IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent.

vs.

CALVIN DION CHISM,

Defendant and Appellant.

Case No. S101984

Los Angeles County Superior
Court Case No. NA043605

DEATH PENALTY CASE

APPELLANT'S OPENING BRIEF

VOLUME 2 OF 2:
PAGES 237 THROUGH 439

On Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

Honorable Richard R. Romero, Judge Presiding

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SECOND PENALTY PHASE TRIAL - JURY SELECTION ISSUES

XII. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN DENYING HIS *BATSON/WHEELER* MOTIONS

A. INTRODUCTION

Three eligible African American venirepersons were seated in the jury box as prospective jurors for the penalty phase retrial in this case involving a Caucasian murder victim and an African American defendant.[73] The prosecutor used peremptory challenges to remove two of the three African American prospective jurors from the jury.[74] One African American juror ultimately served on the jury.[75]

Appellant twice objected to the prosecutor's discriminatory actions in removing African Americans from the jury panel and moved for a new jury selection process in accord with *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1979) 22 Cal.3d 258. Finding both times that there was no prima facie case, the trial court erroneously denied appellant's motions. On both occasions, the prosecutor offered a putative explanation for her actions following the trial court's action.

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[73] While the jury was questioned orally, no written jury questionnaire was utilized. (RT 13:2743-2745, 2748-2750.)

[74] This figure is based on the prosecutor's observations. (RT 15:3505-3506.)

[75] Juror No. 1 -- juror identification number 0982 -- was eventually seated on the jury and was an African American male. In addition, there was an African American alternate juror out of a total of four alternates. (RT 15:3505.)

Appellant's death sentence must be reversed because it was obtained in violation of his rights to a fundamentally fair trial by an impartial jury drawn from a representative cross-section of the community, due process of law, equal protection and a reliable penalty verdict, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 239-241; *Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276-277.)[76]

Improper exercise of peremptory challenges during jury selection on discriminatory grounds enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

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[76] The *Batson/Wheeler* rule has been codified in California:

> A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.

(Code Civ. Proc., § 231.5.)

Appellant has a constitutionally protected liberty interest of "real substance" in his ability to prevent improper exercise of peremptory challenges during jury selection on discriminatory grounds. To uphold his conviction, in light of the prosecutor's racially discriminatory exercise of peremptory challenges, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)[77]

This error was prejudicial and requires a reversal of appellant's sentence.

B. PROCEDURAL BACKGROUND

1. FREDERICK JONES

Frederick Jones was chosen as Prospective Juror No. 2 in the first group of 18 jurors selected for voir dire in the penalty phase retrial. (RT 13:2870.) *Hovey*[78] questioning by the trial judge revealed an open mind on the death penalty and a willingness to vote for either a penalty of death or

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[77] Appellant set forth the factual and legal basis of his objection in the trial court. Accordingly, his Due Process Clause and Eighth Amendment claims are not forfeited despite failure to specifically urge them in the trial court. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 433-439; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1085, fn. 4.)

life without the possibility of parole if the evidence convinced him that it was the appropriate penalty. (RT 13:2873-2874.) Mr. Jones answered the prosecutor's questions on the subject of penalty in the same manner. (RT 13:2927-2928.)

In general voir dire by the trial judge, Mr. Jones revealed that he was single, lives in Carson, and was a driver for United Parcel Service. Mr. Jones previously sat on two criminal trial juries, with a robbery case proceeding to verdict and a murder case resulting in a deadlocked jury. The hung jury was a little frustrating for Mr. Jones. Mr. Jones had been the victim of an armed robbery -- the gun was pointed at his back -- while delivering packages for United Parcel Service eight to ten years previously. The perpetrator was apprehended and convicted. (RT 14:2665-2968.) Defense counsel did not ask Mr. Jones any questions, but under questioning by the prosecutor, Mr. Jones answered that he had been a driver for United Parcel Service for 18 years, since he left high school, and had never been a supervisor at that job. Mr. Jones had two children, aged 1 and 12, and cohabitated with their mother, a wholesale computer salesperson. Mr. Jones revealed that he was a golfer and coached a traveling youth basketball team. According to Mr. Jones, he was certified to coach and required to recruit players. (RT 14:3048-3051.)

After the prosecutor exercised two peremptory challenges and defense counsel exercised one peremptory challenge, new prospective jurors were chosen to fill the jury box. (RT 14:3075-3076.) Following voir dire of the new prospective jurors, defense counsel and the prosecutor each exercised one peremptory challenge. (RT 14:3147-3148.) After defense counsel excused one more juror, the prosecutor sought to excuse Mr. Jones

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[78] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

and defense counsel requested a sidebar conference. (RT 14:3148.) The trial judge asked Mr. Jones to remain in his seat and the following occurred:

> The Court: We're at side-bar.¶ Juror Two is a black male. Juror one is a black female.¶ Defendant is a black male. ¶ I offhand don't recall any other African-Americans on the twelve panel now.¶ Were there any others, Mr. Herzstein?
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> Mr. Herzstein: I think there's two or three in the remaining audience. I'm not sure. I would have to look again. I knew Friday, and now I can't recall. Some may have come up as part of this panel.¶ I think one of them was coming was the one that ended up being Juror Number One.
>
> The Court: Go ahead.
>
> Mr. Herzstein: But, obviously, we have a motion here.¶ Mr. Jones seems open-minded regarding the penalty.¶ He has sat on two prior juries, one of which was a hang.¶ He was a victim of a robbery eight or ten years ago. The person was caught and convicted.¶ He's gainfully employed for some period of time in U.P.S.¶ He's a single father. Appeared to be an ideal juror.
>
> The Court: I always feel inadequate in these *Wheeler* motions.¶ Now I'm supposed to put on a D.A. hat and look at my notes and see whether, in my opinion, a reasonable D.A. would have had a not racial reason for using a peremptory.¶ You did mention the hung jury.
>
> Mr. Herzstein: That is correct. We don't know which side he was on. ¶ It also was a guilty -- robbery was a guilty, the murder was a hung.
>
> The Court: I know some jurors -- D.A.'s would automatically exclude on a hung jury.¶ I'm not asking you for an explanation, if you want to make a record. I'm not making a prima facia finding.
>
> Ms. Lopez: I think it's important to make a record, although I'm not saying that there is a prima facia case.¶ No significant life experience that indicates strong decision-making skills.
>
> Mr. Herzstein: I'm sorry. I didn't understand counsel.

Ms. Lopez: No significant life experiences that indicates strong decision-making skills.¶ He's been throughout his occupation, a U.P.S. driver, never supervised anybody.¶ There is nothing about his background that indicates that he can engage in a decision that -- of this magnitude.¶ There is nothing -- no strength about his background; although, in a different type of case, I think he would be a wonderful juror, but this is a penalty where I'm going to be asking him to bring back a verdict of death. I want strong decision-making skills.

The Court: My notes, since high school U.P.S. driver, loading, no supervisory experience, girlfriend sells computer, two minor children, plays golf, coaches a traveling basketball team.

Mr. Herzstein: He makes decisions there.¶ Your Honor, well, I believe you have to find a prima facia case, and since you are not finding that, we're just making a record; is that correct?

The Court: Yes.¶ If you want the make any comments, though.

Mr. Herzstein: Yes, I do.¶ He's indicated that he can vote one way or the other depending on the evidence.¶ He -- to say that because he hasn't been a supervisor he hasn't made decisions, he obviously has. He has a child. He coaches a team.¶ I mean, all of these things are as counsel said, make an ideal juror.¶ She says because he hasn't been a supervisor that then means that he can't make a decision on life and death.¶ I think if he had a problem with that he would have expressed that, and to just assume because he wasn't a supervisor, I think that's a reach.¶ I think he's being excused because he's black.

The Court: The *Wheeler* motion is denied.¶ I don't find a prima facia basis.¶ If you want to make a further record.

Ms. Lopez: I understand.¶ I just want to make sure that the record is very clear, because I know that if this ever got to appeal they would review this.¶ The decision in a death penalty case, the penalty phase, is far more stressful and of greater magnitude than your ordinary case, and I bear that in mind when I excuse jurors.¶ That's all I want to say.

(RT 14:3148-3152.) The trial judge thanked and excused Mr. Jones and voir dire resumed. (RT 14:3182.)

2. JOAN STANSBERRY

Joan Stansberry was seated as Prospective Juror No. 15 in the first group of new panelists placed in the jury box after Mr. Jones was seated, but prior to his excusal. (RT 14:3076.) Questioning by the trial judge demonstrated that she could vote for a penalty of either death or life imprisonment without the possibility of parole if the evidence demonstrated the penalty was appropriate. (RT 14:3079.) Defense counsel did not question Ms. Stansberry at this point, but the prosecutor elicited her opinion that she was open to a vote for either penalty. (RT 14:3096-3097.)

Further questioning by the trial judge revealed that Ms. Stansberry was divorced and that her ex-husband was a plumber. Ms. Stansberry was a designer of telephone circuits for Pacific Bell. She had three sons, two adults and a 12 year old. She sat on two juries, one criminal and one civil, and verdicts were reached in both. The criminal case concerned child molestation and the civil case was a slip-and-fall. Ms. Stansberry had been the victim of two home burglaries. (RT 14:3105-3106.) Defense counsel questioned Ms. Stansberry and she told him that she would engage with other jurors in the jury room, both expressing her opinion and in her openness to the opinions of others. (RT 14:3123-3124.) Ms. Stansberry told the prosecutor that she studied business for two years in college and worked 30 years for Pacific Bell, moving up in her assignments. Ms. Stansberry said that while she never was a supervisor, she trained others in the use of a computer and circuit design for 20 years. Ms. Stanberry stated that while she was a student she did clerical work for the Los Angeles County District Attorney's Office. (RT 14:3137-3140.)

Following the excusal of a few more jurors, Ms. Stansberry was elevated to the position of Juror No. 1.[79] (RT 14:3148.) Following the exercise of a number of peremptory challenges by both the prosecution and defense, the prosecutor excused Ms. Stansberry, defense counsel requested a sidebar conference, and the trial judge asked Ms. Stansberry to remain in her seat. (RT 15:3247.) The following discussion ensued:

> The Court: We're at side bar.
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> Mr. Herzstein: That's Ms. Stansberry.
>
> The Court: Black female.
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> Mr. Herzstein: Who is a black female.¶ As you note, she was the second black to have been kicked off by the District Attorney. There's only two or three left in the group in the audience. She seemed like an ideal juror. She had two priors, both -- one civil, one criminal. There was a verdict. She has worked for many, many, many years at Pacific Bell. Worked her way up. She supervised people. She trains. She obviously can make decisions. She worked -- and just otherwise seems to be a good juror.¶ I can't see any reason why the District Attorney would not accept her, other than the fact she is a black female.¶ And I would note that the last jury which hung, the two hangs were black females. But that should not be a basis.¶ And the gays have been struck. She struck two gay people, she struck two black people now. And so I'm objecting and moving for mistrial under *Wheeler*.
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> The Court: Of course, Ms. Lopez has relied on life's experience criteria in the past.¶ You want to comment on that?¶ This juror has trained people. I don't recall that she supervised anybody. I believe she has trained people on how to use the computer design circuits.
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> Ms. Lopez: My recollection is that she specifically said she did not supervise anybody.¶ From what I can glean from her job assignment is she's got a very fancy, but misleading, job description, which she is basically, from my understanding, she is into data entry. She makes no decisions.

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[79] Ms. Stansberry was the African American Juror in seat number 1 referred to during the colloquy regarding Mr. Jones, *ante*. (RT 14:3148.)

She is given specifications and she inputs that information into a computer. She is basically a more sophisticated form of a filing clerk. And, basically, she's held nothing but clerk positions. She has trained individuals in terms of inputting data. She is a data entry specialist, basically.¶ I don't think the fact she trains people in how they input data makes her specifically qualified for high-stress decision-making jobs. And that's basically what this is. This is going to be a very stressful, deliberative process. It also requires individuals who are seasoned decision makers. They could handle the stress of a tough decision.¶ The fear factor involved any time you get a stressful and difficult decision to make, that can be very crippling in terms of the deliberation process when you get somebody in the jury room who doesn't have that experience. And that's one of the things, one of the many things that I look at in terms of a juror.¶ I've looked at her job description. She has basically been in clerk positions. If I were to not kick her, it seems to me that it would only be because she is an African American. And I don't believe that I'm going to discriminate in one direction or the other. I'm not going to keep her simply because she is African American. I have confidence in the fact that good people with experience can be fair to an African American male.¶ I don't think that it is essential that an African American sit on the jury. I think it would be wonderful if we can find individuals who I feel are seasoned decision makers who can handle the stress of the situation. But there's absolutely nothing about her background that tells me that she can operate in a high-stress situation. And that's very important in this type of case where the issue is life and death. It's going to be extremely stressful.

The Court: The D.A.'s comments have been non-solicited. I asked a prima facie showing, that prima facie showing has not been made.

Mr. Herzstein: Thirty years, going before she worked for Pacific Bell, she did work for the Department of Justice. This is kind of an elitist viewpoint. I would put her in the category of middle class black. You take the African American community as a rule, someone whose held a job for 30 years, as she put it, she has advanced in her positions from one to the next to the next.¶ Counsel is assuming that she just handles data and nothing else. She is assuming what she wants. The point is if you take the viewpoint that you are go-

ing to have nothing but supervisors on a jury, I don't think that's a jury of your peers. And I don't think that's a good criteria. The fact that she survived for 30 years, not always -- through a situation 20 years or 30 years ago, which is not so favorable to blacks, says a lot about her character. And systematically, blacks are being struck from this panel. There's very few blacks or African Americans available. And that bothers me.¶ We have a black man who kills -- is found guilty of killing a white man. That right off the bat puts him behind the eight ball. That very fact.¶ Studies have been made of these crimes, and the statistics are really crude when it's been a black man killing a white man in terms of the death penalty, versus a black man killing a black man, or a white man killing a black man.¶ And she can always reach and come up with some excuse. But for a fact, this lady is a good juror. She is probably very conservative to survive that long the way she has. And to kick her, you know, these circumstances because she supposedly is not a supervisor, although she last has taught certain classes, and has long job experience, and she is not a youngster. Life's experiences, she is at least in her 50s, probably older, life experiences certainly say something.

The Court: Her position in the Department of Justice was filing.

Mr. Herzstein: Sure.

The Court: And I don't necessarily agree or disagree with the criteria that the D.A. is using as far as whether I would if I were a D.A., but that's a non-race based criteria. And her use of the peremptory as to this juror was consistent with that non-suspect category use.¶ Ms. Sperber.

Ms. Sperber [second chair defense counsel]: I tend to disagree with the Court. *Wheeler* doesn't apply to just race. It applies to defining, I believe, class of people.

The Court: That's why I just said 'suspect.'

Ms. Sperber: By counsel's own definition the people she wants on this juror [sic] are upper middle class, advanced college degreed, middle aged white people. They are the people who are in stressful white collar supervisory positions in this country, because 30 years ago minorities didn't have the opportunities to get there.¶ In addition, they are the only

people who seem to be eligible and capable of passing the hardship requirements of this particular trial. Because in large part, it is the minority or the less educated people who have the hourly pay job who can't take a month or two off at a time, that need to pay for child care and have financial issues that the upper crust doesn't have.¶ So I think that what the D.A. is doing, be it by color, be it by alternative lifestyle, or anything else, what she has defined that her jury is is an upper middle class, advance degreed white person in a heterosexual, basically, relationship. And she wants nothing else on her jury. And I think she is systematically excluding everybody who doesn't fit within that class, be they black, be they blue collar, be they alternative lifestyle.

Ms. Lopez: Let me say --

The Court: My finding still holds.¶ If you want to say something.

Ms. Lopez: I just want to indicate that, first of all, I don't hold the same stereo types with respect to people that Ms. Sperber or Mr. Herzstein hold.¶ But I want to add that it's not just supervisory positions that I look for. I look for how they handled stressful situations or incidences in their life. That's all I have to go on. I have to make a decision as to whether or not an individual juror has what it takes to be fearless in the decision to handles the stress of the moment, and to engage in basically a deliberative process that involves a decision of an enormous magnitude. I have very limited things that I can look at.¶ This is very much a job interview. I don't believe that she is up to the decision in this case.

The Court: Very well, we'll proceed.¶ By the way, this is a side comment, the best way to insure the outcome that *Wheeler* seeks to have is to get rid of peremptories. I think that is really what should be the case. Although, excusal should be for cause. But this is the system we have. And I am confident the D.A. is not using a protected category basis for her peremptories.¶ Final word?

Mr. Herzstein: Yes.¶ The final word is, as I said, to talk about supervisors being the only people who can make decisions, important decisions. I would say there's probably more stress in being underpaid and living in the black communities under those particular circumstances than there is for many supervisors. They have to deal with problems in life.¶

She's had to deal with racial problems when she was younger. She, obviously, has stood up and met the challenge. And to turn her -- I don't think its fair to say well, if the District Attorney says all she wants is supervisors, that's okay. That isn't okay, Judge. That should not be the criteria. That can be, one, a consideration, along with others. But standing alone, that's not -- that shouldn't fly.

Ms. Sperber: May I inquire, this Juror was asked whether or not she has ever had to deal with stress in her life, specifically?

The Court: I don't recall that specific question. But there were questions about her life.

Ms. Sperber: There would be a request to reopen general voir dire on behalf of Mr. Chism so we can explore that possibility with Ms. Stansberry.

Ms. Lopez: I object to that.¶ How a person deals with stress and how they recognize it as stress will vary from individual to individual. I know what I go on; their ability to deal with stress is one of the things I look at, including their ability to make decisions. That includes processing information and experience in making decisions. It's my opinion that more experienced people in terms of decision makers make better decisions for the appropriate reasons.¶ And, again, I don't believe that I will discriminate in favor or against anybody. And to keep her because she is black would be discrimination, and I wouldn't do that.

The Court: The voir dire was appropriately conducted. The request is denied.¶ We'll proceed.

(RT 15:3248-3255.) Ms. Stansberry was then excused from the jury. (RT 15:3255.)

Following the selection of the jurors and alternates, the prosecutor sought to make a further record:

Ms. Lopez: Your Honor, could we take up a different matter, entirely different matter?

The Court: Yes.

Ms. Lopez: And because there were *Wheeler* motions, I just wanted to make as complete a record at this juncture as possible.¶ At this point, based on my observations --

and I may be incorrect as to particular individuals, but I believe in the main 12 jurors we have 11 whites, one black.¶ The black male is Juror Number One, and there are six females and six males within that group of 12.¶ As to the alternate jurors, there are two whites, one black and one person who may either be a Hispanic or Filipino, my guess would be Filipino, but I'm not certain. That's Mr. Loredo.¶ Of those jurors, there are two males and two females.¶ In terms of the peremptories that I exercised, I exercised eleven peremptories.¶ My first peremptory was against the white male.¶ My second peremptory was against an Asian male.¶ My third peremptory was against a white male.¶ My fourth peremptory was against a black male.¶ My fifth peremptory was against a white male.¶ My sixth peremptory was against a white female.¶ My seventh peremptory was against a male -- I would characterize as nondescript. I could not guess what -- whether or not he was white or other.

The Court: That was?

Ms. Lopez: He had an accent. He looked like a white male to me, but he did have a foreign accent.¶ I could not detect what that accent was. That was my seventh peremptory.

The Court: Juror Number 12.

Mr. Herzstein: Galeon.

Ms. Lopez: He's the person who had psychiatric training.¶ He -- I believe he said that -- my recollection is he's the person which psychiatric training who I believe --

The Court: He was the psychiatric nurse at Metropolitan.

Ms. Lopez: Yes, that's my recollection, he was a psychiatric nurse at Metropolitan, and I just couldn't even venture to guess what his ethnic derivation was or ethnic origin, but he is non -- non-black, non-Hispanic, and I would guess non-Asian.

The Court: That was -- and I can't read my writing, Mr. Guitan or Gean, I believe.

Mr. Herzstein: Yeah.

Ms. Lopez: My eighth peremptory was against a Hispanic male.¶ My ninth peremptory was against a black fe-

male.¶ My tenth peremptory was against a white male.¶ And my final peremptory was against a white male.¶ As to the defendant's peremptories, his first peremptory was against an Asian male.¶ Second peremptory against a white male.¶ Third peremptory against a white female.¶ Fourth peremptory against a white female.¶ Fifth peremptory against a white male.¶ Sixth peremptory against a white female.¶ Seventh against a white female.¶ Eighth against a white male.¶ Ninth against an Asian male.¶ Tenth against an Asian male.¶ Eleventh against a white male.¶ Tenth -- twelfth against a white male.¶ Thirteenth against a white male.¶ And fourteenth against a white male.¶ In terms of the alternates, I believe I exercised two peremptories.¶ They are both against white males.¶ And the defense one alternate was against what appeared to be a Hispanic female based on the information that she gave in -- during the course of voir dire, and if I would have to guess, I would have said she was a Hispanic female, although she could have been simply a white female.

The Court: Not required to, but if you want to make any record on that or anything else feel free to do that.¶ Otherwise, anything else to take up on the defense side?

Mr. Herzstein: The one -- Your Honor, I am not sure that she's accurate as to the people we kicked.¶ The last one I remember is Miss Rowan, who she says she thought might be Hispanic. I don't know if she's Hispanic or not, certainly.¶ But --

The Court: She said she interprets for some of the inmates.

Mr. Herzstein: Well --

The Court: I don't know.

Mr. Herzstein: Well, that could be -- I mean, a lot -- I mean, I just don't know.¶ She had no accent, certainly, and she could have been -- but I wasn't even thinking of that. I was thinking of her job.

Ms. Lopez: I'm not suggesting anything by my characterizations. I'm only simply stating my observations just to complete the record.

Mr. Herzstein: Okay.¶ If that's all, that's her observations. I can't argue against her observations.¶ My ob-

servations may not entirely agree with hers.¶ I don't know what comments the Court wants to make on that.

The Court: None. I'm a poor judge on these matters.¶ Juror Number Nine, I'm such a poor judge of ethnic backgrounds, if I hadn't looked at the name and was just looking at his face, I would say he had some African blood in him he's Kobayashi.

Mr. Herzstein: Sounds more like Japanese to me.

The Court: Well, the name is, and he has Japanese features, but if I were just to look at his face -- some of the difficulty in *Wheeler* -- I would have considered him African-American, because, in my mind, -- and maybe I don't have enough exposure -- he seemed to have some African traits to me.

Ms. Sperber: I thought he was Italian and don't think he has any Asian features whatsoever.

Ms. Lopez: I though he was part Asian.¶ I think that was the only certainty that I had that he was partially Asian except for his name.

(RT 15:3504-9.)

C. APPLICABLE LEGAL STANDARDS

The jurisprudence of the United States Supreme Court has consistently condemned the presence of racial discrimination in the judicial system. In *Rose v. Mitchell* (1979) 443 U.S. 545, 555, the Court observed that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." This type of discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." (*Smith v. Texas* (1940) 311 U.S. 128, 130.) In *Batson v. Kentucky*, *supra*, 476 U.S. at p. 85, the Court held that the state denies an African American defendant equal protection of the laws, as required by the

Fourteenth Amendment, when it puts him on trial before a jury from which members of his race[80] have been excluded because of their race.

The *Batson* decision recognized that denying a person participation in jury service on account of race harms the accused and undermines public confidence in the fairness of our system of justice by unconstitutionally discriminating against the excluded juror. (*Id.* at p. 87.)

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the constitution. The United States Supreme Court recently reiterated the three steps in *Johnson v. California* (2005) 545 U.S. 162:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations omitted.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations omitted.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." (Citations omitted.]

(*Id.* at p. 168.)

In the third step of the *Batson* analysis, it is not sufficient that a trial court deem the prosecution's facially-neutral explanation "plausible," (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969, fn. 3) or "probably . . . reasonable." (*Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 832.) Rather, in determining whether the challenger has met his or her burden of showing intentional discrimination, the court must conduct a "sensitive inquiry" into such circumstantial and direct evidence of intent as may be

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[80] In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the Supreme Court eliminated the requirement that the defendant and the stricken juror share the same race, although that commonality is present in this case.

available. (*United States v. Alanis, supra*, 335 F.3d at p. 969, fn. 3 [citing *Batson*, 476 U.S. at p. 93].) Such an inquiry will necessarily require looking beyond the proffered reasons to determine whether they hold up under closer scrutiny.

In *People v. Wheeler*, *supra*, 22 Cal.3d 258, this Court presaged *Batson* by holding that a defendant's right to a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. (*Wheeler, supra*, 22 Cal.3d at pp. 276-277.) Group bias was defined as "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." (*People v. Gonazlez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215, and *People v. Wheeler, supra*, 22 Cal.3d at p. 276.)

In *Wheeler*, this Court set forth procedures similar to those later adopted in *Batson*: One who believes his opponent is using peremptory challenges for improper discrimination must object in timely fashion and make a prima facie showing that prospective jurors are being excluded because of race or group association. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280; see, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171; *People v. Crittenden* (1994) 9 Cal.4th 83, 115; *People v. Garceau, supra*, 6 Cal.4th at p. 170.) As is also required by *Batson*, if the trial court finds a prima facie case, the burden shifts, and the party whose peremptory challenges are under attack must then provide a race or group-neutral explanation, related to the particular case, for each suspect challenge. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Fuentes* (1991) 54 Cal.3d 707, 714.) Once the challenged party, in this case the prosecution, has stated its reasons for each of the peremptory challenges, the trial court has a duty to

make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; accord *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98.)

Wheeler held that the moving party "must show a strong likelihood" that peremptory challenges were being used against persons associated with a specific group and that the trial court could find a prima facie case if a "reasonable inference [arose] that peremptory challenges [were] being used on the ground of group bias alone." (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.) *People v. Johnson* (2003) 30 Cal.4th 1302,1313, held that *Wheeler*'s "strong likelihood" standard did *not* set a higher standard than *Batson*'s "reasonable inference" standard, for establishing a prima facie case, and that the two terms were interchangeable. However, the United States Supreme Court has rejected that view, holding that "California's 'more likely than not' standard is not an appropriate yardstick by which to measure the sufficiency of a prima facie case . . . *Batson* itself . . . provides no support for California's rule." (*Johnson v. California, supra*, 545 U.S. at p. 168.) Now in California, the moving party must show that it is reasonable to infer discriminatory intent under the totality of the circumstances. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) This is a burden of production, not a burden of persuasion. (*Johnson v. California*, *supra*, 545 U.S. at pp. 170-171.) Where it is not clear on the record whether the trial court used the now discredited "strong likelihood" standard or the "reasonable inference" standard -- as is the case here -- this Court must review the record independently to determine whether an inference that the prosecutor improperly excused a juror on a prohibited basis is present in the record. (*Id.* at pp. 341-342.) In the present case, because it is unclear and there is no indication which standard the trial judge utilized in making the determination that defense counsel did not demonstrate a prima facie case

of discriminatory intent, it is necessary for this Court to independently review the record.

