No. S067394

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN LEO CAPISTRANO,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

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

HONORABLE ANDREW C. KAUFFMAN, JUDGE

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN LEO CAPISTRANO, Defendant and Appellant.	No. S067394 (Los Angeles County Superior Court No. KA 034540)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b).)

INTRODUCTION

"A MILE WIDE AND AN INCH DEEP"

This expression, commonly attributed to Mark Twain, was used to describe the South Platte River – its expanse recalled the mighty Mississippi until it became apparent the South Platte was more like a puddle, since could be crossed without getting the tops of one's boots wet. The prosecution's case against Capistrano for capital homicide is similarly deceptive in appearance. No physical or eyewitness evidence connecting Capistrano to the homicide existed. Nor were any of the items allegedly stolen during the homicide recovered. The capital case against Capistrano depended upon the testimony of one witness, Gladys Santos, whose veracity was hotly contested. The jury did not learn the full extent of factors undercutting Santos's believability because the trial court improperly restricted cross-examination that would have impeached her credibility. In

an explicit effort to buttress the credibility of Santos, the prosecution made disingenuous proffers that led to the erroneous introduction of the confession of joined codefendant Michael Drebert that he had been present when Capistrano allegedly committed the homicide. Further enhancing the facade of a capital case against Capistrano, the trial court allowed the prosecution to portray Capistrano as a "residential robber" and thus a likely suspect in the homicide, by the improper joinder of the capital homicide with an unrelated non-capital crime which Capistrano did not contest, as well as with two other unrelated, contested non-capital cases. Compounding the errors arising from the improper joinder of counts, the jury instructions failed to instruct adequately that evidence of one crime could not be used to find Capistrano guilty of another crime. Given these circumstances, the capital prosecution against Capistrano, as shallow as it was, succeeded. Then, because of patently inadequate death qualification voir dire, Capistrano was then sentenced to death by a a "tribunal organized to return a verdict of death." Reversal is required.

STATEMENT OF THE CASE

A plethora of complaints, amended complaints, informations and amended informations were filed against appellant JOHN LEO CAPISTRANO charging him with having committed offenses against six different people on four separate occasions; the last of these charges filed was capital murder. (4 SUPP CT 1-7, 8-14, 15-19, 20-25, 36-41, 42-51, 101-109, 139-151, 277-288, 318-330, 423-435; 2 CT 368-375, 538-541; 3 CT 659-661, 790-801.) During the course of these filings, Capistrano's prosecution was severed from that of codefendants Eric Anthony Pritchard and Anthony Jason Vera, who were not charged capitally, but not from that

of codefendant Michael Eugene Drebert, who was so charged.[1] (3 CT 762-779.) Additionally, the trial court granted a consolidation motion filed by the state so that all of the offenses alleged, jointly or individually, against Capistrano and Drebert could be joined in one pleading. (*Ibid.*)

By amended information number KA034540, filed on September 25, 1997 – the one upon which the trial was conducted – the Los Angeles County District Attorney charged Capistrano with 16 felony counts and additional special allegations. Drebert was also charged in the same amended information with 5 counts. Count 1 charged Capistrano and Drebert with the December 9, 1996 murder of Koen Witters. (Pen. Code, §§ 187, subd. (a) and 1192.7, subd. (c).) It was also alleged that the murder was committed while the defendants were engaged in the commission of the crimes of robbery and burglary. (Pen. Code, § 190.2, subd. (a)(17).) Counts 2 and 3 charged Capistrano and Drebert with first degree residential burglary and first degree residential robbery of Mr. Witters. (Pen. Code, §§ 459, 211, 1192.7, subd. (c) and 462, subd. (a).) (3 CT 790-792.)[2]

Counts 4 through 5 charged Capistrano with the December 15, 1995 home invasion robbery in concert of Jane Doe and Edward Gonzalez, respectively. (Pen. Code, §§ 211 and 213, subd. (a)(1)(A).) Counts 6

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[1] Amy Lynn Benson, named as a defendant to one of the crimes, that of attempted murder and robbery of Michael Martinez, pleaded guilty as an accessory to that crime on June 6, 1996. (2 CT 204.)

[2] "CT" and "RT" refer to the Clerk's and Reporter's Transcripts on Appeal. "SUPP CT" refers to the Clerk's Supplemental Transcripts on Appeal, which consists of seven sets of materials, one of which is contained in two separate volumes; these are referenced by number of the supplemental transcript, followed by volume (if applicable) and page citation (i.e., 4 SUPP CT 1:245). Augmented Reporter's Transcripts on Appeal are referred to by the date of the hearing, followed by "RT" and the page citation.

through 9 charged Capistrano with two counts each of forcible oral copulation in concert and forcible rape in concert of Jane Doe. (Pen. Code, §§ 288a, subd. (d), 264.1, 261, subd. (a)(2), 262, subd. (a)(2) and 1192.7, subd. (c)(5).) As to Counts 6 through 9, it was further alleged that Capistrano had personally used a firearm, engaged in tying or binding the victim and committed the offenses during the commission of a burglary. (Pen. Code, § 667.61, subds. (a), (b), and (e). (3 CT 793-796.)

Count 10 charged Capistrano with the December 15, 1995 carjacking of Edward Gonzalez. (Pen. Code, §§ 215, subd. (a) and 1192.7, subd. (c).) Count 11 charged Capistrano with an additional count of carjacking on the same date against Jane Doe. (Pen. Code, §§ 215, subd. (a) and 1192.7, subd. (c).) (3 CT 797.)

Counts 12 through 13 charged Capistrano and Drebert with the December 23, 1995 home invasion robbery in concert of Ruth Weir and Patrick Weir. (Pen. Code, §§ 211, 213, subd. (A)(1)(A).) Count 14 charged Capistrano and Drebert with the carjacking of Ruth Weir. (Pen. Code, §§ 215, subd. (a) and 1192.7, subd. (c).) (3 CT 798-800.)

Count 15 charged Capistrano and Drebert with the January 19, 1996 attempted willful, deliberate and premeditated murder of Michael Martinez. (Pen. Code, §§ 664/187, subd. (a) and 1192.7, subd. (c).) Count 16 charged Capistrano and Drebert with home invasion robbery in concert of Mr. Martinez. (Pen. Code, §§ 211, 213, subd. (A)(1)(A)) As to Counts 15 and 16, it was also alleged that Capistrano personally used a deadly and dangerous weapon, a bat, within the meaning of Penal Code section 12022, subdivision (b) (1), making the offense a serious felony within the meaning of Penal Code Section 1192.7, subdivision (c) (23). As to Counts 15 and 16, it was also alleged that Capistrano personally inflicted great bodily injury upon Michael Martinez, within the meaning of Penal Code section

12022.7, subdivision (a), making the offense a serious felony within the meaning of Penal Code Section 1192.7, subdivision (c) (8). (3 CT 800-801.)

As to Counts 4 through 14, it was further alleged that Capistrano had personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a), making the offense a serious felony within the meaning of Penal Code Section 1192.7, subdivision (c) (8). Also as to Counts 4 through 14, it was alleged a principal in each offense was armed with a firearm within the meaning of Penal Code section 12022.5, subdivision (a) (1). (3 CT 799.)

Capistrano was arraigned on the amended information on September 25, 1997 and entered not guilty pleas to all of the charges and denied all allegations. (3 CT 802; see also 3 CT 816-817.)

Capistrano and Drebert were tried simultaneously before dual juries. (See, e.g., 5 CT 1185A, 1188-1190; October 8, 1997 [Redacted Jury Voir Dire] RT 1024 et seq.; 2 RT 1248 et seq.)[3] Voir dire of Capistrano's jury began on October 10, 1997 before Hon. Andrew C. Kauffman in the Los Angeles Superior Court. (3 CT 827-828.) On July 16, 1997, the defense filed a motion requesting sequestered death qualification. (3 CT 683-686.) The prosecution joined in this request; however, it was denied by the court on October 10, 1997. (1 RT 1011-1012, 2 RT 1287-1288.)[4] On October 15, 1997, a jury consisting of twelve jurors and six alternates was empaneled and sworn. (5 CT 1185A-1187.)

Opening statements were made, and testimony presented to

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[3] The trial court's order for separate juries is not specifically referenced in the CT.

[4] The joinder in this motion by the prosecution and the denial of the motion by the trial court are not reflected in the minute order from this date.

Capistrano's jury on October 16, 1997. (5 CT 1194-1195.) The prosecution presented further witnesses to Capistrano's jury on October 17, 22-24 and 27, 1997. (5 CT 1203-1204; 1213-1214; 1221-1226.)

On October 27, 1997, Capistrano moved for judgment of acquittal pursuant to Penal Code section 1118.1. (5 CT 1225-1226.) The motion was granted as to Count 11 and the Penal Code section 12022.5, subdivision (a) allegations in Counts 12 through 14. (5 CT 1225-1226.) Count 10 was amended to add the name Julie Solis as a victim. (*Ibid*; see also 3 CT 797.)

The prosecution rested on October 28, 1997. (5 CT 1231.) The defense presentation began on the same date. (5 CT 1231-1232.) The defense rested its guilt phase defense on October 29, 1997. (5 CT 1234.)

The court instructed the jurors on November 3, 1997. (5 CT 1235-1236.) The jurors began their deliberations at 9:00 a.m., on November 4, 1997. (5 CT 1245-1246.) At 3:45 p.m., the jury requested a read-back of the entire testimony of Gladys Santos relating to the Koen Witters homicide. (*Ibid.*; 5 CT 1248.) At 4:00 p.m. the jury was excused for the evening recess. (5 CT 1246.) From 9:53 a.m. to 10:17 a.m. on November 5, 1997, the testimony of Gladys Santos was read back to the jury. (5 CT 1352.) At 11:30 a.m., the jury asked to hear a read-back of the entire testimony of Deputy Davis, also relating to the Koen Witters homicide. (5 CT 1247, 1352.) The jury broke for lunch from 12:00 p.m. to 1:30 p.m. (5 CT 1352.) From 1:59 p.m. to 2:20 p.m., the testimony of Deputy Davis was read back to the jury. (5 CT 1352.) The jury brought in their verdicts and findings at 3:55 p.m. (5 CT 1352.)

The jury found Capistrano guilty on all remaining counts, found true the special circumstance allegations attendant to Count 1, and found true all special enhancements and allegations attendant to each count. (5 CT 1336-1350, 1352-1362.)

The penalty phase began on November 10, 1997 and ended on November 13, 1997. (5 CT 1365, 1385-1386.) The jury began deliberations on November 14, 1997, a Friday. (5 CT 1392-1393.) Deliberations resumed on Monday, November 17, 1997 and the verdict of death was reached that day. (6 CT 1451-1452, 1652.)

On December 18, 1997, Capistrano filed a motion "to reduce the death penalty." (6 CT 1460-1466.) On January 6, 1998, the court denied Capistrano's motion for reduction of penalty and imposed a judgment of death as to Count 1 (the Witters homicide). (6 CT 1514-1518.)

As to the non-capital crimes, the court further sentenced Capistrano to an indeterminate sentence of 25 years to life on Count 9 (forcible rape in concert of Solis) with the high term of 10 years imposed consecutively for the personal use enhancement and to an indeterminate sentence of life in prison on Count 15 (attempted premeditated murder of Martinez) with a consecutive one-year enhancement for personal use and a consecutive three-year enhancement for the infliction of great bodily injury. With regard to the remaining counts and allegations, Capistrano was sentenced to a determinate term of 46 years, to be followed consecutively with the 25 year to life sentence imposed on Count 9, which in turn was ordered to be followed consecutively with the indeterminate life sentence imposed on Count 15. (6 CT 1518-1524; see 12 RT 4301.).

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STATEMENT OF FACTS

A. THE GUILT PHASE

1. The Charged Crimes

a. Counts 1 - 3

Koen Witters, a Belgian citizen, arrived in the United States in mid-September 1995. (5 RT 2336.) He was employed by an import-export company headquartered in Taiwan. (5 RT 2334, 2336.) While in the United States, Witters was living in an apartment rented by his employer at the Pheasant Ridge Apartments in Rowland Heights. (5 RT 2336, 2337, 2326.) The Pheasant Ridge Apartments was a large complex containing in excess of several hundred units. (6 RT 2623.)

Witters planned to return to Taiwan in the evening on December 9, 1995. (5 RT 2325, 2338, 2350-2351, 2355.) At about 4:00 p.m. that day, Witters's co-worker, Sheree Chen, dropped Witters off at his apartment after taking him to return a rental car and arranged to meet him later to pick up the company cell phone and the apartment keys. (5 RT 2338-2339.)

When Chen returned to Witters's apartment at about 9:20 p.m., there was no response to her knocks. (5 RT 2339-2340.) She waited in front of the apartment until the man who was to drive Witters to the airport arrived, then they entered the unlocked apartment and found Witters on the floor in the bedroom. (5 RT 2330-2332, 2340-2343, 2367.) He had been bound and gagged with socks, plastic bags and videotape. (5 RT 2368, 2818-2820.) Found around Witters's neck was the missing strap of a black flight bag that was located in the living room. (5 RT 2368, 2375; 7 RT 2816, 2821-2822.) There were lacerations to both his wrists which did not cut any major vessels. (5 RT 2370; 7 RT 2831-2832.)[5] An autopsy showed that

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[5] Stephen Davis, a sheriff's deputy, opined that the wounds were inflicted post-mortem due to the lack of blood on the wounds. (5 RT 2390.)

Witters died of asphyxia due to strangulation. (7 RT 2825-2839.)

On the bed was a large suitcase that had been pried open. (5 RT 2371.) Items strewn about included a magazine photo of a nude Asian female, computer manuals, and a photo of Witters' Taiwanese girlfriend. (5 RT 2346-2348, 2355-2357, 2371.) A steak knife with what appeared to be a small amount of blood on the blade was found between the box spring and mattress adjacent to the body. (5 RT 2372, 2386.)

In the bathroom were toiletry items, shaving cream, toothpaste, and there was shaving stubble in the sink. (5 RT 2372.) There were disconnected telephone lines near the coffee table and an empty Macintosh computer box. (5 RT 2373-2374.) There was an empty box roughly the size of a VCR on the living room floor at the south end of the sofa. (5 RT 2376.) An Apple computer, a TV, and a VCR were in Witters's apartment one and a half to two weeks before his death. (5 RT 2344, 2352-2354, 2357.) The company cell phone was not found in the apartment. (5 RT 2345, 2376.)

b. Counts 4 - 11

At about 9:30 p.m. on December 15, 1995, Julia Solis and her husband Edward Gonzalez arrived at their home in Whittier. (7 RT 2895, 2898; 8 RT 3001.) Gonzalez parked in the garage and when he exited the car, a man in a pull-over mask pointed a nickel-plated gun at him. (8 RT 3002.) The man said "Give me your money" and Gonzalez gave him his wallet. (8 RT 3003.) There were a total of five men, all masked and

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In contrast, Eugene Carpenter, a medical examiner, testified that the wounds were bloody and therefore inflicted before death. (7 RT 2831-2832, check cite.)

wearing dark gloves.[6] (8 RT 3004-3006, 3008.) Two of them had guns. (8 RT 3007.)

One of the men came around the car while Solis was still seated in the passenger seat and pointed a gun at her without saying anything. (7 RT 2899-2902.) Solis could not see his head or shoulders. (7 RT 2904.) Solis handed the man a hundred dollars. (7 RT 2902.) The man motioned with the gun for Solis to get out of the car and she did. (7 RT 2903.) Gonzalez told one of the men he had money in the house and led the way with the man following. (8 RT 3004, 3006.) Solis followed him and the other man was behind her. (7 RT 2906.)

The five men went into the house with Gonzalez and Solis. (8 RT 3008.) The man behind Gonzalez who Solis followed into the house was very tall, six feet or so. (7 RT 2907-2908.) He appeared to be Latino and had slanted eyes.[7] (7 RT 2909-2911.) The man was wearing a dark colored bandana from his nose down and a dark knit cap pulled down to right above his eyebrows. (7 RT 2911-2912.) Solis could see part of his nose. (7 RT 2912.) He was holding a gun. (7 RT 2913.)

One of the other men had very deep-set "sad" eyes, a large hooked nose, and an olive complexion.[8] (7 RT 2917.) He was about 5'10"- 5'11," had a regular build and was not big. (7 RT 2917-2918.) A bandana covered his mouth from his nose down and he was wearing a beanie. (7 RT 2918.)

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[6] Solis testified she saw only four perpetrators. (See, e.g., 7 RT 2923-2931, 2961.)

[7] At a line-up at the county jail on March 4, 1996, Solis identified this man as Eric Pritchard. (7 RT 2913-2915.)

[8] At a line-up at the county jail on March 4, 1996, Solis identified this man as Anthony Jason Vera. (7 RT 2920-2921.)

Another one of the men was very light complected and could have been either Caucasian or Hispanic. (7 RT 2918-2919.) He was about 5'11" and his build was very thin. (7 RT 2919.) He was also wearing a bandana and a beanie. (7 RT 2919.) He had large eyes, not as distinctive as the others. (7 RT 2922.)

Gonzalez was not able to differentiate between any of the men, but could tell that they were Hispanic. (8 RT 3015.) All the men were wearing dark knit gloves. (8 RT 2967.)

Solis and Gonzalez were tied up in the bedroom with belts, neckties, and telephone cord. (7 RT 2908, 2922-2923; 8 RT 3008-3009.) After they were tied up, one of the men sat next to Solis on the bed and asked questions - did they have kids, if they were expecting anyone, who the neighbors were, were there guns in the house. (7 RT 2925; 8 RT 3011-3012.) Solis and Gonzalez were threatened with guns and asked where they kept money. (7 RT 2926-2927, 2929; 8 RT 3013.)

