorous protections than those afforded non-capital defendants (see *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994), and since providing more protection to a noncapital defendant than a capital defendant would violate the Equal

Protection Clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), it follows that the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating and mitigating circumstances found and rejected.

In addition, the sentencing process in capital cases is highly subjective, and an erroneous sentence determination will result in the defendant's death (see *Turner v. Murray* (1986) 476 U.S. 28, 33-34). Given all that is at stake, the enormous benefit it would bring, and the minimal burden it would create, a requirement of explicit findings is essential to ensure the "high [degree] of reliability" in death-sentencing that is demanded by both the Due Process Clause and the Eighth Amendment. (*Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384.)

Finally, a provision for meaningful appellate review of the sentencing process is an indispensable ingredient of a death penalty scheme under the Eighth Amendment. The United States Supreme Court has recognized as much in a number of cases where, in the course of explaining why the state death statutes at issue were constitutional, it pointed to the fact that the statutory schemes required on-the-record findings by the sentencer, thus enabling meaningful appellant review. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198 (plur. opn.) [explaining appellate review is an "important additional safeguard against arbitrariness and caprice"]; *id.* at pp. 211-212, 222-223 (conc. opn. of White, J.) [stating provision for detailed appellate review is an important aspect of constitutional death penalty statute]; *Proffitt v. Florida*, *supra*, 428 U.S. at pp. 250-253, 259-260 ("[s]ince . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible"); see, e.g., *California v. Brown* (1987) 479 U.S. 538, 543 [describing judicial review

as "another safeguard that improves the reliability of the sentencing process"].[28] Indeed, most state statutory schemes require such findings.[29]

This Court has also recognized the importance of explicit findings. (See, e.g., *People v. Martin, supra*, 42 Cal.3d at p. 449.) Indeed, the Court has described written findings as "essential" for meaningful appellate review:

> In *In re Podesto* (1976) 15 Cal.3d 921, we emphasized that a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to

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[28]Appellant notes that in *Clemons v. Mississippi* (1990) 494 U.S. 738, 750, the United States Supreme Court was not impressed with the claim that without written jury findings concerning mitigating circumstances, appellate courts could not perform their proper role. Nevertheless, in a weighing state, such as California or Florida, an Eighth Amendment violation occurs when the sentencer considers and weighs an invalid aggravating circumstance in reaching its penalty verdict. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532.) Written findings would allow for meaningful appellate review of such an error; a review that cannot take place under California's current procedures.

[29] See Code of Ala., sec. 13A-5-47(d) (1994); Ariz. Rev. Stat., sec. 13-703(D) (1995); Conn. Gen. Stat., sec. 53a-46a(e) (1994); 11 Del. Code, sec. 4209(d) (3) (1994); Fla. Stat., sec. 921.141(3) (1994); Ga. Code Ann. §17-10-30(c) (Harrison 1990); Idaho Code, sec. 19-2515(e) (1994); Ind. Code Ann., sec. 35-38-1-3(3) (Burns 1995) (per *Schiro v. State* (Ind. 1983) 451 N.E.2d 1047, 1052-53); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Code Ann., art. 27, secs. 413(i) and (j) (1995); Miss. Code Ann., sec. 99-19-101(3) (1994); Rev. Stat. Mo., sec. 565.030 (4) (1994); Mont. Code Ann., sec. 46-18-306(1994); Neb. Rev. Stat., sec. 29-2522 (1994); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); N.J. Stat., sec. 2C:11-3© (3) (1994); N.C. Gen. Stat., sec. 15A-2000© (1994); 21 Okla. Stat., sec. 701.11 (1994); 42 Pa. Stat., sec. 9711(F) (1) (1992); S.C. Code Ann. § 16-3-20© (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann., sec. 39-13- 204(g) (2)(A)(1) (1995); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat., sec. 6-2-102(d) (ii) (1995). See also 21 U.S.C., sec. 848 (k) (West Supp. 1993).

> meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable.

(*People v. Martin*, *supra*, 42 Cal.3d at pp. 449-450.)

In California, the primary sentencer in a capital case is the jury. California juries have absolute discretion and are provided virtually no guidance on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 978-979.) Moreover, jurors, unlike the judge, cannot be presumed to know the law or to apply it correctly. (See *Walton v. Arizona*, *supra*, 497 U.S. at p. 653; *Pulley v. Harris* (1984) 465 U.S. 37, 46.) Without a statement of findings and reasons for the jury's sentencing choice, this Court cannot fulfill its constitutionally required reviewing function. Any given juror in appellant's case could have made his or her decision to impose death by using one of the improper considerations described elsewhere in this brief. Further, the individual factors listed were not identified as either mitigating or aggravating. As a result, it is quite possible that a juror improperly considered a mitigating factor in aggravation.