If the trial court makes such a "sincere and reasoned" effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Arias*, *supra*, 13 Cal.4th at p. 136.) However, where an insufficient inquiry is made and the prosecution's reasons are either unsupported by the record or inherently implausible, the trial court's unsupported acceptance of the prosecution's reasons is not entitled to deference. (*People v. Reynoso* (2003) 31 Cal.4th 491, 541; *People v. Silva, supra*, 25 Cal.4th at pp. 385-386; see *People v. Montiel* (1993) 5 Cal.4th 877, 909.) Moreover, "[a] reviewing court's level of suspicion may . . . be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts. (*Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 651.) Justifications for a particular peremptory challenge remain a question of law and thus are properly subject to appellate review. (*People v. Turner*, *supra*, 8 Cal.4th at p. 169, overruled on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

A trial court's failure to engage in such a careful assessment of the prosecution's stated reasons is itself reversible error. (*People v. Silva, supra,* 25 Cal.4th at p. 386; *People v. Fuentes, supra*, 54 Cal.3d at p. 721;[81]

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[81] This Court carved out an exception to the requirement that a trial court make explicit and detailed findings regarding the prosecution's use of peremptory challenges. In *People v. Reynoso* (2003) 31 Cal.4th 903, 929, this Court held that a trial court is not required to make specific findings in instances where the trial court decides to credit the prosecution's demeanor based reasons for exercising a peremptory challenge. In this case, however, the prosecution's stated reasons went solely to decision making experience and were not demeanor based. To the extent it could be argued the reasons were demeanor based, appellant submits that the *Reynoso* exception is con-

see *Purkett v. Elem* (1995) 514 U.S. 765, 768 [third step in *Batson* process requires trial court to determine whether facially non-discriminatory reasons are implausible or pretextual]; *United States v. Alcantur* (9th Cir. 1996) 897 F.2d 436, 438.)

In this case, the trial court erred in (1) finding that a prima facie case of systematic exclusion of African American jurors had not been made by the defense, and (2) allowing Mr. Jones and Ms. Stansberry to be excused based upon allegedly race neutral reasons that were either constitutionally invalid or pretextual.

D. APPELLANT HAS NOT WAIVED HIS FEDERAL CLAIMS

Appellant did not explicitly invoke either federal constitutional provisions or *Batson v. Kentucky*, *supra*, 476 U.S. 79, when he objected to the prosecution's peremptory challenges. This does not waive appellant's equal protection claim under *Batson*. This Court has held that a state chal-

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trary to *Batson* and its progeny and should be reconsidered by this Court. In *Snyder v. Louisiana* (2008) 552 U.S. ___ [128 S.Ct. 1203], the United States Supreme Court stated the general rule for demeanor based rulings:

> In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.

(*Id.* at p. ___ [128 S.Ct. at p. 1208].) An appellate court may not presume that the trial court credited the prosecutor's demeanor based reason for a challenge without proper findings in the trial court. (*Id.* at p. ___ [128 S.Ct. at p. 1209].) In any event, the prosecutor's proffered reason -- that the stricken jurors had no supervisory work experience and thus were unqualified for the "decision making" demands of appellant's case -- is not only pretextual and implausible, but has nothing to do with demeanor.

lenge under *Wheeler* -- specifically invoked and referred to by counsel and the trial judge -- also preserves the federal claim under *Batson*. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118 [*Batson* constitutional claims preserved when the objection was only made under *Wheeler* because the two cases presented "identical factual issues before the court"; *People v. Lancaster* (2007) 41 Cal.4th 50, 73.)

Here, the colloquy between the trial court and defense counsel referenced *Wheeler* and explicitly challenged the prosecutor's peremptory strikes as being based on race bias. Accordingly, this Court must consider all of appellant's federal constitutional claims.

E. BECAUSE THE PROSECUTOR OFFERED HER EXPLANATIONS FOR THE PEREMPTORY CHALLENGES, WHETHER THE DEFENSE ESTABLISHED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION IS MOOT

In the present case, the trial judge twice ruled that the defense failed to make a prima facie case of racial discrimination in the prosecution's excusal of Mr. Jones and Ms. Stansberry. In each instance, the prosecutor offered without prompting or inquiry from the trial judge a putative race neutral explanation for her peremptory challenge.

> The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct.

> 1478, 1482, 75 L.Ed.2d 403 (1983). The same principle applies under *Batson.* Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

(*Hernandez v. New York* (1991) 500 U.S. 352, 359; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 267.)

The present case is the same as the situation in *Hernandez*. Because the prosecutor offered her explanation for the two peremptory strikes and the trial judge ruled based on those explanations, whether or not appellant made a prima facie showing is moot and it is necessary to move beyond the first part of the *Batson* analysis.

F. APPELLANT ESTABLISHED A PRIMA FACIE CASE

Whether or not the issue is moot, appellant did establish a prima facie case of racial discrimination in the prosecutor's use of peremptory challenges on Mr. Jones and Ms. Stansberry. Mr. Jones and Ms. Stansberry were identified as African Americans, a cognizable group for *Batson/Wheeler* purposes. (*Batson v. Kentucky*, *supra*, 476 U.S. 79.)

A total of 59 venirepersons were called into the courtroom for voir dire.[82] Of those, 4 or 5 were African American,[83] representing 7 to 8 per-

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[82] The first panel consisted of 97 members. (RT 13:2758.) Of that group, 30 remained after hardship excusals. (RT 13:2820.) The second panel consisted of 92 members. (RT 13:2828.) Of those, 63 were excused for hardship, leaving 29 members of the second panel. (RT 13:2861-2862.) Thus, the total venire consisted of 59 people. A third panel was called into the courtroom during the selection of alternates. (RT 15:3431.)

[83] As noted in the Procedural History, *ante*, Mr. Jones and Ms. Stansberry were African American and there were perhaps two or three

cent of the venire. The prosecutor exercised peremptory challenges on 2 of the African Americans, or 40 to 50 percent of the available African Americans on the venire. In addition, the prosecutor exercised a total of 11 peremptory challenges. Hence, 18 percent of her challenges excused African American venirepersons, a percentage far larger than the 7 to 8 percent representation of African Americans in the jury venire.

These bare facts present a statistical disparity which, in and of itself, establishes a prima facie case. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077-1080; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812.) A statistical disparity is sufficient to make a prima facie inference of bias even though such a presumption could be rebutted by other relevant circumstances. (*Pauline v. Castro*, *supra*, 371 F.3d at p. 1091; *Fernandez v. Roe*, *supra*, 286 F.3d at p. 1079.)

In *Johnson v. California*, *supra*, 545 U.S. 162, the United States Supreme Court interpreted *Batson* to make the first step of the analysis an additive test. "There, we held that a prima facie case of discrimination can be made out by offering a wide variety of evidence, SO LONG AS THE sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" (*Id.* at p. 169, emphasis in original, footnote omitted.) The Court continued:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

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more remaining in the venire at the time of the first *Batson/Wheeler* motion.

(*Id.* at p. 170.)

While the United States Supreme Court has never defined the other relevant circumstances appellate courts may consider in reviewing a *Batson* step one claim based on statistical disparity, it is clear that possible race neutral reasons which the trial court may be able to discern are not among them. Thus, the Court noted in *Johnson* that it "does not matter that the prosecutor might have had good reasons; what matters is the real reason [potential jurors] were stricken." (*Id.* at p. 172, quoting *Paulino v. Castro*, *supra*, 371 F.3d at p. 1090.)

Here, the trial court twice found that there was no prima facie case of racial discrimination despite the disproportionate percentage of the prosecutor's peremptory challenges exercised against African Americans. Accordingly, the trial court erred in ruling that the defense had not made a prima facie case of racial discrimination.

G. THE PROFFERED RACE NEUTRAL REASONS WERE CONSTITUTIONALLY IMPERMISSIBLE OR PRETEXTUAL

The third step of the analysis requires that the trial court determine whether the prosecutor's justifications are credible; in other words, the court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily. . . .'" (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1216, quoting *People v. Hall* (1983) 35 Cal.3d 161, 167-168.) At this stage, the trial court must assess the credibility of the prosecutor's grounds for excusing the jurors, and implausible justifications

should be found to be pretexts for purposeful discrimination. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768.) In particular:

> Circumstantial evidence of invidious intent may include proof of disproportionate impact. . . . We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."

(*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93, quoting *Washington v. Davis* (1976) 426 U.S. 229, 242.) In doing so, the trial court must use care not to substitute its own speculation of the reasons a prosecutor might have struck a juror for the prosecutor's stated reasons. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.)

1. STATISTICAL EVIDENCE DEMONSTRATES THAT THE PROSECUTOR WAS ACTING IN A PURPOSEFULLY DISCRIMINATORY FASHION WHEN SHE EXCUSED TWO BLACK PROSPECTIVE JURORS

Although it is not dispositive,[84] in appellant's case "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342; see also *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 ["severely disproportionate exclusion of blacks from the jury venire is powerful evidence of intentional race discrimination."].)

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[84] See, e.g., *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 ["Whether a particular reason for striking jurors has a disproportionate effect on minorities is relevant to figuring out whether intentional discrimi-

Further, "if a prosecutor articulates a basis for peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's state reason constitutes a pretext for racial discrimination." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 363.) This Court has agreed that statistical evidence is relevant to show purposeful discrimination in the use of peremptory challenges: "For illustration, however, we mention certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.)

That showing can be made here. As argued in section F, *ante*, a total of 59 venirepersons were called into the courtroom for voir dire. Of those, 4 or 5 were African American, representing 7 to 8 percent of the venire.[85] The prosecutor exercised peremptory challenges on 2 of the African Americans, or 40 to 50 percent of the available African Americans on the venire. In addition, the prosecutor exercised a total of 11 peremptory challenges. Hence, 18 percent of her challenges excused African American venirepersons, a percentage far larger than the 7 to 8 percent representation of African Americans in the jury venire. As stated by the United States Supreme Court, "happenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 342.)

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nation has occurred; but disparate impact does not, by itself, a *Batson* violation make."].

[85] In its *Miller-El* statistical calculation, the United States Supreme Court only included black prospective jurors "eligible to serve on the jury," i.e., those who were not "excused for cause or by agreement of the parties." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 326, 331.)

Believing that African American jurors would favor an African American defendant accused of killing a white man, the prosecutor made clear from the beginning her intention to eliminate blacks from appellant's jury in the second penalty phase trial. Here, she used 2 of her 11 peremptory challenges to remove 40 to 50 percent of the eligible African American prospective jurors, thus eliminating African Americans at a significantly higher rate than expected and making a compelling case of purposeful racial discrimination. (*People v. Reynoso*, *supra*, 31 Cal.4th 903, 926, fn. 7 [recognizing "suspected untoward belief on the prosecutor's part that Hispanic jurors would tend to be biased in favor of, and thereby by more inclined to vote to acquit, the Hispanic defendants"]; *People v. Johnson*, *supra*, 30 Cal.4th at p. 1326 [highly relevant that black defendant was charged with killing white girlfriend's child]; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 28 [alleged victim was member of group to which majority of remaining jurors belonged].)

2. THE PROSECUTOR PEREMPTORILY STRUCK AFRICAN AMERICAN JURORS FOR PROVIDING ANSWERS SIMILAR TO THOSE OF NON-AFRICAN AMERICAN JURORS SHE DID NOT STRIKE

A prosecutor's motives may be considered pretextual when her proffered explanations are also applicable to one or more jurors of another race whom the prosecutor did not see fit to challenge. (*Caldwell v. Maloney*, *supra*, 159 F.3d at p. 651.) Consequently, comparative analysis of struck and seated jurors is "a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination. (*Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251.) When reviewing a *Batson/Wheeler* claim raised on federal habeas corpus, the United States Su-

preme Court stated that, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

In the third stage of *Batson* analysis, "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix* (2008) 44 Cal.4th 602, 622; see also *Snyder v. Louisiana* (2008) 552 U.S. ___ [128 S.Ct. 1203].)

Further, without comparative analysis, even a seemingly neutral explanation may serve as a pretext for racial discrimination. For example, in *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, the prosecutor claimed it challenged two Hispanics based on responses they had given during voir dire. The reviewing court found that the reasons advanced by the prosecutor would normally be adequately "neutral" explanations, but after the court compared them to the responses given by white jurors, they did not hold up. (*Id.* at pp. 698-699; see also *People v. Hall*, *supra*, 35 Cal.3d at p. 168 [disparate treatment given jurors "is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons"]' *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 [court rejected prosecutor's explanation after comparing answers given by the excluded black persons to those given by white persons permitted to serve].)

The proffer of faulty reasons, and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that at *Batson/Wheeler* challenge should be sustained. (See *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831.) "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable,

the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 325.)

Moreover, because a biased prosecutor can simply add traits to a shopping list to achieve a combination that no white juror possesses, some courts have viewed shopping-list claims with disfavor. (See, e.g., *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, 926; *United States v. Alvarado* (2d Cir. 1991) 951 F.2d 22, 25; *United States v. Chinchilla*, *supra*, 874 F.2d at pp. 698-699.) One court has held that giving one false reason makes all other reasons irrelevant. (*United States v. Chinchilla*, *supra*, 874 F.2d at p. 699.)

In this case, the prosecutor proffered the same rationale for her exclusion of both Mr. Jones and Ms. Stansberry. The prosecutor advanced but one explanation for her exclusion of both prospective jurors: that because neither of them had held supervisory positions in their long-term employment, they lacked significant decision making skills and would not stand up to the stress involved in possibly imposing the ultimate penalty of death.

It is hard to imagine how the lack of supervisory experience would cause Mr. Jones or Ms. Stansberry to hold a specific bias in appellant's favor or against the prosecution (see *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276 [peremptory challenges must be based on specific bias]) or to otherwise be unable to deliberate the case. Moreover, a review of the voir dire responses of the seated jurors discloses that the prosecutor ignored similar or virtually identical responses by non-African American members of the jury panel.[86]

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[86] See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, fn. 6 ["None of our cases announces a rule that no comparison is probative unless the situa-

As noted earlier, Mr. Jones was a driver for United Parcel Service. Questioning by the prosecutor revealed that Mr. Jones had been in that position for 18 years, since he left high school, and had never had supervisorial duties. Ms. Stansberry was a designer of telephone circuits for Pacific Bell and, when questioned by the prosecutor, stated that she had worked 30 years for Pacific Bell, moving up in her assignments, and while she never was a supervisor, she had trained others in the use of a computer and circuit design for 20 years.

Juror No. 2[87] was a route sales representative for Frito Lay. (RT 15:3340.) The prosecutor's questioning revealed that Juror No. 2 had been employed by Frito Lay for six months "giv[ing] the chips to your store" and worked in an office answering telephones for about one year before her current employment. Prior to that, Juror no. 2 was a cook at a high school for seven years, rising to the rank of assistant manager in the cafeteria. As assistant manager, Juror No. 2's duties were "seeing that the food was served properly and on time and everybody was doing their duties." (RT 15:3361-3362.) In other words, Juror No. 2 was never a true supervisor, but as a food service worker merely advanced beyond the bottom of the employment hierarchy.

Juror No. 4[88] was a network technician for the Huntington Beach High School District. (RT 14:2970.) The prosecutor elicited information that Juror No. 4's job involved "computer network administration, com-

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tion of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."].

[87] Juror identification number 7312. (RT 15:3369.)

puter troubleshooting" and that the juror had been so employed for 3 years and 2 years in the same position for another school district. Juror No. 4 did not supervise anyone in that capacity, although in a prior position in an office, Juror No. 4 supervised two or three "warehouse-type people." (RT 14:3051-3052.) Similarly to Juror No. 2, in her previous position in an office, Juror No. 4 had merely advanced beyond the bottom rung of the ladder at a position and had moved on to positions requiring increased technical skill, but lacking supervisory responsibilities, for the previous five years.

Juror No. 5[89] was a diesel equipment operator for Los Angeles County. (RT 15:3342.) The prosecutor's questioning revealed that Juror No. 5 had been in his job 11 years and his work consisted of hauling raw sewage to landfills. Juror No. 5's prior position was delivering corrugated boxes for Container Corp. of America.[90] (RT 15:3365-3367.) The prosecutor did not otherwise seek information on Juror No. 5's supervisory experience and there was no evidence that Juror No. 5 had any such qualifying experience.

Juror No. 6[91] was an administrative assistant at Boeing. (RT 14:3220.) Questions by defense counsel revealed that Juror No. 6 worked as an administrative assistant in the areas of worker's compensation and leave of absence. Juror no. 6 had worked at Boeing and an acquired company since 1966, except for seven years during the 1970s, when she worked

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[88] Juror identification number 9349. (RT 13:2870.)

[89] Juror identification number 7225. (RT 15:3370.)

[90] Juror No. 5 also coached a youth baseball team. (RT 15:3366.) This is the same activity that the prosecutor claimed did not qualify Mr. Jones for supervisory, stress-based experience.

[91] Juror identification number 7724. (RT 14:3204.)

as a medical assistant. (RT 14:3224-3226.) The prosecutor's questions revealed that Juror No. 6's experience as a medical assistant was clerical in nature and that her work at Boeing involved being the buffer between insured workers and insurance companies. Juror No. 6 made no decisions on the approval or rejection of claims, although she interfaced with people making decisions. Juror No. 6's job was to facilitate the making and processing of claims. (RT 15:3240-3243.) Again, there was no evidence that Juror No. 6 had ever supervised others or that she was a decision maker.

Juror No. 7[92] was a senior consulting engineer for Tasco Refining. (RT 14:3172.) Defense counsel established that he had never directly supervised people, although he would direct and review the work of outside engineering contractors. (RT 14:3180.) The prosecutor's questions elicited information that Juror No. 7 sometimes worked alone and sometimes with other people. (RT 14:3192.) Yet again, while Juror No. 7's job title indicated he held a senior position, there was no indication that he supervised anyone.

Juror No. 8[93] was an account coordinator for Valassis Communications. Her work consisted of placing media for coupons. ((RT 15:3339-3340.) Defense counsel elicited details about Juror No. 8's work and found that she places ads in the newspaper for clients. (RT 15:3357-3358.) Juror No. 8 revealed to the prosecutor that she had worked for her current employer for five years and before that, she worked in a public relations advertising agency doing public relations related work. Prior to that, Juror No. 8 was a marketing manager for Little Caesars Pizza. The questioning revealed that in her current position, Juror No. 8 worked as a team with an

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[92] Juror identification number 8387. (RT 14:3198.)

[93] Juror identification number 5066. (RT 15:3319.)

account manager, making decisions in conjunction with her supervisor and the client. (RT 15:3359-3360.) Once again, the prosecutor failed to exclude and seated a juror with neither supervisorial experience nor independent decision making authority.

Juror No. 9[94] was a lab technician at Raytheon. (RT 14:2974, 3031.) The prosecutor elicited information that Juror No. 9 had been so employed for 15 years and did metallurgy and electronic failure analysis. He never had to supervise employees, but the employees would help each other out. (RT 14:3057.) Again, Juror No. 9 was a seated juror who lacked supervisorial and decision making experience.

Juror No. 10[95] was a widow who volunteered as a docent at the Torrance Courthouse. (RT 15:3292-3293.) Defense counsel established that she had been a docent for 13 years. (RT 15:3308.) Questions by the prosecutor found that Juror No. 10 had never worked outside the home other than acting as a docent, although she had been a nurse's aide much earlier in life. (RT 15:3314-3316.) Once more, the prosecutor opted to include a juror without the requisite supervisorial experience which the prosecutor cited as a basis for excluding the black jurors.

Thus, in the case of ⅔ of the empaneled jurors, the prosecutor ignored her justification for the exercise of peremptory challenges against Mr. Jones and Ms. Stansberry, opting to use that rationalization only with two African American jurors.

Where, as here, the prosecutor employed a double standard against members of the excluded group in favor of persons permitted to serve as jurors, it is strongly suggestive of group bias and by itself can warrant the

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[94] Juror identification number 5761. (RT 13:2870.)

[95] Juror identification number 7387. (RT 15:3319.)

conclusion that the prosecutor used peremptory challenges for pretextual reasons. (See *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 343; *United States v. Chinchilla*, *supra*, 874 F.2d at p. 695.

This Court should reach that conclusion here.

3. EVALUATION OF THE PROSECUTOR'S REASONS FOR EXCUSING THE TWO AFRICAN AMERICAN PROSPECTIVE JURORS REVEALS THE CHALLENGES WERE USED IN A RACIALLY BIASED MANNER

"[P]eremptory challenges 'are [only] permissible so long as they are based on specific bias." (*People v. Williams*, *supra*, 16 Cal.4th at p. 188, quoting *People v. Johnson*, *supra*, 47 Cal.3d at p. 1216.) Specific bias is "a bias relating to the particular case on trial or the parties or witnesses thereto." (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 274, 276.) The trial court had an obligation to make a "sincere and reasoned" effort to evaluate the genuineness and sufficiency of the prosecutor's reasons as to each individual juror challenged and to clearly express its findings. (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 720-722 [prosecutor did not explain how prospective juror's work and education related to jury service in that case]; *People v. Turner* (1986) 42 Cal.3d 711, 728; *McClain v. Prunty*, *supra*, 217 F.3d 1209, 1220.)

Here, the prosecutor repeatedly tried to rationalize her exclusions of two African American jurors based on their supposed lack of supervisory work experience, arguing that this rendered them unable to make the difficult and stressful penalty determination in appellant's case. However, as pointed out by defense counsel, just because a person lacks that experience does not disqualify them from penalty phase jury service when the jurors have otherwise made clear that they believe they are up to the task and meet

the legal criteria for that service. Indeed, the prosecutor's supposed rationale could result in the wholesale exclusion of a large percentage of the death qualified jury venire from being seated on the jury, largely reducing the seated jury to one composed of middle and upper class management personnel. What the prosecutor failed to explain was how the lack of supervisory experience interfered with their ability and willingness to fulfill their duties as jurors.

By attempting to limit the jury to persons possessing a certain work status, and potentially, a certain economic status, the prosecutor crossed a forbidden line:

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from a representative cross-section of the community. The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

(*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 266-267; see also *Batson v. Kentucky*, *supra*, 476 U.S. at p. 85; *People v. Johnson*, *supra*, 30 Cal.4th at p. 1326; *People v. Reynoso*, *supra*, 31 Cal.4th at p. 926, fn. 7.)

The prosecutor's alleged rationale was pretextual and, because it was based on impermissible group bias, undermines the diversity sought in *Wheeler* and the fairness and equal treatment demanded by the California and federal constitutions. Had the trial judge engaged in a reasoned, informed evaluation of the prosecutor's putative race neutral reason for strik-

ing Mr. Jones and Ms. Stansberry, he would have concluded that the prosecutor failed to establish that her challenges were exercised for a motive other than group bias. While the prosecutor rested her justification on the lack of supervisory work experience and struck jurors Jones and Stansberry on that ground, she allowed 8 of 12 white jurors lacking the same qualification to be seated.

Similarly, the prosecutor was neither asked by the trial court to explain nor explained how an alleged lack of supervisory work experience would render Mr. Jones or Ms. Stansberry biased for or against a party to the trial.

In the case of Mr. Jones, particularly damning was the prosecutor's comment that, "[I]n a different type of case, I think he would be a wonderful juror." (RT 14:3150.) In other words, but for the pretextual excuse for striking Mr. Jones, he was an ideal juror. Lacking the pretext then, the prosecutor's strike rested on the impermissible basis of race.

In examining the actual voir dire responses of the excluded and sitting jurors, it is obvious that the prosecutor's purported race neutral justification for peremptorily excusing Mr. Jones and Ms. Stansberry was implausible and indicative of racial bias. The justifications, therefore, "demanded further inquiry on the part of the trial court." (*People v. Hall*, *supra*, 35 Cal.3d at p. 169.) The trial court's failure to competently investigate the legitimacy of each of the prosecutor's reasons as to each of the challenged African American prospective jurors at issue was error and undermined its fact-finding and rendered denial of appellant's *Batson/Wheeler* motion invalid. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; *Lewis v. Lewis*, *supra*, 321 F.3d at p. 830; *United States v. Chinchilla*, *supra*, 874 F.2d at pp. 698-699.)

Even if this Court were to find that one or more valid, race neutral, but unspoken, reasons supported the prosecutor's decision, that is not the

standard of review. The pretextual reason offered by the prosecutor is strong evidence that, as a whole, the reasons given were insufficient and lacked credibility. (See *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831; *Johnson v. California*, *supra*, 545 U.S. 162 [it does not matter that the prosecutor might have had good reasons; what matters is the real reason potential jurors were stricken].)

H. REVERSAL OF THE PENALTY PHASE JUDGMENT IS NECESSARY

This case involves an African American defendant charged with the capital murder of a Caucasian liquor store clerk. Appellant was tried by a prosecutor who improperly excused from the second penalty phase jury two African American jurors based upon the constitutionally-impermissible basis of race.

The prosecutor excused African American prospective jurors at a rate highly disproportionate to the rate that she struck non-African Americans and the prosecutor's purported race neutral grounds for doing so were belied by the record of voir dire and undermined by her acceptance of seated jurors sharing the same characteristics as the purportedly undesirable jurors.

Despite having two opportunities to prevent this prosecutorial misbehavior, the trial court erroneously denied both of appellant's *Batson/Wheeler* motions, failing to recognize that the prosecutor's justification was a transparent pretext for purposeful racial discrimination. The appellate record does not support a finding that the trial court engaged in a reasoned attempt to evaluate the prosecutor's justification for challenging Mr. Jones and Ms. Stansberry. If the trial court had done so, it would have recognized that the prosecutor was exercising her peremptory challenges

against these jurors for racially motivated reasons and would have granted the *Batson* motion.

Consequently, reversal of the death judgment is mandated. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

SECOND PENALTY PHASE TRIAL - TRIAL ISSUES

XIII. IMPROPER ADMISSION OF A STATEMENT MADE BY STEVEN MILLER TO OFFICER ROMERO WAS HEARSAY VIOLATIVE OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES

A. PROCEDURAL HISTORY

In the guilt phase trial, Officer Rudy Romero testified about a statement made by Steven Miller when Romero first responded to the Eddie's Liquor Store.[96]

In the second penalty phase trial, Romero testified that his unit was the first police unit on the scene, arriving at Eddie's Liquor Store a couple of minutes after the initial radio broadcast, and he contacted a Caucasian male outside the store. (RT 21:4630-4631, 4634.) The man was later identified as Steven Miller. (RT 21:4651.) Romero described Miller: "He appeared to be very nervous and shaken." (RT 21:4634.) When the prosecutor asked Miller, "What did he tell you?", appellant's counsel lodged a hearsay objection. (RT 21:4634.)

The prosecutor urged admission as an excited utterance. Defense counsel countered that no foundation had been laid as an excited utterance because people are always excited when things like this occur and that the witness himself was available to testify. (RT 21:4635.) The trial judge noted that unavailability was not a prerequisite for admission. (RT 21:4636.) Defense counsel additionally argued that no foundation had been laid because it was unknown why the person was nervous and that a spon-

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[96] Appellant has argued that admission in the guilt phase trial of Miller's statement to Romero was error in Argument III, *ante*.

taneous statement must not be in response to questioning. (RT 21:4637.) The objection was overruled. (RT 21:4637.)