One of the men asked if they had any hypodermic needles and Solis told him there were some in the second bedroom. (7 RT 2931-2932; 8 RT 3015.) The man left and then came back and said he could not find them. (7 RT 2932-2933; 8 RT 3016.) The man was at least six feet tall and had a good build – slender, but not skinny. (7 RT 2936, 2962; 8 RT 2988.) He was wearing a mask that covered his whole face. (7 RT 2936.) It looked homemade, like a beanie pulled down with two eye holes and a hole at the mouth cut out. (8 RT 2988-2989.) Solis was partially untied and went with the man to the second bedroom. (7 RT 2933-2934, 2943; 8 RT 3016.) The man took Solis into a small bathroom attached to the bedroom and engaged in two non-consensual acts of oral copulation and two non-consensual acts of intercourse with her. (7 RT 2935-2941.) The man's erect penis was 10 to 12 inches in length. (8 RT 2992.) Then he took Solis to the second

bedroom and left her on the bed. (7 RT 2942-2943, 2945.) The man Solis later identified as Pritchard came in and had Solis orally copulate him. (7 RT 2945-2946.)

Just before the men left, Solis was gagged with a handkerchief, but the gag was removed after she said she could not breathe. (7 RT 2953-2954.) Gonzalez was gagged with a handkerchief stuffed in his mouth and tied on with a T-shirt. (8 RT 3019.) The men said they were leaving and not to move for twenty minutes. (7 RT 2956; 8 RT 3019.) After ten to fifteen minutes, Solis and Gonzalez freed themselves and called the police. (7 RT 2958-2961; 8 RT 3019-3020.)

The property missing from the home included a stereo, VCR, two answering machines, a Sceptre lap top computer with a liquid crystal display, money, jewelry, food, clothing, toaster, and iron. (7 RT 2963-2964; 8 RT 2969, 3020.) One of Gonzalez's two Honda Accords was also missing. (7 RT 2963; 8 RT 3021.) The key to this car was found to be missing from a key ring recovered several days after the incident from the top of the refrigerator in the Solis/Gonzalez home. (8 RT 2967-2968.)

c. Counts 12 - 14

On December 23, 1995, at about 5:00 p.m., Ruth Weir returned to her West Covina home from Christmas shopping and parked in her detached garage. (8 RT 3052-3054, 3056-3057.) When she returned to the car for a second load of groceries, she was met in the backyard by two men in ski masks, one of whom had a gun. (8 RT 3058, 3060, 3062.) They went into the house. (8 RT 3063-3064.) Weir told them that no one was home, but that she was expecting her husband. (8 RT 3064.)

After her husband arrived, Weir was allowed to go to where he was in the family room. (8 RT 3069-3071.) There were three men standing

there.[9] (8 RT 3071.) The third person was not wearing a mask, but covered his face with the lapel of his jacket. (8 RT 3072.) One of the masked men told Weir to lie on floor next to her husband and she did so. (8 RT 3073.) One of the men sat on the couch holding a paring knife from the kitchen. (8 RT 3073-3074.)

Someone in the kitchen asked Weir where her handbag was and if she had any money. Weir told him there were four dollars in her wallet. (8 RT 3078.) Weir was a member of a senior citizen group that did volunteer work for the West Covina police and had a badge that looked like a police badge. (8 RT 3079-3080.) This apparently prompted one of the men to ask where her gun was. (8 RT 3078.) Weir explained that she had no gun and was just a volunteer. (8 RT 3078-3080.) Someone asked Weir where her car keys were and she told him. (8 RT 3081.)

Three to four minutes after the men left, Weir got up and called 911. (8 RT 3084.) Weir's diamond rings, diamond earrings, and some gold chains were missing. (8 RT 3084-3085.) A gasoline credit card, Weir's volunteer badge, and $84 in cash were missing. (8 RT 3085.) A ziploc bag containing some commemorative coins was taken. (8 RT 3088.) All the Christmas gifts that had been wrapped were missing, including two sets of ceramic angels that Weir had made. (8 RT 3076, 3082, 3085-3086.) Weir's white Ford Taurus was missing. (8 RT 3086.)

At dusk, a neighbor who lived near Weir saw two cars parked one behind the other on the north side of the street. (8 RT 3096-3099.) One of the cars was a large older two-tone beige four-door American car and the other looked like Ruth Weir's white Taurus. (8 RT 3096-3100.) The white

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[9] Weir was unable to describe the men in any detail and did not identify anyone in the line-ups she saw on March 4, 1996. (8 RT 3089, 3092-3094.)

car backed up very fast and headed south. (8 RT 3100-3101.) The other car went westbound at normal speed. (8 RT 3102.) There appeared to be two people in it, a driver and a passenger. (8 RT 3102.)

Weir's car was recovered a day after it was taken outside an auto parts store at 1705 West Garvey in West Covina. (8 RT 3089, 3108-3110.) A neighbor of Weir's found the bag of commemorative coins and returned them to Weir about a week after the robbery. (8 RT 3089.)

d. Counts 15 - 16

In October 1995, Capistrano began staying with his cousins, Joanne and Jessica Rodriguez at the Lido Apartments in West Covina. (9 RT 3280.) Joanne's boyfriend and three children also lived in the apartment. (6 RT 2530-2531.) Michael Martinez was living in another apartment in the complex with Amy Benson. (4 RT 2158-2160, 2165.) Benson babysat for Capistrano's 12-year-old daughter Justine. (5 RT 2241.)

By November or December 1995, Michael Drebert, Eric Pritchard, and Anthony Vera had also begun staying with Joanne and Jessica Rodriguez. (4 RT 2161-2164.) Eric Pritchard was the son of Lisa Lucero, who had been Capistrano's girlfriend for years. (9 RT 3308-3309.) Drebert lived with Lucero in Baldwin Park prior to coming to live with Jessica Rodriguez, who was his then-girlfriend. (6 RT 2622-2623; 9 RT 3308.) Vera lived in the same apartment complex as Lucero and sometimes stayed with her. (9 RT 3308.)

In December 1995, Michael Martinez told Amy Benson that Capistrano, Drebert, Vera and Pritchard were not allowed to come into Martinez's apartment because he was concerned that he would be evicted. (4 RT 2166.) At the beginning of January, Martinez told Capistrano he did not want him hanging around in his apartment. (4 RT 2167) In the week prior to January 19, Martinez saw Capistrano, Drebert, Vera and Pritchard

four to five times and told them each time that they were not allowed on the property. (4 RT 2172-2173.)

On the evening of January 19, 1996, Martinez got into the shower between 8:00 and 8:30. (4 RT 2173-2174.) After his shower, Martinez walked into the living room and found Capistrano, Drebert, Vera and Pritchard there. (4 RT 2174-2176.) They seemed angry. (4 RT 2179, 2187-2188.) Capistrano said he knew Martinez was the one who called the police on Pritchard, who six days prior had been contacted by law enforcement at the apartment complex upon a report of a "suspicious person loitering" in the complex; Pritchard was then arrested on an outstanding warrant. (4 RT 2146-2149, 2152, 2181.) Martinez denied this and suggested that the manager had done it. (4 RT 2181.) Capistrano struck Martinez in the jaw with his fist. (4 RT 2183.)

Capistrano told Martinez that Pritchard wanted to kill him and Pritchard pulled up his shirt and showed Martinez the butt of a gun in his waistband. (4 RT 2186-2187.) Capistrano asked Martinez how much money he had and Martinez said $300. (4 RT 2184.) Drebert and Vera rummaged through Martinez's belongings. (4 RT 2177.) Drebert held up some keys and asked and received information regarding which were Martinez's car ignition keys. (4 RT 2181-2182.) Drebert got belts out of the closet and Capistrano tied Martinez with them. (4 RT 2188.) Then Pritchard hit Martinez twice in the face with his fist. (4 RT 2189.)

Martinez saw Drebert get a wood bat out of the closet and hand it to Capistrano. (4 RT 2193- 2194.) Martinez also saw Vera get a bat out of the closet. (4 RT 2193.) Drebert brought a towel or shirt from the closet and gave it to Capistrano who put it on Martinez's head. (4 RT 2191-2192.) After feeling one blow, the next thing Martinez remembered was waking up in the hospital. (4 RT 2195.) Martinez did not know who hit him with the

bat. (4 RT 2195.)

Later that same evening, a car associated with the perpetrators of the attack on Martinez was located at the West Garvey apartment complex in West Covina, about a half-mile away from the Lido apartments. (RT 2243-2244, 2246-2247.) Pritchard was apprehended as he drove away from the West Garvey apartments in that car. (5 RT 2246-2249.) After some questioning, Pritchard took officers to an apartment in that complex; Gladys Santos answered the door. (5 RT 2251, 2262-2263.)

Gladys Santos was a friend of Joanne Rodriguez, and Santos had supplied methamphetamine to Capistrano on prior occasions. (5 RT 2429, 2518-2519, 2530, 2534-2542.) Santos also babysat for Capistrano's daughter three days a week. (5 RT 2430, 2539-2540, 2543-2544.) Santos denied knowing Pritchard and denied that any one was present in the apartment besides the four small children and two teenagers in the downstairs area. (5 RT 2251-2252, 2263.) However, she allowed law enforcement to come into the apartment, where they heard a door slam upstairs. (5 RT 2252-2253.) After some negotiation, Vera, Drebert and Capistrano came downstairs and surrendered without incident. (5 RT 2253-2255, 2257-2258.) Vera, Drebert, Capistrano, Pritchard and Santos were all arrested and taken into custody. (RT 2257-2258.)

Martinez had staples and stitches in his head for a month. (4 RT 2199, 2205.) He lost nine teeth and had root canals to repair them. (4 RT 2199, 2200.) He lost his sense of smell and had a temporary hearing loss. (4 RT 2200.) He also had two stab wounds in his back and a cut on his neck that required stitches to close. (4 RT 2088, 2199, 2203.)

Martinez's pager, some change, and a watch were missing from the dresser. (4 RT 2182.) Martinez had left a backpack containing his wallet and $300 in his car. (4 RT 2211-2212.) About two days later, his car was

found parked in a strip mall. (5 RT 2295-2297.)

2. The Investigation

At 9:30 p.m. on the evening of the arrests of the suspects at the Santos apartment, Michael Ferrari, a West Covina detective assigned to investigate the Martinez incident, spoke to Santos while she was at West Covina Jail and obtained consent to search her apartment. (5 RT 2300, 2302, 2312.) Detective Ferrari then went to Santos's apartment and searched it at 1:00 a.m. on January 20. (5 RT 2302.) Martinez's backpack was found in a trash bag on the balcony of the apartment.[10] (5 RT 2304.) After the search, Santos was released from jail. (5 RT 2308, 2312-2313.)

On January 23, 1996, detectives again went to Santos's apartment. (5 RT 2308-2309; 8 RT 3151-3152.) Santos gave them an answering machine that was later identified by Solis as one taken from her home on December 15, 1995. (5 RT 2309-2310; 6 RT 2522; 7 RT 2964; 8 RT 2971-2972, 3151-3152; People's Exh. 22.) Santos also gave them some gold chains. (6 RT 2522, 2525, 2527; 8 RT 3152-3153.) These were later identified by Ruth Weir as having been taken during the robbery. (8 RT 3087-3088, 3154; People's Exh. 31.) On the same date, the District Attorney decided not to prosecute Santos. (5 RT 2308, 2317.)

A porcelain angel located in Michael Martinez's apartment was also identified by Ruth Weir as having been taken during the robbery. (8 RT 3085-3086; People's Exh. 18.)

In line-ups held on March 4, 1996, Solis identified Pritchard as the person who forced her to orally copulate him in the bedroom and Vera as one of the masked men. (8 RT 2974-2975, 3041, 3043-3045.) In a third line-up, in which Drebert stood, Solis tentatively identified someone other

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[10] Detective Ferrari did not recall any money being recovered from Santos's apartment or on the person of any of the arrestees. (8 RT 3162.)

than Drebert. (8 RT 2975-2977.) Ruth Weir also viewed line-ups on this date and identified no one. (8 RT 3089, 3092-3094.) Solis viewed a line-up containing Capistrano on March 20, 1996. (8 RT 2977, 3047.) Solis found two of the people in that line-up to resemble the man who raped her, however neither of these was Capistrano. (8 RT 2979, 2987-2988.)

DNA testing was performed on swabs taken from Solis after the sexual assaults. (6 RT 2706-2707, 2729-2733.) As a result of testing, Capistrano was excluded as a donor of the DNA on the oral swab. (7 RT 2749-2750.) Capistrano could not be excluded as a possible source of the DNA obtained from the vaginal evidence sample, nor could it be shown that he was the source. (7 RT 2760-2765, 2774-2780, 2785.) On four of the nine markers tested, Capistrano and Solis's DNA types were similar or identical. (7 RT 2762-2764, 2798.) Solis's husband, Edward Gonzalez, was not tested. (7 RT 2804.)

On May 21, 1996, Santos told Detective Ferrari that Capistrano confessed to killing a man in Rowland Heights (the Witters homicide). (5 RT 2455-2456; 8 RT 3158-3159.) On June 18, 1996, the District Attorney's Office helped Santos move by paying the security deposit on her new apartment. (6 RT 2527-2528, 2546, 2571, 2697.)

3. Gladys Santos Testifies To Capistrano's Alleged Confessions Regarding A Homicide

At trial, Santos testified that, in December 1995, a couple days before Christmas, two people came to Santos's apartment. (6 RT 2547-2548.) It was the birthday of one of the people, and he had been drinking. (5 RT 2434-2435, 2548.) This person told Santos that he had been present at a homicide.[11] (5 RT 2433.)

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[11] The person who first told Santos about the homicide was codefendant Drebert, who provided to Santos a detailed account of the killing of Witters prior to her alleged conversations with Capistrano

Three days after she learned of the homicide from this person, Santos asked Capistrano if it was true that he had killed someone with a belt. (5 RT 2436.) Capistrano first laughed. (5 RT 2438.) She asked him again if it was true, and he replied, "That pussy Mike told you, huh?"[12] (*Ibid.*) Capistrano then cut off the conversation and changed the subject. (5 RT 2439.) Later on that evening Santos asked Capistrano again if he had killed someone with a belt; this time he responded in the affirmative. (5 RT 2440.) Capistrano told her that they had been "scoping to rob" an apartment and entered one in which they saw a man shaving.[13] (5 RT 2441.) Capistrano told her he had to kill the man because he saw Capistrano without a mask, and that he strangled him because using a gun would be too loud. (5 RT 2442.) Capistrano said he was with Drebert and Pritchard. (5 RT 2442.) Capistrano said he called Drebert to hold the other side of the belt because he could not kill the man. (5 RT 2443.) Capistrano said he left the room and walked back in and shanked him and then said "Well, the motherfucker wouldn't die so I cut him." (5 RT 2443.)

On about January 14, 1997, Santos said she asked Capistrano again about the killing because she did not believe what he had said previously. (5 RT 2444-2445.) Capistrano said it was true that he had killed a man. (5 RT 2445.) Santos asked him how he could do that when he had gotten to

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regarding the homicide. (See proceedings before Drebert's jury, 5 RT 2462-2476.)

[12] At the preliminary hearing, Santos was cross-examined with the fact that she had initially told the police that Capistrano had denied the accusation. (2 CT 511.)

[13] During her testimony in front of Drebert's jury, Santos testified that Drebert said "they" could see the victim shaving; before Capistrano's jury, she testified that Drebert said Johnny said he could see the man shaving. (5 RT 2467, 2549.)

know the man. (*Ibid.*) Capistrano replied that he did not know that man, he (Capistrano) knew only that the man "like Asian pussy" and that he liked to travel to Europe. (5 RT 2445, 2447.) Capistrano said that he strangled the man and asked Mike to step in the room because he could not do it by himself. (5 RT 2446.) Capistrano said he had walked away from the man twice but that each time the man tried to get away; Capistrano then walked in the room a third time and "shanked" the man. (*Ibid.*)

At some point after the first conversation she had with Capistrano about the homicide, Capistrano telephoned Santos and asked if she knew of anyone who wanted a large computer. (5 RT 2448.) Santos could not recall what kind of computer Capistrano said it was, but after looking at a police report to refresh her recollection, she testified that Johnny said it was an Apple Macintosh. (5 RT 2448-2461.)

Santos told the police that Capistrano told her he had cut the victim's throat. (6 RT 2559.) However, Witters's throat had not been cut. (5 RT 2408.) Santos denied that she first told police that Capistrano said he had used his belt to strangle the victim; Witters had not been strangled with a pant belt. (5 RT 2408-2409; 6 RT 2559.)

4. Santos's Testimony Regarding The Non-Capital Crimes

According to Santos, Capistrano told her about a robbery he had done at a police officer's house in the West Covina. (5 RT 2449.) One evening, Capistrano called Santos and asked her to pick him up from close to the Lido Apartments, then took Santos to the house he had just robbed. (5 RT 2450.) Santos testified she thought the name of the street was Orange.[14] (5 RT 2450.) Before going there, they drove to a location

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[14] However, in May 1996 Santos told Detective Ferrari the name of the street was Colon or Colom, and that it was near a school and four blocks north of the Lido Apartments. (5 RT 2451-2452.)

Capistrano had robbed earlier in the morning and where he had hidden coins on the opposite corner. (5 RT 2452.) Capistrano got out of the car and went to a bush. (5 RT 2453.) There was a gardener there. Capistrano came back to the car and said it was gone. (5 RT 2453.) Capistrano said that he had also taken Christmas presents, a white car, and some groceries. (5 RT 2453.)

Santos testified that Capistrano brought the answering machine identified by Solis to her apartment in December 1995, and a few days later, told Santos she could keep it. (6 RT 2520-2521, 2563.) Santos testified that Capistrano brought the jewelry identified by Weir to Santos's apartment before Christmas 1995 and that she saw Capistrano put it in the cup on the dresser in her niece's room. (6 RT 2525-2527, 2566.)

Santos testified that Capistrano had left a Spectra laptop computer with a plasma screen on top of Santos's refrigerator.[15] (5 RT 2448; 6 RT 2523.) On cross examination, Santos admitted that she was not present when the laptop was brought to her apartment. (6 RT 2562-2563.) The computer was at Santos's house for a week, then Drebert took it away. (6 RT 2525.) Santos claimed that, during a telephone conversation, Capistrano had asked her if the laptop was still there. (6 RT 2563.)