The sentencing process in which the jurors must engage is fraught with ambiguities and unreviewable discretion, concealed beneath a stark verdict imposing a penalty of death. Such a verdict does not allow for meaningful appellate review of the sentencing process, a constitutionally indispensable ingredient of a death penalty scheme under the Eighth and Fourteenth Amendments.

In *People v. Frierson* (1979) 25 Cal.3d. 142, 177, a plurality of this Court concluded that written findings were not required under the 1977 law

because the scheme provided "adequate alternative safeguards for assuring careful appellate review," including (1) the requirement that a special circumstance be found beyond a reasonable doubt before a death sentence could even be considered, and (2) the provision that the trial court in ruling on the automatic modification motion "must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's . . . verdict, and state on the record the reasons for its findings." (*Id.* at p. 179.) In *People v. Jackson* (1980) 28 Cal.3d 264, 317, this Court carried the analysis a step further, concluding:

> Surely, if Florida's scheme is valid (wherein an advisory jury makes recommendations, without findings, to the trial judge), California's system, which imposes the *additional* safeguard of a jury independently determining the penalty, must likewise be valid.

(*Ibid*; emphasis in original.)

This logic is flawed, because it conflates the reviewing role of the California trial court at the automatic sentence modification hearing with the sentencing function of the jury responsible for fixing the penalty of death. The findings referred to approvingly in *Gregg* and *Proffitt* are statements of the reasons for the sentence by the sentencer.[30] A trial court's statement of reasons

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[30] In Florida, prior to *Ring*, the jurors' function was merely to advise the judge, who was responsible for the final pronouncement of sentencing and specifying in writing the underlying reasons for such a sentence. (See *Proffitt*, *supra*, 428 U.S. at pp. 251-252 ["[s]ince . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible"].)

There are other critical distinctions between the California and the former Florida statutes. For example, Florida's sentencing considerations were separated into discrete categories as either aggravating or mitigating. California factors are not so designated. In addition, Florida's aggravating

for upholding the jury's sentence is no substitute for a statement of reasons by the entity that actually made the critical decision. Although a judge's findings might provide insight as to his or her considerations in upholding the jury's findings, that explanation sheds no light on the appropriateness, consistency, propriety, or strength of the sentencing body's actual reasons. The fact that the court, while independently reviewing the evidence, is able to articulate a rational basis for the sentencing decision affords no assurance that the jury did so. (Cf. *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279 [explaining court reviewing for harmless error must look "to the basis on which 'the jury *actually rested* its verdict'" (emphasis in original)].) Thus, rather than "substantially comport[ing] with the requirements of both *Gregg* and *Proffitt* with respect to disclosure of the reasons supporting a sentence of death" (*People v. Frierson*, *supra*, 25 Cal.3d at p. 180), that feature of California's sentencing scheme further insulates the jury's sentencing decision from meaningful appellate review. (See *People v. Lock*, *supra*, 30 Cal.3d at p. 459 [meaningful appellate review obviously impossible where sentencer states no reasons for its sentence choice].)

H. The Failure to Instruct the Jury on the Presumption of Life Violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

In noncapital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is a basic component of a fair trial. (See *Estelle v. Williams*, *supra*, 425 U.S. at p. 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty

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factors for death selection correspond to California's special circumstances that serve to narrow the class of individuals eligible for death.

phase correlate of the presumption of innocence. (Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) Appellant submits that the court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that such a presumption of life is not necessary when a person's life is at stake, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" so long as the state's law properly limits death eligibility. (*Id.* at p. 190.) However, California's capital-sentencing statute fails to narrow adequately the class of murders that are death eligible. (See Shatz & Rivkind, "The California Death Penalty Scheme: Requiem for Furman?" (1997) 72 N.Y.U. L.Rev. 1283.) Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to require written findings regarding aggravating factors, and fails to require intercase proportionality review. Accordingly, appellant submits that a presumption of life instruction is constitutionally required at the penalty phase, and reversal of the penalty judgment is required.