Romero then testified that Miller said, "I think he's dead." (RT 21:4640.) Romero testified that after he entered the store, he emerged and recontacted Miller. At that time, Miller appeared "very uneasy and shaken." (RT 21:4645.) Defense counsel renewed the objection that Miller's new statement would not be a spontaneous statement because Miller had sufficient time for reflection. In addition, the foundational argument was renewed. (RT 21:4646-4648.) The trial judge overruled the objection, noting that the passage of time was relatively brief and Miller was still operating under the stress and excitement of his observations. (RT 21:4648.)

Romero testified that Miller told him that he had walked with his girlfriend to the bus bench at the southeast corner of Butler and Artesia, kitty-corner from Eddie's Liquor Store, when he saw two African American males walk toward the store. The man stated that the two men entered the store, he heard a popping sound almost immediately, and observed the two men run northbound from the store for about two blocks on Butler. He said that the men then ran eastbound, probably on Marker Street. (RT 21:4648-4650.) The man told Romero that the first African American male was wearing a shirt with multiple white stripes on it and possibly dark jeans. He said the second male wore an unknown colored shirt and long, dark shorts. He said that both men had short Afro-style haircuts and both were 5'8" to 5'9" tall.. (RT 21:4650-4651, 4663.)

At the guilt phase of the trial, Miller was sworn as a witness outside the presence of the jury. He refused to answer any questions, stating his intent not to do so. After Miller was ordered to answer questions and still refused to do so, the trial judge found him in contempt of court. The trial

judge stated his inclination to rule Miller unavailable to testify. (RT 7:1238-1240.)

In erroneously admitting the evidence of Miller's hearsay statements to Romero, the trial judge violated appellant's federal Fifth and Fourteenth Amendment rights to due process and his Sixth Amendment right to confront witnesses. (*Crawford v. Washington*, *supra*, 541 U.S. 36.)[97] Because confrontation of witnesses is designed to prevent conviction upon suspect evidence, admission of Miller's statement without cross-examination enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant had a constitutionally protected liberty interest of "real substance" in the ability to cross-examine Miller. To uphold his conviction, when there was no cross-examination, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the pro-

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[97] The new rule announced in *Crawford* is applicable to all criminal cases pending on appeal. This case was pending at the time of the *Craw-*

cedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

This error was prejudicial and requires reversal of appellant's judgment of death.

B. MILLER'S STATEMENT WAS TESTIMONIAL, HE WAS UNAVAILABLE AS A WITNESS AND THERE WAS NO PRIOR OPPORTUNITY FOR CROSS EXAMINATION

In Argument III of this brief, *ante*, appellant argued that the same testimony was error at the guilt phase of his trial. Because the legal principles pertaining to this testimony remain the same at the second penalty trial, appellant incorporates here the arguments made in Argument III.(A) through III.(F), inclusive.

Accordingly, because Miller's interview was testimonial for Confrontation Clause purposes,[98] Miller was unavailable to testify, and there was no prior opportunity for cross-examination,[99] admission of Miller's statement to Officer Romero was violative of appellant's Sixth Amendment right to confront witnesses. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.)

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ford decision. (*Schriro v. Summerlin*, *supra*, 542 U.S. at p. 351; *People v. Cage*, *supra*, 40 Cal.4th at p. 974, fn. 4.)

[98] See Argument III(B), *ante*.

[99] See Argument III(C), *ante*.

Similarly, failure to object in the trial court on the specific grounds here urged did not waive this claim because case law binding the lower court at the time would have precluded the claim.[100] (*People v. Abbaszadeh*, *supra*, 106 Cal.App.4th at pp. 648-649; *People v. Birks*, *supra*, 19 Cal.4th at p. 116, fn. 6.)

C. PREJUDICE

Because the error involved a federal constitutional violation, reversal is required unless respondent can prove the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

This was not a case lacking mitigation. There was powerful evidence about appellant's troubled background and his efforts to improve himself. Appellant was born when his mother was 13 years old and was the first of six children. Appellant's mother was drug addicted and lost him at an early age because she was selling cocaine out of her home. Through appellant's youth, she was in-and-out of prison. Appellant was twice sexually abused before he was 10 years old. At the age of ten, appellant's father was killed in an act of violence and appellant had to identify the body. Through no fault of his own, appellant spent his youth bouncing between McClaren Hall and the homes of his grandparents. Not surprisingly, appellant began abusing drugs and alcohol when he was 11 years old. Later, appellant was greatly influenced by religion and learned to inspire others. While held in the California Youth Authority, appellant's religious activities helped to reduce the level of violence in the institution and he had a vey positive impact on others.

Within that context, any assessment of prejudice in the penalty phase retrial must begin with the fact that despite the evidence of aggravating fac-

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[100] See Argument III(D), *ante*.

tors, the first penalty phase jury deadlocked on the determination of sentence, indicative of that jury's analysis of the close case presented by both sides. (See *People v. Brooks* (1979) 88 Cal.App.3d 180, 188; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.) The earlier jury heard this same erroneously-admitted evidence in the guilt phase of the trial and deadlocked in the penalty phase. Appellant has previously argued the prejudicial impact of this error in the guilt phase[101] and incorporates that argument here. Appellant asserts, without conceding the issue, that the same error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609.) "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; see generally Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases* (1983) 58 N.Y.U.L.Rev. 299, 328-334 [section entitled "Guilt Phase Defenses and Their Penalty Phase Effects"].) The same dangers presented by this error during the first penalty trial were also present during the second penalty trial.

"[T]he death penalty is qualitatively different from all other punishments and . . . the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Zant v. Stephens*, *supra*, 462 U.S. at p. 885.) Skewing the scales of justice in favor of death creates a constitutionally impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

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[101] Argument III(E), *ante*.

Here, the prosecutor utilized the improperly admitted statement to argue that the jury should harbor no lingering doubt about the capital conviction because the evidence of appellant's guilt was overwhelming. (RT 24:5418, 5429-5431.) Because lingering doubt is a proper mitigating consideration for the jury in the penalty phase, the prosecutor successfully skewed the weighing process in the direction of death.

It is clear that admission of Miller's out-of-court statement resulted in the abridgement of appellant's constitutional right to confront the witnesses against him. Respondent cannot demonstrate beyond a reasonable doubt that a different, more favorable result would not have been obtained absent the wrongfully admitted out-of-court statement of Steven Miller. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Reversal of appellant's death penalty is mandated.

XIV. ALLOWING THE PROSECUTOR TO INTRODUCE AN ADOPTIVE ADMISSION ALLEGEDLY MADE BY APPELLANT THROUGH HIS SILENCE WAS PREJUDICIAL ERROR

A. PROCEDURAL HISTORY

In the guilt phase trial, both a letter written by Iris Johnston to appellant and testimony about the letter was introduced into evidence as an adoptive admission of appellant based on his failure to respond to the letter.[102]

In the second penalty phase trial, prior to Iris's testimony, defense counsel objected to introduction of evidence of the letter:

> [Mr. Herzstein]: In addition to that, there was a letter that she wrote to the defendant, as the Court may recall. I don't like to again object to that letter, as I recall the Court ruled it was some form of adoptive admission. I believe based upon the subsequent events of the trial, it did not fit the category.¶ Before we get into the letter, I would like to have a hearing and argument on that question.
>
> The Court: Right now.
>
> Mr. Herzstein: Great.¶ All right.¶ An adoptive admission, among other things, requires -- as this was not a spoken thing, it was between the two of them, it was a letter that was written to Mr. Chism by her, and it was what I would call a Dear John letter. Basically, she said for these various reasons we should not longer have our relationship, this is the end.¶ Now, that letter was written and it was on his -- in his room when he was arrested. She -- her testimony, her subsequent testimony, she had had no communication with him whatsoever since that point. And my limited experience, before I was married, which was many, many years ago, Your Honor, if someone were to write me a letter like that, you don't respond to it. You say, okay. Some people may re-

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[102] Appellant has argued that admission in the guilt phase trial of the letter and testimony about the letter was error in Argument VI, *ante*.

> spond. But it is not a given that you will always respond to a Dear John letter. In fact, it's more likely a given that you wouldn't.¶ And to say it was some form of adopted admission because he did not write her back or did not call her on the phone after she kissed him off, to me it is erroneous. Plus, I think that the things that she talks about in the letter, things she's going to testify to anyway, which occur in the car, in the vehicle. And so I think it's probative value is outweighed by the prejudicial effect of the letter itself. And it seems to me there's not an adopted admission in that circumstance, because it was not a requirement or a pressure for him to respond to that letter, and it was not a person-to-person situation.

(RT 21:4554-4555.)

The prosecutor responded:

> People disagree.¶ I believe it meets all the requirements for an adoptive admission.¶ In addition, it was also used as prior inconsistent statements and past recollection recorded.¶ But in either event, it meets the requirements of an adoptive admission.¶ He was given an opportunity to respond. The witness will say he never responded to the letter. She had delivered the letter to him.¶ There were various points during her testimony where she gave testimony that was inconsistent with the items in the letter, and in that event the letter also served as prior inconsistent statements.

(RT 21:4555.)

After defense counsel added that there would be no testimony that appellant opened the letter and read it in front of Iris (21:4556), the following occurred:

> Ms. Sperber [co-defense counsel]: I just think under [Evidence Code section] 1221 that it's not an adoptive admission, it doesn't meet the second half requirements.¶ Also, the writing itself is inadmissible because it's not offered against the party. The party against whom it is offered has never admitted its authenticity. It's being admitted against Mr. Chism, not Miss Johnston. And it has not been acted upon as authenticating that Mr. Chism did not take any action or place any credence by his actions in the content of the letter.¶ Under both theories, it's inadmissible.

Mr. Herzstein: It can be used to refresh her memory and still be inadmissible.

The Court: The letter does accuse the defendant of committing a robbery. And the admission is the silence. The admission is not the letter. The letter is not being used against the defendant, it's his silence in face of the accusation of the letter that is the admission.¶ The admission, is the silence, not the letter. The silence is being used again the defendant. That's the admission.

Mr. Herzstein: But the silence --

The Court: The silence adopts the letter and gives mean (sic) to it.¶ But the admission is not the letter. It's the silence.

Mr. Herzstein: Unless there are other valid reasons for the silence, Your Honor.

The Court: I understand.

Mr. Herzstein: In this situation there were valid reasons for the silence.

The Court: You can argue that to the jury.¶ The 402 is denied.

(RT 21:4556-4557.)

The letter[103] was used to refresh Iris' recollection that appellant was nervous when they walked to the store and saw police cars. (RT 21:4585-4587.) In addition, while the prosecutor attempted to use the letter to refresh her recollection that appellant asked her not to speak during a telephone conversation and that something about the conversation made her suspicious, the letter did not help her. (RT 21:4590, 4591-4593.)

Iris testified that she hand delivered the letter to appellant the night of June 12, 1997, and that appellant neither responded nor discussed the contents with her. Appellant did not read the letter in Iris' presence. Iris stated that she never spoke to appellant about the contents of the letter. (RT

21:4593-4596.) Despite a defense objection based on both hearsay and the ground that the witness's state of mind was irrelevant, major portions of the letter were read into the record or otherwise referred to in questions and answers. (RT 21:4596-4600.)

During the prosecutor's redirect examination of Iris, the letter was read into the record[104] after a defense objection again was overruled. (RT 21:4624-4625.)

Detective Reynolds subsequently testified that the letter was seized at appellant's house inside an envelope addressed to appellant. The envelope was marked as Exhibit 2B. (RT 21:4706.) Reynolds also testified that he retrieved a letter written by appellant to Iris in reply to her letter, that he booked it into evidence, and that he unsuccessfully attempted to locate it for trial. According to Reynolds, he obtained the letter on August 20, 1997, at Iris' residence and it was postmarked August 11, 1997. Reynolds did not recall if he read the letter. (RT 21:4723-4726.)

Following this testimony, Iris' letter to appellant was admitted into evidence over defense objection. (RT 22:4913-4914.) Prior to instructions being read to the jury, appellant's counsel objected to instruction with CALJIC No. 2.71.5 on adoptive admissions, but the trial judge overruled the objection. (RT 24:5282.) The jury was so instructed. (CT 4:975; RT 24:5337.)

Defense counsel also requested a proposed jury instruction advising the jury that failure to preserve appellant's reply letter could be used to draw an adverse inference to the prosecution sufficient to raise a lingering doubt about appellant's conviction of murder in the guilt phase of the

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[103] The letter was admitted as Exhibit 2A. (RT 18:4137, 21:4585, 22:4932.)

trial.[105] The following dialogue ensued when the instruction was requested:

> The Court: What is the evidence that the police knew the exculpatory nature of this evidence?
>
> Mr. Herzstein: I think I would ask for a modification by removing that particular paragraph or put it in that 'It is possible for you to conclude,' or things like that, in there instead.[¶] Because when something like that happens, there is no evidence of, or rarely you can find the evidence that some act was done knowingly. It was done. And to ever try to find out why it was done is almost impossible.[¶] So the very fact that it was lost or destroyed, and of the nature, the Court made the ruling that there was no indication of any response by the defendant to the letter, therefore, that's why it was allowed in.[¶] I think something to balance that would be there was a second letter from the defendant to her, we don't know what it was. It was lost by the police department and, therefore, you can hold that against the prosecution. Which I think that is what this is saying.[¶] Maybe we can put it in a milder manner than what it is stated. But I think it is of significance that letter was lost. We never saw it ever, the first trial or the second trial.

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[104] The text of Exhibit 2A can be found in Argument VI(A), *ante*.

[105] Proposed Special Instruction 1 read:

> In the instant case, a certain item was not provided to the defendant and was apparently lost by the police agency responsible for preserving it. That item is a letter postmarked August, 1977, and allegedly written by the defendant to Iris Johnston.[¶] The exculpatory nature of this evidence was apparent before its loss, and no other copy of said evidence was made by the police agency that possessed said item, and the defendant is unable to obtain said evidence in any way whatsoever.[¶] Because of the failure of the prosecution to preserve this evidence, you may draw an adverse inference to the prosecution as to the crime or conduct it pertained to. Such adverse inference may be sufficient to raise a lingering doubt in your mind as to the conviction previously rendered.

(CT 4:911.)

The Court: It's all speculative.[¶] Denied.

(RT 24:5313-5314.)

The trial judge erroneously admitted the alleged adoptive admission made by appellant through his supposed silence in the face of the letter from Iris Johnston. In addition, because there was no properly admitted evidence of an adoptive admission, instruction with CALJIC No. 2.71.5 was error.

Because the hearsay rule is designed to prevent conviction upon suspect evidence, improper admission of a letter as an adoptive admission and instruction thereon enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of Eighth and Fourteenth Amendments which has greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

In addition, law enforcement's intentional destruction of, or failure to preserve, material evidence favorable to the defense violates a defendant's Fifth and Fourteenth Amendment rights to due process of law and the Sixth Amendment right to present a defense. (*California v. Trombetta*, *supra*, 467 U.S. at pp. 488-489; *United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at p. 867.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in his ability to exclude evidences and inferences unsupported

by the evidence and to preclude jury instruction on those issues. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

This error was prejudicial and requires a reversal of appellant's judgment of death.

B. THE LETTER FROM IRIS JOHNSTON TO APPELLANT WAS IMPROPERLY ADMITTED AS AN ADOPTIVE ADMISSION BASED ON APPELLANT'S SILENCE

In Argument VI of this brief, *ante*, appellant argued that allowing into evidence largely the same testimony and evidence was error at the guilt phase of his trial. Because the legal principles pertaining to this testimony remain the same at the second penalty trial, appellant incorporates here the arguments made in Argument VI(A) through VI(I), inclusive.

Accordingly, because an admission in a criminal case may not be implied from the failure to respond to a writing[106] and an admission may not be implied from silence in the face of a narrative statement,[107] it was error to admit the letter as the basis for an adoptive admission. Similarly,

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[106] See Argument VI(C), *ante*.

because there was a lack of foundation to admit the letter on the stated basis, to the extent that portions of the letter may have been properly admitted, it was improper to admit the entire letter.[108] In addition, the letter was inadmissible because law enforcement violated appellant's right to due process by losing or destroying the letter appellant wrote to Iris.[109] It was also an abuse of discretion for the trial judge to refuse the proposed jury instruction in the second penalty phase advising the jury that it could use the police's failure to produce appellant's reply letter to produce an adverse inference sufficient to raise a lingering doubt as to appellant's guilt of murder beyond a reasonable doubt.[110] The failure to do so unfairly and improperly bolstered the prosecution's case; the prosecutor argued these points against appellant to damning and highly prejudicial effect. Finally, lacking an evidentiary basis, it was error to instruct the jury with CALJIC No. 2.71.5 on adoptive admissions.[111]

C. PREJUDICE

As argued above, the introduction of this evidence violated appellant's right to due process of law. When a trial court error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at

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[107] See Argument VI(D), *ante*.

[108] See Argument VI(E), *ante*.

[109] See Argument VI(F), *ante*.

[110] See Argument VI(F), *ante*.

[111] See Argument VI(G), *ante*.

p. 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt. [112]

The error here was admitting appellant's lack of response to an accusation that he was a perpetrator of the crimes committed at Eddie's Liquor Store and failing to preserve a letter apparently written by appellant in response to the accusation.

In argument, the prosecutor exploited the contents of the entire letter -- not merely the so-called adoptive admission -- to argue that appellant was one of the perpetrators at Eddie's Liquor Store and to corroborate Marcia Johnson's accomplice testimony. (RT 24:5416-5417, 5435-5436.) The clear purpose of this argument was to dispel any lingering doubt the jurors had regarding the capital conviction.

Appellant has previously argued the prejudicial impact of this error in the guilt phase[113] and incorporates that argument here. The same error

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[112] To the extent that only a state law error is involved, this Court has adopted a "reasonable possibility" standard for assessing prejudice at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In *Chapman v. California*, *supra*, the United States Supreme Court equated an almost identically worded standard adopted by it in *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, with the *Chapman* standard of "harmless beyond a reasonable doubt," stating: "There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility that the evidence complained of may have contributed to the conviction" and requiring the beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Thus, the High Court has recognized that the language of "reasonable possibility" and of "harmless beyond a reasonable doubt" implicate the same standard and impose the same burden on the beneficiary of a constitutional error. This Court has observed that the tests are "the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) Under this standard, this Court must ascertain how the error would have affected "a hypothetical 'reasonable juror.'" (*Id.* at p. 984.)

may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez*, *supra*, 1 Cal.4th at pp. 605, 609.) In the second penalty phase trial, there was abundant mitigating evidence presented.[114] And because the first penalty phase jury deadlocked on the determination of sentence, it was indicative of the close case presented by both sides.

Here, prejudicial evidence in the nature of an admission that appellant committed the charged crime was erroneously admitted in a capital case, negating appellant's strong mitigating circumstance of lingering doubt and skewing the jury's weighing process in the direction of death.

It is clear that admission of the supposed adoptive admission of appellant resulted in the abridgement of appellant's constitutional right to confront the witnesses against him. Respondent will be unable to demonstrate beyond a reasonable doubt that a different result would not have been obtained absent the wrongfully admitted evidence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Reversal of appellant's death penalty is mandated.

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[113] Argument VI(H), *ante*.

[114] Argument XIII(C), *ante*.

XV. IMPROPER ADMISSION OF TWO ENHANCED STILL PHOTOGRAPHS TAKEN FROM THE VIDEOTAPE AT EDDIE'S LIQUOR STORE WITHOUT A PROPER FOUNDATION MANDATES REVERSAL

A. PROCEDURAL HISTORY

In the guilt phase trial, the trial judge admitted Exhibits 41 and 42 over defense objection that an improper foundation had been laid for admission of enhanced photographs from a video recorder at the Eddie's Liquor Store crime scene.[115]

In the second penalty phase trial, Sergeant Cisneros testified that he took possession of the Eddie's Liquor Store videotape and took it to Aerospace Corporation in El Segundo. Cisneros had previously viewed the videotape at the police department. (RT 19:4230-4231.) Cisneros gave the videotape to a person -- identity unknown -- at that location on an unknown date. (RT 19:4231.) Cisneros remained with the person throughout the time the person had the videotape and after he observed the person put the videotape in a "machine," Cisneros viewed the videotape with the person. (RT 19:4233.) According to Cisneros, when he viewed the videotape at the police department, he could not see the heads and faces of persons entering the liquor store, but he could see more of the top and bottom portion of the frame when viewed on the machine. (RT 19:4233-4234.) The person gave Cisneros a still photograph made by the machine.[116] (RT 19:4235.)

At this point, defense counsel objected:

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[115] Appellant has argued that admission of the two enhanced photographs in the guilt phase trial was error in Argument VII, *ante*.

[116] Exhibit 41. (RT 19:4236.)

> Mr. Herzstein: Lack of foundation, Your Honor, with regard to the photographs from Aerospace Corporation.¶ All we know is that some stuff was put in a box and more came out. We don't know whether things were added on by computer, we don't know whether, you know, what was done to it.¶ In the past, as I recall, there was some indication there was some enhancement going on. Before we start showing things like that to the jury, a foundation has to be established as to the process that it went through. The fact that it is put in a box and it comes out and it's different, and you can do things with it, is not a foundation.

(RT 19:4237.) After the trial judge questioned whether there was a difference between the two photographs beyond being able to view the entire frame of the videotape, defense counsel replied:

> In the last trial somebody testified that it was sent to Aerospace to have the photographs enhanced. Enhancing means more than just enlarged.¶ We don't know what it means exactly. I do know the reason they sent it to Aerospace Corporation was because of all the work with enhancing deals from spy satellites.¶ I worked at Aerospace 35 years or 40 years ago, I know what business they are in. I suspect that something was done to these photographs, and I suspect it was more than just getting a larger picture. And I don't know how much was done by computer.¶ Computers can take certain information and extrapolate it out. I don't know if that was done or not. And the point is, there's no foundation established. And on this basis, I'm objecting to it.¶ I think the foundation can be established, but not by this gentleman right here.

(RT 19:4238-4239.)

The trial judge inquired:

> But if this is an objection to evidence, you had discovery of it. If this tape, then, apparently she wants to use, are tainted in any way, tell me what the taint is. Tell me, 'Your Honor, the original tape you can not view the feature of the nose on person number 2. The enhanced tape you can now see this enhanced nose.'¶ I need you to tell me what the problem is.

(RT 19:4239.) Defense counsel responded:

Ms. Sperber: I was going to indicate it appears as if the original tape, when viewed by the officer, cut off the top and bottom. I don't know if that's a result of the machine in Long Beach versus if you put it in my machine would you see the whole frame, or if the Aerospace machine itself did something to enlarge a picture that otherwise wasn't there on the tape.¶ Simply put, was it the machine in Long Beach that created the smaller frame, or did Aerospace do something to the tape itself to enlarge the picture?¶ If it's merely a question that Long Beach has a crummy machine, and you put it in someone else's machine and it plays, you get a bigger view, that's different than saying Aerospace did something to physically enlarge a picture that otherwise would never have been seen by anyone.

The Court: Go ahead.

Mr. Herzstein: Okay.¶ I'm noticing -- looking on People's 41, Your Honor -- that there are certain details in the face.¶ You look at People's well I guess it was 43-A -- there is no mark on it, but I assume -- it's in red -- the heads are cut off.¶ I don't know, for example, if it was a matter of taking the raw data, which then included the head and then massaging it in order to crate and draw out details, since the originals don't have the head in it.¶ Follow me?¶ So I can't tell you, Your Honor, whether or not this face up here on the top of People's 41 is enhanced somehow, or processed, or massaged, or whether it is raw data. That information can be gotten from the person, or the expert, or the people at Aerospace Corporation.¶ I am arguing as lack of foundation. All we know is we had the box, it came out different and we have nothing to compare the heads to, because the head wasn't on the original photograph on the tape from Long Beach.¶ And there is where we are.¶ And I do remember that there was testimony last time that this was sent in for enhancement. That's why it was sent to Aerospace Corporation.¶ So before you show enhanced photographs, you have to somehow describe the process, and what it is, and whether or not things were added by the computer or whether it's just a matter of we just showed more picture and that's the end of it.

(RT 19:4240-4241.)

The prosecutor replied that Cisneros previously testified that he was advised that the videotape could not be enhanced and that the only differ-

ence was the size of the visible image because the machines used were different. (RT 19:4241-4242.)

The hearing continued:

> Ms. Sperber: Your Honor, which brings me to the basis much (sic) my objection. This witness saw a small screen in Long Beach. He went to Aerospace Corp, he saw a big screen. My question is, did the machine at Aerospace -- I don't think this witness can testify to that -- did the machine at Aerospace Corp. just provide more viewing area to a tape that originally contained the information, or did the machine at Aerospace do something to add information to the tape? Meaning, does the Long Beach recorder or player, whatever it's called, cut off the top and bottom, and does the Aerospace machines video show the entire thing that's already there?¶ I know I have a D.V.D. player where you can do those wide screens or full screens, and it cuts off. Either way, the same material is on that D.V.D. on that disc.¶ Did the original tape contain he heads and it just didn't show on Long Beach's machine, or did the Aerospace machine add the heads? That is the issue.
>
> Ms. Lopez: Your Honor --
>
> The Court: The state of the evidence is that the imagine [sic] was there on the tape and was not visible on the playing of the machine at the Long Beach Police Department.¶ If they had gone down the hall and gotten a different machine that viewed the whole frame, we probably wouldn't be here. Because it's Aerospace, there is suddenly an idea that something may be improper here.¶ But in my view, the mere fact that it's Aerospace doesn't add anything. It's just state of the evidence so far as it's just a player.
>
> Ms. Sperber: I agree with the Court. That's why I said if you took it to my house and put it on my machine, would you see the heads on the original tape? Because you had a second tape made. That's what I'm asking.¶ Was it just a bad machine in Long Beach and had he gone to El Segundo P.D. or Carson Sheriff Station and used their V.C.R. or taken it home, would it show a whole frame?
>
> The Court: My bottom line is, not to point fingers, but it's up to you to determine whether something improper has occurred and raise it in an objection and not really specu-

late and say now we have to have a hearing where there's no offer of proof.

Mr. Herzstein: Your Honor, I'm stuck with the situation where the copy I have is the copy of the -- well --

The Court: No. Aerospace is still there. You could have gone over to Aerospace and talked to the person there, and they would have said, 'Oh, we added all this. There was no face there. The police officer gave us this picture of the defendant and we filled it in.'¶ I'm not saying that happened. But that's what you need to do. We're not going to have that kind of --

Mr. Herzstein: May I voir dire this witness, Your Honor?

The Court: -- of discovery in the middle of trial.

Mr. Herzstein: No, no. On the question of foundation. Because we are speculating he thinks it was some form of a tape machine. In fact, he assumed that. I think that was his words. And I would just like to explore that a little further, if I can, to establish the foundation.¶ It may be that that's all it is, and that's what his knowledge is. That will end it. That's not the way it came off.¶ I'm responding to his testimony, Your Honor.¶ And I don't recall whether it was in trial or conversation with one of the officers or whatever that originally it was sent to Aerospace for enhancement, and I don't understand why they would send it, but if they just think they cut off part of the head, it apparently was a different kind of machine, because he had asked to have it put into a standard format, so apparently it was one of these -- and I think you're looking at machines that does not have the same speed and such as the -- as a regular VHS does, so I'd like to be allowed to ask him a few questions on that, and that may solve the whole problem.