At trial, Santos claimed to regularly have accepted many collect phone calls from Capistrano after his arrest in January 1996, until she moved in June 1996. (5 RT 2457; 6 RT 2570, 2572-2573, 2694.) She further claimed that Capistrano began making unspecified threats to her in February 1996, and yet she continued to accept Capistrano's calls which she claimed occurred in intervals as frequently as every day and every five minutes. (6 RT 2570, 2694.) Santos claimed that in late March, Capistrano

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[15] At the preliminary hearing, Santos testified that Drebert, not Capistrano, had brought the laptop to her house. (CT 496.)

said he had heard she was a snitch and that he threatened to harm her children. (5 RT 2457-2458; 6 RT 2571.) Santos neither requested help from the police nor offered them any information regarding Capistrano's alleged statements about a murder for another two months after this alleged threat. (6 RT 2547, 2570, 2694.)

On May 15, 1996, Detective Ferrari went to Santos's apartment at her request and listened to a voice mail message. (8 RT 3154-3155.) He recognized Capistrano's voice. (8 RT 3155.) The message was that Capistrano had gotten copies of the police reports and that Santos had talked to the police. (8 RT 3155.) Capistrano said he was going to send her copies of the reports and that he was going to see what he had to do. (8 RT 3155.)

5. Other Prosecution Evidence

The prosecution presented evidence that Capistrano's aunt and his cousin Jessica Rodriguez had lived in the same complex where Witters was killed and that Capistrano, Richard Scaggs, and someone named J.J. had helped her move at the end of November, 1995. (6 RT 2618-2621, 2625.)

On December 9, 1995 (the day of the Witters homicide), Jessica Rodriguez was with Drebert that afternoon at the apartments in West Covina, but did not know what time he left. (9 RT 3299, 3301.) Rodriguez did not know what Drebert was doing between when he left her in the afternoon and when Drebert returned just after it got dark; then Drebert, Capistrano, Pritchard, and Joanne were all together, drinking Jack Daniels and beer for a of couple hours. (9 RT 3297-3298, 3301-3302.)

Jessica Rodriguez, Drebert and Vera were arrested in Montebello on January 6, 1996.[16] (8 RT 3115-3116; 9 RT 3287.) Montebello Police

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[16] The arrests were unrelated to any of the charges in the instant case, and none of the three were prosecuted on the charges for which they

stopped and impounded Jessica Rodriguez's beige Buick. (8 RT 3115-3116, 3118, People's Exh. 6.) Rodriguez was driving and Drebert and Vera were passengers. (8 RT 3117-3118.) Two blue ski masks, a black ski mask, and several black cotton gloves were found in the passenger seat and in the backseat. (8 RT 3118-3119, 3122-3123, 3129-3131; People's Exhs. 50-52.)

The prosecution introduced evidence of the proximity of various locations in the San Gabriel Valley. (8 RT 3138-3145, 3159-3161; People's Exh. 53.) The distance between the location of the Solis/Gonzalez crimes and where Capistrano's mother lived in Whittier was about two miles. (8 RT 3137, 3143.) The home addresses of Pritchard, Drebert and Vera were addresses of apartment buildings in the same complex in Baldwin Park. (4 RT 2151-2152; 5 RT 2261-2262; 8 RT 3144.) Edward Gonzalez's car was recovered in Baldwin Park. (7 RT 2963; 8 RT 2974, 3021, 3028-3030, 3145.)

Gladys Santos's apartment, the Weir's home, Martinez's apartment and the locations where Martinez's and Weir's cars were recovered were all in West Covina. (8 RT 3160-3161.)

6. Capistrano's Defense

The defense presented evidence that Capistrano had not been an unwelcome presence in Michael Martinez's home. (9 RT 3280-3282.) While Capistrano was staying at the Lido Apartments with Joanne and Jessica Rodriguez, Martinez socialized with Capistrano at the Rodriguez apartment on more than one occasion, eating and drinking beer. (9 RT 3280-3281, 3289-3290.) Moreover, after the Rodriguez's were evicted at the beginning of December 1995, Martinez offered to let Jessica, Capistrano, Justine, Pritchard, and Drebert stay in his apartment, which they

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were arrested. (8 RT 3113.)

did for a couple days later for one night and then another night a couple days after that. (9 RT 3281-3282, 3288.)

The defense also introduced evidence regarding the physical appearance of Eric Pritchard's brother, Willie. At the time of the charged crimes, Willie Pritchard was taller than Eric Pritchard. (9 RT 3302-3303.) Willie was about Capistrano's height and about the same build as Capistrano in the shoulders. (9 RT 3303-3305; Defense Exh. B.) Drebert and Jessica Rodriguez had spent time at Lisa Lucero's apartment with other young men ages 18-20 with shaved heads, including Eric Pritchard's brother, Willie Pritchard. (9 RT 3305-3309.) Drebert was not always in the company of Capistrano. (9 RT 3307.)

A plastic and chrome automatic pistol with a black handle was found in the trunk of the car occupied by Rodriguez, Drebert and Vera when they were stopped in Montebello on January 6, 1996. (9 RT 3317; Defense Exh. C.)

Finally, William Vicary, a psychiatrist, testified that Capistrano's penis was seven inches in an erect state and it would be physically impossible for him to become erect to the size of 10-12 inches. (9 RT 3318-3319, 3332.)

B. THE PENALTY PHASE

1. The Prosecution's Case In Aggravation

As evidence in aggravation, in addition to the crimes of which the jury found Capistrano guilty in the guilt phase, the prosecution presented four incidents that took place while Capistrano was in custody.

The prosecution sought to prove that, on June 4, 1994, Capistrano had punched and kicked a fellow jail inmate. (11 RT 3861-3868.) At trial, the alleged victim of this assault, Victor Rodela, denied that he had been assaulted by Capistrano. (11 RT 3854-3857.) Deputy Gregory Icamen testified that he had interviewed Rodela on June 4, 1994, and that Rodela

said that he had been punched and kicked by someone with a tattoo that read "Capistrano" on his chest and later pointed Capistrano out as the person who hit him. (11 RT 3863-3868.) The implied motive for this assault was that Rodela was homosexual.[17] (11 RT 3863-3868.)

The prosecution presented evidence that on October 4, 1996, Capistrano admitted kicking fellow inmate Ricky Crayton in the mouth. (11 RT 3909-3919, 3923-3924, 3926.) Capistrano was sent to "the hole" as punishment. (11 RT 3928.)

On December 20, 1996, Capistrano went to court for an appearance. (11 RT 4061-4062.) Drebert and three other inmates were already in the courtroom. (11 RT 4063-4064.) The bailiff saw Capistrano look at another inmate and mouth the words "Get that fucker" and look toward Drebert and nod. (11 RT 4064-4065, 4067.) The inmate looked at Drebert then back at Capistrano, but did not do anything. (11 RT 4065, 4068.)

On February 18, 1997, a deputy was escorting Maravilla gang member Mauricio Gonzalez back to his cell from court. (11 RT 3950-3951.) Capistrano and Arthur Farrell entered the sallyport where the deputy and Gonzalez were and struck Gonzalez with a jail-made weapon. (11 RT 3963-3967.) The deputy subdued Ferrell and Capistrano by striking them in the head with his flashlight. (11 RT 3969-3973.)

Capistrano's counsel stipulated that in case KA035295, Capistrano was found guilty of attempted premeditated murder of Gonzalez and not guilty of assault with a deadly weapon on the deputy escorting Gonzalez. (11 RT 3979-3980.)

The prosecution also introduced extensive testimony by a "gang expert" regarding activities of the Mexican Mafia in the prison system. Joe Mendoza, a Los Angeles County Sheriff's Deputy working in a unit that

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[17] At trial, Rodela denied that he was homosexual. (11 RT 3856.)

investigates organized crime, prison gangs, and the Mexican Mafia, testified generally as to the existence of various prison gangs, their spheres of influence, and the symbols and tattoos with which they identify themselves. (11 RT 4004-4023.) Specifically, Mendoza testified that the Mexican Mafia is a prison gang with jurisdiction over all of the Hispanic street gangs south of Bakersfield. (11 RT 4008-4010, 4015-4017.) Street gang members pay a percentage of their drug dealing profits as taxes to the Mexican Mafia. (11 RT 4018.) Southern Hispanic gangs on the street fight among themselves, but in prison they join together under the Mexican Mafia. (11 RT 4013-4015.) The function of a prison gang is to control criminal activity in prisons by controlling other inmates, drugs, assaults, and extortions. (11 RT 4012-4013.)

There are different levels of membership in the Mexican Mafia. (11 RT 4019.) "Member" is the highest level. (11 RT 4019.) To be a member, to other members have to vote to sponsor you. (11 RT 4019.) Death is the punishment for one who falsely claims membership. (11 RT 4019.) An associate is someone who passes messages or orders, or makes phone calls for members. (11 RT 4020.) A soldier is someone who does what he is told and enforces rules of the Mexican Mafia. (11 RT 4020.) A torpedo is someone who is given a mission to kill or stab someone and does it without regard for consequences. (11 RT 4020.)

Based on his tattoos, Mendoza testified that Capistrano was a member of El Monte Florez street gang and that he had allegiance to the Mexican Mafia. (11 RT 4021-4023, 4030-4032.) Capistrano's nickname is "Giant." (11 RT 4032.) Luis Maciel, a member of the Mexican Mafia and El Monte Florez who had been in the Los Angeles County Jail for two years awaiting trial, had been overseeing all Mexican Mafia activity in the jail system. (11 RT 4033-4035.) Maciel went by the name "Pelon." (11 RT 4033.)

The prosecution presented evidence that, on October 17, 1996, Capistrano was found to be in possession of jail letters or "kites," addressed to a person named Pelon or to "P." (11 RT 3993-3996.) One appeared to have been written by Capistrano because it was signed "Giant EMF;" Capistrano's "street name" is Giant and "EMF" refers to El Monte Florez gang. (RT 3997-3999, 4001; People's Exh. 63.) Looking at one of these kites that was alleged to have been written by Capistrano, Mendoza interpreted the terminology used to mean that Capistrano was a soldier in the Mexican Mafia and would do anything the Mexican Mafia wanted him to do. (11 RT 4001; 4035-4041; People's Exh. 63.) Mendoza interpreted the fact that Capistrano was carrying these kites to "shows his frame of mind, that he was willing to do anything that the Mexican Mafia wanted" and "he really didn't care about the consequences of any of his actions." (11 RT 4042.)

Finally, Mendoza opined that Gonzalez was assaulted by Capistrano and Ferrell because the Mexican Mafia had a hit out on all Maravilla gang members because that gang was refusing to "pay taxes" to the Mexican Mafia. (11 RT 4023-4028, 4041-4042; People's Exh. 66.) Mendoza testified that the Maravilla felt that they should not have to pay because they were the original founders of the Mexican Mafia. (11 RT 4025.)

The prosecution also presented evidence of a group assault on another inmate in a jail holding cell. On June 23, 1997, Raymond Gonzalez, an inmate awaiting trial who was a witness for the prosecution in another case, was placed in a court holding cell with five to seven inmates, one of whom was Capistrano. (11 RT 3831, 3836-3837, 3841-3843, 3850.) Everyone in the tank began hitting and kicking Gonzalez. (11 RT 3843-3846.) The assault stopped when a bailiff from an adjacent courtroom came to see what was happening. (11 RT 3826, 3828-3829, 3844.) As Gonzalez was being taken out, someone called him a snitch. (11 RT 3834, 3844,

3847.) Gonzalez's left eye was swollen shut and he had two broken ribs. (11 RT 3848.) He was at the hospital for three to four hours and then taken back to court. (11 RT 3849.)

In addition to the testimony about these incidents, the prosecution introduced documentary evidence of Capistrano's prior felony convictions for marijuana transport and vehicle theft. (11 RT 3929; 12 RT 4148; People's Exh. 59.)

2. The Defense Case In Mitigation

The defense penalty phase presentation consisted of two witnesses, Capistrano's girlfriend, Claudia Meza, and his father, John Catano.

Meza testified that she had known Capistrano for eleven years, and had dated him from October 1995 to January 1996. (12 RT 4149-4150.) Capistrano never participated in gang activities or did drugs around Meza. (12 RT 4150.) Capistrano planned to change his life by getting a job as a Certified Nurse's Assistant and getting his tattoos removed. (12 RT 4150-4152.) Capistrano told Meza he had a troubled life, that he had always been in and out of jail, and nobody had been there for him. (12 RT 4151.)

John Catano testified that he is Capistrano's father, but was not present at the time of Capistrano's birth in 1970 because he was incarcerated. (12 RT 4154-4155.) When Capistrano was born, Capistrano's mother, Rosella Rodriguez, was going with someone named Capistrano. (12 RT 4154-4155.) Catano was with Capistrano's mother off and on between 1972 and 1975, and then they were together for 15 years until 1990. (12 RT 4155-4156.) Catano was also incarcerated for a year in 1976, and then again from 1988 to 1990. (12 RT 4157-4158.) At the time of his testimony at Capistrano's trial, Catano was serving a prison term for attempted murder and assault. (12 RT 4155-4156, 4166.)

Catano and Capistrano's mother fought constantly and one or the other of them would leave. (12 RT 4159.) Catano has had drug problem on

and off throughout his life. (12 RT 4158.) Capistrano's mother had a drinking problem. (12 RT 4158.) In 1975, the family was living in Whittier. (12 RT 4157.) Between 1975 and 1990, the household consisted of Catano, Capistrano's mother, and Catano's other children Rebecca and Marlene. (12 RT 4156.) One daughter is younger and one daughter is older than Capistrano. (12 RT 4159.)

Capistrano was 14 or 15 years old when Catano noticed him wearing tattoos, starting with his mother's name and then with gang tattoos. (12 RT 4162.) Catano and Capistrano have similar tattoos. (12 RT 4160-4161.) Catano thinks Capistrano joined El Monte Flores in his late teens. (12 RT 4159, 4162.)

Capistrano was incarcerated in the California Youth Authority ("CYA") when he was 15 or 16. (12 RT 4161, 4164.) Catano visited him there and scolded him and told him it was not the right way to go. (12 RT 4161, 4164.) By the time Capistrano got out of CYA, Catano had been arrested again. (12 RT 4166.) The last time Catano saw Capistrano before his testimony in the instant trial was July, 1990. (12 RT 4162.)

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I

THE TRIAL COURT'S DEATH QUALIFICATION VOIR DIRE WAS INHERENTLY INSUFFICIENT AND ITS ERRONEOUS SUA SPONTE EXCUSAL OF TWENTY-TWO PROSPECTIVE JURORS REQUIRES REVERSAL OF CAPISTRANO'S DEATH JUDGMENT

The trial court erroneously excused 22 prospective jurors for cause based solely upon the jurors' answers to a single ill-phrased question from the trial court inquiring into negative "feelings" about the death penalty. The prospective jurors' answers were given without the benefit of the trial court's explanation of the governing legal principles and without any inquiry into whether the prospective jurors would put aside their feelings about the death penalty and follow the law in this case. As a result, Capistrano was sentenced to death by a "tribunal organized to return a verdict of death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 (*Witherspoon*); see also *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*).) The trial court's error in this case was much more egregious than that in *People v. Stewart* (2004) 33 Cal.4th 425, 454-455 (*Stewart*) and *People v. Heard* (2003) 31 Cal.4th 946, 951 (*Heard*), where this Court found reversible error for the failure to ensure adequately through the voir dire process that prospective jurors were not disqualified simply because of opposition to the death penalty. Reversal of Capistrano's death sentence is required.

A. Proceedings Below

On July 16, 1997, defense counsel filed a motion requesting sequestered death qualification voir dire under *Hovey v. Superior Court* (1980) 28 Cal.3d 1. (3 CT 683-686.) The motion requested that the jurors be death-qualified outside the presence of other jurors to "prevent prospective jurors from being influenced by others in the responses to the death-qualification aspect of the voir dire process and enable the parties to

discover bias." (3 CT 685.) The motion also requested that counsel be permitted to conduct the death-qualification voir dire. (3 CT 683.)

During a chambers conference on October 8, 1997, the court and counsel discussed preparation of a questionnaire to be used exclusively for death qualification. (1 RT 1013, 1016.) It was agreed that the defense motion for sequestered death-qualification would be heard on the day jury selection began.[18] (1 RT 1011-1012, 1014.)

Four panels of jurors comprised the pool of jurors from which Capistrano's jury was selected.

1. The First Panel

The first panel of jurors entered the courtroom on October 10, 1997. (2 RT 1248, et seq.; 4 CT 827-828.) After conducting a very brief hardship voir dire,[19] and without ruling on counsel's motion for sequestered voir dire, the trial court addressed the first group of prospective jurors:

> The defendant in this case is charged with having committed various felonies, including one count of murder in the first degree . . . .
>
> ***
>
> As I started to say, one of the charges against Mr. Capistrano in this case is murder, and it's alleged that it's murder in the first degree. It's further alleged that due to the manner in which the murder was committed, that special circumstances exist. If the jury in this case finds that the special circumstances allegation is true, the jury in this case will be asked to determine the penalty in this case. The jury will have two options, and two options only, and that will be life without the possibility of parole, that will be life in prison, or death.

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[18] The prosecution had no objection to the defense motion (1 RT 1012) and later joined it. (2 RT 1288.)

[19] The parties had agreed to allow the clerks in the jury room to time-qualify jurors and to not send to the courtroom those who had only ten days paid jury service. (1 RT 1015; 3 CT 827-829.)

> The reason I'm mentioning that is this: Now, *without knowing anything at all about this case*, is there any juror sitting in the audience right now that, regardless of what the evidence might be, has *such feelings about the death penalty* that he or she would be *unable to impose* the death penalty *in this case*?
>
> If the answer is yes, would you rise, please?

(2 RT 1265-1267, emphasis added.) At the point when this question was asked, the court had not introduced the parties, other than referencing Capistrano by name as set forth above, or talked generally about the jurors' duties. (2 RT 1248-1249.) The court had not described the nature of the charges, the capital sentencing process or what legal principles were to guide a capital sentencing decision. (2 RT 1248-1267.)

In response to the trial court's question, and over defense objection to the excusal of jurors in this manner[20] (2 RT 1268) ten prospective jurors stood up and were summarily excused.[21] [22] (2 RT 1267-1271.)