For all the above reasons, the trial court violated appellant's federal constitutional rights by instructing the jury in accordance with CALJIC No. 8.88, and appellant's death sentence must therefore be reversed.

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VII.

THE PENALTY PHASE INSTRUCTIONS WERE DEFECTIVE AND DEATH-ORIENTED IN THAT THEY FAILED TO PROPERLY DESCRIBE OR DEFINE THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE

Neither CALJIC No. 8.88 nor any other instruction given in this case informed the jurors that a sentence of life without possibility of parole meant that appellant would *never* be considered for parole. Appellant submits that the trial court had a sua sponte duty to instruct on the true meaning of this sentence.

The trial court is obligated to instruct on its own motion on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131 [proposed instruction on the meaning of life without parole found to be inaccurate and not constitutionally required]), the Court should reconsider its decisions based on recent United States Supreme Court rulings.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.)

The *Simmons* opinion has been repeatedly reaffirmed by the United States Supreme Court. In 2001, the Court reversed a second South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52 [citation omitted].)

In *Kelly v. South Carolina* (2002) 534 U.S. 246, the Court again reversed a South Carolina death sentence for this same error, even though the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (534 U.S. at p. 256.)[31]

[31] The Supreme Court opinions make it quite clear that there was an inference of future dangerousness in this case sufficient to warrant an

The state in *Simmons* had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the

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instruction on parole ineligibility. In *Kelly* the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." (*Kelly, supra*, 534 U.S. at p. 254 [footnote omitted].) In that case, the Court found that future dangerousness was a logical inference from the evidence and injected into the case through the state's closing argument. (*Id.* at pp. 250-251; see also *Shafer, supra*, 532 U.S. at pp. 54-55; *Simmons, supra*, 512 U.S. at pp. 165, 171 (plur. opn.) [future dangerousness in issue because "State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regard the [same]"]); *id.* at p. 174 (conc. opn. of Ginsburg, J.); *id.* at p. 177 (conc. opn. of O'Connor, J.).

As Justice Rehnquist argued in his dissent from the *Kelly* decision, "the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." (534 U.S. at p. 261 (dis. opn. of Rehnquist, J.).) The rule is invoked, "not in reference to any contention made by the State, but only by the existence of evidence from which a jury might infer future dangerousness." (*Ibid.*)

In this case, the evidence raised an implication of future dangerousness, and the prosecutor argued during penalty phase opening argument that appellant led a life of crime that was similar to a violent and horrible television mini-series, and that the jurors in the guilt phase had only heard about a part of appellant's life of crime. The prosecutor argued that appellant had committed other violent crimes before and after the triple murder in September 1994, including the robbery of a credit union in Oceanside also in September 1994 and the robbery of a credit union in Lompoc in 1997 in which one customer was shot in the leg and a second customer was murdered by one of the robbers. (23 RT 3864-3878.) The prosecutor then presented aggravating evidence of fifteen (15) other criminal incidents in appellant's life, and the jury was instructed they could consider that evidence as evidence in aggravation. (See 35 CT 3421, jury instruction listing 15 incidents of "Other Criminal Activity" by appellant in addition to the three charged murders.)

petitioner to be released into society. (512 U.S. at p. 166.) In rejecting this argument, the United States Supreme Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading. *(Id.* at pp. 166-168.)

This Court has erroneously concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People* v. *Arias, supra*, 13 Cal.4th at pp. 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a sentence. One study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venirepersons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. (Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.)

The results of a telephone poll commissioned by the *Sacramento Bee* showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (*Sacramento Bee* (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons, supra*, 512 U.S. at p. 168, fn. 9.) In addition, the information given California

jurors is not significantly different from that found wanting by the United States Supreme Court.

In the instant case, jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were never informed that life without possibility of parole meant that the defendant would not be released. In *Kelly*, the Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Court also recognized that the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly, supra*, 534 U.S. at p. 257.)

Similarly, in *Shafer*, the defense counsel argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer, supra*, 532 U.S. at p. 52.) The Court nevertheless found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.)

In *Simmons*, the Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons, supra*, 512 U.S. at p. 170.) Here, the instruction that the sentencing alternative to death was life without possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole.

The Supreme Court's rejection of South Carolina's "plain and ordinary meaning" argument in the *Simmons* case should be instructive when applied to California's statutory language of "life without possibility of parole." The principle to be derived from the Court's reliance in *Simmons* on *Gardner v.*

Florida, supra, 430 U.S. 349, is that the Constitution will not countenance a false perception to form the basis of a death sentence, whether that perception is brought about as a result of incorrect instructions or by inaccurate societal beliefs regarding parole eligibility.