The Court: Overruled.

(RT 19:4242-4245.)

On continued direct examination, Cisneros testified that Exhibit 41 included about ¾ of an inch at both the top and bottom of the photograph, including faces, that was not visible on the videotape recording. According to Cisneros, Exhibit 42 had something clipped off of it and he had no idea

what had occurred, albeit about ½ inch at both the top and bottom were now visible on the videotape. (RT 19:4245-4247.)

On cross-examination, Cisneros testified that it was his decision to take the videotape to Aerospace Corporation and that he had used them before on other cases. According to Cisneros, Aerospace came to different conferences demonstrating their ability to do things and Cisneros wanted to use them to enhance the clarity of the videotape. (RT 19:4266-4267.) Cisneros wanted them to make the videotape clearer, but this time the videotape did not clear up. (RT 19:4267-4268.) Cisneros testified that the machine used was a workstation that looked like a computer. It was large, had a screen that he could view the videotape on, had a keyboard, and had the capability to print. He did not know the name or the total function of the machine. (RT 19:4269-4270.) It was Cisneros' opinion that the photographs produced by the machine were not an improvement over the original photographs. (RT 19:4272.)

Because the prosecutor failed to lay a proper foundation for introduction of Exhibits 41 and 42, it was error to admit them into evidence.

Because rules preventing admission of evidence without a proper foundation are designed to prevent conviction upon suspect evidence, admission of the enhanced photographs enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of

the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in his ability to exclude evidence and inferences unsupported by the evidence. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

This error was prejudicial and requires a reversal of appellant's conviction.

B. ADMISSION OF THE "SILENT WITNESS" PHOTOGRAPHS WAS IMPROPER BECAUSE THERE WAS NO SHOWING THAT THE PHOTOGRAPHS HAD NOT BEEN TAMPERED WITH

In Argument VII of this brief, *ante*, appellant argued that allowing into evidence Exhibits 41 and 42 was error at the guilt phase of his trial. Because the legal principles pertaining to this testimony remain the same at the second penalty trial, appellant incorporates here the arguments made in Argument VII(A) through VII(C), *ante*, inclusive.

Accordingly, because the prosecutor failed to lay a proper foundation for introduction of Exhibits 41 and 42, so called "silent witness" pho-

tographs that the evidence demonstrated was somehow manipulated to show an image different from the original, the trial judge abused his discretion in admitting those exhibits.[117]

C. PREJUDICE

As argued above, the introduction of this evidence violated appellant's right to due process of law. When a trial court error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt. [118]

The error here was admitting two enhanced photographs of the crime scene at Eddie's Liquor Store allegedly showing facial features similar to appellant when those features were not otherwise shown in original photographs.

This error was magnified, to appellant's prejudice, when the prosecutor argued that lingering doubt could be dispelled by use of the evidence from the Eddie's Liquor Store incident, then used the photographs to prove to the jury that appellant was one of the perpetrators. (RT 24:5416-5417, 5429.) The only purpose of this argument was to dispel any lingering doubt the jurors had arising from the capital conviction and, on that basis, to urge the jury to sentence appellant to death.

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[117] See Argument VII(B), *ante*.

[118] To the extent that only a state law error is involved, this Court has adopted a "reasonable possibility" standard for assessing prejudice at the penalty phase. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.)

Appellant has previously argued the prejudicial impact of this error in the guilt phase[119] and incorporates that argument here. The same error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez*, *supra*, 1 Cal.4th at pp. 605, 609.) In the second penalty phase trial, there was abundant mitigating evidence presented.[120] Because the first penalty phase jury deadlocked on the determination of sentence when the evidence was largely the same in both penalty trials, it was indicative of the close case presented by both sides.

Here, prejudicial evidence in the nature of two enhanced photographs allegedly showing inside Eddie's Liquor Store was erroneously admitted in a capital case, negating appellant's strong mitigating circumstance of lingering doubt and skewing the jury's weighing process in the direction of death.

It is clear that erroneous admission of the two enhanced photographs resulted in the abridgement of appellant's constitutional right to confront the witnesses against him and to be convicted only upon competent evidence. Respondent will be unable to demonstrate beyond a reasonable doubt that a different result would not have been obtained absent the wrongfully admitted evidence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Reversal of appellant's death penalty is mandated.

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[119] Argument VII(C), *ante*.

[120] Argument XIII(C), *ante*.

XVI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING ONLY SELECT PORTIONS OF MARCIA JOHNSON'S SECOND STATEMENT TO DETECTIVE EDWARDS

A. PROCEDURAL HISTORY

The trial judge allowed admission of a significant portion of Marcia Johnson's second statement to Detective Edwards, but erroneously did not allow the defense to put on evidence of the portion relating to appellant's statement to Marcia that he only shot Moon after Moon went for a gun. This omission prejudicially resulted in the jury receiving an incomplete view of appellant's culpability in Moon's killing at Eddie's Liquor Store and violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, present a defense, due process and a reliable determination of guilt.

During the second penalty phase trial, Marcia Johnson testified on cross-examination that she was interviewed by Detective Edwards in September, 1999. (RT 21:4767.)

Defense counsel sought to elicit testimony from Marcia that she told Detective Edwards that appellant told her that "[Moon] tried to get a gun." (RT 21:4768.) The trial judge sustained the prosecutor's objection to the question because the hearsay statement neither qualified for admission as a statement against penal interest nor a party admission. (RT 21:4768-4771.)

Still on cross-examination, Marcia admitted lying in that interview when she said that she never saw appellant with a gun before. (RT 21:4779, 4789.) She also lied when she said that the robbery was planned the day before it took place. (RT 21:4780-4781.) In the interview, Marcia told Edwards that the car used was a brown Cutlass and never mentioned appellant. (RT 22:4798-4799.) On the prosecutor's redirect examination, Marcia testified that Edwards suggested to her that there had been planning

the night before and that somebody was a leader in planning the robbery. Because Marcia did not want to implicate her brother and wanted to minimize her own involvement, she understood what she should tell Edwards. (RT 22:4816.)

Edwards was the prosecution's next witness and testified during the prosecutor's direct examination that the interview with Marcia took place on September 23, 1999, and that she was in custody after Edwards directed that she be arrested. Edwards advised Marcia that she was under arrest in connection with the murder and robbery at Eddie's Liquor Store. (RT 22:4825-4826.)

Edwards testified that Marcia then gave him a statement about the occurrences of June 12, 1997. (RT 22:4826.) When the prosecutor inquired about Marcia's initial comments regarding what happened in the morning, defense counsel lodged a hearsay objection, the trial judge noted that the comment might be admissible as an inconsistent statement, and the prosecutor noted that it was admissible pursuant to the rule of completion in Evidence Code section 356. (RT 22:4826.) The following discussion ensued at sidebar:

> Mr. Herzstein: Okay, Your Honor.[¶] I don't think that it is proper for her to go into everything that was told to him. She can go into areas that are inconsistent. She is talking about rule of completion. That doesn't mean you bring in everything under the sun.
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> The Court: What is your offer?
>
> Ms. Lopez: My offer is that he is going to say initially she said that she was with only Sam Taylor and her brother. They traveled to Eddie's Liquor Store in the brown Cutlass, and they parked in front of the liquor store. She did not mention Chism at that time. Then she says that she went in, she made a purchase, and then they went and they watched cheerleading practice.[¶] He then confronts her and says, 'I don't believe you.' She changes her story and gives the story that involves the robbery and Chism. He says, 'I believe part

of what you're saying, but I believe that -- but I believe there's more to the story. I believe it was planned the night before.' Then she admits, yes, it was planned the night before.[¶] All of those areas were gone into on cross-examination in an attempt to impeach the witness with prior inconsistent statements. Unfortunately, they were taken out of context. I think in some ways misleads the jury as to how the interview transpired, what was actually said in the statement. So I believe under the rule of completion we're entitled to bring out all the statements that relate to the statement that was brought out by Mr. Herzstein and put it in an appropriate context.[¶] Also, it will include prior inconsistent, as well as consistent statements.[¶] Also, under 1202 of the Evidence Code, when a hearsay declaration is offered, we may bring in all other hearsay statements that refute or demonstrate that that particular hearsay statement is not to be credited.[¶] And I'm referring to the statement, brought out by Mr. Herzstein, where they travel to Eddie's Liquor Store, they parked in front of the liquor store, they traveled in a brown Cutlass, and she was only with her brother and Mr. Taylor.[¶] So I get to put the entire thing into context. The appropriate context.

The Court: One way to look at this, I think the appropriate way, is to view the Detective's testimony as demonstrating the inconsistencies of the witness's testimony. Apart from her statement that she made inconsistent statements. Because the jury is not required to accept any portion of her testimony. So we have to assume that the D.A. is allowed to impeach the witness through the Detective. The jurors can decide whether the Detective's account of that interview is correct, whether the witness' -- the prior witness's account is correct and view the evidence from that particular perspective. Otherwise, all the jury has is her account of what the interview was like. And the jury may accept that, they may not. Jurors may wish to here from the Detective what was told to the Detective.[¶] So regardless of whether she admitted making inconsistent statement to the Detective, she has the right to present those inconsistent statements through the Detective.[¶] Apart from insuring a fair trial, that she can present all of the evidence that bears on it, doesn't she?

Mr. Herzstein: Your Honor, if that's the Court's ruling, that's fine. That means that despite what she says I can also bring out things that were consistent with her state-

ment that she was inconsistent.[¶] I've been in situations where I have tried to bring in stuff and they said, no, she admitted that she didn't, therefore you can't impeach her with anything else. I've had judges tell me that.[¶] Now, in this situation, that's fine, if counsel is going to limit it to the area she is talking about, what her offer of proof is, and the Court wants to rule to let her in, that's fine. I submit it.

Ms. Sperber: May I?

The Court: In a moment.[¶] If I were a prosecutor, I would want all this material before the jury. This is important. She is presenting the evidence to him. As an attorney, she wants all the evidence before the jury. She can step back, they make their decision and she can live with it.

Mr. Herzstein: I've just seen the shoe on the other foot, where the defense tries to put in the statements which are consistent with what the testimony was that the story was different then. And I have been stopped by objections by the prosecution, and I've had courts rule the witness has admitted it, therefore you're not impeaching the witness because the witness impeached themselves.[¶] I actually kind of like the court's logic here. I think it's a better way to go.

Ms. Sperber: I don't know what Mr. Herzstein just said, in all honesty, but I think under 356 this would not be admissible, because the adverse party, not the party who proffered the witness, the adverse party who can do the completion. And I believe Marcia Johnson was the People's witness, not a defense witness.[¶] So it says, 'Where part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party.'[¶] So I don't think 356 applies to this theory at all.[¶] Under 1202, I don't think that that is necessarily applicable. However, I think the jury is entitled to an instruction on the limited admissibility of the testimony of Detective Edwards that it's not being offered for the truth of the matter asserted, but merely to show what Marcia Johnson might have told him.

Ms. Lopez: What Ms. Sperber missed, because she was not present, is that the person who offered the statements to the officer was not me during Marcia Johnson's testimony, but Mr. Herzstein. So I am now the adverse party offering the completed statement.

Ms. Sperber: But the completed statement, under 356, comes in from the witness, not from another witness.

Ms. Lopez: No, that's not true.

The Court: Just a second.

. . . .

The Court: It need not be the same witness.[¶] Overruled.

(RT 22:4827-4831.)

Edwards testified that Marcia initially told him that she had been in Eddie's one time in 1997 to buy some Jolly Ranchers, having gone there with Johnson and Taylor in Taylor's brown Oldsmobile Cutlass. Marcia said nothing about having been a participant in a robbery. (RT 22:4832.) Edwards testified that he told her that he had spoken to other people and they were telling a different story. (RT 22:4832-4833.) Marcia then altered her story and said that she went to the store in a silver or gray van with Johnson, Taylor, and appellant. She said they parked on a side street, she walked to the store by herself, and bought Jolly Ranchers for 65 cents. (RT 22:4833.) Marcia told Edwards that she returned to the van and that Johnson and appellant got out, walking toward Eddie's. Marcia said that she saw a gun in appellant's right hand. She said that she waited in the van with Taylor, Johnson and appellant ran back to the van, jumped in, and they drove off, leaving the area. (RT 22:4834.) Edwards told Marcia that he believed most of her story, but he knew they planned the robbery the night before at her house. Marcia agreed that the robbery was planned the night before and recited what occurred during the planning. According to Edwards, he never suggested to Marcia who he believed had a gun. (RT 22:4835.) Marcia then said she had seen appellant with the same gun one or two months earlier. (RT 22:4838.) Marcia said that appellant was wearing black pants and a black T-shirt with white writing on it. She said that Johnson was wearing a long sleeved, green Gap sweater with a half zipper

in the front, black shorts, and a black hat. (RT 22:4836.) Marcia told Edwards that appellant dived through an open passenger window to get back into the van and Johnson jumped into the van through the sliding door. (RT 22:4838-4839.) Marcia said they drove to downtown Long Beach to pick up Iris and Valicia, then returned to Compton on the freeway, observing several helicopters flying overhead. (RT 22:4839.) According to Edwards, at the time of Marcia's statement, he had not threatened her or made promises of leniency in exchange for testimony. (RT 22:4839.)

Defense counsel cross-examined Edwards and he testified that during the interview, Marcia told three different stories -- one in the beginning that was false, then the "correct version," and finally, she added to the second story. (RT 22:4849.) Edwards testified that in the second version of her story, Marcia stated that she saw appellant with a gun in his hand as he left the van and that she had never seen the gun before, although in the third version she stated that she had seen the gun before. (RT 22:4850-4851.)

Defense counsel then sought to elicit the statement made by Marcia to Edwards that appellant told her that the man in the liquor store went to get a gun, so he shot the man. (RT 22:4851-4852.) The prosecutor offered a hearsay objection and the following transpired:

> Mr. Herzstein: Okay.[¶] The rule of completion here, Your Honor.[¶] He was allowed to recite the story, the three versions of a story that were told, and part of this, right in the middle of this page, is that they had watched the news on Channel Seven and saw some helicopters flying around the liquor store, which is the liquor store they had testified to they had been to earlier.[¶] Waac [appellant] then said he was trying to get a gun when he was trying to get the money, so he shot the man -- shot him and the man was bleeding.[¶] This to me, is part of the same story she's talked about, what she saw and what happened, and this is what was said to her by Waac. We're excluding this.[¶] The District Attorney was allowed by objection to go over the whole thing.
>
> The Court: She didn't go over the whole thing.

Mr. Herzstein: She left this out.[¶] The point is I'm allowed to complete the story here, aren't I?

The Court: No, you proffered it.

Mr. Herzstein: Well, I -- okay.[¶] She is able to say what she saw, what had happened. She told several different stories.[¶ In there, she's saying that Waac made an admission to her, because we went through this before.

The Court: Right.

Mr. Herzstein: But now it's coming in different because he was allowed to testify as to what she was telling him and the whole story and why she excluded that. I don't see why that part should be excluded.

The Court: You're the proffering party, so . . .

Ms. Lopez: In addition to that, I didn't touch areas of defendant's statements, and there's a multiple hearsay problem, and it doesn't -- the defendant's statements to her don't come in within [Evidence Code section] 356 as part of the subject matter of her activities.

The Court: How is it relevant to any of her examination? If it is, I'll listen to it.

Mr. Herzstein: Well, I just think it completes the story, and I think it should be allowed in on that basis, Your Honor.

The Court: Overruled.

Ms. Sperber: I --

The Court: Yes.

Ms. Sperber: I just want to put in I think, under 356, once she offers the rest of the statement as the adverse party and she edits that statement, she is now the proffering party, and under 356, we're allowed the finish it.

The Court: If it's necessary to clarify some point that she's brought out, you're correct. You're correct.[¶] If she's misleading the jury in her addition and this needs to be inserted to correct that, then certainly.[¶] That's why I asked why it's relevant to any part of her examination.

Mr. Herzstein: As to any part of the District Attorney's examination, not the examination of Marcia John-

son?[¶] We're talking about right now her examination, the District Attorney. When you said her, is that who you are talking about, Judge?

The Court: Yes, her.

Mr. Herzstein: Pointing at the District Attorney.

The Court: Right.

Mr. Herzstein: Okay.[¶] Well, it seems to me that she, under the prodding of the officer started with one story, changed the story somewhat, and he prodded her for another, and she changed the story some more, all the time further and further making Chism the bad guy, the worst guy.[¶] This statement clarifies a little bit. It makes him a little less bad than what her statements are making, and I think it is relevant on that basis.[¶] You know, the knife has to cut both ways, and I objected to bringing this stuff in in completion, and she, over my objection, did, and now I cannot finish it, and yet, it does tend to back off a bit from the final point position that she has the defendant in.

Ms. Sperber: I think it also clarifies the position I think the District Attorney is misleading the jury into believing that Marcia Johnson's testimony as we hear it here is the true version of the events, meaning it's premeditated, preplanned, intent was formed before going in, and I think that this allows the jury to consider all the facts of the case and the intent of the parties and be presented with a true image of what this witness saw, heard and believed, and I think that leaving this out allows the jury to grossly distort the import of the rest of the testimony.

Mr. Herzstein; There is also a different angle.[¶] He had said unsolicited that the second version was the correct version. The second version included her statement that Chism said this, and if nothing else, I could ask him was that also correct.

The Court: No.[¶] The term 'correct' should be struck from the testimony, but he has to do that.

Mr. Herzstein: I didn't ask to do that.

The Court: So we don't proceed down that road.

Mr. Herzstein: But I'm saying -- okay. Fine.[¶] But it just seems that the blade has to cut both ways in this

> situation, Your Honor.[¶] This does back off a bit.[¶] In the end, she gives him apparently -- she gives him the story which absolutely implicates Mr. Chism as being the guy who planned it, the whole thing this his (sic) the plan, right. Remember, he suggested the plan, and now but she even says it, but Chism did say that the guy made a move for a gun and I shot him, and it seems to me that this is countered somewhat, this scheming, conniving individual who planned this the night before, et cetera, et cetera, and I think I should be allowed to bring in to show the whole picture.[¶] The jury can make their own conclusions.
>
> The Court: Overruled.[¶] That's why we have rules of evidence. Everything doesn't come in that relevant that's helpful.[¶] It does not tend to explain prior testimony of the witness.[¶] The D.A. did not mislead the jury in her editing, so overruled -- excuse me -- sustained.[¶] We'll proceed."

(RT 22:4852-4856.)

Allowing admission of a significant portion of Marcia's second statement to Edward while cutting out the portion relating to appellant's statement to Marcia that he only shot Moon after Moon went for a gun -- thus refuting the prosecutor's argument that the shooting was a "thrill killing" -- resulted in the jury receiving an incomplete and prejudicial view of appellant's culpability in Moon's killing at Eddie's Liquor Store. Thus deprived of highly relevant defense evidence, the jury was more vulnerable to the prosecutor's repeated theme during penalty phase argument that this was a "thrill killing" as opposed to a situation in which appellant reacted spontaneously. While this evidence did not absolve appellant, it did provide a basis for a sentence less than death.

B. THE ADMISSION OF ONLY A PORTION OF MARCIA JOHNSON'S STATEMENT VIOLATED EVIDENCE CODE SECTION 356 AS WELL AS APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE

Under Evidence Code section 356[121] it was error for the trial court to admit select portions of Marcia's statement, excluding a portion which would have presented appellant's level of culpability in the Moon shooting in a less adverse light and potentially carried great weight with the second penalty phase jury.

The purpose of Evidence Code section 356 is to prevent the use of selected portions of a conversation, so as to create a misleading impression of the subjects addressed. (*People v. Pride*, *supra*, 3 Cal.4th at p. 235.) Thus, if a party's oral admissions in a statement have been introduced in evidence, the party may show other portions of the statement, even if self-serving, which "have some bearing upon, or connection with, the admission . . . in evidence. (*People v. Breaux* (1991) 1 Cal.4th 281, 302; *People v. Hamilton*, *supra*, 48 Cal.3d at p. 1174; *People v. Arias*, *supra*, 13 Cal.4th at p. 156; *People v. Williams* (2006) 40 Cal.4th 287, 319.) A trial court's determination of whether evidence is admissible under Evidence Code section 356 is reviewed for abuse of discretion. (*People v. Pride*, *supra*, 3 Cal.4th at p. 235.)

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[121] Evidence Code section 356 states:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

The excluded portion of Marcia's statement to Detective Edwards certainly had some bearing upon or connection with the remainder of her statement that was admitted into evidence. At the time of the interrogation, Marcia was under arrest for Moon's murder. The purpose of Marcia's interrogation by Edwards was to determine exactly what occurred at Eddie's Liquor Store. However, that purpose must be taken in context -- the police already had elicited Marcia's statement that appellant was the organizer of the robbery, so the subsequent interrogation largely focused on determining appellant's culpability level.

The prosecutor sought to use Marcia's testimony and the details of her interrogation to prove that appellant organized the robbery and that he was the shooter. While the prosecutor may have argued inconsistent statements as the basis for admission, she was not seeking to impeach Marcia's testimony. Indeed, the prosecutor sought to prove Marcia truthful so that the jury would believe what she stated and to that extent, the statements from her interrogation inconsistent with her testimony were admitted to prove the truth of the matters asserted. Both sides sought admission to demonstrate culpability. The prosecution sought to prove appellant's role in the shooting as did the defense; they merely sought to prove opposite interpretations of the words spoken by putting them in a fuller, more accurate context.

The statement that the defense was precluded from introducing -- that later in the day of the shooting appellant told Marcia that the victim went for a gun and appellant shot him -- was consistent with the prosecution's use of the remainder of Marcia's statement because it focused on appellant's level of culpability. Moreover, the prosecutor introduced other portions of Marcia's statement relating to events of the entire day, including the time at which appellant made his statement about the victim going for a gun before appellant shot him. The mere fact that this portion of the state-

ment refuted the prosecutor's argument that the shooting was a "thrill killing" and thus mitigated appellant's culpability, does not mean that it did not bear on the admitted statements. Indeed, the very fact that the excluded evidence was potentially mitigating suggests that the truncated portions of Marcia's statements admitted by the prosecutor were designed to mislead the jury.

The prosecutor's assertion that the defense could not complete the statement pursuant to Evidence Code section 356 because the defense propounded the original portion of the statement was, at best, disingenuous. Whether or not defense counsel originally brought up Marcia's statements to Edwards during cross-examination of Marcia, the prosecutor was the proponent of the interrogation during her direct examination of Edwards. Hence, defense counsel was free to enter the entire interrogation of Marcia during cross-examination of Edwards pursuant to Evidence Code section 356. Moreover, even if the prosecutor was not the party originally putting the interrogation into evidence, she did not fully cover the subject during her direct examination of Edwards, omitting a critical portion and leaving the jury open to being misled about what Marcia told Edwards regarding appellant's culpability. The purpose behind Evidence Code section 356 would accomplish little if an adverse party is entitled to only introduce a second portion of an oral statement, leaving the jury as misled -- or more so -- as the original proponent did.

Here, the trial judge permitted admission of statements made by appellant, as alluded to by Marcia in her second interview with Edwards. Appellant's alleged admissions included pre-offense statements of planning and leadership in a robbery. Excluded by the trial judge was an admission by appellant, after the robbery had gone bad and Moon was killed, that appellant only shot Moon after Moon reached for a gun. In hindsight, the statement was a complete confession to the crime to the extent that appel-

lant admitted being the shooter in a robbery-murder prosecuted under the felony murder rule, albeit the portion relating to the shooting may have been self-serving with respect to his level of culpability. In the context of the rule of completion under Evidence Code section 356, however, self-serving statements must be admitted. (*People v. Williams*, *supra*, 40 Cal.4th at p. 319.) More importantly, the portion of the statement appellant sought to introduce went directly to the critical issue before the jury -- what was the appropriate punishment? Accordingly, the trial judge abused his discretion in excluding appellant's statement to Marcia.

Exclusion of evidence that is "highly relevant" to a defense contravenes due process. (*Green v. Georgia* (1979) 442 U.S. 95, 97 [finding a due process violation when testimony was excluded at trial "was highly relevant to a critical issue in the punishment phase of the trial" regardless of the state's hearsay rule]; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-302 [exclusion of third party testimony that was "critical evidence" violated due process].) In deciding whether the exclusion of evidence violates due process, a court balances the following factors: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. (*Chia v. Cambria* (9th Cir. 2004) 360 F.3d 997, 1004; *Daryden v. White* (9th Cir. 2000) 232 F.3d 704, 711.)

All of these factors are present in this case. The excluded evidence was highly probative on the very issue on which the trial court admitted the other portions of the statement: the level of appellant's culpability for Moon's murder. The statement was reliable in that it was the result of an interrogation sought by the prosecution, Edwards testified that it was the "correct version" of the events, and the prosecution case depended on the

jury believing both what Marcia told Edwards and what was testified to on the witness stand. Moreover, appellant had no reason to lie to Marcia about what occurred in the liquor store as she was a co-participant. Appellant's statement was simple, one-sentence long, and described what transpired in the store; as such, the jury could easily evaluate it. The excluded statement was the sole evidence on the subject, no other evidence described how or why Moon was shot, and while appellant did testify at the penalty phase retrial, he did not testify on this subject. Finally, the statement went to the heart of a defense precluded by its exclusion, that appellant should be spared the death penalty.

This error by the trial court denied appellant his ability to present a defense. In *Davis v. Alaska*, *supra*, 415 U.S. 308, a Supreme Court concerned with the abridgment of a defendant's right to present all evidence in his defense, overturned his conviction because the lower court would not allow impeachment of a material witness with a prior juvenile record. (*Id.* at p. 317.) The Court concluded "a defendant's right to present his defense theory is a fundamental right and . . . all of his pertinent evidence should be considered by the trier of fact." (*Id.* at p. 317.)

In *Rock v. Arkansas* (1987) 483 U.S. 44, the Supreme Court issued another decision supporting this principle. There, the defendant was convicted of manslaughter after the lower court, pursuant to an Arkansas statute, refused to allow her to testify to matters recalled only after she had been hypnotized. The Arkansas Supreme Court affirmed and reasoned, much as the trial judge did here, that the prejudicial effect of such testimony outweighed its probative value. The Supreme Court reversed, once again emphasizing the important right to present exculpatory evidence. (*Id.* at p. 62.)

California courts also support the fundamental right of an accused to present all relevant evidence vital to his or her defense. In *People v. McDonald*, *supra*, 37 Cal.3d 351, this Court commented that:

> Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it.

(*Id.* at p. 372.) In *People v. Reeder* (1978) 82 Cal.App.3d 543, the court emphasized that "[i]n *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed.2d 297, 93 S.Ct. 1038], it was held that the exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial in violation of constitutional due-process requirements." (*Id*, at p. 553.)