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[20] The court also denied trial counsel's alternative request that these prospective jurors be permitted to remain in the pool of jurors to be selected to serve in the guilt phase. (2 RT 1268.) Denial of this motion if the subject of a separate claim of error on appeal. (See Argument IV, *post.*)

[21] Prospective jurors Cynthia Maxwell (2 RT 1267), Stephen Corley (2 RT 1268), Debbie Garcia (2 RT 1268), Oglesby (2 RT 1268-1269), Audrey Uy (2 RT 1269), Aiso (2 RT 1269), Joanne Whitcher (2 RT 1270), Taisha Lewis (2 RT 1270), Zahra Mishek (2 RT 1270-1271), and Alfonsa Santos (2 RT 1271) were excused in this fashion.

[22] The court reiterated the question or a portion of the question after each prospective juror identified himself or herself. For example, prior to excusing the first prospective juror, Cynthia Maxwell, the court asked, "That is regardless of what the evidence is; is that correct?" (2 RT 1267.) When Ms. Maxwell answered "yes," she was excused. (2 RT 1267-1268.) The court's question varied slightly from one prospective juror to another. For instance, the court asked five of the prospective jurors in issue whether

(continued...)

The court did not ask these prospective jurors about the basis of their feelings about the death penalty, nor were they asked if they could set aside their feelings and follow the law. The court did not explain the process for determining the sentence or the meaning of the alternative to the death penalty, life without the possibility of parole. Neither the defense or the prosecution was given the opportunity to question the excused jurors.

The remaining prospective jurors were asked to fill out a jury questionnaire designed for the death qualification process, were later instructed by the judge about the death penalty law, and questioned at length by the judge and counsel regarding their responses and their attitudes about the death penalty. (2 RT 1272, 1295 et seq.)

2. The Second Panel

When the second group of prospective jurors entered the courtroom, after brief hardship voir dire, the court again told them that Capistrano was charged with first degree murder with special circumstances and they may be called upon to decide between LWOP and death. Again, the court abruptly asked jurors about the death penalty:

> *Because of your feelings about the death penalty in general*, is there anyone who would be unable to vote to impose the punishment of death in this case or in any case, regardless of the evidence?

(2 RT 1283, emphasis added.)

The trial court asked each of the six prospective jurors who identified themselves to stand and excused them after repeating essentially

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[22](...continued)
they would be unable to impose death "in this case or any case." (2 RT 1269-1271.) Santos was asked if she would be "unwilling" rather than "unable" to impose the death penalty. (2 RT 1271.)

the same question to them individually.[23] (2 RT 1283-1285.)[24]

The defense objection to the excusal of these prospective jurors was noted and overruled. (2 RT 1283.) The remaining jurors were given death qualification questionnaires to fill out and told to return later for voir dire.[25] (2 RT 1286-1287.)

The same afternoon, the court denied the parties' motion for sequestered death qualification that had been pending since July 16, 1997. (2 RT 1287-1288; 3 CT 683-686.)[26]

3. The Third Panel

On October 14, 1997, a third panel of prospective jurors began the jury selection process. (2 RT 1388.) Again, after a brief hardship inquiry (2 RT 1388-1395), the trial court again explained that, because of the charges in this case, Capistrano would be sentence to either death or life without the possibility of parole. (2 RT 1395.) It then told the jurors:

> Persons do tend to have strong opinions one way or the other about the death penalty. There is nothing wrong about having such opinions, but I do need to find out a little bit about those opinions at this time.
>
> Now, *if there are any of you who have such strong feelings about the death penalty law in general* that you would be unable to

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[23] In questioning the jurors individually, the court twice used the word "unwilling" as opposed to "unable." (2 RT 1283-1286.)

[24] Prospective jurors Amelia Williams (2 RT 1283-1284), Yvonne Bolden (2 RT 1284), Erik Nilsson (2 RT 1284), Jacqueline Schau (2 RT 1284-1285), Marva Jackson (2 RT 1285), and Lily Enriquez (2 RT 1285) were excused in this fashion.

[25] When these jurors returned, the court instructed them regarding the death penalty law before allowing counsel to conduct death qualification voir dire. (2 RT 1359 et seq.)

[26] The denial of this motion is the subject of a separate claim of error on appeal. (See Argument III, *post*.)

impose the punishment of death in this case or in any case, regardless of the evidence, would you stand please?

(2 RT 1395-1396, emphasis added.)

The first prospective juror in the group volunteered an explanation, saying that he was "just against the death penalty." (2 RT 1396.) In turn, three more of the jurors identifying themselves in this panel began their response to the same question posed to the venire and repeated to the jurors individually with a statement reflecting opposition to the death penalty in general[27]; a fourth juror indicated she did not believe she could vote to impose death because she was a vegetarian. (2 RT 1397-1400.) In toto, five additional prospective jurors were excused. (2 RT 1396-1400.)[28] The sixth and last juror who identified herself in this group was questioned by the court more extensively and was not excused.[29] (2 RT 1400-1401.)

Trial counsel again objected to the jurors being excused and the court stated that he "assumed" that Mr. Lindars was making an objection. (2 RT 1397.) The remaining jurors were given death qualification

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[27] In addition to its original question, the court also asked if there was "any possible case that you would vote to impose the death penalty" (2 RT 1396) or if the prospective juror could "conceive of" a case where they would vote for death. (2 RT 1398-1399.)

[28] Prospective jurors Leung (2 RT 1396), Lewis (2 RT 1397), Williams (2 RT 1397-1398), Cobain (2 RT 1398-1399), and Harris (2 RT 1399-1400) were excused in this fashion.

[29] When asked if she could "conceive of a case where she would vote to impose the death penalty, prospective juror Simpson stated that she did not think she could vote to impose death for murder, but thought there might be a misdemeanor for which death would be the appropriate penalty. The court allowed Simpson to remain in the venire for further questioning. (2 RT 1400-1401.)

questionnaires to fill out and told to return later for voir dire.[30] (2 RT 1388.)

4. The Fourth Panel

Again, after brief hardship questioning and without explanation of the death penalty law in California, the trial court addressed the fourth group of prospective jurors:

> Now, there are persons who have strong feelings about the death penalty in the state of California, and there is nothing wrong with having such opinions, but I need to know what those opinions are.
>
> So I'll ask you first if any of you have *such strong feelings about the death penalty* that you would be unable to vote to impose the punishment of death in this case or in any other case, regardless of the evidence or the circumstances?
>
> If your answer is yes, would you please stand.

(2 RT 1446-1450, emphasis added.)

Three jurors stood up. (2 RT 1451-1453.) This time, instead of repeating the same question asked of the venire, the court asked the first prospective juror who identified himself whether the juror could "conceive of" a situation where death might be appropriate. (2 RT 1451-1453.) This brief additional questioning readily disclosed that the prospective juror's attitude was ambivalent and required exploration through additional voir dire:

> PROSPECTIVE JUROR BAILER: I could not participate in a jury that would be asked to impose death in any case.
> THE COURT: So you could not conceive of a case where the death penalty might be appropriate?
> PROSPECTIVE JUROR BAILER: I could conceive – I could

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[30] When these jurors returned later, the court instructed them regarding the death penalty law before allowing counsel to conduct death qualification voir dire. (2 RT 1457 et seq.)

conceive of a case, but I don't know that I'd want – I – I don't know that I would want to be a part of that case.
THE COURT: Well, I think we're going to have to ask you some more questions about that. Have a seat.

(2 RT 1451.)

The same type of questioning yielded the same results of another of the three prospective jurors from this panel:

PROSPECTIVE JUROR TAYLOR: I would not like to be the one to decide on taking a person's life.
THE COURT: Well, you wouldn't be the only one. It would be twelve jurors who would have to agree.
PROSPECTIVE JUROR TAYLOR: I –
THE COURT: So you would not want to participate?
PROSPECTIVE JUROR TAYLOR: No.
THE COURT: Could you conceive of a case that would be so horrendous that you would vote to impose the death penalty?
PROSPECTIVE JUROR TAYLOR: Yes.
THE COURT: So depending on the circumstances or the evidence, you might be willing to vote to impose it?
PROSPECTIVE JUROR TAYLOR: Yes.
THE COURT: Okay. Have a seat.

(RT 1452-1453.)

The third juror was also subject to additional questioning, and was the only one of the three excused by the court. (2 RT 1451-1452.)

The remaining jurors were given death qualification questionnaires to fill out and told to return later for voir dire. (2 RT 1453.) When those jurors returned, the court instructed them regarding the death penalty law before allowing counsel to conduct death qualification voir dire. (3 RT 1516, et seq.)

B. The Trial Court Failed In Its Duty To Conduct Adequate Death-Qualification Voir Dire In Erroneously Excluding 22 Prospective Jurors For Cause Without Determining Whether The Jurors' Views On The Death Penalty Would Prevent Or Substantially Impair The Performance Of Their Duties As Jurors

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, this right applies to the determinations of both guilt and penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Turner v. Murray* (1986) 476 U.S. 28, 36, fn. 9.) This right also is protected by the California State Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has enacted a process of "death qualification" for capital cases. (See *Witherspoon, supra,* 391 U.S. at p. 522; *Witt, supra,* 469 U.S. at p. 421.) Even with a death qualification process, the Supreme Court has held that prospective jurors do not lack impartiality, and thus may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon, supra,* 391 U.S. at pp. 520-523, fns. omitted.) Such an exclusion violates the defendant's rights to due process and an impartial jury "and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon, supra,* 391 U.S. at p. 521.) Rather, under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Witt, supra,* 469 U.S. at p. 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45; see also *Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946 [excusing a juror for cause

in a capital case, based on failure to fully understand the law before trial began, is unconstitutional since such misunderstanding can be corrected by jury instructions where juror has indicated willingness to follow the law].) The focus on a prospective juror's ability to honor his or her oath as a juror is important:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *Witherspoon*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a jury and to obey the law of the State."]; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060.) Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) The same standard is applicable under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d, 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In *Witherspoon*, *supra*, 391 U.S. at p. 522, fn. 21, the United States Supreme Court imposed a duty on trial judges to conduct adequate voir dire to allow prospective jurors with a bias against the death penalty to disclose whether they would be able to make a fair determination of guilt and penalty without regard to their personal views on the death penalty. In *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734, the high court held that trial courts must also conduct adequate voir dire to determine whether death penalty proponents would automatically vote for a death sentence upon a verdict of guilty. Given the court's view of the crucial role of voir dire in

protecting the right to trial by an impartial jury, the court has held that perfunctory voir dire is not sufficient. (*Mu'Min v. Virginia, supra,* 500 U.S. at pp. 431-432.) In conducting voir dire of potential jurors, then, "particularly in capital cases," "certain inquiries must be made to effectuate constitutional protections." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 730.) If proper inquiry is not made, the conviction, or at the very least, the sentence of death, may be invalid. (*Id.* at p. 739.)

In *Stewart, supra,* 33 Cal.4th at pp. 454-455, this Court found reversible error where, over defense objection, the trial court erroneously excused five prospective jurors for cause based on inherently ambiguous responses to a legally flawed questionnaire. The voir dire in the present case was more abbreviated and less meaningful than that in *Stewart.*

In *Stewart*, before asking the jurors to fill out a questionnaire, the trial court explained the legal principles each would be asked to apply in making a sentencing determination in a capital case. (*Id.* at pp. 441-442.) The jurors were then given a questionnaire containing, inter alia, the following sub-questions in enumerated question No. 35:

> (1) Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you:
>
> (a) To find the defendant guilty of first degree murder regardless of what the evidence might prove? ( ) Yes ( ) No
>
> (b) To find a special circumstance to be true, regardless of what the evidence might prove? ( ) Yes ( ) No
>
> (c) To ever vote to impose the death penalty?
>
> ( ) Yes ( ) No

(*Id.*, at pp. 442-443.)

The prosecutor challenged five prospective jurors for cause on the basis of the following answers:

Juror No. 8 had checked "No" in response to question No. 35(1)(a)

and (b), thereby indicating that he or she did not "have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult" to find defendant guilty of first degree murder, or to find a special circumstance to be true, "regardless of what the evidence might prove." But Prospective Juror No. 8 also had checked "Yes" with regard to question 35(1)(c) – thereby indicating that he or she had a "conscientious opinion or belief about the death penalty which would prevent or make it very difficult" to "ever vote to impose the death penalty." In addition, in response to the questionnaire's direction to "explain" any "Yes" answer, Prospective Juror No. 8 had written, "I do not believe a person should take a person's life. I do believe in life without parole." The trial court found that Juror 8's answers in the questionnaire constituted an unambiguous expression of opinion, "especially with the added handwritten portion that says, "I do not believe a person should take a person's life." (*Id.* at pp. 444-445.)

Thereafter the prosecutor also challenged jurors No. 53, 59, 93, and 122, each of whom, like Prospective Juror No. 8, had checked "No" in response to question 35(1)(a) and (b), and had checked "Yes" with regard to question 35(1)(c). In response to the direction to "explain" any "Yes" answer, Prospective Juror No. 53 wrote: "I am opposed to the death penalty." Prospective Juror No. 59 wrote: "I do not believe in capit[a]l punishment." Prospective Juror No. 93 wrote: "In the past, I supported legislation banning the death penalty." Prospective Juror No. 122 wrote: "I don't believe in irrevers[i]ble penalties. A prisoner can be released if new information is found." The trial court found the jurors' checked answer and brief written response to be clear and unambiguous, and granted the challenges for cause. (*Id.* at p. 445.)

This Court held the trial court's determination, informed by no more information than the cold record of the five prospective jurors' check marks

and brief handwritten comments, was insufficient to support an assessment required by *Witt, supra*, 469 U.S. at p. 424, that any of the five prospective jurors would be unable faithfully to perform the duties required of a juror by the law. (*Stewart, supra*, 33 Cal.4th at p. 451.) The Court explained that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*Id.* at p. 446.) Accordingly, the Court concluded that, on the record before the trial court and on appeal, the trial court erred in dismissing the five prospective jurors for cause without first conducting any follow-up questioning.

The question posed by the trial court in the instant case was even less adequate as a basis for excusing jurors under the *Witherspoon-Witt* inquiry than the questions posed in the questionnaire in *Stewart* and equally required follow-up inquiries. The jurors responses to the questionnaire in *Stewart* supplied the trial court with vastly more information than the responses to the question asked of jurors in the instant case. Before providing their written responses to the questionnaire in *Stewart*, the jurors had been extensively instructed and were responding in the context of some background knowledge about the death penalty law and its administration in California. (*Stewart, supra*, at pp. 441-442 and fn. 7.) The jurors in Capistrano's case had received no such instructions.

The perfunctory voir dire in this case also pales in comparison to that found to be legally insufficient in yet another case. In *Heard, supra,* 31 Cal.4th at p. 951, this Court reversed the penalty determination where the trial court erroneously excused one prospective juror for cause based on ambiguous answers to imprecise and incomplete oral examination, finding the voir dire conducted by the trial court to have been "seriously deficient,"

albeit lengthy. (*Heard*, *supra*, 31 Cal.4th 946, 951.) The prosecution moved to excuse Juror H. for cause because in the juror questionnaire, and prior to the oral voir dire examination, Juror H. expressed the view that imprisonment for life without the possibility of parole represents a "worse" punishment than death." (*Id.* at p. 964.) After the trial court explained to Juror H. that California law considers death the more serious punishment and that the death penalty can be imposed under California law only if the aggravating circumstances outweigh the mitigating circumstances, Juror H. did not provide any indication that his views regarding the death penalty would prevent or significantly impair him from following the controlling California law. Instead the prospective juror stated that he would do "whatever the law states." In view of Juror H.'s clarification of his views during voir dire, the Court concluded that his earlier juror questionnaire response, *given without the benefit of the trial court's explanation of the governing legal principles*, did not provide an adequate basis to support Juror H.'s excusal for cause. (*Id.* at p. 964 [emphasis in original].)

> And in response to other questions Juror H. made it quite clear that he would not vote "automatically" – in other words, "no matter what the evidence showed" – either for life imprisonment without the possibility of parole or for death, and also that he would not be reluctant to find the defendant guilty of first degree murder or to find the special circumstances true "so as to avoid having to face the issue of the death penalty."

(*Id.* at p. 964.)

> In reversing the death judgment, this Court explained:
>
> The colloquy set forth above shows that, in response to a series of awkward questions posited by the trial court, Prospective Juror H. indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty. Prospective Juror H. generally was clear in his declarations that he would attempt to fulfill his responsibilities as a juror in accordance with the court's instructions and his oath. To the extent

> H.'s responses were less than definitive, such vagueness reasonably must be viewed as a product of the trial court's own unclear inquiries.

(*Id.* at p. 967.)

This Court has stressed the need for trial courts to proceed with special care in conducting voir dire in death penalty cases.

> As the present case demonstrates, an inadequate or incomplete examination of potential jurors can have disastrous consequences as to the validity of a judgment. The error that occurred in this case – introducing a fatal flaw that tainted the outcome of the penalty phase even before the jury was sworn – underscores the need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials. The circumstance that the error in this case was committed by a trial judge with substantial experience in criminal law renders the voir dire examination at issue all the more inexplicable and disappointing.

(*Ibid.*) Lamenting the avoidability of the error, this Court reiterated "the need for our trial courts to redouble their efforts to proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." (*Id.* at p. 968.) In this regard, this Court has also noted the need for trial courts to spend the requisite time on making additional inquiries and to thoroughly explain their reasons for excusing a juror:

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

(*Ibid.*)

The voir dire in the instant case was far more deficient than that

found deficient in *Heard*. Unlike in *Heard*, in the instant case there was ***no*** exploration of the jurors' views and their potential impact on their ability to serve. The excused jurors here were never asked about their ability to consider both aggravating and mitigating evidence. In fact, they were never told about the governing legal principles at all.

Recently, in *People v. Avila* (2006) 38 Cal.4th 491,531 (*Avila*), this Court distinguished *Stewart* and held that "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." The Court compared the questions presented to the prospective jurors in the questionnaire in that case to the flawed questions presented to the prospective jurors in the questionnaire in *Stewart*. In *Avila*, the questionnaires contained questions that tracked those that have been determined to be sufficient to properly weed out "automatic life" and "automatic death" prospective jurors, and the questions and the answers given were sufficiently unambiguous to allow the trial court to identify disqualifying biases on the basis of the written responses alone.[31]

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[31] The questions designed to identify prospective jurors' views about the death penalty read in relevant part as follows:

81. What are your views on the death penalty?
____ Strongly Support
____ Support
____ Will Consider
____ Oppose
____ Strongly Oppose
82. Please explain your position: [¶] [¶]
85. Do you feel that the death penalty is used too often, not often enough, or too randomly? Please explain:

(continued...)