Further, the inadequate instruction violated the principles of *Caldwell v. Mississippi, supra,* 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without specific instructional guidance on the meaning of life without parole that addressed and overrode the belief so commonly held among jurors that "without the possibility of parole" is legal jargon for "life until someone decides otherwise," the jurors undoubtedly deliberated under the mistaken perception that the choice they were asked to make was between death and a limited period of incarceration. (See *Simmons, supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was unfairly simplified.

The prejudicial effect of the failure to clarify the sentencing options is clear. There is a substantial likelihood that at least one of the jurors[32] concluded that the non-death option offered was neither real nor sufficiently severe and chose a sentence of death not because the juror deemed such

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[32] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915,. 937 (conc. opn. of Gould, J.) ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, at pp. 691-692].)

punishment warranted, but because he or she feared that appellant would someday be released if they imposed any other sentence.[33] Given the existence of evidence in this case from which the jurors would infer future dangerousness, the jurors should have been clearly instructed that a sentence of life without the possibility of parole meant that appellant would never be eligible for parole – not just that they should "assume" that a sentence of "life without parole," if imposed, would be carried out.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605.) Had the jury been instructed forthrightly that appellant could not be paroled, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *Chapman v. California, supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

* * * * *

[33] California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 Journal of Social Issues 149 (1994), at pp. 170-171; accord, Ramon, *et al.*, *Fatal Misconceptions*, *supra*, at p. 45.)

VIII.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), cert. den. (1979) 440 U.S. 974 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S.637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *(United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) .

Appellant has argued that a serious constitutional error occurred during the guilt phase of trial and that this error alone was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. The death judgment rendered in this case also must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is

> overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown, supra,* 46 Cal.3d at p. 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. *(Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California, supra,* 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown that errors occurred in the guilt and penalty phases. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. There can be no doubt that appellant was denied the fair trial and due process of law to which he is entitled before the State can claim the right to take his life. Reversal is mandated because

respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. *(Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

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IX.

CALIFORNIA'S CAPITAL-SENTENCING STATUTE IS UNCONSTITUTIONAL

A. California's Use of the Death Penalty as a Regular Form of Punishment Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions."[34] (*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; see also *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 225-229 (conc. and dis. opn. of Harrison, J.).)

The unavailability of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is uniform within the nations of Western Europe. (See *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, plus Canada, Australia, and the Czech and Slovak Republics, have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)

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[34] South Africa abandoned the death penalty in 1995, five years after the article was written.

The abandonment of the death penalty in Western Europe is especially important since our Founding Fathers looked to the nations of Western Europe for the "law of nations," as models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution. "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 (dis. opn. of Field, J.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; what civilized nations of Europe forbade, such as poison weapons or the selling into slavery of wartime prisoners, was constitutionally forbidden here. (See *Miller v. United States, supra,* 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment," as defined in the Constitution, is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency, as perceived by the civilized nations of Europe to which our Framers looked as models, have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus 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 supposed to be antithetical to our own. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."].)

Thus, assuming *arguendo* that 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 contrary to those norms. Nations in the Western world no longer accept it, and the Eighth Amendment does not permit states in this nation to lag so far behind. (See *Hilton v. Guyot, supra*; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)[35]

Thus, the very broad death scheme in California, and the regular use of death as a punishment, violates the Eighth and Fourteenth Amendments. Consequently, appellant's death sentence should be set aside.

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[35] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.)

B. Failing to Provide Intercase Proportionality Review Violates Appellant's Eighth and Fourteenth Amendment Rights

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198; *Proffitt v. Florida, supra,* 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris, supra*, 465 U.S. 37, the Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Based upon that, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam, supra,* 28 Cal.4th at p. 193; *People v. Fierro* (1991) 1 Cal.4th 173, 253.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* was based in part on an understanding that the application of the relevant factors "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," thus "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate. As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the court will be well advised to reevaluate its decision in *Pulley v. Harris*."

(*Tuilaepa v. California, supra*, 512 U.S. at p. 995 (dis. opn. of Blackmun, J.), quoting *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1194 [interior quotation marks omitted].)