Because Evidence Code section 356 is designed to prevent conviction upon suspect evidence, improper exclusion of a portion of Marcia's statement enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally-protected liberty interest of "real substance" in his ability to introduce exculpatory evidence. To uphold his conviction, in light of the improperly excluded evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445

U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

Hence, exclusion of the portion of Marcia's statement to Edwards sought to be introduced by the defense was violative of Evidence Code section 356. Exclusion also violated appellant's violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, present a defense, due process and a reliable determination of guilt and sentence.

C. PREJUDICE

As argued above, the introduction of this evidence violated appellant's federal constitutional rights and the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, requiring reversal unless the prosecution can prove the error is harmless beyond a reasonable doubt. [122]

The error here was excluding defense evidence that appellant told Marcia Johnson that he shot the clerk in Eddie's Liquor Store after the man went for a gun. Without this evidence, the prosecutor was free to repeatedly argue that Moon's killing was a "thrill" shooting by appellant. (RT 24:5385, 5400.) Admission of this evidence would have negated this argument by demonstrating that, while the shooting brought appellant within

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[122] To the extent that only a state law error is involved, this Court has adopted a "reasonable possibility" standard for assessing prejudice at the penalty phase. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.)

the ambit of the felony-murder rule, it was far from the "thrill" shooting urged by the prosecutor as a basis for sentencing appellant to death.

The same evidence could also have established lingering doubt as to what occurred inside the liquor store and encouraged the jury to exercise mercy and sympathy in appellant's favor.

Here, mitigating evidence that appellant only shot when the victim reached for a gun, in contrast to the prosecutor's "thrill killing" argument, was erroneously excluded during the penalty phase of a capital case. This error permitted the jury to deliberate punishment in the absence of evidence appellant was constitutionally-entitled to present that supported a sentence less than death.

In the second penalty phase trial, there was abundant mitigating evidence presented.[123] The first penalty phase jury deadlocked on the determination of sentence when the evidence was largely the same in both penalty trials. This was indicative of the close case presented by both sides for the deadlock occurred even without this defense evidence.

It is clear that erroneous exclusion of appellant's statement to Marcia -- that he shot the clerk spontaneously and in response to the victim's unexpected attempt to reach for a gun -- resulted in the abridgement of appellant's constitutional rights to present a defense, to due process, and to urge the jury to impose a sentence less than death. Although it is possible the jury may have rejected this defense argument, respondent cannot show beyond a reasonable doubt that a different result would not have been obtained absent the wrongfully admitted evidence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Reversal of appellant's death penalty is mandated.

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[123] Argument XIII(C), *ante*.

XVII. INTRODUCTION OF IMPROPER VICTIM IMPACT EVIDENCE MANDATES REVERSAL

A. INTRODUCTION

Prior to the penalty phase retrial, the defense filed a motion to preclude or limit victim impact evidence. (CT 3:836-840, 848-849.) Before evidence was taken in the case, defense counsel stated that she wanted victim impact testimony limited to the criteria set out in *Payne v. Tennessee* (1991) 501 U.S. 808, and *People v. Edwards*, *supra*, 54 Cal.3d 787. The trial judge proposed that he would make rulings as the victim impact witnesses were called based on objections and defense counsel agreed to this procedure. (RT 14:3011-3014.)

When Steven Morris, Moon's son-in-law, took the stand as the first prosecution victim impact witness, defense counsel objected to use of a collection of photographs -- on a photo board -- of the victim, Richard Moon,[124] during his testimony.

Defense counsel objected to use of the photographs, stating:

> Your Honor, these pictures are totally and completely inappropriate under both *Payne*, *Edwards*, and *Mills versus Maryland*.[¶] This is not a short recitation of facts by a family member. These are photographs of a baby; I assume it (sic) not the victim.[¶] In the very center, for the record, there is a photograph of a man, that I will assume is the victim, with his arms up in the air, to me, is reminiscent of a Jesus Christ pose.[¶] This is the exact thing that *Payne* and *Edwards* cautioned against.[¶] It is not an aggravating factor.[¶] As far as being an aggravating factor in California, since it is not specifically enumerated in the code, it is -- it falls under a catchall citation. However, there is still Eighth Amendment error.[¶] When we look at things that are totally, A, unrelated to the impact this crime had on people who were present at the time of its commission, and the immediate family mem-

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[124] Exhibit 52. (RT 22:4867.)

> bers, and B, this is presented for no other reason than to invoke empathy by the jurors.[¶] These are the kind of photographs that the prosecutors object to when it is of the defendant and his family and they say that's not a proper mitigating circumstance.[¶] This is not proper aggravating circumstances. This is pure sympathy ploy, especially that center photograph, which I might add is at least five to eight times larger than all the other photographs on the board.

(RT 22:4860-4861.)

The prosecutor responded that the photographs were permissible under section 190.3, factor (a), were neither in violation of *Payne v. Tennessee*, *supra*, 501 U.S. 808, nor the Eighth Amendment, adding that "[t]he law clearly allows the People to not only put on evidence that relates to the impact this killing had on the victim's family, but also information or evidence that relates directly to the victim's character, as well as photographs showing the victim alive, that demonstrate clearly to the jury the person that the defendant encountered the morning he entered that liquor store and shot him in the back." (RT 22:4862.)

Defense counsel reiterated that "the character of the victim is not an aggravating circumstance under subdivision (a) or (k), or any other catch-all under 190.3."[¶] All it says is that limited testimony regarding the impact on the witnesses to the crime or the family members is admissible. Not the character of this person, what a wonderful man he was, how his granddaughters are going to miss him. That's all speculative on future conduct. And the fact that he's loved and missed is one thing, the fact that he poses like Jesus Christ, dresses in a Santa Claus suit is nothing but a sympathy ploy, Your Honor." (RT 22:4863.)

The following dialogue followed:

> The Court: I'm sorry.[¶] I don't understand how evidence of the family relationship is not relevant to circumstances of the offense if the offense terminated those relationships, those friendships and relationships.[¶] And to the sense

that his character was reflected in his relationships to these individuals, isn't that a loss?

Ms. Sperber: But the point is, under *Payne*, P-a-y-n-e, under *Edwards*, and all the cases that I have cited to the Court, that is not a proper aggravating factor. His character is not in evidence unless it is part of a defense that he was a drunken person they were fighting. And since that's not the defense in this case, his character is not an issue.[¶] And the cases clearly state that in states that have -- that weight aggravating versus mitigating factors, you have to limit the victim impact testimony to that which is, and I will quote --[¶] Well, I can't find the quote at this moment. Unless it's in the second page.[¶] What *Payne* does, it say that the evidence which was presented in that case, which has been held as the boundaries within which such evidence is admissible, pertains solely to the impact of the crime on the immediate family members of the victim.[¶] The impact is they've lost someone they love, they have lost the bread winner of the family. But not, well, I can't go jet-skiing anymore, and tossing the cute little grandchildren in the air, and He can't stand on a mountain top and be -- I'll make up a word -- exaltatious. I'm sure that's not a word. That's what he looks like to me.[¶] This is purely inflammatory. It does nothing to show this is his past life, and it doesn't show the current impact it has on the family. And it has to be limited.[¶] This is not admissible when it comes to the defendant. You have to look at the flip side of the coin under California, because you get the same mitigating and aggravating catch-all statutes. They apply to aggravating as well as mitigating. And if it's not allowed for the defendant to show the pretty pictures, then it's not allowed for the People to do it. And *Payne* and *Edwards* specifically say you can't do it.

The Court: I agree. Character, isolated, is not evidence of any aggravating factor. But if the character is part of the relationship, that is why this person was loved, that is why the loss of the person stemmed from this offense, then character is not admitted for character by itself, it's irrelevant what the victim's character was.[¶] What is relevant is what the relationship was. If the relationship is because of this character, that's the reason for part of the loss, then it comes in under *Payne* and all other cases.

Ms. Sperber: But character is testimonial evidence. He was a wonderful man, he loved his grandchildren. These photographs are absolute fluff. They are meant to do nothing. You can't speak to these photographs. These are photographs shown to make this man look good, Mr. Chism look bad. This is improper. This is purely being shown to inflame the jury's senses, period.[¶] This man can testify all he wants to how much he misses his, I believe it's his father-in-law, that he loved his grandchildren, that he was a fun man. He liked to go out on outings. But to show the pictures is merely just to make the jury feel incensed. No other reason.

The Court: Mr. Herzstein:

Mr. Herzstein: Yes.[¶] I do remember counsel's argument [from the first penalty phase trial] was how much, his arms out spread, he loved life. How much he wanted to live. And that could be said, but that in itself is what she used these photographs for in her argument. And that was certainly an improper use of it, and it was there for her to use on that basis.[¶] You can talk about -- well, I'll leave it at that.[¶] I'm just adding that her argument was not that this was his character. She made the big thing about how he loved to live. He wanted to live. That can be said about any victim. At that point we're not talking about family, we're talking about the victim. That's every murder. And it is inflammatory.

Ms. Lopez: Your Honor, character is permissible.

The Court: I've heard enough.[¶] Overruled.

(RT 22:4863-4866.)

During Morris's testimony, the trial judge overruled a defense objection to a questions about when Morris commenced living in Moon's household (RT 22:4867-4868) and overruled a defense motion to strike Morris's testimony that "[t]he greatest thing [Moon] ever did for me is he knew that my dad had left when I was younger" (RT 22:4868-4869). Morris described in depth the different photographs on Exhibit 52, including many family members not testifying at trial. (RT 22:4870-4874.)

Subsequently, Jolene Watson testified that she had know Moon for many years and that he was her son's grandfather based on her relationship with Moon's son, Bill. (RT 22:4884, 4888.) When the prosecutor asked Watson to describe Moon's relationship with Bill, the following occurred:

> Ms. Sperber: Your Honor, I think, based on the fact that this woman evidently does not have a current marital relationship with the son of the victim or the adopted son of the victim -- I'm not even sure what that relationship is, and that has nothing to do with it, but I just don't think there is foundation for this evidence.[¶] Their past relationship during the time they might have been dating is immaterial. It's the current relationship at the proximity of his death, and I don't know if there's been a foundation established that this woman has had that kind of contact with her ex to be able to testify to this.[¶] I don't think it's proper. We don't know, you know, what kind of relationship she has with him.[¶] She refers to her -- she refers to the victim as her son's grandfather, but it wasn't clear what her relationship was, how she got -- how the grandfather and her son are related at all.[¶] So it appears to me there's not a real good relationship between her and this person, Bill, and for her to be testifying as to what Bill's relationship was with his father at the time of his death, we don't know if she ever spoke to him during that time. For all we know, they weren't speaking to each other, which is very often the case with exes.
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> The Court: Briefly.
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> Ms. Lopez: I believe that there is sufficient foundation.[¶] I can go in more depth if that's what's necessary, but I believe at this juncture there is sufficient foundation.[¶] This is her child's grandfather. I think common sense tells us it is the child of Bill, the victim's son.[¶] She's observed the relationship. She's known the victim for 18 years. She dated his son for seven years. She has his grandchild. She sees his mother on a daily basis.[¶] She can -- I think she's in a position to testify to the relationship between the two of them when the victim was alive.
>
> Ms. Sperber: Your Honor, that goes to her relationship with the victim and the mother and the child's relationship.[¶] But to say because she's the mother of this man's grandson allows her to testify as to any relationship between the father

> of her child and the victim -- and what I got from listening to her is that Bill might not be a blood son. What's the work (sic) I'm thinking of -- genetic, whatever.[¶] It sounded to me like when she said it's the only father he ever knew, and I believe this is a second marriage, that it might be, you know, a stepfather situation even.[¶] So to say that she dated his son for seven or eight years, therefore she knows what their relationship is --[¶] I've dated people for seven or eight years, maybe only once in my life, but I haven't seen him in 20-plus years. I know what their relationship was with their parents 20 years ago, but I certainly am in no position to say what it is now.
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> The Court: Overruled.[¶] She was the one that called Bill, and she seems to be essentially a family member, although not blood related, so overruled.

(RT 22:4889-4891.)

The prosecutor later sought to make a record of specific questions asked of Morris:

> When I asked the witness Steve Morris about his attitudes towards the crime, I was relying on *People versus Johnson* at 3 Cal.4th, 1183, specifically page 1246, which cites -- which acknowledges the ruling in *Booth* and the *Payne* decision and cites *People versus Mitchum* at 1 Cal.4th 1027 at 1061. And in parenthesis, 'These case assessment of and reaction to the crime from the victim standpoint is highly relevant to consideration of the circumstances of the crime.'[¶] And although I realize that Mr. Morris was not an actual victim, he is peripherally a victim in terms of a person affected by the commission of the crime. That was my basis for asking the question. I was offering it under subdivision (a).

(RT 22:4907-4908.) What the prosecutor went on to present was consistent with her position, but far more extensive and prejudicial than the evidence held admissible in *Payne v. Tennessee*, *supra*.

B. ONLY LIMITED TYPES AND QUANTITIES OF VICTIM IMPACT EVIDENCE ARE PROPERLY ADMITTED AND ARGUED

In *Payne v. Tennessee*, *supra*, the United States Supreme Court stated in its majority opinion:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that *evidence about the victim and about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Id.* at p. 827, emphasis added.)

In so holding, the Court overruled its decisions in *Booth v. Maryland* (1987) 482 U.S. 496, which created a per se bar to victim impact evidence, and *South Carolina v. Gathers* (1989) 490 U.S. 805, which prohibited prosecution argument on the subject.

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. The son survived critical injuries suffered in the attack. The prosecution presented the testimony of the boy's grandmother that the boy missed his mother and sister, then 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." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 816.) The Court warned that there are limits to victim impact evidence and observed that it would violate the Due Process Clause of the Fourteenth Amendment to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Id.* at p. 825.)

In a concurring opinion Justice O'Connor, joined by Justices Kennedy and White, wrote that the absence of any due process violation in *Payne* was established by the distinctly limited quantity of otherwise irrelevant victim impact evidence presented in the case:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." *Ante,* at 2609. 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.
>
> That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony-who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived-only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.

(*Id.* at pp. 831-832 (conc. opn. of O'Connor, J.).) Justice Souter concurred, joined by Justice Kennedy, adding the following warning:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh,* 492 U.S. 302, 319-328, 109 S.Ct. 2934, 2947-2952, 106 L.Ed.2d 256 (1989) (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct.

> 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring)); *Gholson v. Estelle,* 675 F.2d 734, 738 (CA5 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). But this is just as true when the defendant knew of the specific facts as when he was ignorant of their details, and in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. See *Darden v. Wainwright,* 477 U.S. 168, 178-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986) (due process standard of fundamental fairness governs argument of prosecutor at sentencing); *United States v. Serhant,* 740 F.2d 548, 551-552 (CA7 1984) (applying due process to purportedly 'inflammatory' victim impact statements); see also *Lesko v. Lehman,* 925 F.2d 1527, 1545-1547 (CA3 1991); *Coleman v. Saffle,* 869 F.2d 1377, 1394-1396 (CA10 1989), cert. denied,, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 964 1990); *Rushing v. Butler,* 868 F.2d 800, 806-807 (CA5 1989). With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." *Burger v. Kemp,* 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

(*Id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Notably, the only type of victim impact evidence addressed in *Payne* was one witness' evidence describing the impact of the capital crimes on a family member personally present during, and immediately affected by, the capital murders.

Section 1191.1 is consistent with *Payne*. It provides in pertinent part that "[t]he victim, or up to two of the victim's parents or guardians if the victim is a minor, or the next of kin of the victim if the victim has died" may appear and testify "at the sentencing proceeding . . . ." Appellant submits that this same limitation must apply to the penalty phase of a capital trial because the penalty phase is a "sentencing proceeding" and the

statute does not exclude capital trial from its reach.[125] Section 1191.1's description of a singular victim impact witness limits the prosecution to a single victim impact witness at the penalty phase, just as the Illinois Supreme Court interpreted the similar provisions of the Illinois statute in *People v. Hope* (Ill. 1998) 702 N.E.2d 1282. While *People v. Mockel* (1990) 226 Cal.App.3d 581, 585-587, holds that the statute does not limit the number of persons who may send letters to the sentencing court for consideration, letters to a judge in a noncapital case are not comparable with the emotion-laden testimony of victim impact witness before a jury at the penalty phase of a death penalty trial.

Other courts accept similar limitations as necessary to avoid fundamental unfairness. As observed by the New Jersey Supreme Court in *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

In *People v. Hope*, *supra*, 702 N.E.2d 1282, the Illinois Supreme Court interpreted the provisions of The Illinois Rights of Crime Victims Witnesses Act to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime." (*Id.* at p. 1287.)

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[125] Cf., *State v. Hill* (S.C. 1998) 401 S.E.2d 122, 128, which concluded that the South Carolina statute authorizing victim impact statements at sentencing did not limit the scope of victim impact evidence in capital

In *State v. Mosley* (Tex. 1998) 983 S.W.2d 249, the Texas Court of Criminal Appeals called upon trial courts to exercise discretion "in permitting some evidence about the victim's character and the impact on others' lives while limiting the amount and scope of such testimony" (*id.* at p. 262) and cautioned "that victim impact and character evidence may become unfairly prejudicial through sheer volume." (*Id.* at p. 263.)

Similarly, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court held that:

> Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family. Of these types of proof, evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice, particularly if no proof is offered on the other types of victim impact.

(*Id.* at p. 891, internal citations and fn. omitted.)

In Louisiana, the prosecution is permitted to introduce victim impact testimony in the form of general statements describing the victim's qualities, but "detailed descriptions" and "specific examples" are discouraged. (*State v. Taylor* (La. 1996) 669 So.2d 364, 372.) Even family members are limited to general statements describing the impact of the victim's death on their lives and are not permitted to provide "detailed responses" or testify to "particular aspects of their grief . . . ." (*Ibid.*) Noting that the Louisiana statute limits victim impact evidence to the "impact that the death of the victim has had on family members . . . ," the Louisiana Supreme Court has

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cases because the statute expressly "exclude[ed] any crime for which a sentence of death is sought . . . ."

held that no victim impact evidence is admissible concerning neighbors, friends, or other non-family members. (*State v. Frost* (La. 1998) 727 So.2d 417, 429-430; *State v. Wessinger* (La. 1999) 736 So.2d 162.)

United States v. Glover (D.Kan. 1990) 43 F.Supp.2d 1217, 1235-1236, ruled that victim impact witnesses would be limited to presenting "a quick glimpse of the [victim's] life . . . ," including "a general factual profile of the victim, [and] information about the victim's family, employment, education and interests . . . ," it must "be factual, not emotional, and free of inflammatory comments or references." The Court further held that no victim impact witnesses may be permitted to testify "if the witness is unable to control his or her emotions." (*Id.* at p. 1236.)

Some forms of family member testimony have been recognized as unduly prejudicial under the Due Process Clause. "Comments about the victim as a baby, his growing up and his parent's hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; . . . [but] address only the emotional impact of the victim's death . . . [and increases] the risk a defendant will be deprived of Due Process." (*Connor v. State* (Okla.Cr. 1997) 933 P.2d 904, 921.)

In *Cargyle v. State* (Okla.Cr. 1995) 909 P.2d 806, 829-830, the Oklahoma court also held it was error to admit testimony "portraying [the decedent] as a cute child at age four . . ;" and "that he dressed up as Santa Claus, saved the county thousands of dollars by a personal fundraising effort, was a talented athlete and artist, and was thoughtful and considerate to his family . . . ."

One additional restriction necessary to keep the trial fair and avoid offense to the Eighth Amendment is strict prohibition of evidence and arguments encouraging judgment based upon comparison of the goodness of the victim's life and that of the defendant. To argue that a defendant should

be sent to death because his life was of less value than his victim is to ask a jury to decide, not on the character of the crime, not on the consequences of the crime, not on the criminal record of the perpetrator of the crime, but on some unfettered evaluation of human worth.

The Connecticut Supreme Court has condemned the use of victim impact evidence in a comparative worth analysis as inconsistent with a sentencing scheme in which aggravating factors are to be weighed against mitigating factors:

> This improper appeal to emotion was exacerbated by the fact that it was a blatant misstatement of the statutory weighing test. That test required the jury to weigh the aggravating factor proven against any mitigating factor or factors proven. It did not permit the jury to weigh the life of the defendant against the life of the victim.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 420.)

This Court has not articulated similar limits or guidelines on the admission and use of victim impact evidence. It has construed section 190.3, factor (a) ("circumstances of the crime") to permit all that may be permitted under *Payne* (*People v. Fierro* (1991) 1 Cal.4th 173, 235 [majority], 264 (dis. opn. of Kennard, J.)) and has yet to find a violation of federal constitutional limits on the use of victim impact evidence in any California capital case, although many have included evidence more extensive that that passing muster in *Payne*. (See, e.g., *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172.)

C. IMPROPER VICTIM IMPACT EVIDENCE AND ARGUMENT RENDERED THE TRIAL FUNDAMENTALLY UNFAIR AND MANDATES REVERSAL OF THE PENALTY JUDGMENT

The prosecutor put on three victim impact witnesses[126] and effectively demonstrated that Moon was a wonderful human being, living a great life after a hard childhood, and that each witness suffered both severe emotional distress and loss of enjoyment in their own life as a result of Moon's death. In addition, a large photo board with multiple pictures of family members not before the court, centered around a large picture of Moon with arms outstretched, was placed before the jurors.

This presentation was unlike a "quick glimpse of the life" of the victim that might be necessary to keep appellant's mitigating evidence in proper perspective. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.)

The display of Moon's virtues and the value of his life inferentially demanded that the jury base its decision on a comparison of the virtues of Moon and appellant, the value of Moon's life versus the value of appellant's life. The prosecutor exploited that call in her rebuttal argument to the jury; because these were the last words she spoke to the jury, she implied that this was the most important weighing consideration:

> I'm asking you to consider everything. But view Calvin Chism in the context of what he has done in his lifetime, and compare it to those circumstances in aggravation that have been offered to you for your consideration. Then reach an appropriate and truthful verdict.[¶] I, again, ask that you bring back a verdict of death.

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[126] Stephen Morris, Jolene Watson, and Maryann Morris.

(RT 24:5476-5477.) This argument must be read in the context of the remainder of the prosecutor's argument, including her earlier admonition to the jury that one factor in aggravation was sufficient to return a verdict of death. (RT 24:5383.) In other words, because the value of Moon's life was part and parcel of the aggravating factor found in section 190.3, factor (a) -- "The circumstances of the crime of which the defendant was convicted in the present proceeding" -- a comparison of Moon's inherent goodness and appellant's natural evilness was all that the jury required to return a death verdict.

Moreover, the quality and quantity of the victim impact evidence went far beyond that authorized by *Payne v. Tennessee*, *supra*, or by section 1191.1. None of the witnesses stood in the position of the single witness at issue in *Payne* -- a member of the homicide victims' family offering brief comment on the impact of the deaths upon another family member present at the scene of the crime.[127]

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[127] In *Payne*, the defendant killed a woman and her two year old daughter in the presence of the woman's three year old son, Nicholas. Nicholas was stabbed by the defendant, but survived despite serious injuries. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811-813.) At the penalty phase of the trial, the prosecution offered testimony from the woman's mother -- Nicholas's grandmother -- who was asked how Nicholas had been affected by the murder of his mother and sister. The grandmother described, in six short sentences, Nicholas's cries for his mother and expressions of longing for his little sister. (*Id.* at pp. 814-815.)

Here, none of the victim impact witnesses were present when Moon was killed, a detail not overlooked by the prosecutor when she argued that Moon knew his death was imminent "[a]nd his family, the people who loved him, would not be there to comfort him. Were not there to comfort him." (RT 24:5387.)

Similarly, the victim impact witnesses described much more than Moon's uniqueness as a human being and the impact of his death on them. Each witness gave an extended description of his or her long term relationship with Moon. In addition to describing their personal reaction to Moon's death, each witness described the impact on at least one other family member who neither testified nor was present when Moon was killed.

The influence of the victim impact evidence is best demonstrated by the request of the jury, during deliberations, to view the photo board.[128] (CT 4:1039.) Within the course of a short one-day penalty phase deliberation, the jury requested a viewing of the most prejudicial item of evidence available to them because of the sympathy for the victim that it engendered. While the jury was not allowed to see it, the request itself lays bare the raw emotion present in the jury room and the prejudicial effect of the erroneously admitted evidence.

In both its depth and emotionality, the presentation of victim impact evidence was "so unduly prejudicial that it renders the trial fundamentally unfair" and under which "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. [Citation.]" (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) On the facts of this case, the use of highly emotional and prejudicial victim impact evidence, coupled with a

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[128] The photo board was not made available to the jury during deliberations, despite the request. (CT 4:1040.) This suggests that, contrary to

call for comparison between the value of appellant's life and that of his victim, cannot be harmless.

Reversal of appellant's death penalty is mandated.

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its earlier ruling, the trial court recognized the prejudicial nature of this evidence.

XVIII. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT REFUSED TO DELIVER ADDITIONAL INSTRUCTIONS AT THE PENALTY PHASE WHICH WOULD HAVE CLARIFIED THE JURY'S TASK AND GUIDED THEIR INDIVIDUALIZED MORAL ASSESSMENT OF MITIGATING AND AGGRAVATING EVIDENCE

A. INTRODUCTION

Appellant proposed numerous penalty phase jury instructions that would have explained three separate subjects for the jury: First, appellant's proposed instructions would have illuminated critical and frequently misunderstood aspects of "mitigation." Second, appellant's proposed instructions would have guided the jury as it weighed aggravation against mitigation. The trial court refused three of the requested instructions. The trial judge explained that the instructions were overbroad, allowed the jury to consider improper factors, and were adequately covered by the CALJIC pattern instructions. (RT 24:5307, 5312, 5313..) The refusal of these proposed instructions, both alone and in combination, was reversible error.

The trial court's refusal to read appellant's requested instructions violated his right to present a defense because it precluded the jury from giving due weight to appellant's mitigation evidence. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi*, *supra*, 410 U.S. 284.) The trial court denied appellant's right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638), and his right to a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) The error denied appellant his right to a jury which deliberated with a full understanding

of its responsibility for the decision. (U.S. Const., 8th & 14th Amends.; *Caldwell v. Mississippi* (1985) 472 U.S. 320.) The error violated appellant's right to trial by a properly instructed jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145.) Finally, the failure to instruct violated appellant's right to due process by arbitrarily depriving appellant of his state right to the delivery of requested instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346-347; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

This Court has previously rejected arguments similar to the ones appellant presents here. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177; *People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Breaux*, *supra*, 1 Cal.4th at pp. 314-315.) However, appellant urges the Court to reconsider those opinions, particularly in light of recent empirical studies of capital juries repeatedly showing that juries do not understand concepts necessary to perform their function at penalty phase.

B. THE TRIAL COURT ERRED IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS

1. APPELLANT'S REQUESTED JURY INSTRUCTIONS

The trial judge refused defense jury instructions elaborating on the meaning of "mitigation" in a death penalty trial. One refused instruction informed the jury mitigating factors were not limited to those spelled out in CALJIC No. 8.85, that mitigating factors did not have to be proved beyond a reasonable doubt, and that a single mitigating factor was sufficient to

support a vote against the death penalty.[129] (CT 4:917.) The defense proffered an instruction that the jury did not have to agree unanimously on what evidence was mitigating.[130] (CT 4:921.) Another refused instruction advised the jurors that aggravating factors are limited to those set forth in CALJIC No. 8.85.[131] (CT 4:922.) A further instruction refused by the trial

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[129] Proposed Jury Instruction No. 52.16 read:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors.[¶] You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.[¶] A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it.[¶] Any mitigating circumstance presented to you may outweigh all the aggravating factors. You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor.