(*Id.* at p. ___.)

Significantly, and in stark contrast to the single question presented in

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[31](...continued)

86. How strongly do you hold this view and why? [¶] [¶]

91. One of the duties of a juror is to follow the law as it is instructed to you. Do you honestly think that you could set aside your personal feelings and follow the law as the Court explains it to you, even if you had strong feelings to the contrary? Yes ____ No ____ Please explain: [¶] [¶]

97. If the People prove beyond a reasonable doubt that the defendant(s) is guilty of murder in the first degree, would you refuse to vote for such a verdict because of your conscientious opinion concerning the death penalty, knowing that verdict would obligate the jury to get into a second phase of the trial? In other words, regardless of the evidence, and because of your conscientious objections to the death penalty, would you in every case automatically vote for something other than murder in the first degree because you know that such a verdict would end the death penalty questions once and for all? Yes ____ No ____

98. If the People prove beyond a reasonable doubt that the defendant(s) is guilty of murder in the first degree and prove beyond a reasonable doubt the truthfulness of the special circumstances alleged, would you refuse to vote for a verdict of the truthfulness of the special circumstances because of your conscientious opinion concerning the death penalty and your knowledge that to do so would obligate the jury to get into the penalty phase? In other words, regardless of the evidence that might be produced during the course of this trial, and because of your conscientious objections to the death penalty, would you in every case automatically vote for a verdict of not true as to the special circumstances alleged because you know that such a verdict would end the death penalty question then and there? Yes ____ No ____

99. Do you entertain such conscientious opinions concerning the death penalty that, regardless of the evidence that might be developed during the penalty phase of the trial, should we get there, that you would automatically and absolutely refuse to vote for such a penalty in any case? In other words, regardless of the evidence and because of your conscientious objections to the death penalty, would you in every case automatically vote for life imprisonment without the possibility of parole and never vote for a verdict of death? Yes ____ No ____

(*Avila, supra*, 38 Cal.4th at p.528, fn. 23.)

voir dire to prospective jurors in this case, the questionnaire in *Avila* included the question of whether the jurors could put aside their personal reservations about the death penalty and follow the law. (*Avila, supra*, 38 Cal.4th at p. 528, fn. 23.) In this case, the trial court did not review the basic law governing the penalty determination nor did it ask the prospective jurors if they could temporarily put aside their negative feelings about the death penalty and follow the law. Deference cannot be accorded to the trial court's judgment about the impartiality of the prospective juror where, as here, the trial court failed to conduct an adequate inquiry using the proper legal standard.[32] The reason is simple: without asking the right questions, the trial court does not have the necessary information to determine whether the prospective juror's death penalty views would substantially impair her functioning as a juror.

Thus, trial courts have a "duty to know and follow proper procedure, and to devote sufficient time and effort to the process." (*People v. Stitely* (2005) 35 Cal.4th 514, 539.) The jury-selection process in a capital case includes the use of questionnaires and oral questions addressed to the jurors by the judge and follow-up questions designed to clarify any ambiguous responses. (*People v. Lewis* (2001) 25 Cal.4th 610, 630 [oral voir dire and written questionnaires are both part of examination]; Code Civ. Proc., §

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[32] See also *Adams v. Texas*, *supra*, 448 U.S. at p. 49 [granting relief where "the touchstone of the inquiry . . . was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond a reasonable doubt"]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1272 [granting relief where "none of the questions which Mrs. Phillips answered articulated the proper legal standard under *Witt*"]; and *Szuchon v. Lehman* (3rd Cir. 2001) 273 F.3d 299, 300 [granting habeas relief where "[n]either the Commonwealth nor the trial court, however, questioned Rexford about his ability to set aside his beliefs or otherwise perform his duty as a juror"].)

223; see also California Rules of Court, Standards of Judicial Administration § 8.5.) It also includes an opportunity for counsel to question jurors for the purpose of disclosing biases upon which to base challenges for cause. (*People v. Cash* (2002) 28 Cal.4th 703, 720-722; Code of Civ. Proc., §§ 223, 225.)

> At bottom, both the court and counsel "must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views [on capital punishment] would ' "prevent or substantially impair" 'the performance of his or her duties." (*People v. Stewart, supra*, 33 Cal.4th at p. 445.) Otherwise, reversible error can occur.

(*People v. Stitely, supra,* 35 Cal.4th at pp. 539-540.)

In this case, the trial court failed to engage in the minimally adequate process necessary to protect Capistrano's rights to a fair trial by an impartial jury. Rather, it excused 22 prospective jurors who voiced some opposition to the death penalty without either explaining the applicable law or conducting any inquiry into whether the jurors could temporarily put aside those feelings and follow the law in this case. The voir dire conducted in this case thus provided no evidentiary basis to conclude that the excused jurors' views on capital punishment would have substantially impaired the performance of their duties as a juror.

First, the court's question did not meaningfully gauge the nature, depth, and effect of any feelings the jurors had about the death penalty and therefore did not and could not elicit information that met the standard of substantial impairment under *Witherspoon/Witt.* It asked jurors if they had "feelings" about the death penalty without asking what those feelings were.[33] It is not even certain that in each case reservations about the death

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[33] The first panel was asked whether they had "such feelings about (continued...)

penalty were the basis of the "feelings about the death penalty." One prospective juror who rose after the court asked its question explained that she was a vegetarian. (2 RT 1399.) Certainly, being a carnivore is not a prerequisite for sitting on a capital jury. Of the twenty-two jurors who were summarily excused, only six volunteered the information that they were "against" or did not "believe in" the death penalty. (2 RT 1268-1269, 1396-1398, 1451-1452.) Being against the death penalty is not a disqualifying status even when it would make it "very difficult" for the juror to vote to impose the death penalty. (*Stewart*, *supra*, 33 Cal.4th at p. 488.) Without inquiring into the nature of the prospective jurors' "strong feelings" about the death penalty, it was impossible to know whether they were feelings of an immutable type that carried an imperative that could not be set aside.

Second, Capistrano's jurors were not given the benefit of the court's explanation of governing legal principles. Without understanding what the law is and what rules they were required to follow in a capital sentencing phase, it is impossible for prospective jurors to know whether they would put aside whatever personal views they held regarding the death penalty and follow the law. (See *Heard, supra*, 31 Cal.4th at p. 964 [answer given in juror questionnaire without benefit of trial court's explanation of governing legal principles does not provide adequate basis to support excusal for cause under *Witherspoon/Witt*].) Because the trial court gave the jurors no explanation of a legal context within which to understand the court's single question, the jurors could only have understood it as merely requesting

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[33](...continued)
the death penalty." (2 RT 1267.) The second panel was asked if they had "feelings about the death penalty in general." (2 RT 1283.) The third panel was asked whether they had "such strong feelings about the death penalty law in general." (2 RT 1396.) The fourth panel was asked if they had "such strong feelings about the death penalty." (2 RT 1450.)

jurors who were against the death penalty to identify themselves.[34] "[A] juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case." (*Stewart, supra*, 33 Cal.4th at p. 446.) Jurors who responded to the question that asked if they were "unable" may have found themselves able if the principles that guide the sentencing process had been explained to them.[35]

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[34] It appears that the trial court also understood his question as asking those with mere reservations about the death penalty to identify themselves, separate and apart from the issue of whether or not they could put aside their personal beliefs and follow the law. During the actual voir dire process, after one of the jurors indicated on his questionnaire that he didn't believe in the death penalty, the trial court chided him for not identifying himself previously:

> "THE COURT: Mr. Barber, you indicated in response to question number 4, in response to: "What are your general feelings about the death penalty?" "I don't believe in death penalty."
> PROSPECTIVE JUROR BARBER: Right.
> ***
> THE COURT: Then you go on to indicate in a few other places that you don't believe in the death penalty. You're certainly entitled to your opinion on that subject, Mr. Barber. Your opinion is shared by lots of other people. But I guess my question to you is why *you didn't indicate that to me this morning when I asked?*"

(2 RT 1345-1346, emphasis added.) This juror went on to say that he could put aside his feelings and follow the law. (2 RT 1346-1347.) The erroneous excusal of this prospective juror for cause is the subject of a claim of error on appeal in Argument II, *post*.

[35] For example, prospective juror Simpson responded to the court's initial question that she was against the death penalty for religious reasons (2 RT 1400); however, after hearing instructions and filling out the death qualification questionnaire, she stated she could make the penalty decision and was deemed "death qualified" over a prosecution challenge for cause.

(continued...)

Third, and for the same reason as stated above, the clause in the court's question asking "regardless of the evidence" would not have been understood by an uninstructed layman to mean evidence in aggravation and mitigation as well as evidence of the capital crime, or to represent the refusal to follow the law. The relevant inquiry is whether the prospective juror is unable or unwilling, in view of the court's instructions, *to weigh aggravating and mitigating evidence to determine the appropriate penalty.* A prospective juror cannot be excused under *Witt* "unless he or she were unwilling or unable to *follow the trial court's instructions by weighing the aggravating and mitigating circumstances* of the case and determining whether death is the appropriate penalty under the law." (*Stewart*, *supra*, 33 Cal.4th 425, 447, emphasis added.) In the instant case, the jurors had been given no instructions and had not been told what constituted aggravating and mitigating evidence. Therefore, the court's question could not meaningfully be interpreted to encompass the idea of refusal to follow the court's instructions.

Finally, none of the 22 prospective jurors excused were asked if they would put aside whatever views they held about the death penalty and follow the law in this case. The court's question was only directed to "feelings about the death penalty" and did not determine whether they could put those feelings aside and follow the court's instructions regarding the applicable law. Such inquiry was a prerequisite to a proper determination of excusability under *Witherspoon/Witt*, and it was simply not done.

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[35](...continued)
(2 RT 1491-1494, 1498-1499.) Similarly, prospective juror Bailer responded to the court's initial question in the affirmative. (2 RT 1451.) However, after hearing the court's instructions and filling out the questionnaire, he said he could make a determination of sentence. He was not then the subject of a challenge for cause by the prosecution. (3 RT 1546-1547, 1549.)

Therefore, the record in this case does not contain any evidence, and certainly not "substantial evidence" required by law, that any of the 22 jurors were properly excused by the trial court.

The trial court's question did not go to the decision making process, but "was directed only to those who held reservations concerning the death penalty ... [and] whether the prospective jurors could reach the ultimate decision to impose the death penalty." (*Stewart* at p. 453, fn. 16.) The court's question asked whether the jurors could "impose" the death penalty, not whether they could consider it in an appropriate case, i.e., whether they can follow the law and weigh aggravating and mitigating circumstances and thereby reach a decision on the appropriate sentence. The court's question failed to address whether jurors could put aside their feelings and apply the law as directed by the trial court.

The court's question framed the inquiry as to whether jurors would be "unable" to impose death without further inquiry into the basis of any "inability."[36] Without additional questioning, it was impossible to determine whether the inability could be overcome by an understanding of the jury's role in the sentencing process and the standards to be applied in making such a decision.

Ten of the prospective jurors were excused after speaking their names and the word "yes" or "yes, sir." [37] (RT 1267-1271, 1284-1285,

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[36] The first nine excused jurors in the first panel of jurors and the first four excused jurors in the second panel were asked only if they were "unable" to impose the death penalty. (2 RT 1269-1271, 1283-1285.) All of the jurors in the third and fourth panels were asked if they were "unable." (2 RT 1396-1400, 1450-1453.) The last juror in the first panel (Santos) and the last two jurors in the second panel (Jackson and Enriquez) were asked if they were "unwilling" to impose the death penalty. (2 RT 1271, 1285.)

[37] For example:

(continued...)

1396.) The record contains no information as to the basis of their "inability" to impose the death penalty. In one instance, the court cut off a juror who appeared to be about to explain the basis of her response.[38] At most, the juror's "yes" response to the court's compound question indicated the necessity to inquire further about the *possibility* of impairment. (*Stewart*, *supra*, 33 Cal.4th 425, 448 [juror's written comments provided *preliminary* indication that juror *might be* subject to challenge for cause, but were not sufficient to establish basis for exclusion].)

One juror in the first panel formulated a sentence longer than "yes" and stated by way of explanation "I just don't believe in the death penalty."

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[37](...continued)
THE COURT: Your name, ma'am?
PROSPECTIVE JUROR GARCIA: Debbie Garcia.
THE COURT: Miss Garcia, your answer is that you would be unable to vote to impose the penalty of death, regardless of the evidence?
PROSPECTIVE JUROR GARCIA: Yes.
THE COURT: You are excused. Thank you.

(2 RT 1268.)

[38] THE COURT: All right. Let's start with the lady in the – I guess that's the second row, in blue. Your name, please?
PROSPECTIVE JUROR WILLIAMS: I just don't believe –
THE COURT: I need your name.
PROSPECTIVE JUROR WILLIAMS: Amelia Celeste Williams.
THE COURT: And Miss Williams, you would be unable to impose the death penalty in this case or any case, regardless of the evidence; is that correct?
PROSPECTIVE JUROR WILLIAMS: Yes.
THE COURT: You are excused. Thank you.

(2 RT 1283-1284.)

(2 RT 1268-1269.)[39] This juror's statement of conscientious objection to the death penalty is not grounds for disqualification. "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Stewart*, *supra*, 33 Cal.4th 425, 446, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 699.) However, the court conducted no follow-up questioning to determine whether this juror could set aside those feelings and follow the law. Without follow-up questioning, it impossible to know whether the prospective jurors' feelings about the death penalty were immutable.

Unlike the single-question procedure employed with the entire first and second panels, after summarily excusing three jurors in the third panel, the court made a follow-up inquiry of the fourth, fifth and sixth jurors as to whether those jurors could "conceive of" a case where the death penalty would be appropriate. (2 RT 1398-1400.) This follow-up question to the last of these jurors readily revealed some equivocation and that juror was not excused. (2 RT 1400-1401.)

By the time the court began its summary excusal of jurors in the fourth panel, the trial judge seemed to have recognized the inadequacy of the procedure he had theretofore employed. From the outset of questioning

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[39] "THE COURT: And you, Miss Oglesby?
PROSPECTIVE JUROR OGLESBY: Yes.
THE COURT: And your answer would be the same?
PROSPECTIVE JUROR OGLESBY: Yes, sir.
THE COURT: Regardless of the evidence, you would be unable to vote to impose the punishment of death?
PROSPECTIVE JUROR OGLESBY: Yes. I just don't believe in the death penalty.
THE COURT: Thank you. You are excused.
PROSPECTIVE JUROR OGLESBY: Thank you.
(2 RT 1268-1269.)

with the fourth panel, the court continued to make a limited follow-up inquiry, asking the question he had developed at the end of his questioning of the third panel – whether jurors could "conceive of" a case where the death penalty would be appropriate. (2 RT 1451-1453.) In contrast to the first three panels who heard the single multi-part question, during the fourth panel where some follow-up questioning was done at the outset, only three jurors identified themselves as having "feelings" about the death penalty which would render them unable to impose the death penalty, and only one of those three was excused. (2 RT 1451-1453.) The court recognized that two of the jurors could not be summarily excused and needed to be questioned further. (*Ibid.*)

This Court has upheld the adequacy of death qualification voir dire "where the court *relied heavily* on *three, four, or five* questions tracking language from *Witherspoon*," but in those cases found voir dire "adequate because the court and/or counsel asked additional questions to clarify ambiguous responses and to reliably expose disqualifying bias." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 540, emphasis added.) Here, the trial court's mini-procedure relied on one compound question, without follow-up by either the court or counsel.[40]

The truncated process employed was not designed to identify jurors with substantial impairment. The flaws in the truncated process were readily exposed when the trial court did engage in follow-up questioning with the fourth panel and jurors who would have been deemed unqualified

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[40] During the actual death-qualification process of all jurors who survived the court's preliminary death penalty reservations pruning, the court explained to jurors the death penalty law, jurors filled out a written questionnaire containing 20 death-qualification questions, and counsel were permitted to question jurors and, in fact, conducted much of the questioning. (See CT 830-837 [jury questionnaire]; 2 RT 1295 et seq., 2 RT 1359 et seq., 2 RT 1457 et seq.; 3 RT 1516 et seq.)

by their response to the court's initial question were deemed qualified after additional questions. (2 RT 1400-1401, 1451-1453; see also fn. 18, above.)

The deficiencies in the trial court's questioning can not be overcome by making assumptions about the jurors' understanding of instructions they had been given or other voir dire they had heard. Here, jurors were asked this question in the absence of an explanation of the process, the law, or a context to be able to answer the question. They heard no other colloquy and no other question save the one to which they were responding. There was no additional information to be gleaned from the surrounding circumstances to cure the trial court's failure to supply information necessary for the jurors to understand what they were being asked. (*Darden v. Wainwright* (1986) 477 U.S. 168, 177 [jurors understood the *Witt* inquiry because they heard other jurors questioned].) And the trial court itself supplied no explanation of reasons for the excusals.

Indeed, what the trial court did with the 22 excused prospective jurors was not voir dire at all. Voir dire is a process, not a question. "[T]o preserve the right to a fair and impartial jury on the question of penalty, the death qualification process must *probe* prospective jurors' death penalty views." (*People v. Earp* (1999) 20 Cal.4th 826, 853, emphasis added.) The trial court's abbreviated procedure for dismissing those with reservations about the death penalty can be scarcely termed a "procedure" and was as far short of probing as can be imagined. As the United States Supreme Court has observed, "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Witt, supra*, 469 U.S. at p. 424.)

The trial court's decision to undertake a cursory process to exclude death-scrupled jurors outside of the death-qualification process is inexplicable. Jury selection had begun only moments before; there was no

time pressure. There was no justification for removing these jurors from the process of death qualification undergone by the other jurors.

> Unlike other duties imposed by law upon a trial court that may call for the rendition of quick and difficult decisions under unexpected circumstances in the midst of trial, the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion.

(*Heard, supra*, 31 Cal.4th 946, 966.)