The time has come for *Pulley v. Harris* to be reevaluated, because the special circumstances of the California statutory scheme fail to perform the type of narrowing required to sustain the constitutionality of a death penalty scheme in the absence of intercase proportionality review. Comparative case review is the most rational, if not the only, effective means by which to demonstrate that the scheme as a whole is not producing arbitrary results. That is why the vast majority (31 out of 34) of the states that sanction capital punishment require comparative, or intercase, proportionality review. [36]

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[36] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

The capital sentencing scheme in effect in this state is the type of scheme that the *Pulley* Court had in mind when it said "that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) One reason for this is that the scope of the special circumstances that render a first-degree murderer eligible for the death penalty is now unduly broad. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?, supra,* 72 N.Y.U. L. Rev. at pp. 1324-1326.) Even assuming that California's capital-sentencing statute's narrowing scheme is not so overly broad that it is actually unconstitutional on its face, the narrowing function embodied by the statute barely complies with constitutional standards. Furthermore, the open-ended nature of the aggravating and mitigating factors, especially the circumstances-of-the-offense factor delineated in Penal Code section 190.3, grants the jury tremendous discretion in making the death-sentencing decision. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 986-988 [dis. opn. of Blackmun, J.].)

The minimal narrowing of the special circumstances, plus the open-ended nature of the aggravating factors, work synergistically to infuse California's capital-sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few first-degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital-sentencing scheme lacks other safeguards, such as a beyond-the-reasonable-doubt standard and jury unanimity requirement for aggravating factors, the use of an instruction informing the jury which factors are aggravating and which are mitigating, or the required use of an instruction informing the jury that it is prohibited from finding nonstatutory aggravating factors. Thus, the statute fails to provide any

method for ensuring that there will be some consistency from jury to jury when rendering capital-sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

Penal Code section 190.3 does not forbid intercase proportionality review; the prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries is strictly the product of this Court. *Furman v. Georgia, supra*, raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra,* 408 U.S. at p. 313 [conc. opn. of White, J.].)

California's capital-sentencing scheme does not operate in a manner that enables it to ensure consistency in penalty-phase verdicts; nor does it operate in a manner that assures that it will prevent arbitrariness in capital sentencing. Because of that, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution, and therefore requires the reversal of appellant's sentence of death.

* * * * *

X.

BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, BINDING ON THIS COURT, THE DEATH SENTENCE HERE MUST BE VACATED

The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky, supra,* 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that [e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v.*

Robertson (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[37]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v.*

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[37] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

Ghent, supra, 43 Cal.3d at pp. 778-779; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Appellant requests that the Court reconsider and, in this context, find appellant's death sentence violates international law. (See also *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].) For this reason, the death sentence here should be vacated.

* * * * *

CONCLUSION

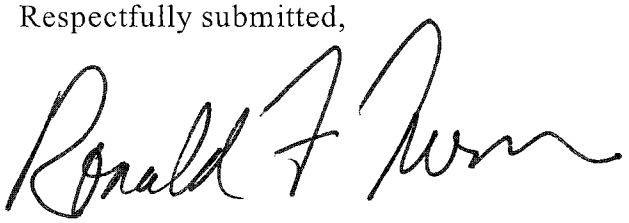
For all the foregoing reasons, appellant's conviction for murder and his judgment of death must be reversed.

Counsel's Certificate as to Length of Brief Pursuant to Rule 36(b)

I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the table, contains approximately 59,750 words.

DATED: June 20, 2011

Respectfully submitted,



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Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Marcus Adams*** **Crim. No. S118045**
(Los Angeles County Superior Court No. BA109664)

I, Ronald Turner, declare that I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 8400 Jennie Avenue NE, Bainbridge Island, Washington, 98110.

On June 20, 2011, I served the attached

APPELLANT'S OPENING BRIEF

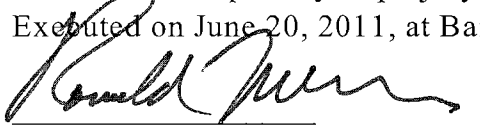
by placing a true copy thereof in an envelope addressed to the persons named below at the address shown, and by sealing and depositing said envelope in the United States Mail at Bainbridge Island, Washington, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Marcus Adams
P.O. Box P-22139
San Quentin, CA 94974

Scott Kauffman
California Appellate Project
101 Second St., 6th Floor
San Francisco, CA 94105

Colleen Tiedeman, D.A.G.
Office of the Attorney General
300 South Spring St., Suite 1702
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.
Executed on June 20, 2011, at Bainbridge Island, Washington.



Declarant