(CT 4:917.)

[130] Proposed Jury Instruction No. 52:25 read:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation. Each juror must make his own individual assessment of the weight to be given such evidence. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(CT 4:921.)

[131] Proposed Jury Instruction No. 52:26 read:

judge informed that jury that they should assume the penalty they chose will be carried out.[132] (CT 4:925.) Submitted in conjunction with the last instruction were instructions defining life without the possibility of parole[133] (CT 4:927) and advising the jury that they should assume that the death penalty will be imposed[134] (CT 4:928). In addition, the trial judge refused an instruction that there is no requirement for the jurors to vote for

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> The aggravating factors that I have just listed for you may be considered by you, if applicable, and established by the evidence, in determining the penalty you will impose in this case.[¶] These factors that I have listed are the only ones that you may find to be aggravating factors and you cannot take into account any other facts or circumstances as a basis for imposing the penalty of death on the defendant.

(CT 4:922.)

[132] Proposed Jury Instruction No. 52:36 read:

> In determining the penalty to be imposed, you must assume that the penalty that each of you chooses will in fact be carried out.

(CT 4:925.)

[133] Proposed Jury Instruction No. 52:39 read:

> Life without the possibility of parole means exactly what it says - the defendant will be imprisoned for the rest of his life. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(CT 4:927.)

[134] Proposed Jury Instruction No. 52:39.1 read:

> In your deliberations, you must assume that a sentence of death means that the defendant will suffer the ultimate penalty and be executed. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(CT 4:928.)

death.[135] (CT 4:924.) Finally, the defense sought to instruct the jury on the limited role of victim impact evidence.[136] (CT 4:926.)

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT MITIGATION EVIDENCE IS UNLIMITED AND THAT AGGRAVATING EVIDENCE IS LIMITED

Appellant was entitled to have the jury read his proposed instruction informing them that mitigating factors were not limited to those spelled out in CALJIC No. 8.85, that mitigating factors did not have to be proved beyond a reasonable doubt, and that a single mitigating factor was sufficient

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[135] Proposed Jury Instruction No. 52:32 read:

> The law of California does not require that you ever vote to impose the penalty of death. After considering all of the evidence in the case and the instructions given to you by the court, it is entirely up to you to determine whether you are convinced that the death penalty is the appropriate punishment under all of the circumstances of the case.

(CT 4:924.)

[136] Proposed Jury Instruction No. 52:38 read:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.[¶] You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.[¶] You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(CT 4:926.)

to support a vote against the death penalty.[137] (Proposed Jury Instruction No. 52:16.)

The trial court refused to so instruct, stating, "This is too broad and would allow the jury to consider the factors which they are not allowed to.[¶] So I'll not give that." (RT 24:5307.)

Similarly, appellant was entitled to have the jury informed that aggravating evidence is limited to the factors on which the trial judge instructed the jury. (Proposed Jury Instruction No. 52:26.)

The first proposed instruction was a correct statement of the law, taken almost verbatim from an instruction approved by this Court in *People v. Wharton* (1991) 53 Cal.3d 522, 600-601, fn. 23. In approving the instruction, this Court stated:

> Interpreting the instructions as a whole and as would a reasonable juror, we find defendant's proposed interpretation is unreasonable. The entire special instruction, read in context, is clearly favorable to defendant, informing the jury to give him the benefit of any doubt it may have regarding the appropriateness of the death penalty. In short, we find nothing in the instruction preventing the jury from considering a mitigating circumstance no matter how strong or weak the evidence is.

(*Id.* at p. 601; see also *People v. Mayfield*, *supra*, 14 Cal.4th at p. 807 [approving instruction that mitigating factors are unlimited and that mitigating factors listed in the instruction are only examples of possible mitigation]; *People v. Raley* (1992) 2 Cal.4th 870, 918 [same].)

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[137] Portions of this instruction were contained in other jury instructions refused by the trial judge. Proposed Jury Instruction No. 52:13 advised the jury that a single mitigating factor was sufficient to vote against the death penalty. (CT 4:914.) Proposed Jury Instruction No. 52:15 advised the jurors that mitigating factors were not limited and what other considerations could be used in mitigation. (CT 4:916.) Proposed Jury

Studies show that a substantial minority of jurors do not understand that they can consider any factor in mitigation as they deliberate. (Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided* (1995) 70 Ind. L.J. 1161, 1167 [only 59 percent of jurors understood that they could consider any evidence as a mitigating factor]; Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L.Rev. 1, 10 [less than ⅓ of jurors understood that a mitigating circumstance must be proven only to the juror's satisfaction].) In one important study including California jurors who had only been read pattern instructions, it was shown that only ¼ of the jurors understood that they could consider any and all evidence as factors in mitigation. (Bowers & Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. Law Bull. 51, 67-68.)

Similarly, it was error not to instruct the jury that factors in aggravation are limited. The instruction proffered by the defense is a rewording of the instruction approved by this Court in *People v. Beeler* (1995) 9 Cal.4th 953, 996-997.) The language of CALJIC Nos. 8.86 and 8.87 is too narrow because it does not prevent the jury from considering non-criminal aggravating evidence. Therefore, the defendant has a right, upon request, to an instruction that only the factors specified in the statute may be considered in aggravation. (*People v. De Santis* (1992) 2 Cal.4th 1198, 1252-53; *People v. Caro* (1988) 46 Cal.3d 1035, 1065; *People v. Williams* (1988) 45 Cal.3d 1268, 1324; *People v. Hamilton* (1988) 45 Cal.3d 351, 375; see also *People v. Williams*, *supra*, 16 Cal.4th at p. 272 ["It is not clear . . . that *Tuilaepa* undermined *Zant*'s suggestion that states may not, consistent with due process, label 'aggravating' factors 'that actually should militate in fa-

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Instruction No. 52:24 advised the jury that the defendant did not have a burden of proof with regard to mitigating factors. (CT 4:920.)

vor of a lesser penalty, such as perhaps the defendant's mental illness' [Citation]." Hence, appellant's jury should have been instructed upon request to an instruction which specifically informed the jury which factors may be considered as aggravating.

The verdict of a jury which does not understand the broad scope of mitigation and the limited scope of aggravation is constitutionally unacceptable. 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.) The failure to adequately instruct the jury on the scope of mitigation impermissibly foreclosed full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

3. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT APPELLANT NEED NOT PROVE MITIGATION BEYOND A REASONABLE DOUBT AND IT NEED NOT UNANIMOUSLY AGREE THAT EVIDENCE IS MITIGATING

The trial court erred in failing to give appellant's requested instruction that the defense did not need to prove mitigation beyond a reasonable doubt and that the jury not need unanimously agree that evidence was mitigating for any single juror to consider the evidence mitigating. (Proposed Jury Instruction No. 52.25.) Federal constitutional law does not require a defendant unanimously to prove mitigation. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *McKoy v. North Carolina* (1990) 494 U.S. 433.) Under

California law, a defendant need not prove mitigation beyond a reasonable doubt. Yet this Court has held that a defendant is not entitled to an instruction that mitigation need not be unanimously proven beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1077.)

This Court has held that the rationale for a jury not being instructed that a defendant need not prove mitigation beyond a reasonable doubt is that in the absence of a specific instruction, the jury is unlikely to believe that it is bound by the reasonable doubt instruction given during the guilt phase in deciding whether evidence can count in defendant's favor as mitigating. (*People v. Welch* (1999) 20 Cal.4th 701, 767.) However, there is nothing in the pattern instructions that assures a jury will know that a defendant need not prove mitigation beyond a reasonable doubt. Information about the burden of proof in the pattern instruction as it pertains to mitigation is conspicuous by its absence. Instead, the only instruction about the burden of proof the jurors receive is CALJIC No. 8.87, stating that some items at the penalty phase, such as appellant's guilt of prior crimes, must be proved beyond a reasonable doubt.

Studies have shown that this Court's assumption that the jury will not "read over" an instruction about the burden of proof from the guilt phase[138] and from other parts of the penalty phase is false. California capital jurors who have been read the pattern instructions uniformly misunderstand that a defendant does not need to prove mitigation beyond a reasonable doubt. In fact, a substantial minority of California jurors who had been read the pattern instructions assumed just the opposite: that a defendant must prove mitigation beyond a reasonable doubt. (Bowers, Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned*

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[138] Here, the penalty phase jury did not sit through the guilt phase of the trial.

Moral Judgment, or Legal Fiction, America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (Acker, Bohm, Lanier edits., 2003 (2nd Ed.)) p. 438; Bowers & Foglia, *supra*, at p. 68; Eisenberg & Wells, *supra*, at p. 10.)

There are similar problems with the jury's understanding that they need not be unanimous about mitigating circumstances. This Court has held that the pattern instructions considered as a whole do not mislead the jury about unanimity not being required. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 315.) The evidence shows otherwise. A substantial minority of California capital jurors believe that the jury must be unanimously persuaded of a factor in mitigation before the jury may consider the evidence as mitigation. (Bowers, Steiner & Antonio, *supra*, at p. 438; Bowers and Foglia, *supra*, at p. 68; Eisenberg & Wells, *supra*, at p. 10; Diamond & Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions* (1996) 79 Judicature 224, 225.)

The failure to explicitly instruct the jury about the applicable burden of proof thus violates the Constitution. The Eighth Amendment requires that state law define with reasonable specificity the circumstances in which the death penalty is to be imposed. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362-363.) Without appellant's proposed instruction, it was likely that the jury misunderstood "what they must find in order to impose the death penalty." (*Ibid.*) Without appellant's proposed instruction, the penalty phase instructions acted as a barrier to consideration of mitigation evidence, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Lockett v. Ohio*, *supra*, 438 U.S. 586.)

4. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON THE CONCEPT OF "WEIGHING"

The court refused several related instructions explaining the concept of "weighing" aggravation against mitigation. The defense proposed an instruction making clear that the jury need find but one mitigating factor to determine that life without the possibility of parole was the appropriate sentence. (Proposed Jury Instructions No. 52:13 & 52:16.) Another instruction emphasized that a sentence of death was never mandatory. (Proposed Jury Instruction No. 52:32.) Several proposed instructions emphasized the requirement that if the jury found that mitigation outweighed aggravation then it must return a verdict of life in prison without the possibility of parole. (Proposed Jury Instructions No. 52:13, 52:16 & 52:25.)

Appellant's requested instructions were a correct statement of the law and would have told the jury the death penalty is never mandatory and that it always had the discretion to return a verdict of life without the possibility of parole. (See *People v. Duncan* (1991) 53 Cal.3d 955, 978-379 ["our statute . . . give[s] the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.].) This Court has found that instructions informing the jury that it can return a verdict of life, even if it failed to find mitigation, is not required (even upon request) because the instruction is implicit in CALJIC No. 8.88. In *People v. Johnson* (1993) 6 Cal.4th 1, 52, this Court held that by reading what is now CALJIC No. 8.88, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist." Since *Johnson*, the

Court has never revisited the grounds for its holding. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 124 [citing *Johnson* without analysis]; *People v. Anderson* (2001) 25 Cal.4th 543, 600 fn. 20 [same].)

Appellant submits that the Court's analysis in *Johnson* is wrong and must be revisited. Its finding begs the real question, which is whether a reasonable juror would believe that options were restricted in some fashion when considering the appropriate punishment. This question is critical because if the instruction conveyed the impression that the jurors sentencing options were restricted, then appellant has been denied his right to an individualized sentencing determination. As such, the proper question is not whether a juror would assume that death had to be imposed even if there were insubstantial aggravating circumstances, but whether a juror would feel free to return a verdict of life imprisonment without parole in the face of aggravating circumstances and no mitigating circumstances. That is what is implicit in appellant's requested instructions. The pattern instructions do not clearly tell the jury what to do in this situation.

This Court's assumption that jurors understand that the death penalty is not mandatory once aggravation is found is simply false. Far from understanding that life without parole is always an option, even if aggravation is found, a substantial minority of jurors given the pattern instructions believe that once they find any aggravation at all, the death penalty is required. (Bentele & Bowers, *supra*, 66 Brook.L.Rev. at pp. 1031-1041 (2001); Bowers, Steiner & Antonio, *supra*, at p. 440 [presence of an aggravating factor, which should merely make a defendant eligible for a death sentence, operates as a mandate for the death penalty]; see also Eisenberg & Wells, *supra*, at p. 2; Clarifying Life and Death Matters, *supra*, at p. 582.)

This Court has maintained that language describing aggravation as "so substantial" in comparison with mitigation conveys to a jury that it may choose life without the possibility of parole even when aggravation out-

weighs mitigation. (*People v. Boyette* (2002) 29 Cal.4th 381, 465.) In reality, studies demonstrate that the instruction is "too vague and nonspecific to be applied evenly by a jury" (see *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 392[139] [holding term "substantial" history of conviction unconstitutionally vague]) and fails to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.) The words "so substantial" are too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Such words certainly do not inherently assure that jurors will understand that they are not required to impose death.

Without the aid of appellant's requested instructions, the jurors were not able to fully engage in the type of individualized consideration the Eighth Amendment requires in a capital case (*Zant v. Stephens*, *supra*, 462 U.S. 862, 879) and created the risk that the death penalty would be imposed in spite of factors calling for a less severe sentence. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Instruction without appellant's proposed modifications also made the penalty determination unreliable (U.S. Const., 8th & 14th Amends.)

5. THE TRIAL COURT ERRED IN REFUSING TO GIVE REQUESTED INSTRUCTIONS THAT THE DEATH PENALTY MUST BE "APPROPRIATE," NOT MERELY WARRANTED

Appellant requested an instruction informing the jury that in order to return a verdict of death the jury must find that death was "appropriate."

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[139] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

(Proposed Jury Instruction No. 52:32.) Indeed, the ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1037.) This Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *People v. Champion* (1995) 9 Cal.4th 879, 948.)

The determination that the death penalty is warranted is not the same as whether it is appropriate. When the jury finds a special circumstance, it effectively has found that the death penalty is warranted and that the death penalty is a possible punishment for the crime. (See Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 1328 ["warrant" defined as "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something].) However, death penalty jurisprudence demands that a death sentence be based on the conclusion that death is the appropriate punishment, not merely that the punishment is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense: it must be appropriate. A death penalty frequently may be warranted, yet not be appropriate.

This Court has wrongly assumed that the pattern instructions adequately communicate to the jury that a death sentence is not appropriate for all defendants for whom a death penalty is warranted. However, the evidence shows that a substantial minority of jurors who have been read the pattern instructions believe that they are required to sentence the defendant to death once they have found aggravation. (Bentele & Bowers, *supra,* at pp. 1031-1041; Bowers, Steiner & Antonio, *supra*, at p. 440.) Many jurors

who have been instructed with the pattern instructions do not understand their duty and do not wait for evidence in the penalty phase about whether the death penalty is appropriate in light of all the additional mitigation and aggravation, but rather have decided at the end of the guilt and special circumstance phase that the sentence is death. (Bowers, Steiner & Antonio, *supra*, at p. 427 ["Many jurors appear not to wait for the penalty phase and arguments regarding the appropriate punishment . . ."].) Such jurors are deciding for death without having even been exposed to, much less considered, mitigating evidence. (*Id.* at p. 428.) Again, the failure of the trial court to give the instructions requested by the defendant denied appellant his rights to a reliable penalty determination by a jury which deliberated with an accurate understanding of its responsibility to give full consideration to his mitigation evidence in reaching its verdict. (U.S. Const., 6th, 8th & 14th Amends.)

6. THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTIONS PROPERLY DEFINING THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant requested that the jury be instructed with Proposed Jury Instructions No. 52:36, 52:39 and 52:39.1 advising them that sentence of life without the possibility of parole means that someone will be imprisoned for the remainder of their life, that a death sentence means that some will be executed, and that they must assume that the penalty imposed will be carried out. The trial judge refused to so instruct the jury. (RT 24:5312-5313.) No other instructions given at the penalty phase informed the jurors that a sentence of life without the possibility of parole meant that appellant would never be paroled or that they should assume the penalty imposed would be carried out.

The failure to so instruct the jury violated due process by failing to inform the jury accurately of the meaning of the sentencing options, thereby violating appellant's right to a properly instructed jury. (U.S. Const., 6th & 14th Amends; Cal. Const, art. I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. at p. 302; *People v. Sedeno* (1974) 10 Cal.3d 703, 720.) The trial court's refusal to provide the jury with the proposed instructions violated appellant's right to present a defense (U.S. Const., 6th & 14th Amends.; Cal. Const., art I, §§ 7 &15; *California v. Trombetta*, *supra*, 467 U.S. at p. 485; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303), his right to a fair and reliable penalty determination (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638), and his right to a fundamentally fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Estelle v. Williams*, *supra*, 425 U.S. at p. 503). The error also violated federal due process by arbitrarily depriving appellant of his state-created right to instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Fetterly v. Paskett*, *supra*, 997 F.2d at p. 1300.)

By failing to define the meaning of a sentence of life without the possibility of parole, it is likely that the jurors, out of concern that appellant might be released, did not properly consider appellant's mitigating evidence or whether death was appropriate in light of such evidence. This concern was magnified because the prosecutor focused significantly on appellant's other criminal activities during argument to the jury, implying that appellant would continue on this path if he was ever released. Thus, the trial court's refusal to give the proposed instructions prevented the jury from giving effect to appellant's mitigating evidence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Although this Court has rejected this argument (see, e.g., *People v. Wilson* (2005) 36 Cal.4th 309,

355; *People v. Gordon* (1990) 50 Cal.3d 1223, 1277), appellant respectfully requests that this Court reconsider its decisions in light of rulings on this issue by the United States Supreme Court.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 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 ineligible for parole. The plurality relied upon public opinion and juror surveys to support the common sense notion that jurors are confused about the meaning of the term "life sentence." (*Id.* at pp. 168-170 & fn. 9.)

The opinion in *Simmons* has been reaffirmed by the United States Supreme Court. In *Shafer v. South Carolina* (2001) 532 U.S. 36, 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. 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 failure to give an instruction defining life without the possibility of parole in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. 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." (*Id.* at p. 256.)

In this case, just as in *Kelly* and *Shafer*, there was an inference of future dangerousness sufficient to warrant instruction on parole ineligibility. In *Kelly v. South Carolina*, *supra*, 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. (*Id.* at p. 254, fn. omitted.) The Court found that future dangerousness was a logical inference from the evidence and injected into the case through the prosecutor's closing argument. (*Id.* at pp. 250-251; see also *Shafer v. south Carolina*, *supra*, 532 U.S. at pp. 54-55; *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 165, 171.) As Justice Rehnquist stated 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." (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 261 (dis. opn. of Rehnquist, J.); see also *Bronshtein v. Horn* (3rd Cir. 2005) 404 F.3d 700, 716-717.) That criteria was met in this case.

The evidence introduced by the prosecutor, as well as the prosecutor's argument to the jury, placed future dangerousness at issue. The prosecutor introduced as aggravation evidence of violent criminal activity by appellant. As the United States Supreme Court has recognized, evidence of past criminal conduct may be indicative of future dangerousness. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 5.) Apart from the argument that appellant deserved the death penalty because of his nature and past conduct, the prosecutor argued that appellant had a proclivity for committing crimes for the thrill of it and without regard for the safety of others. (RT 24:5385-5386, 5391, 5395, 5397, 5400.)

The message from the prosecutor's argument is that appellant needed to be stopped or he would commit serious harm again and, there-

fore, should be sent to death. In light of the evidence presented and the prosecutor's argument, the *Simmons* instruction was required in this case.

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 the possibility of parole. (See, e.g., *People v. Wilson*, *supra*, 36 Cal.4th at p. 355; *People v. Arias*, *supra*, 13 Cal.4th at pp. 172-174.) This holding is erroneous and must be reconsidered. There is simply no evidence that juries accurately understand the meaning of life without the possibility of parole. Instead, empirical evidence establishes widespread confusion about the meaning of such a sentence in California.

One study conducted prior to appellant's trial revealed that, among a cross-section of 330 death-qualified potential venire persons in Sacramento County, 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, pp. 42-45.) In another study, also prior to appellant's trial, 68.2% of those surveyed believed that persons sentenced to life without the 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, pp. 43, 45.) 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 the possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death jurors cited as one of their reasons for returning a death verdict the belief that the sentence of life without the possibility of parole does not really mean that the defendant will never be released. (Haney, Sontag & Costanzo, *Deciding to Take a Life: Capital*

Juries, Sentencing Instructions, and the Jurisprudence of Death (1995) 50 J. Soc. Issues 149, 166; see also Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L. Rev. 605, 643-671; *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 168.) There is nothing to indicate that these views among jurors have changed or that appellant's jurors held different views. The information given California jurors is not significantly different from that found to be deficient by the United States Supreme Court.

The jurors determining the penalty to impose on appellant were instructed that the sentencing alternative to death is life without the possibility of parole, but they were never informed that life without the possibility of parole means that appellant would never be released. In addition, the argument of defense counsel in this case that life without the possibility of parole means just (RT 24:5440) that does not change the outcome of the case. In *Kelly v. South Carolina*, *supra*, counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. In that case, the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 257.)

In *Shafer v. South Carolina*, *supra*, defense counsel similarly 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 v. South Carolina*, *supra*, 532 U.S. at p. 52.) Nonetheless, the United States Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.) In *Simmons v. South Carolina*, *supra*, 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 v. South Carolina*, *supra*, 512 U.S. at p. 170.)

In this case, instructions merely stating that the sentencing alternative to death was life without the possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole. (CALJIC Nos. 8.84, 8.88; contra, CALCRIM No. 766 ["In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole will be carried out."].) The core principle from *Simmons v. South Carolina*, *supra*, is that the Constitution will not permit a false perception, whether brought about as a result of inadequate instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. Since California's instructions do nothing to dispel the usual misconception about the sentence of life without the possibility of parole, a clarifying instruction such as those proposed by the defense here must be given.

The inadequate instruction in this case also violated the principles of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, as interpreted in *Darden v. Wainwright*, *supra*, 277 U.S. at p. 183, fn. 15, because the instructions taken as a whole "[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 adequate instructional guidance on the meaning of life without parole, the jurors undoubtedly deliberated under the mistaken, but common misperception, that the choice they were asked to make was between death and a limited period of incarceration. (See *Simmons v. South Carolina*, *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.

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

Defense counsel requested that the trial court instruct the jury on the proper use of extensive victim impact evidence introduced by the prosecutor in the penalty phase retrial. (Proposed Jury Instruction No. 52:38.) The trial judge denied the request. (RT 24:5313.) Doing so was error.

"Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 441.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use and admonish the jury against its misuse. (*Cargle v. State* (Okla. Crim. App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required cautionary instruction varies in each state, depending on the role victim impact evidence plays in that state's statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered and an admonition not to base a decision on emotion or the consideration of improper factors such as an emotional response to the evidence. (See *Commonwealth*

v. Means supra, 773 A.2d at p. 159; *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)

In *People v. Ochoa* (2001) 26 Cal.4th 398, 455, this Court addressed a very similar proposed limiting instruction and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1,[140] which was also given in this case.

Appellant respectfully urges this Court to reconsider the decision in *Ochoa* because CALJIC No. 8.84.1 does not caution the jury against an irrational decision premised on victim impact evidence. CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce in a jury uninstructed on the subject. The instruction does nothing to guard against jurors' tendency to base their decision on anger or sorrow rather than on objective facts related to the defendant's individual culpability and characteristics and determination of the appropriate sentence. They would not recognize those entirely natural emotions as being forbidden by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

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[140] CALJIC No. 8.84.1 reads, in relevant part:

> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise you discretion conscientiously, and reach a just verdict.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction appellant proposed at trial would have conveyed that message to the jury; none of the other instructions given at trial did so. Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's penalty decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

C. PREJUDICE

Had the jury been properly instructed, 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, 536.) The violations of appellant's federal constitutional rights require reversal unless respondent can demonstrate that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 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. Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde* v. *California* (1990) 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

Reversal of appellant's death penalty is mandated.

XIX. THE CUMULATIVE EFFECT OF THE ERRORS IN THE PENALTY PHASE RETRIAL WAS PREJUDICIAL AND REQUIRES REVERSAL OF THE VERDICT OF DEATH

In Argument XI, *ante*, appellant has set forth authority for the principle that even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal of the guilt phase.[141] The discussion of each individual error identifies the way in which the error prejudiced appellant and requires reversal of the death judgment.

This Court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without the possibility of parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt* (1984) 37 Cal.3d 436.) Moreover, "the death penalty is qualitatively different from all other punishments and . . . the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon*, *supra*, 160 F.3d at p. 585 (citing *Ford v. Wainwright, supra*, 477 U.S. 399 at p. 411; *Zant v. Stephens*, *supra*, 462 U.S. 862, 885.)

Appellant has shown that the following individual errors occurred during the penalty phase retrial:

- Admission of an out-of-court statement made by Steven Miller, who did not testify, to Officer Romero describing the perpetrators as they departed Eddie's Liquor Store immediately after the shooting, used to identify appellant and to connect the van to the killing.
- Admission of a letter written by Iris Johnston to appellant in which she broadly accused him of committing the crime at Eddie's Liquor

Store as the basis of an adoptive admission premised on appellant's failure to reply, coupled with the failure to preserve a letter that was presumably appellant's reply.

- Admission of two enhanced still photographs taken from the videotape at Eddie's Liquor Store showing the heads of the two perpetrators not shown in the original videotape and the other still photographs made from it.
- Exclusion of a statement made by appellant to Marcia Johnson that he only shot the clerk in Eddie's Liquor Store after the man went for a gun.
- Permitting excessive and improper victim impact evidence from three witnesses, including a poster board containing numerous improper photographs.
- Failure to instruct the jury on the appropriate use of victim impact evidence.
- Failure to instruct the jury that mitigation evidence is unlimited and that aggravating evidence is limited; that appellant need not prove mitigation beyond a reasonable doubt and that it need not unanimously agree that evidence is mitigating; on the concept of "weighing;" that the death penalty must be "appropriate" and not merely warranted; and to properly define the meaning of life without the possibility of parole.

As previously noted, this was not a case lacking mitigation. There was powerful evidence about appellant's troubled background and his efforts to improve himself. Appellant was born when his mother was 13 years old and was the first of six children. Appellant's mother was drug

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[141] Appellant hereby incorporates Argument XI, *ante*, at this point.

addicted and lost custody of appellant at an early age because she was selling cocaine out of her home. Through appellant's youth, she was in-and-out of prison. Appellant was twice sexually abused before he was 10 years old. When appellant was 10 years old, his father was killed in an act of violence and appellant had to identify the body. Through no fault of his own, appellant spent his youth bouncing between McClaren Hall and the homes of his grandparents. Not surprisingly, appellant began abusing drugs and alcohol when he was 11 years old. Despite his unstable, violent and traumatic upbringing, appellant was greatly influenced by religion and learned to inspire others. While held in the California Youth Authority, appellant's religious activities helped to reduce the level of violence in the institution and he had a vey positive impact on others. Thus, the defense at the penalty trial was premised on lingering doubt about the guilt finding on the capital crime, and a request for mercy and sympathy.