As this Court has observed, death-qualification voir dire must avoid the two extremes of being overly abstract or overly specific. (*People v. Cash, supra,* 28 Cal.4th at pp. 721-722.) Not only did the trial court's single question fall short of being meaningful voir dire, it was overly abstract in that the jury knew nothing of either the charges or the applicable law. The question was not delivered within a context that might have provided it with additional meaning.

In conclusion, not one, but 22 prospective jurors were excused by the trial court in response to a single, ill-phrased question that simply could not and did not evidence substantial impairment under *Witherspoon/Witt*.

C. The Trial Court's Rulings Are Unsupported By The Record And Are Not Entitled To Deference

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962); see also, *Witt, supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole].) As this Court has explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind

> when the prospective juror has made statements that are conflicting or ambiguous.

(*Heard, supra,* 31 Cal.4th at p. 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, citations omitted.)

A presumption of the correctness of a trial court finding of juror bias does not apply where: (1) "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;" and (2) "the material facts were not adequately developed at the State court hearing." (*Witt, supra*, 469 U.S. 412, 426, fn. 7.) Both of these circumstances are applicable to the instant case and, therefore, no presumption of correctness applies.

In the instant case, there is virtually no evidence of "whether and how" the jurors' views would have affected their performance as jurors. In most cases, there was absolutely no evidence regarding "what those views actually [were]." As described above, neither the court's question or the jurors' responses provided a basis for determining what the jurors' views were. No extended voir dire took place to allow the trial court to assess the jurors' credibility and demeanor or to gauge their understanding of the question they were asked. The trial court's failure to instruct the jurors on the relevant legal principles to be employed in making a determination of the appropriate penalty made the responses the jurors did make meaningless for the purpose of determining what the jurors' views actually were and whether they could be set aside in deference to the rule of law.

Under these circumstances, the trial court had no opportunity to make the sort of credibility determination that could justify upholding a trial court's excusals. No credibility assessment was possible under the circumstances of the instant case. Some of the excused jurors said no more than their name and the word "yes" in response to the trial court's question.

(See, e.g., 2 RT 1268.) The excused jurors were never asked and never stated whether they could set aside their feelings and apply the law as instructed by the court. Indeed, as explained above, they were never told what the law was.

The trial court failed to engage in the sort of inquiry that would have developed the substantial evidence necessary for a deferential review of the excusals. "[P]art of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois, supra*, 504 U.S. at p. 729.) The trial court's questioning was patently inadequate and it is thus impossible to determine whether the removed jurors were in fact excusable for cause. (*Gray v. Mississippi* (1987) 481 U.S. at 648, 663.) Had the court conducted even minimal follow-up inquiry,

> despite their initial responses, the venire members might have clarified their positions upon further questioning and revealed that their concerns about the death penalty were weaker than they originally stated. It might have become clear that they could set aside their scruples and serve as jurors.

(*Ibid.*)

The trial court's failures in this case is clear, and its rulings on the 22 excused jurors both unsupported by the record and not entitled to deference.

D. Reversal Of Capistrano's Judgment Of Death Is Required

The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 664-666, 668; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Brown v. Lambert, supra*, 451 F.3d at pp. 948-955.) As shown above, there were 22 prospective jurors excluded in this case in violation of *Witherspoon/Witt*, 22 people who voiced some reservations about imposing the death penalty but who were never informed of the applicable law nor asked if they could put aside their views and

follow the law in this case.

The error denied Capistrano's rights to an impartial jury, a fair capital sentencing hearing, due process of law and a reliable judgment of death under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. The controlling decisions of the United States Supreme Court establish that, under federal constitutional principles, this type of error is not subject to harmless-error analysis, but rather must be considered reversible per se with regard to any ensuing death penalty judgment. (See Gray v. Mississippi, supra, 481 U.S. at pp. 664-666, 668; *Davis v. Georgia, supra,* 429 U.S. at p. 123.) Accordingly, the judgment as to the sentence of death imposed on Capistrano must be reversed and the matter remanded for a new penalty trial before a properly selected jury.

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II

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR BARBER REQUIRES REVERSAL OF CAPISTRANO'S DEATH JUDGMENT

Over Capistrano's objection, the trial court granted the prosecution's challenge for cause to prospective juror Barber who, after being instructed on the applicable law, unequivocally stated he would be able to follow the law and impose a death sentence in this case. The trial court excused Mr. Barber, despite his unequivocal answers in court, because in his questionnaire, which was filled out prior to the court's instructions on applicable legal principles, "he indicated he did not believe in the death penalty." (2 RT 1357-1358.) However, nothing in his in-court responses supported a finding that Mr. Barber's views were such that they would prevent or substantially impair the performance of his duties as a juror, and Mr. Barber's answers in his juror questionnaire, given without the benefit of the trial court's explanation of the governing legal principles, did not provide an adequate basis to support Mr. Barber's excusal for cause. (*Witherspoon, supra,* 391 U.S. at p. 521; see also *Witt, supra,* 469 U.S. 412; *Heard, supra,* 31 Cal.4th at p. 964.) The excusal of Mr. Barber by the trial court violated Capistrano's rights to an impartial jury, a fair capital sentencing hearing, due process of law and a reliable judgment of death under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. Reversal of Capistrano's death judgment is required.

A. Prospective Juror Barber's Questionnaire

Before the trial court explained the law applicable to the penalty determination, prospective jurors, including Mr. Barber, were asked to fill out a questionnaire regarding their "feelings about the death penalty." (2 RT 1286-1287.) Juror Barber filled out his questionnaire stating, when

asked his general feelings about the death penalty, "I don't believe in death penalty." (CT 853.) Question number 9 asked: "Regardless of your views on the death penalty, would you, as a juror, be able to vote to impose the death penalty on another person if you believed, after hearing all of the evidence, that the penalty was appropriate?" (CT 854.) Mr. Barber answered "No." (*Ibid.*) When asked if he had conscientious objections to the death penalty that might "impair [his] ability to be fair and impartial" to the prosecution, Mr. Barber indicated that he was "Not sure." (CT 855.)

B. The Voir Dire Of Prospective Juror Barber

After Mr. Barber turned in his completed questionnaire, the trial court explained the bifurcated trial procedure and instructed the jurors regarding the process by which the penalty determination was to be made, including the weighing of aggravating and mitigating factors. (2 RT 1297-1302.) After receiving this instruction, upon oral voir dire by the court, Mr. Barber affirmed that he did not personally believe in the death penalty (RT 1345), but consistently said he could set aside his feelings and apply the law:

> THE COURT: But as you sit there right now, it's your position that you could not vote to impose the death penalty in this case?
> PROSPECTIVE JUROR BARBER: Depending on the evidence.
> THE COURT: But depending on the evidence?
> PROSPECTIVE JUROR BARBER: Yes.
> THE COURT: So you might be able to vote to impose the death penalty?
> PROSPECTIVE JUROR BARBER: True.
> THE COURT: If you felt the evidence warranted it?
> PROSPECTIVE JUROR BARBER: Right.
> THE COURT: Even though you personally don't believe in the death

penalty?

PROSPECTIVE JUROR BARBER: Right.

THE COURT: So you could put aside your own personal beliefs and apply the law objectively?

PROSPECTIVE JUROR BARBER: Right.

THE COURT: Mr. Lindars.

MR. LINDARS: Thank you, your honor. Mr. Barber, there is a whole spectrum of positions that people have on the death penalty, and I think they probably run from, "I would never impose it" at one end to, "I would impose it in every case" at the other end. And then somewhere in between are the people that say, "I don't like to do it, but I'd do it if it was warranted under the evidence because it's my duty." Is that more or less where you're saying you would fall?

PROSPECTIVE JUROR BARBER: True.

THE COURT: Didn't hear you, Mr. Barber.

PROSPECTIVE JUROR BARBER: True.

(RT 1346-1349)

In response to questioning by the prosecutor, Mr. Barber affirmed that he believed he could vote to impose the death penalty in the appropriate case:

MR. SORTINO: Thank you, your honor. Mr. Barber, as you sit here today, do you believe you could vote to impose death – the death penalty in the appropriate case?

PROSPECTIVE JUROR BARBER: Yes.

MR. SORTINO: You could make that vote, if the evidence and the law warranted it, and be okay with your own conscience?

PROSPECTIVE JUROR BARBER: Yeah, depending on the evidence.

: MR. SORTINO: I'm sorry?

PROSPECTIVE JUROR BARBER: Depending on the evidence.

(2 RT 1348-1349.) The prosecutor then asked Mr. Barber about his questionnaire:

> MR. SORTINO: Is there a reason why the questionnaire asked you that question, or asked you the question of whether or not you could impose death on someone, despite your personal views, you indicated that you couldn't? Have you changed your mind since the questionnaire?
>
> PROSPECTIVE JUROR BARBER: No.

(2 RT 1349.)

The prosecutor challenged Mr. Barber for cause "based upon his answering of the questionnaire." (2 RT 1357.) Defense counsel responded to the challenge: "I think he's indicated that in response to both the court's questions and my questions and the district attorney's oral questions that he could consider the death penalty and impose it in an appropriate case." (2 RT 1357.) The trial court sustained the prosecution challenge for cause to Mr. Barber. (2 RT 1357.) The trial court's reasoning was that Mr. Barber "indicated in response to the District Attorney's questions that his basic decision hasn't changed from what he wrote down on the questionnaire, which he indicated he did not believe in the death penalty." (*Ibid.*)

C. The Trial Court Committed Reversible Error In Excusing Mr. Barber For Cause, Because His Voir Dire Did Not Establish That His Views About The Death Penalty Would Prevent Or Substantially Impair His Ability To Follow The Law, Obey His Oath, Or Impose A Death Sentence

1. Applicable Legal Standards

Capistrano incorporates by reference Argument I as if fully set forth in this paragraph. To reiterate in part, the "standard for determining whether prospective jurors may be excluded for cause based on their views

on capital punishment . . . is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' " (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658 (quoting *Witt, supra,* 469 U.S. at p. 424 (quoting *Adams, supra,* 448 U.S. at p. 45).) The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions. Even jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Ibid.* (quoting *Lockhart v. McCree, supra*, 476 U.S. at p. 176).) Further, the Supreme Court significantly circumscribed the state courts' role in excusing jurors for cause in capital cases. It held that:

> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law."

(*Gray v. Mississippi, supra*, 481 U.S. at pp. 658-659 (alterations in original) (citation omitted) (quoting *Witt, supra,* 469 U.S. at p. 423 and *Witherspoon, supra*, 391 U.S. at p. 523.) Thus, it is – and was at the time of Capistrano's trial in 1997 – clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law.

The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning,

that the potential juror lacks impartiality." (*Witt*, *supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois, supra,* 504 U.S. at p. 733; *Stewart*, *supra*, 33 Cal.4th at p. 445; see *Gray v. Mississippi*, *supra*, 481 U.S. at p. 652, fn. 3 ["A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve."].) As will be shown below, the prosecution failed to carry its burden in this case and the trial court erred in excluding Mr. Barber because the record failed to evidence that his views on capital punishment would have substantially impaired the performance of his duties as a juror. Accordingly, Capistrano's death sentence must be set aside.

2. Mr. Barber Was Qualified For Jury Service And The Trial Court's Exclusion Of Mr. Barber Did Not Satisfy the *Adams-Witt* Substantial Impairment Standard

In his jury questionnaire, prepared without the benefit of instruction of the applicable law, Mr. Barber indicated that he was personally opposed to capital punishment. (CT 852-855.) However, following the trial court's explanation of the applicable law, during the court's voir dire, Mr. Barber consistently stated that he could put aside his own feelings about capital punishment and make the decision based on the evidence. (2 RT 1346-1347.) Mr. Barber affirmed his ability to put aside his own feelings and follow the law in subsequent questioning by counsel. (2 RT 1347-1349.) He also affirmed that he would be able to vote to impose the death penalty "in the appropriate case." (2 RT 1348.)

In this case, the relevant question was whether, notwithstanding his personal opinion about the death penalty, Mr. Barber could perform his duties as a juror in accordance with the law. (*Witt*, *supra*, 469 U.S. at p. 424.) Mr. Barber clearly stated that he could do that. (2 RT 1346-1348.)

Even a prospective juror who is opposed to capital punishment may be capable of subordinating his sense of conscience to his legal oath. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658, quoting *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."]; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699 ["A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict."].) The record in this case fails to demonstrate that Mr. Barber's feelings about the death penalty would prevent or substantially impair his ability to consider and vote for a death sentence. In fact, the record establishes that while Mr. Barber did not disavow his opposition to the death penalty, he consistently stated that he could put aside those personal feelings and apply the law.

Despite Mr. Barber's repeated assertions that he could put aside his feelings about the death penalty and follow the law, the trial court excused him based upon a one-word answer to a compound question by the prosecutor. The first of these questions was "Is there a reason why the questionnaire asked you that question, or asked you the question of whether or not you could impose death on someone, despite your personal views, you indicated that you couldn't?" (2 RT 1349.) Mr. Barber was not given an opportunity to respond to this question, and did not respond to it, before the prosecutor asked a second question to which Mr. Barber did respond:

> MR. SORTINO: Have you changed your mind since the questionnaire?
> PROSPECTIVE JUROR BARBER: No.

(2 RT 1349.) The record does not establish anything more than that Mr. Barber maintained his personal opposition to the death penalty. Indeed, Mr. Barber's personal position on the death penalty was what the court cited as the reason for Mr. Barber's excusal:

> THE COURT: [. . .] His basic decision hasn't changed from what he wrote down on the questionnaire, which indicated he did not believe in the death penalty.

(2 RT 1357-1358.)

The trial court's dismissal of Mr. Barber for cause was erroneous. The trial court excused Mr. Barber based on his conscientious objections to capital punishment. (2 RT 1357-1358.) Rather than applying the "substantial impairment" standard, the trial court applied a standard that personal opposition to the death penalty warranted excusal per se.

That the trial court applied the incorrect standard is not only evidenced by its treatment of 22 other jurors who were erroneously excused by the trial court based solely on their opposition to the death penalty (see Argument 1, *ante*), it is also evidenced by the following exchange between the trial court and Mr. Barber, who had been present in court earlier in the day when the trial court had summarily excused the other jurors who indicated that they had feelings against the death penalty. (See 2 RT 1265-1271.) The court almost scolded Mr. Barber for having not identified himself earlier as opposed to the death penalty:

> THE COURT: Then you go on to indicate in a few other places [in the questionnaire] that you don't believe in the death penalty. You're certainly entitled to your opinion on that subject, Mr. Barber. Your opinion is shared by lots of other people. But I guess my question to you is why you

didn't indicate that to me this morning when I asked?
PROSPECTIVE JUROR BARBER: Because my – during the questionnaire, I made --
THE COURT: I can't hear you.
PROSPECTIVE JUROR BARBER: When I read the questionnaire outside, that's when I made my mind up. I wasn't sure about it in here, about the death penalty.

(2 RT 1345-1346.)

In addition, the trial court erroneously focused solely on a single answer to a confusing and compound question purportedly affirming a statement Mr. Barber had made in his questionnaire; it did not assess his qualifications on the basis of his voir dire "as a whole." (See *Witt*, *supra*, 469 U.S. at p. 433.) In reviewing his exclusion, this Court must consider the entire voir dire, not merely isolated answers. (*Id.* at pp. 433-435; see *Darden v. Wainwright, supra,* 477 U.S. at p. 178 [evaluating voir dire in its entirety to decide *Witherspoon-Witt* claim]; *People v. Carpenter*, *supra*, 15 Cal.3d at p. 358 [same]; *People v. Cox* (1991) 53 Cal.3d 618, 647-648 [evaluating voir dire in its entirety to decide *Witherspoon/Witt* claim and criticizing defendant's attempts to use excerpts of voir dire and take particular answers out of context].) As this Court instructed long ago: "In short, in our probing of the juror's state of mind, we cannot fasten our attention upon a particular word or phrase to the exclusion of the entire context of the examination and the full setting in which it was conducted." (*People v. Varnum* (1969) 70 Cal.2d 480, 493.) The same admonition is relevant to the trial court's assessment of juror impartiality. Because the trial court excluded Mr. Barber on the basis of an isolated statement rather on his voir dire as a whole, its decision is not fairly supported by the record and is not worthy of deference.

Further, the record reflects that Mr. Barber's feelings about the death penalty were not intractable and of longstanding duration; Mr. Barber told

the court that he did not identify himself that morning as opposed to the death penalty because he was not sure then that he was opposed to it. (2 RT 1346.) Thus, his stated feelings regarding capital punishment do not support the conclusion that Mr. Barber's personal opposition to the death penalty would substantially impair his ability to sit as a juror in Capistrano's case. (*Ibid.*)

Nor do Mr. Barber's answers in the questionnaire evidence substantial impairment. Mr. Barber's questionnaire responses were made without the benefit of an explanation of the governing legal principles. In *Heard*, a juror expressed a view in his questionnaire that was inconsistent with law about whether death or LWOP was the worst punishment. After being instructed to the contrary, the juror stated he would follow the law as given by the court. This Court found that "[i]n view of [that juror's] clarification of his views during voir dire, we conclude that his earlier juror questionnaire response, *given without the benefit of the trial court's explanation of the governing legal principles*, does not provide an adequate basis to support [his] excusal for cause." (*Heard, supra*, 31 Cal.4th at p.964 [emphasis in original].) Obviously, in response to the trial court's instruction on the law applicable to the penalty determination, Mr. Barber somehow came to realize that his personal opposition to the death penalty did not disqualify him from jury service and he responded on oral voir dire in light of that realization.

At the end of Mr. Barber's voir dire, the record shows that he would and could vote for a death sentence. The trial court and the prosecutor failed to develop the facts relevant to the substantial-impairment test under *Adams* and *Witt*. "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,'

(citation omitted) he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." (*Davis v. Georgia, supra,* 429 U.S. at p. 123.)

Mr. Barber's personal opposition to the death penalty was clear. Mr. Barber's willingness to put aside that opposition and follow the law was also clear. No less than ten times did Mr. Barber state that he would consider imposing the death penalty, depending on the evidence. The trial court's ruling is unsupported by the record as a whole and is not entitled to deference. (See *Brown v. Lambert, supra,* 451 F.3d pp. 950-951 [had there been a finding that prospective juror was "substantially impaired" in his ability to follow the law, it would have been unreasonable where juror was asked if he could consider voting for the death penalty and he responded with an unequivocal, "Yes, I could."]) Accordingly, the trial court's excusal of Mr. Barber was error which requires the automatic reversal of Mr. Capistrano's death judgment. (See *Gray v. Mississippi, supra*, 481 U.S. at pp. 666-668 (opn. of the court); *id.* at pp. 669-672 (conc. opn. by Powell, J.); *Davis v. Georgia, supra*, 429 U.S. at p. 123; *Heard, supra*, 31 Cal.4th at p. 966; *Stewart, supra*, 33 Cal.4th at p. 454.) Mr. Capistrano's case must be remanded for a new penalty trial before a properly selected jury.

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III

THE TRIAL COURT ERRONEOUSLY DENIED CAPISTRANO'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

On July 16, 1997, prior to jury selection, defense counsel filed a written motion requesting sequestered death qualification voir dire to be conducted by counsel. (CT 683-686.) On October 8, 1997, at a pretrial conference at which Capistrano was not present, the parties agreed to defer ruling on the motion until voir dire began and when Capistrano would be present for argument on the motion. (1 RT 1011-1012, 1014.) The prosecution did not object to the request for sequestered voir dire at the time it was made, and later joined it. (1 RT 1012; 2 RT 1288.)

On October 10, 1997, the trial court began jury selection by making hardship inquiries of the first panel of jurors. (2 RT 1248 et seq.) After the trial court completed the hardship inquiries, but before ruling on Capistrano's pending motion, in open court in the presence of the full jury panel, the court abruptly began a summary death qualification procedure directed toward excusing jurors with reservations about the death penalty. (2 RT 1267-1271; see Argument I, *ante*.) Ten jurors responded to the court's question and, without further inquiry by the court or counsel, were summarily excused. (*Ibid.*) In objecting to this excusal procedure, trial counsel also asked that jurors with reservations about the death penalty "be allowed to participate in a pool of jurors that determine the guilt phase, at least, of the trial." (2 RT 1268.) This request was denied. (*Ibid.*) The court followed the same procedure with a second panel of prospective jurors. (2 RT 1282-1286.) Six more jurors responded to the court's question and, without further inquiry by the court or counsel, were summarily excused. (2 RT 1283-1285.) After the remainder of the panel

were given death qualification questionnaires and excused to fill them out, the court addressed Capistrano's motion for sequestered death qualification. (2 RT 1287.) Defense counsel pointed out that the *Witherspoon* inquiry that the court had just made of the panel was part of what the defense was asking to be sequestered voir dire. (2 RT 1288.) The prosecution joined the request for sequestered voir dire. (2 RT 1288.) The court denied the motion without analysis or elaboration. (2 RT 1288.)

As explained below, the trial court's failure to conduct individual sequestered death-qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated Capistrano's federal and state constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16.) It also violated Capistrano's right under California law to individual juror voir dire where group voir dire is not practicable (Code Civ. Proc., § 223); the trial court's failure to exercise that discretion resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

A. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire On Death-Qualification Violates A Capital Defendant's Constitutional Rights To Due Process, Trial By An Impartial Jury, Effective Assistance Of Counsel, And A Reliable Sentencing Determination[41]

A criminal defendant has federal and state constitutional rights to

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[41] Capistrano acknowledges that his contention that the federal Constitution requires sequestered death-qualification voir dire of every prospective juror in a capital case has been frequently rejected by this Court. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 101; *People v. Stitely, supra,* 35 Cal.4th at pp. 536-537; *People v. Box* (2000) 23 Cal.4th 1153, 1180.) Capistrano believes it necessary to include this claim to ensure federal review.

trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois, supra,* 504 U.S. at p. 726; Cal. Const, art. I, §§ 7, 15 & 16.) Whether prospective capital jurors are impartial within the meaning of these rights is determined, in part, by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or substantially impair their ability to judge in accordance with the court's instructions are not impartial and constitutionally cannot remain on a capital jury. (See generally, *Witt, supra,* 469 U.S. 412; *Witherspoon, supra,* 391 U.S. 510; see also *Morgan v. Illinois, supra,* 504 U.S. at pp. 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois, supra,* 504 U.S. at p. 729.) To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray, supra,* 476 U.S. at p. 37.) A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court, supra,* 28 Cal.3d at pp. 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74.) By the same token, "[j]urors exposed to the death qualification process may also become

desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey v. Superior Court*, *supra*, at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil Procedure section 223, which abrogates this Court's mandate that such voir dire be done individually and in sequestration (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80; *People v. Waidla* (2000) 22 Cal.4th 690, 713) – is inconsistent with constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 736, citing *Turner v. Murray*, *supra*, 476 U.S. at p. 36 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].) Nor is such restriction consonant with Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges

(*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of Capistrano's death sentence. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at p.739; *Turner v. Murray*, *supra*, 476 U.S. at p. 37.)

B. The Trial Court Erred In Denying Capistrano's Request For Individual Sequestered Voir Dire

Even assuming that individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case, the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated Capistrano's constitutional rights to an impartial jury and due process of law. The court's conduct also violated Capistrano's constitutional right to equal protection of the law, and his federal due process protected statutory right to individual voir dire where group voir dire is impracticable. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. (*People v. Box, supra,* 23 Cal.4th at p. 1180; *People v. Waidla*, *supra*, 22 Cal.4th at p. 713; *Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1184.) Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (Code

Civ. Proc., § 223.) However, as this Court has held, individual sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 80, 81.) The proper exercise of a trial court's discretion under section 223, therefore, must balance competing practicalities. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 ["exercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].)

The trial court gave no explanation of its decision to overrule Capistrano's request for individual sequestered voir dire about the death penalty. The record thus does not reflect an exercise of discretion in which the trial court "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [Capistrano's] case." (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1183 [trial court's comments that Proposition 115 had effectively overruled *Hovey* did not reflect an exercise of discretion]; cf., *People v. Waidla*, *supra*, 22 Cal.4th at pp. 713-714 [trial court set out "reasonable" reasons for denying sequestered voir dire].) There is simply no "reasoned judgment" here which can be deemed an exercise of judicial discretion. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 977 ["'a ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law.'"]; *People v. Downey* (2000) 82 Cal.App.4th 899, 912, citations omitted.) Therefore, in denying Capistrano's motion for individual, sequestered voir dire, the trial court erred in failing to exercise its discretion under Code of Civil Procedure section 223. (Cf., *People v. Romero* (1996) 13 Cal.4th 497, 532 [remanding case where trial court did not set forth

reasons for its exercising discretion to strike prior conviction under section 1385]; *People v. Bigelow* (1984) 37 Cal.3d 731, 743 [failure to exercise discretion about appointing advisory counsel]; *People v. Green* (1980) 27 Cal.3d 1, 24-26 [failure to exercise discretion to determine whether prejudicial impact outweighed probative value of evidence]; *In re Brumback* (1956) 46 Cal.2d 810, 813 [failure to exercise discretion regarding bail on appeal].)

C. The Trial Court's Unreasonable And Unequal Application Of The Law Governing Juror Voir Dire Requires Reversal Of Capistrano's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in a "a miscarriage of justice, as specified in section 13 of article VI of the California Constitution." However, section 223 must be viewed as providing Capistrano an important procedural protection and liberty interest (namely, the right to individual juror voir dire on death penalty issues where group voir dire is impracticable) that is protected under the federal due process clause. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346.) Moreover, the state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Ashmus, supra,* 54 Cal.3d at p. 965.) Accordingly, the trial court's unreasonable application of section 223 in Capistrano's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to Capistrano's death verdict (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the trial court's failure to conduct individual, sequestered juror voir dire on death penalty issues requires

reversal of Capistrano's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that Capistrano was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, fn. 134), and who had become "desensitized to the intimidating duty" of determining whether Capistrano should live or die (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1173) because of their "repeated exposure to the idea of taking a life." (*Hovey v. Superior Court*, *supra* at p. 75.) Therefore, the trial court's failure to carefully consider the practicability of group voir dire as applied to Capistrano's case led to a voir dire procedure that denied Capistrano the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that Capistrano was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *id.* at pp. 74-75.)

These hazards infringed upon Capistrano's rights to due process and an impartial jury (see *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729), and cast doubt on whether the Eighth Amendment principles mandating a need for the heightened reliability of death sentences is satisfied in this case. By their very nature, these rights are so important as to constitute an "essential part of justice" (*People v. O'Bryan* (1913) 165 Cal. 55, 65) for which the risks of deprivation must be regarded as a miscarriage of justice. Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 699

["The denial of the right to trial by a fair and impartial jury is, in itself, a miscarriage of justice."].)

The trial court's refusal to conduct sequestered death-qualification voir dire cannot be dismissed as harmless. (*People v. Cash, supra,* 28 Cal.4th at p. 723.) Because the group voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge Capistrano in accordance with the court's instructions. Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that Capistrano was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles, and that doubt requires reversal of Capistrano's death sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

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IV

CONSTITUTIONAL FLAWS IN THE SELECTION OF HIS DEATH PENALTY JURY REQUIRE REVERSAL OF CAPISTRANO'S CONVICTION AND DEATH SENTENCE

Capistrano's motion to allow the jurors who were excused because of their opposition to the death penalty to remain in the pool of jurors eligible to be selected for the guilt phase of his trial was denied. (2 RT 1268.) Capistrano maintains that the death qualification process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury (*Witt v. Wainwright* (1985) 470 U.S. 1039 (Marshall, J., dissenting from denial of certiorari); *Grigsby v. Mabry* (8th Cir. 1985) 758 F.2d 226, revd. sub nom, *Lockhart v. McCree, supra,* 476 U.S. at p. 176) and that trial counsel's request in this case to have those jurors excused during this process nevertheless remain in the pool of jurors to be selected for the guilt phase jury was erroneously denied.

Before a prospective juror may sit on a death penalty jury, the trial court questions the individual in a group with other prospective jurors to learn whether he or she is "death qualified." The trial court must determine whether the prospective juror's views on the death penalty would either prevent that person from ever imposing a death sentence, or, conversely, would result in an automatic sentence of death once the defendant has been found guilty of capital murder. If the court determines that the prospective juror is so opposed to or so strongly in favor of the death penalty that his or her views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," then that juror may be excused for cause. (*Witt, supra*, 469 U.S. at p. 425.) This process of death qualification violates Capistrano's federal and state

constitutional rights to due process, a fair trial and to a fair and reliable guilt and penalty determination for the following reasons: (1) death qualification does not screen out everyone who would always impose the death penalty, so that such jurors remain on the jury even after *Witt* voir dire; (2) death qualification results in jurors who are less likely to consider the defendant's mitigation evidence; (3) jurors exposed to the death qualification process are more likely to impose death; (4) death qualified jurors are more likely to convict a defendant at the guilt/innocence phase.

The process by which a death penalty jury is selected in California violates Capistrano's federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois*, *supra*, 504 U.S. 719, 726; *Taylor v. Louisiana* (1975) 419 U.S. 522, 530-531; Cal. Const., art. I, §§ 7, 15 & 16.) Death qualification violates Capistrano's Eighth and Fourteenth Amendment right to a reliable death sentence. (*California v. Ramos* (1983) 463 U.S. 992, 998-999; *Gardner v. Florida*, *supra*, 430 U.S. 349, 357-358; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) It also violates his right to a jury selected from a representative cross-section of the community. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, § 16; Taylor v. Louisiana, supra, 419 U.S. at p. 526.)

Capistrano recognizes that these issues have previously been rejected. This Court has held that individual sequestered voir dire is not required by the constitution. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1215, 1247-1248, and cases cited there.) The United States Supreme Court has also rejected the claim that the use of death-qualified jurors for guilt and penalty violates the Sixth and Fourteenth Amendments in *Lockhart v. McCree*, *supra*, 476 U.S. 162. This Court has rejected a similar challenge in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, and more recently in *People*

v. Lenart (2004) 32 Cal.4th 1107, 1120, *People v.* Steele (2002) 27 Cal.4th 1230, 1240, and *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199. These holding are wrong and Capistrano urges their reconsideration.

A. Death Qualification Does Not Guarantee Jurors Who Will Consider A Life Sentence And Will Weigh Mitigation

The United States Supreme Court has set significant constitutional constraints on who can sit on a death penalty jury. In *Morgan v. Illinois*, *supra*, 504 U.S. 719, the Court made it explicit that to sit on a death penalty jury, a prospective juror must not only not automatically impose the death penalty, he or she must also be willing to consider a life sentence. The Court held that jurors who would "be unalterably in favor of, or opposed to, the death penalty in every case . . . by definition are ones who cannot perform their duties in accordance with law." (*Id.* at p. 735.) So, "juror[s] who will automatically vote for the death penalty in every case" must be disqualified from service, because their presence on the jury would violate "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment." (*Id.* at p. 729.)

The Constitution also guarantees jurors who will consider a wide-range of mitigation evidence offered by the defendant. To assure the constitutionality of the death penalty the death penalty decision must be tailored to the particular individual. (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 203.) Because of the tailoring requirement, a qualified death penalty juror must be open to weighing a defendant's background and character as "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, overruled on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304 (*Atkins*).) Accordingly, jurors must be able to consider mitigating evidence even if it does not relate "specifically to the defendant's

culpability for the crime he committed." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) Capital jurors are free to assess the appropriate weight to be given mitigation but they may not give it "no weight at all by excluding such evidence from consideration." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.) In other words, they must consider any evidence in mitigation that might call for a sentence of life rather than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

However, recent empirical evidence shows that death qualifying a juror using *Witt* does not guarantee jurors who will consider a life sentence and does not assure that jurors will give meaningful consideration to a defendant's mitigation evidence. Empirical studies of actual jurors from actual capital cases show that many jurors who had been screened to serve as capital jurors under the *Witt* standard, and who were thus death qualified, and "who had decided a real capital defendant's fate, approached their task believing that the death penalty is the only appropriate penalty for many of the kinds of murder commonly tried as capital offenses." (Bowers, W. & Foglia, W. *Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. Law. Bull. 51, 62.) Studies of California jurors showed that a substantial minority, and sometimes a majority of jurors, believed that the only appropriate punishment for the defendant in their case was death. (Bowers & Foglia, p. 63; Blume, J., Eisenberg, T. & Garvey, S. *Lessons from the Capital Jury Project* in America's Death Penalty: Beyond Repair? (2003), pp.150-153; Dillehay, R.C. and Sandy, M.R. *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification* (1996) 20 L. & Hum. Behv. 147, 159-160.

Jurors who believe that death is the only acceptable punishment for certain categories of murder can hardly give meaningful consideration to

the defendant's evidence in mitigation as required by *Lockett*. To the contrary, in the language of *Morgan*, such jurors "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) Indeed, because such a juror has already formed an opinion that death is the only possible punishment, the presence or absence of either "aggravating or mitigating circumstances is entirely irrelevant . . . ." (*Ibid.*) Recent empirical studies show that this is in fact the case. Such studies show that jurors who believed that death was the only acceptable punishment had no place in their deliberation for mitigation. A majority of capital jurors when asked about typical mitigation presented in a death penalty case said that such evidence would not be mitigating.[42]

B. *Hovey* Was Right About The Biasing Effects Of Group Voir Dire

However, it is not simply that the death qualification process fails to eliminate jurors from the pool who are unmovably in favor of death and

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[42] So, for example, less than half the jurors saw evidence that a defendant was less than eighteen when the crime occurred or evidence that he had been abused as a child as mitigating. Fewer than one in three thought that good behavior in prison was mitigating. There were only a very few examples of mitigation where a majority of jurors thought that evidence would be mitigating, such as, mental retardation, a history of mental illness or a history of institutionalization. Even here, between twenty and 40 percent of the jurors said that the evidence was not mitigating. At least one juror considered every category of mitigation to be aggravation. (Sandys & McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality,* in 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.)) pp. 402-406.) In addition, factors jurors reported actually discussing in the decision to impose death included very little discussion, and sometimes no discussion, of mitigation. (Bentele & Bowers, *supra,* 66 Brooklyn L.Rev. at pp. 1031-1041.)

who do not consider mitigation. This Court long-ago recognized that exposure to the death qualification process itself creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74; see also Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process* (1984) 8 L. & Hum. Behv. 121, 132 [death qualification creates an imbalance to the detriment of the defendant]; Haney, *Examining Death Qualification: Further Analysis of the Process Effect* (1984) 8 Law & Human Behavior 133, 151.).) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.) The wisdom of this Court's holding requiring sequestered voir dire has most recently been substantiated by studies showing that jurors who had been through a non-sequestered voir dire were more likely to favor the death penalty. (Allen, Mabry & McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis* (1998) 22 L. & Hum. Behv. 715, 724.)

C. *Witt* Qualified Jurors Are More Likely To Convict

The process of death voir dire not only fails to assure a qualified penalty phase jury, it also creates a jury that is not fair and impartial at the guilt phase. This issue has been considered before. In *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, the defendant argued that a jury composed solely of proponents of capital punishment would be biased in favor of guilt: "such a jury . . . must necessarily be biased in favor of conviction, for that kind of juror who would be unperturbed by the prospect of sending a man to his death . . . is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts and return a guilt verdict." (*Id.* at p. 516.) In support of his claim, the defense introduced social science studies which the Court rejected as "too tentative, and too fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." (*Id.* at p. 517.) It refused to rule on the basis of such studies that death qualification was unconstitutional.

This Court in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, also considered the question of whether a death qualified jury was more conviction prone. (*Id.* at p. 1308.) In deciding this issue, this Court conducted an analysis of the research and found that *Witherspoon* excludables, i.e., individuals who would be challenged for cause as opposed to the death penalty, were significantly less conviction prone than the death qualified members. Although the Court accepted that *Witherspoon* qualified jurors were more conviction prone, none of the cited studies had considered the conviction proneness of a jury pool where, besides the exclusion of jurors who would always vote for life, jurors who would always vote for death were excluded, as California law required. In light of the failure to include such "California excludables" in the studies, this Court

concluded that: "petitioner has not made any reliable showing that a pool of 'California death qualified' jurors differs from the pool of jurors who are eligible to serve at non-capital trials," (*id.* at p. 64, footnotes omitted) and declined to hold that death qualification was unconstitutional.