The prosecution presented several aggravating factors: (1) a high school incident in which appellant allegedly fired a gun at another person, though no one actually saw a gun; (2) an armed robbery by appellant and his cohorts one month later in which, according to appellant, the victim was shot accidentally and in which appellant threatened a bystander that pursued him during his escape; (3) an armed robbery of a market by a group including appellant, who was not armed, but who stole the proprietor's gun during the robbery; and (4) the facts and circumstances surrounding the capital crime, including victim impact evidence. Nevertheless, the first penalty phase jury deadlocked on the determination of sentence following a trial in which the evidence was largely identical, indicative of that jury's analysis of the close case presented by both sides. (See *People v. Brooks*, *supra*, 88 Cal.App.3d at p. 188; *People v. Ozuna*, *supra*, 213 Cal.App.2d at p. 342.)

Given this factual context, the errors in appellant's second penalty trial substantially and adversely impacted appellant's mitigating evidence. Numerous evidentiary errors acted to negate evidence of lingering doubt regarding appellant's role in the capital crime. Steven Miller's statement to Officer Romero served to identify appellant as a participant, as did the two improperly-admitted enhanced still photographs. The improper admission of Iris Johnston's letter, based on an unproven failure to reply, acted as appellant's confession to the crime.

The substantial and powerful victim impact evidence had two effects on the jurors -- effects demonstrated by the jurors' request during deliberations to view the poster board containing the victim impact photographs. First, it acted to eliminate the mitigating factors of sympathy and mercy because it gave the appearance that appellant killed an exemplary human being without reason. Secondly, it bolstered the aggravating factor of the circumstances surrounding the capital crime by improperly placing the jurors' passions and sympathy for the victim into the weighing equation.

Marcia Johnson's statement that appellant told her he only shot the clerk after he went for a gun would have supported appellant's appeal for sympathy and mercy because it showed him to be less culpable in Moon's shooting and to warrant a sentence less than death. Exclusion of the statement effectively negated this evidence and removed it from the jury's consideration in determining sentence. In addition, exclusion allowed the prosecutor to unfairly and deceptively characterize the shooting as a "thrill" killing, an argument that would have been refuted and made far less persuasive by admission of the statement.

Skewing the scales of justice in favor of death creates a constitutionally-impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) All of the errors pled here did so individually. Cumulatively,

the errors multiplied the harm, vitiating the mitigating evidence and magnifying the aggravating evidence, creating an atmosphere in which only a death verdict could be rendered.

And, if the errors did not already render the verdict predestined, the failure to properly instruct the jury regarding multiple legal issues critical to its penalty determination virtually assured that appellant would be sentenced to death. Under these circumstances, the verdict was far from reliable.

The events at appellant's trial were contrary to the established principle that the right to a fair trial includes the right to be judged on one's "personal guilt" and "individual culpability." (*United States v. Haupt* (7th Cir. 1943) 136 F.2d 661, cited in *People v. Massie* (1967) 66 Cal.2d 899, 917, fn. 20.) The errors cited violated the Eighth and Fourteenth Amendment requirements of an individualized capital sentencing determination. (See *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

Moreover, respondent will be unable to demonstrate beyond a reasonable doubt that a different result would not have been obtained absent the numerous and compounded errors. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

As a result of these errors, appellant was denied a fair trial, the verdicts are inherently unreliable, and reversal of the death penalty is required.

XX. APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY-MURDER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Appellant was subject to the death penalty under the robbery-murder special circumstance, the sole fact making him death-eligible. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. The lack of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment. To the extent that death eligibility in this case is premised on the robbery felony-murder special circumstance allegation, it must be reversed.

A. CALIFORNIA AUTHORIZES THE IMPOSITION OF THE DEATH PENALTY WHEN A PERSON KILLS DURING AN ATTEMPTED FELONY WITHOUT REGARD TO HIS OR HER STATE OF MIND AT THE TIME OF THE KILLING

Appellant was found to be death-eligible solely because he was convicted of committing an attempted robbery and killing during the robbery attempt. (See §§ 189, 190.2, subd. (a)(17)(i).) Normally, to obtain a murder conviction, the prosecution must prove that the defendant had the subjective mental state of malice. In the case of a killing committed during an attempted robbery, or, indeed, during any attempted felony listed in section 189, the prosecution can convict a defendant of first degree felony-murder without proof of any mens rea connected to the murder.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premedi-

> tated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon* (1983) 34 Cal.3d 441, 477.) This rule is reflected in the standard jury instruction for felony murder:

> The unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of _____] is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(CALJIC No. 8.21, italics added.)

Under California law, this strict rule of culpability applies not only to the question of guilt, but to the question of death eligibility as well. A defendant who is the actual killer in a felony-murder is eligible for death even if the state does not prove that the defendant had any distinct *mens rea* as to the killing. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936 [rejecting defendant's argument that there had to be a finding that actual killer intended to kill the victim or, at a minimum, acted with reckless indifference to human life]; *People v. Earp* (1999) 20 Cal.4th 826, 905, fn. 15 [rejecting defendant's argument that the felony-murder special circumstance could not be applied to one who killed accidentally]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264 [rejecting defendant's argument that to prove a felony-murder special circumstance, the prosecution was required to prove malice].) Except in one rarely-occurring situation,[142] under this

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[142] See *People v. Green* (1980) 27 Cal.3d 1, 61-62 (robbery-murder special circumstance does not apply if the robbery was only incidental to the murder.

Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a robbery felony-murder, the defendant also is death-eligible under the robbery-murder special circumstance.[143] (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony-murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)[144]

The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where this Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*Id.* at p. 1147.) The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of Broussard, J.).)

In this case, there was no evidence of what occurred inside Eddie's Liquor Store beyond the fact of the shooting of Richard Moon. In urging the jury to convict appellant of first degree murder under the felony murder rule, the prosecutor argued:

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[143] As a result of the erroneous decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson* (1987) 43 Cal.3d 1104, this Court has required proof of the defendant's intent to kill as an element of the felony-murder special circumstance with regard to felony-murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

[144] The robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied mal-

> The felony murder rule is what I like to say is a no fault insurance plan that the Legislature has taken out on each one of its citizens, and under that plan, what the Legislature has said, what the law says is, Mr. Robber, you embark on a robbery, you attempt to rob somebody, we don't care whether or not at the point you killed it was intentional, we don't care if it's unintentional, we don't even care if it's accidental, if a person dies during the commission of a robbery or an attempted robbery, we say it's murder in the first degree.¶ We don't assess fault or blame. We don't engage in the decision as to whether or not this was intentional, unintentional or accidental.¶ A person dies during the commission of an attempted robbery, that is automatically murder in the first degree.¶ You are -- your victim's insurer.¶ If you victim dies, you are guilty of murder in the first degree, and it goes further than that.¶ It says, Mr. Aider and Abettor, not only will the actual killer be the insurer of your victim's life, but you, too, must ensure the continuing life and safety of your victim.¶ Because if anyone killed, any one of the confederates, anyone who is participating in this robbery kills, every person who either directly, indirectly or as an aider and abettor participated in that robbery is guilty of murder in the first degree.¶ And we're not going to set out to decide whether or not it's intentional, unintentional or accidental, we don't even care which one of you pulled the trigger.

(RT 10:2085-2086.) Addressing the robbery-murder special circumstance, the prosecutor emphasized that appellant's status as the actual killer proved the special circumstance. (RT 10:2086-2087.) The jury was instructed pursuant to the standard felony-murder instruction CALJIC No. 8.21 set forth above. (CT 3:699.)

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ice murders, so-called "provocative act" murders. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

B. THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT'S PROPORTIONALITY REQUIREMENT AND INTERNATIONAL LAW BECAUSE IT PERMITS IMPOSITION OF THE DEATH PENALTY WITHOUT PROOF THAT THE DEFENDANT HAD A CULPABLE MENS REA AS TO THE KILLING

In a series of cases beginning with *Gregg v. Georgia* (1976) 428 U.S. 153, the United States Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty disproportionate for defendant under 18 years old].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183.)

The Supreme Court addressed the proportionality of the death penalty for unintended felony-murders in *Enmund v. Florida*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred imposition of the death penalty on the getaway driver to an armed robbery-murder because he did not take life,

attempt to take life, or intend to take life. (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. The majority held that it was not and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison v. Arizona*, *supra*, 481 U.S. at pp. 158.) The Court explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all–the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.) In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, the majority eschewed any distinction between actual killers and accomplices. It was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill

in the case of accomplices (*id.* at pp. 168-179 (dis. opn. of Brennan, J.), but that argument was rejected by the majority.

That *Tison* established a minimum *mens rea* for actual killers as well as accomplices was confirmed in *Hopkins v. Reeves* (1998) 524 U.S. 88. In that case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, *so long as their requirement is satisfied at some point thereafter.*

(*Id.* at p. 99, citations and fns. omitted, italics added; see also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) [an accidental homicide, like the one in *Furman v. Georgia* (1972) 408 U.S. 238, may no longer support a death sentence].)

Every lower federal court to consider the issue -- both before and after *Hopkins v. Reeves* -- has read *Tison* to establish a minimum *mens rea* applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn. 9; see also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.)

The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving v. Hart*, *supra*, 47 M.J. at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of in-

tent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins v. Virginia*, *supra*, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312.) Of the 36 death penalty states,[145] there are at most five states -- California Florida, Georgia, Maryland and Mississippi -- where a defendant may be death-eligible for felony-murder *simpliciter*.[146] That at least 45 states (31 death penalty states and 14 non-death penalty states) and the federal government[147] reject felony-murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative

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[145] The 14 states without the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. In addition, the District of Columbia lacks the death penalty.

[146] In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1319, fn. 201 (1997), the authors list seven states other than California as authorizing the death penalty for felony-murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), and North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665), now require a showing of some mens rea in addition to the felony-murder in order to make a defendant death-eligible. The position of Mississippi is not altogether clear because its supreme court recently stated that "to the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty, pursuant to *Enmund v. Florida*, 458 U.S. 782, 796 (1982)." (*West v. State* (Miss. 1998) 725 So.2d 872, 895.) And the Nevada Supreme Court has recently invalidated felony-murder *simpliciter* as a basis for death eligibility. (*McConnell v. State* (Nev. 2004) 102 P.3d 606, 624.)

[147] See 18 U.S.C. § 3591, subd. (a)(2).

judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-799, quoting *Coker v. Georgia*, *supra*, 433 U.S. at p. 592.) With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared.

(*Tison v. Arizona*, *supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-99; accord, *Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for robbery-murder *simpliciter* clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for robbery-murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." Here, the felony-murder special circumstance instructions given to the jury permitted it to find appellant death-eligible without making any finding at all as to whether he harbored a culpable mental state as to the killing. Accordingly, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and appellant's death sentence must be set aside.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6;[148] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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[148] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

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

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

and freakish" system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction.

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

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

(*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023, citations omitted.)

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

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At this time, the statute contains thirty-three special circumstances[149] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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[149] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon*, *supra*, 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[150]

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[150] In a habeas petition to be filed after the completion of appellate briefing, appellant intends to present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia*

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

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[151] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[152] or having had a "hatred of religion,"[153] or threat-

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(1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

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

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

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

ened witnesses after his arrest, or disposed of the victim's body in a manner that precluded its recovery.[154] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v.*

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

Cartwright, *supra*, 486 U.S. at p. 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

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

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

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not

only is inter-case proportionality review not required, it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make -- whether or not to condemn a fellow human to death.

1. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; HIS CONSTITUTIONAL RIGHT TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh

mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 ["*Apprendi*"]; *Ring v. Arizona* (2002) 536 U.S. 584 ["*Ring*"]; *Blakely v. Washington* (2004) 542 U.S. 296 ["*Blakely*"]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] ["*Cunningham*"].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's

conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304, italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham,* 549 U.S. at pp. ___ [127 S.Ct. at pp. 868-871].) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. IN THE WAKE OF *APPRENDI*, *RING*, *BLAKELY*, AND *CUNNINGHAM*, ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a capital defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance -- and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th 1223; see also *People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[155] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (CT 3:819-820 [first penalty trial], CT 4:1025-1026 [second penalty trial]; RT 12:2676-2678 [first penalty trial], 24:5369-5371 [second penalty trial]), "an aggravating factor is *any fact,*

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

condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88, italics added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury.[156] And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[157]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias*, *supra*, 39 Cal.4th at p. 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; *People v. Prieto* (2003) 30

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[156] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[157] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison.

Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

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

The United States Supreme Court explicitly rejected this reasoning in *Cunningham.*[158] In *Cunningham*, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature and concluded they were after a review of the relevant rules of court. (*Id.* at pp. ___ [127 S.Ct. at pp. 862-863) That was the end of the matter: *Black*'s interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Id.* at p. ___ [127 S.Ct. at p. 868].)

(*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (*Brown I*) (1985) 40 Cal.3d 512, 541.)

[158] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.___ [127 S.Ct. at p. 868].)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. ___ [127 S.Ct. at p. 870].)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line".

(*Id.* at p. ___ [127 S.Ct. at p. 869].)

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

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

This holding is simply wrong. As section 190, subd. (a),[159] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 6 [127 S.Ct. at p. 862].)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and the defendant was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected this line of reasoning:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, *supra*, 536 U.S. at p. 586.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of

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

one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subdivision (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, *supra*, 542 U.S. at p. 328, italics in original.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact-finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. WHETHER AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS IS A FACTUAL QUESTION THAT MUST BE RESOLVED BEYOND A REASONABLE DOUBT

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors -- a prerequisite to imposition of the death sentence -- is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State*, *supra*, 59 P.3d 450.)[160]

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[161] As the high court stated in *Ring*, *supra*, 536 U.S. at pp. 589, 609:

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[160] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[161] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sen-*

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

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

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tencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS EXIST AND OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY

a. FACTUAL DETERMINATIONS

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments. (*In re Winship*, *supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amend-

ment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the principle of reliability underlying the Eighth Amendment.

b. IMPOSITION OF LIFE OR DEATH

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

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

In *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude

> that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

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

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge v. California*, *supra*, 524 U.S. 721, the United States Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible

the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Id.* at p. 732, italics added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. CALIFORNIA LAW VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by

this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.)[162] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

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

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can and should be articulated.

The importance of written findings is recognized throughout this country; post-*Furman*[163] state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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[163] *Furman v. Georgia* (1972) 408 U.S. 238.

4. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITION OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 (italics added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have

made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*.[164] The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions[165] and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing.[166] Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly-situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

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[164] See Section 1 of this Argument, *ante*.

[165] See Section 3 of this Argument, *ante*.

[166] See Section 2 of this Argument, *ante*.

5. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant, including possibly shooting at a second person at Gilbert High School and an armed robbery committed in conjunction with other persons at Cypress Park in which the victim resisted, causing the gun held by appellant to discharge, and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation,

such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding nor is such an instruction generally provided for under California's sentencing scheme.

6. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see section 190.3, factors (d) and (g)) and "substantial" (see section 190.3, factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

7. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED ADMINISTRATION OF THE CAPITAL SANCTION.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" -- section 190.3, factors (d), (e), (f), (g), (h), and (j) -- were relevant solely as possible mitigators. (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1184; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating

circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; italics added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.* at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could

be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel*, *supra*, 5 Cal.4th at pp. 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) -- and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 343; *Fetterly v. Paskett*, *supra*, 997 F.2d at p. 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus more than likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State -- as represented by the trial court -- had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it inclined the jury to treat appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black*, *supra*, 503 U.S. at p. 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it

has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *People v. Prieto*, *supra*, 30 Cal.4th 226,[167] as in *People v. Snow*, *supra*, 30 Cal.4th 43,[168] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the curious position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.420, subdivision (e) provides: "The rea-

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[167] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, *supra*, 30 Cal.4th at p. 275.)

[168] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, im-

sons for selecting one of the three authorized prison terms referred to in section 1170(b) must be stated orally on the record."[169]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply.[170] And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided.[171] These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[172] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Fifth, Eighth and Fourteenth Amendments.

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pose one prison sentence rather than another." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3.)

[169] In light of the Supreme Court's decision in *Cunningham*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[170] See Sections C.2 and C.3, *ante*.

[171] See Section C.3, *ante*.

[172] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

(See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" -- as opposed to its use as regular punishment -- is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to

that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes -- as opposed to extraordinary punishment for extraordinary crimes -- is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other countries include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. Article VI, Section 2, of the International Covenant on

Civil and Political Rights limits the death penalty to only "the most serious crimes."[173] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright*, *supra*, 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and the state's use of the death penalty as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[173] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

OTHER SENTENCING ISSUES

XXII. APPELLANTS PRIOR CONVICTION MUST BE STRICKEN AS THE USE OF A JUVENILE ADJUDICATION FOR THREE-STRIKES PURPOSES IS UNCONSTITUTIONAL IN LIGHT OF *APPRENDI v. NEW JERSEY*

In March, 1994, an amended petition[174] was filed pursuant to Welfare and Institution Code section 602, accusing appellant, then 16 years old, of numerous crimes, including assault with a semiautomatic rifle (§ 245, subd. (b)). The petition further alleged that defendant was not "a fit and proper subject to be dealt with under the Juvenile Court." (CT Supplemental III:5-6.) In July, 1994, appellant admitted a violation of section 245, subdivision (b), in juvenile court. (CT Supplemental III:7-8.)

After a court trial, appellant was found to have suffered a priorable juvenile adjudication -- based on his juvenile adjudication -- and that prior conviction was used to double his sentence for the Rite Way robbery[175] pursuant to section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). (CT 4:1096-1100.)

Doing so was error.

Commencing in the 1960s, the United States Supreme Court promised juveniles virtually all of the procedural rights and protections they would have been entitled to if they were adults. (See *In re Gault* (1967) 387 U.S. 1 [fair notice of charges, right to counsel, testimony by sworn witnesses, privilege against self incrimination]; *In re Winship*, *supra*, 397 U.S. 358 [proof beyond a reasonable doubt]; *Breed v. Jones* (1975) 421 U.S. 519 [double jeopardy].) In *McKeiver v. Pennsylvania* (1971) 403 U.S.

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[174] Orange County Superior Court Case No. J-155407.

528, the Court held that "despite disappointments of grave dimensions" the juvenile court system still held the promise of "accomplish[ing] its rehabilitative goals," and that by "imposing the jury trial" requirement in juvenile cases the Court would impede the states' "experimentation" with "new and different ways" to solve "the problems of the young." (*Id.* at p. 547.)

In California, "[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." (Welf. & Inst. Code, § 203.) Consistent with Welfare and Institutions Code section 203, California courts have construed Proposition 8, the Crime Victims' Bill of Rights, as excluding juvenile adjudications from the definition of "any prior conviction of any person in any criminal proceeding, whether adult or juvenile" (Cal. Const., art. I, § 28, subd. (f)) and prohibited their use as enhancements under section 667. (*People v. West* (1984) 154 Cal.App.3d 100.)

The "Three Strikes" law explicitly defines a juvenile adjudication as a prior conviction for enhancement purposes. (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3).) The question raised is whether doing so is constitutionally permissible.

In *Apprendi* v. *New Jersey, supra,* 530 U.S. 466, the United States Supreme Court held that "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." (*Id.* at p. 490.) The exception for the "fact" of a prior conviction reflects the certainty that full procedural safeguards attended the ascertainment of the underlying facts of the crime that gave rise to the conviction.

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[175] Count 3.

Discussing *Almendarez-Torres v. United States* (1998) 523 U.S. 224, a case in which the Court permitted the defendant to be sentenced by reason of a prior conviction to a term higher than that attached to the offense alleged in the indictment, the Court observed:

> Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range.

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 488.)

In *Jones v. United States* (1999) 526 U.S. 227, the United States Supreme Court noted the critical distinction between the fact of a prior conviction and other facts that prompt increased punishment: "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." (*Id.* at p. 249.)

Apprendi and *Jones* teach that where the facts pertaining to a prior offense have already been found true beyond a reasonable doubt by a jury, after a trial safeguarded by prior notice and the other requirements of due process, that offense may serve as a qualifying prior conviction for purposes of a statute that increases the maximum penalty for a new offense by reason of such prior crime, without the necessity for another jury trial on the issue of whether the defendant committed that prior offense or suffered that prior conviction.

The United States Constitution grants the right to trial by an impartial jury "in all criminal prosecutions." (U.S. Const. 6th Amend.) This right is "fundamental to the American scheme of justice" and therefore guaranteed in state criminal prosecutions by the Fourteenth Amendment.

(*Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 148, 149.) The right to a jury trial in criminal prosecutions "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power ... found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." (*Id.* at p. 156.)

In this case, appellant was found after a court trial to have suffered a priorable juvenile adjudication and that prior conviction was used to double his sentence for the Rite Way robbery[176] pursuant to section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). (CT 4:1096-1100.)

The crime of robbery, together with suffering a prior conviction of a serious or violent felony, is a greater offense that includes the elements of the current offense plus the additional elements of the conviction of the prior crime. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483, fn 10 ["facts that expose a defendant to a punishment greater than that otherwise legally prescribed were [historically] by definition 'elements' of a separate legal offense"].) In a criminal prosecution, every element of the crimes charged must be submitted to the jury subject to a standard of proof beyond a reasonable doubt. "It is self-evident . . . that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Together these constitutional commands require that every fact essential to a conviction must be found true by a jury beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 510.)

The exception carved out by *Apprendi* for the fact of a prior conviction is conditioned upon the certainty that the prior conviction itself was the product of a process affected by full constitutional safeguards, including the right to trial by jury. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 488; *Jones v. United States*, *supra*, 526 U.S. at p. 249.) Where all of the elements of the prior offense were previously found in a proceeding safeguarded by the right to jury trial, a second jury trial of those elements is not required by the constitution. Where the condition of a prior jury trial of the additional elements of the current crime is not met, the exception to the constitutional command of trial by jury of every fact essential to the crime (i.e., every fact that causes an increase beyond the otherwise-applicable statutory maximum sentence) does not apply. Because that condition is not met in the case of a juvenile adjudication, the exception is inapplicable and the constitutional command of trial by jury of every fact that gives rise to the increased punishment prohibits using the prior adjudication as a substitute for jury trial of the elements of the alleged prior offense.

In *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, the Ninth Circuit held that a juvenile adjudication is not a prior conviction for *Apprendi* purposes, and is not excepted from *Apprendi*'s rule. (*Id.* at p. 1189.) Specifically the Court stated that the exception for prior convictions is a narrow one "limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt." (*Id.* at p.1194.) The Court observed that "[t]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable

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[176] Count 3.

doubt, and allowing the judge to find the required fact under a lesser standard of proof." (*Id.* at p. 1194, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 496.)

In *People v. Bowden* (2002) 102 Cal.App.4th 387, the Court of Appeal held that the fact that a defendant had no right to a jury trial when he suffered a prior adjudication in juvenile court does not prevent using the prior juvenile adjudication as a strike. (*Id.* at pp. 389-390.) The Court of Appeal followed *People v. Fowler* (1999) 72 Cal.App.4th 581, which stated that "[s]ince a juvenile constitutionally - and reliably (*McKeiver v. Pennsylvania* [(1971) 403 U.S. 528]) - can be adjudicated a delinquent without being afforded a jury trial, there is no constitutional impediment to using that juvenile adjudication to increase a defendant's sentence following a later adult conviction." (*People v. Fowler, supra*, 72 Cal.App.4th at p. 586, quoted in *People v. Bowden, supra*, 102 Cal.App.4th at p. 392.)

However, the constitution does not command a jury trial in juvenile adjudications because juvenile adjudications are not "criminal prosecutions," but rather are determinations of whether a minor requires the rehabilitative guidance of the state (*McKeiver, supra*, 403 U.S. at p. 541), a result "significantly different from and less onerous than a finding of criminal guilt." (*Id.* at p. 540.) Because the result of a juvenile adjudications is less onerous than the result of a criminal trial, the question of whether juries should be provided in those adjudications is within the state's discretion, and the reliability of alternative methods of ensuring truthful outcomes is relevant to the exercise of that discretion. But the trial in the current case was a criminal prosecution and among the facts of the crimes for which petitioner was criminally prosecuted was his former commission of and adjudication for a serious or violent felony. These elements must be tried to a jury beyond a reasonable doubt by reason of the Sixth and Fourteenth Amendments. (*Duncan v. Louisiana, supra,* 391 U.S. at pp. 148, 149;

United States v. Gaudin, supra, 515 U.S. at p. 510; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 478.)

There is a vast difference between proving to a jury that appellant once suffered a juvenile adjudication and proving to a jury, from contested facts, that the defendant actually committed the criminal conduct underlying the juvenile adjudication of delinquency. "It is not the adjudication, but the conduct itself, which is relevant." (*People v. Lucky* (1988) 45 Cal.3d 259, 295, fn. 24.) Accordingly, it is constitutionally impermissible to use a California juvenile adjudication as a priorable strike conviction.

As noted earlier, appellant's juvenile adjudication was the result of an admission in the 1994 juvenile proceeding.

When appellant admitted the facts underlying his juvenile adjudication, the jury played no role in the admission because he lacked the right to a jury trial. When it came time to sentence appellant as an adult for the Rite Way robbery in this case, his sentence fully reflected neither a jury determination of the juvenile adjudication strike nor the voluntary and intelligent waiver of a jury determination. To the extent that appellant's sentence for the Rite Way robbery depended on an admission he made in a proceeding lacking the right to a jury trial, the role of the jury was "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." (*Blakely v. Washington, supra*, 542 U.S. at p. 307, fn. omitted.)

Blakely did not "turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals . . . . There is not one shred of doubt, however, about the Framer's paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power

accomplished by strict division of authority between judge and jury." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 313.) Hence, the use of a juvenile adjudication to enhance appellant's sentence beyond the statutorily-mandated maximum sentence pursuant to the Three Strikes law violates appellant's *Apprendi* rights.[177]

Accordingly, appellant's prior juvenile adjudication found to be a "strike" prior conviction must be stricken.

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[177] The issue presented here is currently before this Court. (*People v. Nguyen*, review granted October 10, 2007, S154847.)

XXIII. THE TRIAL COURT'S IMPOSITION OF UPPER TERM SENTENCES IN COUNTS 2 AND 3, AND THE FIREARM ENHANCEMENTS IN COUNTS 1 AND 3, VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL, PROOF BEYOND A REASONABLE DOUBT AND DUE PROCESS

A. INTRODUCTION

In addition to the sentence of death imposed on Count 1, appellant was sentenced to a consecutive determinate term on the firearm enhancement, imposed pursuant to section 12022.5, subdivision (a)(1), consisting of the upper term of 10 years. The sentence on Count 2 included an upper term sentence for attempted robbery, although the sentence on this count was stayed pursuant to section 654. The consecutive sentence for the Rite Way robbery in Count 3 consisted of the upper term of 5 years, doubled to 10 years because appellant had one prior conviction, pursuant to "Three Strikes," and an upper term of 10 years for the firearm enhancement, imposed pursuant to section 12022.5, subdivision (a)(1). (CT 4:1096-1100; RT 25:5589-5591.)

Imposition of the upper term sentences violated appellant's Fifth, Sixth, and Fourteenth Amendment rights to jury trial, proof beyond a reasonable doubt, and due process as set forth in *Cunningham v. California*, *supra*, 549 U.S. 270 [127 S.Ct. 856], *Blakely v. Washington*, *supra*, 542 U.S. 296, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, because the aggravating factors relied on by the court to impose the upper terms were neither found true by a jury beyond a reasonable doubt nor admitted by appellant.[178]

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[178] Appellant did not forfeit this issue despite a failure to raise it in the trial court. Appellant's sentencing occurred in 2001, well before the

B. PROCEDURAL BACKGROUND

In imposing sentence, the trial judge imposed the penalty of death on Count 1, then stated:

> And as to personal use of a firearm in Penal Code section 12022.5(A) as to Count 1, and the Court does find that the factors in aggravation greatly outweigh those in mitigation. The crimes involved great violence, threat of great bodily injury, indicate viciousness and callousness. Mr. Moon was alone, unarmed, shot in the back.[¶] The case involving Jung Ja Chung, a gun was held to her head. Both victims were particularly vulnerable.[¶] Miss Jung was in an area with no escape route. A gun held to her head by the defendant, she was unarmed, her arms held up, a position of surrender.[¶] The defendant was in a position of leadership, I believe.[¶] He did induce Mr. Johnson to join in the robbery, planning, sophistication[,] professionalism is shown.[¶] He has an entourage that he does recruit to commit the robberies.[¶] A person was sent in to check out the site first.[¶] Each robbery is carried out with a firearm.[¶] Defendant has engaged in violent conduct indicating a threat to society, had been recently paroled.[¶] As to the personal use allegation on Count 1, high term of ten years is imposed.[¶] Count 2, the attempted robbery, the high term of six years. This is the strike having been found true.[¶] Use of a gun allegation, 12022.5(A), high term Count 2 is five years. Term on Count

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decisions in *Blakely* and *Cunningham* referenced in this argument. "We agree with the assessment of a federal court that 'w]ith its clarification of a defendant's Sixth Amendment rights, the *Blakely* court worked a sea change in the body of sentencing law.' (*United States v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, fn. omitted.) The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated the high court's decision in *Blakely*. We conclude that, at least with respect to sentencing proceedings similar to the one here at issue, preceding the *Blakely* decision, a claim of sentencing error premised upon the principles established in *Blakely* and *Cunningham* is not forfeited on appeal by counsel's failure to object at trial." (*People v. Black* (2007) 41 Cal.4th 799, 812.)

> 2 is stayed pursuant to Penal Code section 654 with a permanent stay on the completion imposed on Count 1.[¶] Count 3, the robbery, high term of ten years, plus ten years for the personal use of a firearm.[¶] As to Counts 1 and 3, they are ordered to be served consecutively under Penal Code sections 1170.12(A)(6) and 667(C)(6)

(RT 25:5589-5591.)

C. APPELLANT'S UPPER TERM SENTENCES VIOLATE HIS FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL, PROOF BEYOND A REASONABLE DOUBT, AND DUE PROCESS

In *Blakely v. Washington, supra*, 542 U.S. 296, the United States Supreme Court held that Washington's sentencing scheme, providing for one maximum sentence in the usual case and a higher maximum sentence in cases where the sentencing court finds aggravating factors by a preponderance of the evidence, was unconstitutional. The court reached this conclusion by applying the rule from *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490, that "[o]ther 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." (See *Blakely v. Washington, supra*, 542 U.S. at p. 301.)

The Court explained:

> . . . the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [Citation], and the judge exceeds his proper authority.

(*Blakely v. Washington, supra*, 542 U.S. at pp. 303-304.)

Blakely held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain addi-

tional facts are found, the Sixth Amendment entitles the defendant to a jury determination of those additional facts by the beyond a reasonable doubt standard of proof. It is thus evident that portions of the California Determinate Sentencing Law violate the holding in *Blakely*, because the middle term is the presumptive sentence, and a defendant may not be sentenced to the upper term unless the court determines by a preponderance of the evidence that there are circumstances in aggravation of the crime. (§ 1170; Cal. Rules of Court, rule 4.420.)

In *Cunningham v. California, supra*, 549 U.S. 270 [127 S. Ct. 856], the majority recognized that because an upper term sentence in California requires findings of additional aggravating circumstances beyond the minimum elements of the offense, "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum" for *Apprendi-Blakely* purposes. (*Cunningham v. California, supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868].) "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi's* bright-line rule." (*Ibid.*) "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent. [Fn.]" (*Id.* at p. ___ [127 S.Ct. at p. 871.) *Cunningham* confirmed that the sentencing judge's determination of aggravating factors and his reliance on those factors to impose the upper term violated appellant's constitutional rights to a jury trial and due process.

Here the sentencing court found the following aggravating factors: (1) the crime involved great violence and threat of great bodily injury; (2) the crimes involved viciousness and callousness; (3) appellant was armed with a firearm; (4) the victims were vulnerable; (5) appellant was in a posi-

tion of leadership; (6) appellant's conduct renders him dangerous; and (7) appellant's had recently been paroled.

The only factor on which the jury returned a finding was the personal use of a firearm. However, firearm enhancements were imposed on all counts. A court cannot base an upper term on a fact which is either an element of the underlying offense or which is the basis for an enhancement. (*People v. Black* (2007) 41 Cal.4th 799, 808-809; Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420, subds. (c) & (d).)[179]

Other than the last factor listed above, none of the aggravating factors relied on by the trial court to impose the maximum sentence was the result of a jury verdict or admission by appellant. Indeed, victim vulnerability and danger to society were the specific aggravators alleged in *Cunningham* and found by the United States Supreme Court to mandate jury findings beyond a reasonable doubt. (*Cunningham v. California*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 860-861 & fn. 1].)

Only the last factor is arguably related to recidivism and the United States Supreme Court has not yet applied *Apprendi* to such factors, even when the fact of such prior convictions is used to increase the statutory maximum sentence for an offense. (*Almendarez-Torres v. U.S.*, *supra*, 523

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[179] California Rules of Court, Rule 4.420, subdivisions (c) and (d), states:

> (c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.
>
> (d) A fact that is an element of the crime may not be used to impose the upper term.

U.S. 224.) However, appellant submits that if an exception applies to the *Apprendi/Blakely* rule, it should apply to the actual "fact of a prior conviction," rather than to other recidivist based aggravating factors. In *Apprendi v. New Jersey, supra*, 530 U.S. 466, the high court stated:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as *a narrow exception* to the general rule we recalled at the outset.

(*Id.* at p. 490 [Emphasis added.])

In *People v. Towne* (2008) 44 Cal.4th 63, this Court held that "the aggravating circumstance that a defendant's prior performance on probation or parole was unsatisfactory may be determined by a judge, so long as that determination is based upon the defendant's record of one or more prior convictions." (*Id.* at p. 70.) Appellant seeks reconsideration of the decision in *Towne*, as that conclusion is in direct contravention of express ruling of the United States Supreme Court.

Almost five years after *Apprendi*, in *Shepard v. United States* (2005) 544 U.S. 13, 24, the court stated, "A fact about a prior conviction, . . . is too far removed from the conclusive significance of a prior judicial record, . . . to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." In *Jones v. United States, supra*, 526 U.S. 227, the high court noted the critical distinction between the fact of a prior conviction and other facts that prompt increased punishment. It stated, "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." (*Id.* at p. 249.) Therefore the exception to the *Apprendi/Blakely* rule should apply, if at all,

only to the actual fact of a prior conviction, rather than to other recidivist based sentencing factors.

The arguably recidivism-related factor present in this case falls outside of the *Almendarez-Torres* exception because it goes beyond the mere fact of a prior conviction. First, it is among the enumerated "aggravating circumstances" in California Rules of Court, rule 4.421 (b) "relating to the defendant." These factors consist entirely of conduct-related facts that go beyond the mere fact of status. The rule must be construed accordingly. (See *People v. Gordon* (2001) 90 Cal.App.4th 1409, 1412.)

In *Almendarez-Torres, supra,* the defendant did not make any separate, subsidiary standard of proof claims because he had admitted his recidivism at the time he pleaded guilty. (*Id.* at pp. 247-248.) Therefore, the United States Supreme Court did not consider any issue regarding the standard of proof that might apply to those sentencing determinations. (*Ibid.*) The Due Process Clause of the federal Constitution requires that those facts be found beyond a reasonable doubt. (U.S. Const., 14th Amend.; see *Almendarez-Torres, supra,* 523 U.S. at pp. 247-248.)

Even if prior convictions are deemed different from other facts that might be used at sentencing because a finding of guilt has previously been made beyond a reasonable doubt by a jury -- or by a valid guilty or no contest plea -- and the determination of whether a particular defendant suffered a particular prior conviction usually depends on documentary rather than testimonial evidence, that determination should nonetheless be made by the standard of proof of beyond a reasonable doubt before it can be used as a basis to increase the defendant's current sentence beyond the statutory maximum. (See *Blakely v. Washington*, *supra*, 542 U.S. at p. 301; *Almendarez-Torres*, *supra*, 523 U.S. at pp. 247-248.) In *Almendarez-Torres,* the court acknowledged, but did not consider "whether some heightened standard of proof might apply to sentencing determinations that bear signifi-

cantly on the severity of sentence." (*Id.*, at p. 248.) However, in considering which factfinder -- a judge or jury -- must determine the truth of any facts that are used to increase the sentence beyond the statutory limit, *Blakely* concluded that a "manipulable standard," such as one encompassing only factors that "bear significantly on the severity of sentence," was unworkable for the judiciary. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 306-308.)

By analogy, a manipulable standard for determining when the Due Process Clause requires the higher standard of proof of beyond a reasonable doubt to increase a defendant's sentence beyond the statutory maximum based upon a criminal history is untenable. Just as *Blakely*'s analysis led to the conclusion that, regardless of the magnitude of the increase in the sentence, the jury must always be the factfinder under the Sixth Amendment, similar reasoning leads to the conclusion that the standard of proof for determining past criminal convictions should always be beyond a reasonable doubt under the due process guarantee of the Fourteenth Amendment. (*Ibid.*)

Here, the trial judge imposed an upper term sentence for (1) attempted robbery alleged in Count 2; (2) robbery alleged in Count 3; and (3) firearm enhancements alleged pursuant to section 12022.5, subdivision (a)(1), in all three counts. The presumptive term -- the term which must be imposed absent a jury finding of aggravating factors -- is the middle term in each instance and there was no fact-finding by the jury. Therefore the middle term was the maximum permissible sentence in each instance.

In light of *Blakely*, appellant's upper term sentences are in violation of his federal constitutional rights to a jury trial and to due process. (U. S. Const., 5th, 6th & 14th Amends.)

D. *APPRENDI, BLAKELY* AND *CUNNINGHAM* HAVE BEEN INCORRECTLY INTERPRETED BY THIS COURT

In *People v. Black* (2007) 41 Cal.4th 799 (hereinafter "*Black II*"), this Court held that:

> Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not "legally entitled" to the middle term sentence, and the upper term sentence is the "statutory maximum.

(*Black II, supra*, at p. 813.) *Black II* drew a distinction between "two functions" served by aggravating factors within California's determinate sentencing scheme: first, to raise the maximum sentence from the midterm to the upper term, and second, to "serve as a consideration" in the trial court's discretionary selection among the available terms. This parsing of the sentencing process means the Sixth Amendment attaches to the first function -- the question of non-midterm eligibility -- but not to the second – the process of term selection, within which the court retains wholesale discretion. (*Id.* at pp. 815-816].)

> Accordingly, so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely on any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found true by a jury.

(*Id.* at p. 813, italics in original.)

Appellant submits that *Black II* wrongly decided that the upper term becomes the "statutory maximum" upon the existence of a single aggra-

vating factor such as the fact of a prior conviction, as that conclusion is in direct contravention of the express ruling in *Cunningham*. Further, it is an untenable interpretation of the Determinate Sentencing Law ("DSL") in light of the express wording of section 1170, Rule 4.420 of the California Rules of Court, and a consistently contrary interpretation of the DSL by California courts. (*People v. Scott* (1994) 9 Cal.4th 331, 350; *People v. Hall* (1994) 8 Cal.4th 950, 957-958; *People v. Wright* (1982) 30 Cal.3d 705, 709-710, 720.)

The United States Supreme Court in *Cunningham* held that the middle term in the DSL was the statutory maximum. That statutory maximum can be exceeded, but is not changed. (*Cunningham v. California, supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 873].) Thus, the holding in *Black II* that one constitutional aggravating factor makes the upper term the statutory maximum is in direct conflict with United States Supreme Court authority.

Further, *Black II*'s bifurcation scheme runs counter to the spirit and letter of the DSL and therefore counter to *Blakely*. Parsing the sentencing decision into a two-step analysis vitiates what should be a global process, as the bottom-line determination is whether this particular defendant deserves an aggravated term for this particular offense. This is done by considering whether there are factors in aggravation and whether those factors outweigh any factors in mitigation – the conjunctive is not a second prong in the analysis, but rather the second half of an equation. For only if the answer to both variables is yes, is this defendant then, using *Black II*'s terminology, *eligible* for the aggravated sentence. Contrarily if the answer to the first "function" is yes, and the second no, the defendant is not, as a matter of law, eligible for the upper term. (See §1170, subds. (a), (b); Cal. Rules of Court, rule 4.420, subds. (a) and (b) *People v. Hall, supra,* 8 Cal.4th at pp. 957-958; *People v. Wright*, *supra*, 30 Cal.3d at pp. 709-710, 720.)

It is true that a single factor in aggravation can be sufficient to justify the imposition of the upper term. (See *People v. Osband* (1996) 13 Cal.4th 622, 728.) But this does not mean that any given factor in aggravation will necessarily justify the upper term in any given case. *Black II*'s reliance on *Osband* to support that principle was misplaced.

In *Osband*, this Court held that the trial court improperly used one fact twice, once to impose an upper term and again to impose a full consecutive term under an enhancement statute, in violation of former Rule 441(c) of the California Rules of Court. (*People v. Osband, supra,* 13 Cal.4th at p.728.) This Court held that resentencing was not required, however, as it was not reasonably probable that a more favorable sentence would have been imposed absent the error. (*Ibid.*)

It was in the context of determining whether resentencing was necessary that the court stated that "only a single aggravating factor is required to impose the upper term." (*Ibid.*) The trial court had relied on the viciousness of the crime to impose consecutive sentences. In imposing the upper term, the court had relied on that factor, the additional facts of the victim's vulnerability and the defendant's dangerousness, criminal record, and probationary status. This Court concluded that the dual use of one factor was harmless because the trial court needed only one factor each to impose the upper term and consecutive sentences, respectively, and could have relied on disparate factors to make those sentencing choices; based on the record before it, the Court saw no reasonable probability that the trial court would not have done so. (*Ibid.*) The analysis in *Osband*, however, is not logically equivalent to finding that one aggravating factor is always automatically sufficient to impose the upper term.

Moreover, if sentencing determinations are to now be made serially, this is another sea-change, and as such, this Court cannot assume that the sentencing court below determined eligibility first and only afterwards

chose between available terms, in accordance with *Black II*'s bifurcated analysis. (See, e.g., *People v. Hall, supra*, 8 Cal.4th at pp. 957-958; *People v. Wright, supra*, 30 Cal.3d at pp. 709-710,720; Pen. Code, § 1170; Cal. Rules of Court, rule 4.408 (a); 4.420; see also *Black II, supra*, 41 Cal.4th at p. 816 ["Although the DSL does not distinguish between these two functions . . . ."].) Thus, even if this Court finds one or more of the factors used here constitutional, it should remand for resentencing if it cannot determine beyond a reasonable doubt that the trial court would have imposed the upper term based only on those factors. (See *People v. Jackson* (1987) 196 Cal.App.3d 380, 388-389, overruled on other grounds in *People v. Rodriguez* (1990) 51 Cal.3d 437, 444, fn. 3 [sentencing error not harmless where one of two factors relied on was improper dual use of facts] *People v. Jardine* (1981) 116 Cal.App.3d 907, 923 [resentencing ordered where one of three factors relied on for the upper term was improper dual use], disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 1158, 1167, *People v. Holt, supra*, 37 Cal.3d at pp. 452-453, and *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 33.)

E. THE ERROR WAS NOT HARMLESS

In *Washington v. Recuenco* (2006) 548 U.S. 212, 221-222, the United States Supreme Court held that *Apprendi/Blakely* error is subject to harmless error analysis under *Chapman v. California, supra*, 386 U.S. at p. 24. The *Recuenco* court relied in large part on *Neder v. United States* (1999) 527 U.S. 1, in which the court held that the trial court's failure to instruct the jury on an element of the crime was harmless because the omitted element was uncontested and supported by overwhelming evidence, such that the jury certainly would have found it true beyond a reasonable doubt. (*Neder v. United States, supra*, at pp. 16-17.)

In *People v. Sandoval* (2007) 41 Cal.4th 825, this Court held that the harmless beyond a reasonable doubt standard applies in determining whether unconstitutional judicial fact-finding at sentencing requires resentencing. This Court explained that the reviewing court must determine "whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*Id.* at p. 838.) If it can be determined that the jury would necessarily have found at least one of the aggravating factors to be true, the error is harmless, and there is no inquiry into whether the other aggravating factors for which there was constitutional error, affected the judge's selection of the upper term. (*Id.* at pp. 839.) This Court cautioned that the reviewing court cannot necessarily assume that the record reflects all of the evidence or arguments that would have been presented had the aggravating circumstances been submitted to the jury. (*Ibid.*) Therefore under *Sandoval*, it is difficult for a reviewing court to conclude beyond a reasonable doubt that the jury would have found all the aggravating factors true beyond a reasonable doubt.

Here, under the harmless error analysis, reversal is required because the government cannot show beyond a reasonable doubt that the error did not contribute to the result. (See also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) It cannot be concluded that without the error the decision would have been the same. Although the trial court found that there were numerous aggravating factors and no mitigating factors, a jury considering the evidence of the aggravating factors in appellant's case is likely to have viewed the evidence differently.

The trial court found that the offenses involved great violence and threat of great bodily injury, viciousness and callousness, arming, vulnerable victims, leadership by appellant, appellant's actions were dangerous, and that he had recently been paroled. As noted earlier, arming with a fire-

arm cannot be considered because it is a "dual use" of facts. Moreover, murder and robbery, together with firearm enhancements, necessarily involve great violence, a threat of great bodily injury, danger, and callousness. The trial judge never explained why those actions were more violent, dangerous or callous than any other similar situation. In addition, victims of murder and robbery are uniformly vulnerable. Again, the trial judge never explained why these victims were more so than others. It is unlikely that the jury would have found such aggravating factors to be true beyond a reasonable doubt, because they necessarily were part of the offense committed.

Appellant's behavior on parole was never proven and no admissible evidence to prove this factor was submitted to the court. Instead, in finding this to be an aggravating factor, the court apparently relied on the representations in the probation report. The conclusive statements and chronologies in the probation documents are not tantamount to "proof beyond a reasonable doubt," as they constitute hearsay. Even assuming the statements in the probation report could be proven, appellant's performance on parole is but a minor factor; indeed, appellant already paid a price for violating that parole by his conviction in this case. (RT 25:5587-5588.)

Based on the reasons discussed above, it cannot be determined that a jury would have found at least one of the aggravating factors to be true beyond a reasonable doubt. Accordingly, the error cannot be found to be harmless beyond a reasonable doubt, and appellant's sentence must be vacated.

F. *SANDOVAL*'S RESENTENCING REGIME VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST EX POST FACTO LAWS AND GUARANTEES OF EQUAL PROTECTION

In *People v. Sandoval*, *supra*, 41 Cal.4th 825, this Court adopted the procedures set forth in Senate Bill 40 reforming section 1170, subdivision (b), and in the related amendments to the California Rules of Court. It directed that sentencing proceedings remanded due to *Cunningham* error "are to be conducted in a manner consistent with the amendments to the DSL adopted by the Legislature." (*Id.* at p. 846.) This Court found that doing so did not deny the defendant due process of law, nor did it violate the prohibition against ex post facto laws. (*Id.* at pp. 853-857.) Appellant submits that this approach is wrong as it violates both the prohibitions against both ex post facto laws (U.S. Const., art I, § 9, Cl. 3; Cal. Const., art. I, § 9) and the constitutional guarantees of equal protection (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, §7.)

In *Miller v. Florida* (1987) 482 U.S. 423, the United States Supreme Court explained that to constitute an ex post facto violation, a law must be (1) retrospective, meaning that it applies to events occurring before its enactment, and (2) "it must disadvantage the offender affected by it." (*Id.* at p. 430-431.) The reviewing court must compare the practical operation of the two statutes as applied to a defendant's offense. (*Lindsey v. Washington* (1937) 301 U.S. 397, 399.) The Ex Post Facto Clause looks to the standard of punishment prescribed, rather than to the sentence actually imposed. (*Id.* at p. 401.)

Here, because the application of SB 40 removes mandatory limits on a judge's ability to impose the upper term, *Sandoval* disadvantages appellant at resentencing and violates the ex post facto prohibition. (*Miller v. Florida, supra,* at pp. 432-433, 435-436; *Lindsey v. Washington*, *supra,* at

p. 400.) The violation is the same whether it is the Court or the legislature that imposes the revised procedures. "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354; see also *People v. Martinez* (1999) 20 Cal.4th 225, 238; *People v. Weidert* (1985) 39 Cal.3d 836, 850; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 634-635; *In re Baert* (1988) 205 Cal.App.3d 514, 518.)

Sandoval's application of SB 40 also violates the guarantee of equal protection because persons who are resentenced on appeal after *Sandoval* have their resentencing controlled by SB 40, while persons who were resentenced prior to *Sandoval* are subject to the more favorable treatment of pre-SB 40 DSL and court rules. Because there is no rational basis for the disparate treatment of the two groups of similarly-situated persons, it violates the guarantees of equal protection. (See *People v. Olivas*, *supra*, 17 Cal.3d at p. 248-250; *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.)

Accordingly, this case should be remanded for resentencing under section 1170 and the Rules of Court as they existed at the time the current offense was committed.

XXIV. APPELLANT WAS ERRONEOUSLY DENIED ALL CONDUCT CREDIT BECAUSE THE MURDER HE WAS CONVICTED OF OCCURRED BEFORE THE EFFECTIVE DATE OF PENAL CODE SECTION 2933.2

Appellant was convicted of, among other counts, first degree, special circumstance murder and was sentenced to death. The murder occurred on June 12, 1997. While appellant was correctly awarded 643 days of custody credit, he was improperly denied presentence conduct credit. (CT 4::1096-1100; RT 25:5587-5588, 5592.) Appellant here seeks to correct the award and amend the abstract of judgment to the correct total of 643 days of presentence custody credit and 96 days of custody credits.

"'It is well established that when the trial court pronounces a sentence which is unauthorized by the Penal Code that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the trial court or the reviewing court.'" (*People v. Rivera* (1989) 212 Cal.App.3d 1153, 1163-1164, quoting *People v. Benton* (1979) 100 Cal.App.3d 92, 102; see also *People v. Cabral* (1975) 51 Cal.App.3d 707, 718-719.) If punishment for a crime is increased retroactively, it is violative of both the Ex Post Facto Clause (U.S. Const., Art. I, § 10, cl. 1) and the Due Process Clause (U.S. Const., Fourteenth Amend.). (*Collins v. Youngblood* (1990) 497 U.S. 37, 43.)

Appellant acknowledges that he did not object to imposition of the improper denial of presentence conduct credit. This Court recognizes "the venerable notion that claims involving 'unauthorized,' 'void,' or 'excessive' sentences, and sentences entered in 'excess of jurisdiction,' can be raised at any time." (*People v. Scott*, *supra*, 9 Cal.4th at p. 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstances in the particular case." (*Ibid.*) Accordingly, this

issue has not been waived by appellant and may be raised on appeal in the first instance.

In this instance, the trial court erred in denying appellant all presentence conduct credit. Appellant was convicted of a murder occurring before the effective date of section 2933.2, which prohibits a person convicted of murder from accruing credits as specified in sections 2933 or 4019.

Subdivision (d) of section 2933.2 specifically provides that "[t]his section shall only apply to murder that is committed on or after the date on which this section becomes operative." Because the murder of Richard Moon took place on, June 12, 1997, prior to the date section 2933.2, became operative, appellant is entitled to have an award of 15% conduct credit pursuant to section 2933.1.

Section 2933.2 was added by Statutes 1996, chapter 598, section 3. Section 5 of that statute provided that "[s]ections 2 and 3 of this act shall become operative only if the provisions of Section 1 [amending section 190 of the Penal Code] are adopted by the voters." Section 1 was not submitted to the voters in 1996.

Under the terms of section 3 of Statutes 1997, chapter 413, section 3 of Statutes 1996, chapter 598, would become operative if section 1 of chapter 413 was adopted by the voters. That section was approved by the electorate on June 2, 1998, as part of Proposition 222. Section 2933.2 took effect on June 3, 1998. (See *People v. Cooper* (2002) 27 Cal.4th 38, 40, fn. 2; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1315-1317; *People v. Ly* (2001) 89 Cal.App.4th 44, 46-47.) Hence, any murder committed prior to June 3, 1998, did not subject the person convicted of that crime to the provisions of section 2933.2.

Therefore, section 2933.2 does not bar appellant from receiving conduct credits and the trial court erred in construing it to do so. Appellant submits that this Court order an amended abstract be filed crediting appel-

lant with both the 643 days he was incarcerated before sentencing in this matter as well as the 15% conduct credits in the amount of 96 days to which he was entitled. (*People v. Cooper*, *supra*, 27 Cal.4th at pp. 47-48.)

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Honorable Court reverse his judgment of conviction and sentence of death.

Dated: September 25, 2008.

Respectfully submitted,

MARK D. LENENBERG
Attorney for Appellant
CALVIN DION CHISM

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.630(b)(2)

I certify that this Appellant's Opening Brief contains 132,966 words, including footnotes, but not including this page, attachments, and tables, as counted by Microsoft Word for Windows 2003.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration is executed this September 25, 2008, at Simi Valley, California.

MARK D. LENENBERG
Attorney for Appellant
CALVIN DION CHISM

DECLARATION OF SERVICE BY MAIL

I, MARK D. LENENBERG, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 940327, Simi Valley, California; I served one copy of the attached APPELLANT'S OPENING BRIEF (VOLUMES 1 & 2) on the following, by placing same in an envelope addressed as follows:

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Each envelope was then, on September 25, 2008, sealed and deposited in the United States mail at Simi Valley, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on September 25, 2008, at Simi Valley, California.

MARK D. LENENBERG
Declarant