In *Lockhart v. .McCree*, *supra*, 476 U.S. 162, the defendant again sought to establish that death qualifying a capital jury results in a jury that is unconstitutionally guilt-prone and unconstitutionally death-biased. (*Id.* at p. 165.) By the time McCree presented his case, he was able to introduce a substantial body of research (more than two dozen scholarly studies) to support his claim. Nevertheless, the *Lockhart* Court refused to hold death qualification unconstitutional based on social science data, holding that the data was flawed. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 171.) Ultimately, however, the Court held that the empirical issue of conviction proneness was irrelevant: "we will assume for the purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction prone' than 'non-death qualified juries.' We hold, nonetheless that the Constitution does not prohibit States from 'death qualifying' juries in capital cases." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 173.) The Court based its decision on a new interpretation of impartiality, concluding that "an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." (*Id.* at p. 178, italics in original.)

Research has repeatedly demonstrated that *Lockhart's* conclusion that empirical studies do not show that a death qualified jury is more likely to convict is incorrect. Death qualified subjects were more likely to vote for guilt and subjects who would have been excluded because of their opposition to the death penalty under *Witt/Witherspoon* were less likely to

so vote. *Witt/Witherspoon* excludables evaluated the prosecutor and the prosecution witnesses as less believable and were more likely to believe that it was better for society to let some guilty people go free rather than convict an innocent person. Individuals who were death qualified, on the other hand, were more likely to believe that failure to testify on ones own behalf implied that the defendant was guilty; they were more trusting of the prosecutor and of prosecution witnesses and were less likely to trust defense attorneys and defense witnesses, including defense expert witnesses.[43] In short, the studies showed that "death qualification systematically distorts the attitudes of the jury in a direction that discriminates against the defendant and undermines the protections of due process." (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 48.)

Research has also undermined the finding in *Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 64, that there was no evidence that capital jury pools were more conviction prone than noncapital jury pools. More recent studies have shown that "California excludables," i.e., individuals who would never impose the death penalty, are a small percentage of the population, and that even when such individuals are excluded from the pool, a pool of death qualified jurors is significantly more likely to convict

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[43] (See Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation* (1984) 8 L. & Hum. Behv. 53-79; Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes* (1984) 8 L. & Hum. Behv. 31-51; see Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (1998) 61 Law & Contemp. Probs. 125, 147; Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109, 1127; see also Allen, Mabry & McKelton, *supra*, 22 L. & Hum. Behv. at p. 721 [Meta-analysis of fourteen studies showed that the more an individual favored the death penalty the more likely he or she was to favor conviction, regardless of the evidence.)

than the pool of jurors in a non-capital group. (See Kadane, *A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 L. & Hum. Behv. 115, 119; Haney, Hurtado & Vega, *supra*, 18 L. & Hum. Behv. at pp. 624-630.)

D. This Issue May Be Considered On Appeal

Capistrano's trial counsel made a request for individual voir dire pursuant to *Hovey.* (RT 1:198, 2:245) The trial court denied Capistrano's request for general sequestered voir dire, finding that state law did not require him to do so, but held that trial counsel could question some of the jurors individually if it made a timely request to do so. (RT 2:245.) However, the opportunity to voir dire some individual prospective jurors was not adequate to assure that the pool from which the prospective jurors were chosen was fair and unbiased. As noted above, it is the process of voir dire that causes jurors as a group to become less forthcoming about their views on the death penalty (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, fn. 34) and it is the process of group voir dire that causes jurors to be more likely to favor the death penalty. (*Id.* at p. 75.) Since it is the group dynamic that creates the problem, sequestered voir dire of a couple of individual jurors would do nothing to correct it.

Defense counsel did not request that the trial court not death qualify the jury. Nevertheless, this Court can and should consider this issue on appeal. This Court long ago held that it will consider an issue on the merits where it involves "a pure question of law which is presented by undisputed facts." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394, see also *People v. Hines* (1997) 15 Cal.4th 997, 1060-1061.) This Court has repeatedly stated that it is more inclined to review constitutional issues where an appellant's fundamental rights are involved. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195 f n. 6, citing *People v. Yeoman* (2003) 31 Cal.4th 93, 117, 133.)

Finally, any objection to the process of death qualification would likely have been futile. The trial court refused to allow general *Hovey* voir dire, finding that it was not required to do so. (See RT 1:173.) It is therefore unlikely that it would have reconsidered *Lockett*. (See *People v. Whitt* (1990) 51 Cal.3d 620, 637 fn. 7 (addressing merits of appellate claim because objection would likely have been futile); see also *Stutson v. United States* (1996) 516 U.S. 193, 196 [inappropriate to "allow technicalities which caused no prejudice to the prosecution" to preclude appellate review of a criminal defendant's claims]; *People v. Hill* (1998) 17 Cal.4th 800, 820 [reviewing claims on appeal that would have been denied if made to the trial judge].) As such, this Court can and should review the issue.

E. This Court Should Revisit Its Holdings

The *Lockhart* decision relied heavily upon empirical evidence that, as shown above, has changed with the passage of time and no longer supports the holding. The United States Supreme Court has evidenced a willingness to reconsider its holdings where more current empirical evidence has undermined the rationale for the holdings. (See *Brown v. Board of Education* (195) 347 U.S. 483, 494, fn. 11, overruling *Plessy v. Ferguson* (1896) 163 U.S. 537 [modern authority on the psychological damage inflicted upon African-American children by segregated education supported abolition of "separate but equal" doctrine]; *Atkins, supra,* 536 U.S. at pp. 317-320, abrogating *Penry v. Lynaugh, supra*, 492 U.S. 302 [empirical evidence supported relative diminished culpability of the mentally retarded justifying categorical exclusion from eligibility for capital punishment]; *Roper v. Simmons* (2005) 543 U.S. 551 (*Simmons*), abrogating *Stanford v. Kentucky* (1989) 492 U.S. 361 [scientific and sociological studies supported categorical exclusion of juvenile offenders from eligibility for capital punishment].) As such, the principles underlying

Lockhart can be revisited as a matter of federal law.

In addition, Capistrano is entitled to relief as a matter of state law. Capistrano urges this Court to to revisit *Hovey* and the cases following it. *Lockhart* should not be followed for three reasons. First, the United States Supreme Court's holding in *Lockhart* that social science findings were irrelevant to the issue of whether a death qualified jury was fair and impartial is inconsistent with this Court's findings in *Hovey, supra*, 28 Cal.3d 1, that social science research on death qualification is highly relevant to the question of a fair capital jury. Many of the empirical studies rejected by the Supreme Court were in fact found to be reliable by this Court in *Hovey*. For instance, the Supreme Court rejected studies on generalized attitudes to the death penalty and other aspects of the criminal justice system as irrelevant to the constitutional question. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 169.) This Court, on the other hand, expressly acknowledged the importance of the studies. (See *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 41-61.) Moreover, in *Hovey*, the only significant fault this Court found with the studies offered by the petitioner in that case was that they did not include California excludables. (*Id.* at p. 64.) However, as Capistrano has shown, current studies show that even "California qualified" death penalty juries are more likely to convict than a pool of noncapital prospective jurors.

Second, the *Lockhart* decision was made in a context in which the United States Supreme Court assumed that the capital punishment system instituted after *Gregg v. Georgia*, *supra*, 428 U.S. 153, which provided a system of guided discretion, was fair. However, as the recent empirical studies quoted by Capistrano have shown, this is highly doubtful. Capistrano has cited above studies showing that the system as currently constituted results in jurors that are unwilling to weigh mitigation and who

automatically impose death. Capistrano has also cited studies which show that jurors systematically misunderstand the instructions they are read at penalty phase in a way that disadvantages the defense. (See Argument XXIII, *supra.*) This Court cannot assume as *Lockhart* did that capital punishment is operating fairly. (See *United States v. Carolene Products* (1938) 304 U.S. 144, 153 [where the "constitutional facts" upon which a case is based are no longer correct, the Court's holding is no longer controlling under the federal Constitution].)

Third, this Court's discussion of the requirements of a fair jury in *Hovey* was based on both the federal Constitution and on the California Constitution. Although the United States Supreme Court has held that a jury may be fair even if it is shown to be more inclined toward death, this Court has never overruled its holding in *Hovey* to the contrary. Under *Hovey*, a fair jury pool from which capital jurors are drawn must be one which is not only impartial, but is one which is "constitutionally neutral" through diversity. (*Id.* at p. 66.) California law requires that a fair jury pool be not only one where all members are fair and impartial but one where the members of the jury pool "bring to the determination of guilt a diversity of experience, knowledge, judgment, and viewpoints, as well as differences in their 'thresholds of reasonable doubt." (*Id.* at p. 22.) This Court held that such jury pool diversity was critical to the functioning of a jury because by counter-balancing the various biases among jurors, and by assuring that evidence was considered from different points of view, diversity in a jury pool promoted the accuracy of verdicts. (*Id.* at pp. 23-24.)

In the case of death qualified juries, Capistrano has shown that the principle of jury neutrality through diversity has been violated. As the data shows, death qualification systematically excludes individuals who are more likely to find reasonable doubt in a case, more likely to be skeptical

about the prosecution's evidence and less likely to mistrust the defense. As such, a death qualified jury violates California law. Therefore, this Court should not follow *Lockhart* which relied on incorrect empirical assumptions, a false presumption that the death penalty is fair, and which is inconsistent with the law in California. Moreover, since Capistrano has shown that the process of group voir dire creates a jury that is more inclined to impose death, this Court should also reverse its recent holdings permitting group voir dire.

F. Death Qualification Violates Capistrano's Constitutional Rights To A Reliable Sentence And To A Fair Trial

The Eighth Amendment requires heightened reliability in capital cases both at guilt and at penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) Death qualification distorts the jury so that it is more conviction prone and more prone to sentence a defendant to death, as such a death sentence imposed by a death qualified jury cannot meet the requirements of the Eighth Amendment.

Moreover, such a sentence violated Capistrano's rights to a fair trial. In *Taylor v. Louisiana*, *supra*, 419 U.S. at pp. 530-531, the Supreme Court identified three purposes underlying the right to a jury trial. Death qualification defeats all three purposes underlying the Sixth Amendment right. First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who tend to question the prosecution are the very people excluded from the jury via death qualification. Death qualification makes the "commonsense judgment of the community" unavailable. Death qualification also removes the

constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Ibid.*) The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (*Taylor v. Louisiana, supra*, 419 U.S. at pp. 530-531.) Death qualification fails to preserve confidence in the system, and discourages community participation. The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Louisiana, supra,* 419 U.S. at p. 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because death qualification undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement of the Equal Protection Clause. "We think it obvious that the concept of 'distinctiveness' must be linked to the [three] purposes of the fair-cross-section requirement." (*Lockhart v. McCree*, *supra*, 476 U.S. at p.175.)

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V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RESTRICTING THE CROSS-EXAMINATION OF THE PROSECUTION'S KEY WITNESS ON MATTERS RELEVANT TO HER CREDIBILITY

The trial court erroneously precluded the cross-examination of Gladys Santos regarding conduct underlying two prior misdemeanor petty theft convictions and precluded examination as to whether there was a connection between Santos's legal problems and her favorable testimony for the state. Likewise, the trial court erred by precluding cross-examination of Santos relating to her concerns about child custody and public assistance as those areas were directly related to Santos's willingness to testify truthfully regarding her own activities as a drug supplier. Santos was the state's key witness and all of the precluded areas of cross-examination were directly relevant to her credibility as well as evidence of her motive to fabricate. The court's rulings denied Capistrano his federal and state constitutional rights to confrontation, to a fair trial, to due process of law and to a reliable determination of guilt and judgment of death in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

A. Proceedings Below

On the day before Gladys Santos testified, the prosecution disclosed information to the defense relevant to Santos's credibility. (5 RT 2412-2414.) The information disclosed was that Santos had suffered two misdemeanor petty theft convictions; that she had been on probation for one of these offenses at the time she told police of Capistrano's statements to her regarding the charged crimes; that the prosecution had paid expenses for Santos to move to a new apartment; and that Deputy District Attorney Sortino had contacted the Department of Children Services on her behalf.

(5 RT 2413-2414.) The following day, just before Santos was to testify, the prosecutor sought a ruling to preclude the use of this information to impeach her. (5 RT 2412-2414.)

The court ruled that Santos's misdemeanor petty theft convictions were inadmissible hearsay. (5 RT 2415.) The court further ruled that the conduct underlying the convictions could be presented through the testimony of other witnesses, but precluded defense counsel from cross-examining Gladys Santos on this herself. (5 RT 2415-2417.) The court allowed that it was permissible to elicit that Santos was on probation for a misdemeanor offense at the time she made statements to the police regarding Capistrano and Drebert's alleged statements. (5 RT 2415-2416.) But, again, the court precluded cross-examination about the underlying conduct, saying "there will be no inquiry as to what particular offense she was on probation for." (5 RT 2416.)

The trial court deemed the prosecutor's contacts with the Department of Children Services on Santos's behalf to be irrelevant to Santos's credibility. (5 RT 2416.) The court discouraged counsel from exposing the prosecution's payment for Santos to move to a new apartment by suggesting that it would open the door to admission of evidence to explain why Santos wished to move: that is, that Capistrano had threatened Santos. (5 RT 2417.)

Initially, the trial court ruled that cross-examination regarding Santos's drug sales activities was permissible because such activities were indicative of moral turpitude and thus relevant to her credibility. (5 RT 2416.) However, after Drebert's counsel indicated that she intended to cross-examine Santos regarding her sales of drugs to individuals other than the defendants, the prosecution sought to curb that cross-examination. (6 RT 2673.) The trial court then ruled that Santos could only be cross-

examined about supplying drugs to Drebert and Capistrano and could not be asked about drug transactions with others absent a witness to testify to those transactions. (6 RT 2675.)

Drebert sought to cross-examine Santos to explore whether her concern about losing custody of her children and losing her public assistance benefits was affecting the truthfulness of her testimony at trial. (6 RT 2669-2670.) Drebert asserted that, contrary to her assertions that she provided defendants with drugs as a favor to Joanne Rodriguez, that Santos was a methamphetamine dealer and a fence and that was the reason for Drebert's contacts with her. (6 RT 2670-2671.) The court precluded the examination, deeming the area to be collateral under Evidence Code section 352.[44] (6 RT 2672-2674.)

On direct examination, the prosecutor elicited that Santos was on misdemeanor probation at the time she told law enforcement about Capistrano's alleged statements and that the District Attorney's office had helped her move because she had been threatened by Capistrano. (6 RT 2518, 2527-2528.)

On cross-examination, defense counsel exposed some inconsistencies in Santos's testimony, but was precluded by the court's rulings from "expos[ing] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 318.)

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[44] Although this particular request for cross-examination was put forward by Drebert's counsel, because it was a joint trial, the ruling affected Capistrano as well. The ruling demonstrated the futility of Capistrano making a similar request although his defense would have benefitted from cross-examination on the same topic because it was relevant to Santos's credibility and to her motive to lie.

B. The Trial Court's Restrictions On Cross-Examination Of Gladys Santos Violated Capistrano's Rights Under State Law And The State And Federal Constitutions

Under the Confrontation Clause, a defendant has a right to an opportunity for effective cross-examination "designed to show a prototypical form of bias on the part of the witness." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) Cross-examination of a witness is the principal means by which a defendant's right to confront the witnesses against him is secured. (*Davis v. Alaska, supra,* 415 U.S. at pp. 315-316.) The right to cross-examination is considered to be even more important when the witness to be examined is the key witness in a criminal prosecution. (*People v. Murphy* (1963) 59 Cal.2d 818, 831; *United States v. Brown* (5th Cir. 1977) 546 F.2d 166, 170.)

Although the extent of cross-examination is within the trial court's discretion, the right to cross-examine in a relevant area is not. Thus, although a trial court may properly limit cross-examination in an area, the court has no power to completely preclude inquiry into an area relevant to the witness's credibility. (*United States v. Atwell* (10th Cir. 1985) 766 F.2d 416, 419-420; *United States v. Valentine* (10th Cir. 1983) 706 F.2d 282, 287-288; *United States v. Haimowitz* (11th Cir. 1983) 706 F.2d 1549, 1559; *United States v. Brown*, (5th Cir. 1977) 546 F.2d 166, 169.) The court's power to limit the extent of cross-examination in an area only arises "after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." (*United States v. Haimowitz*, *supra*, 706 F.2d at p. 1559.)

Cross-examination in any particular area is sufficient to satisfy the Sixth Amendment when the defendant has been allowed the opportunity to ask "'whether [the witness] was biased' but also 'to make a record from which to argue why [the witness] might have been biased'" or otherwise

unreliable. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; accord *People v. Boehm* (1969) 270 Cal.App.2d 13, 21; *United States v. Schoneberg* (9th Cir. 2005) 396 F.3d 1036, 1042; *United States v. Elliot* (5th Cir. 1978) 571 F.2d 880, 908.) "It is the essence of a fair trial that reasonable latitude be given the cross-examiner." (*Alford v. United States* (1931) 282 U.S. 687, 692.) When a court precludes cross-examination in a particular area, the defendant's constitutional rights have been violated. (See, e.g., *United States v. Valentine*, *supra*, 706 F.2d at pp. 287-288; *United States v. Brown*, *supra*, 546 F.2d at p. 169.)

The jury is entitled to know the circumstances underlying a witness's cooperation. As stated in *People v. Pantages* (1931) 212 Cal. 237:

> It should require neither argument nor authority as the basis for an assertion that if it be established as a fact that by the use of direct or even by veiled threats, or through insinuations, or innuendo, or intimidation, or menace of any sort, or by means of promises of assistance, or of influence to be exerted in his behalf, expressly made, or but ambiguously suggested by or through anyone either actually or assumedly in authority in the premises, or even by an utter stranger or interloper in the proceedings, or by any way, method, or manner whatsoever, a witness be thereby induced either to give false testimony, or to color the truth of his sworn statements – the jury should be placed not merely in possession of the affirmative ultimate fact of the bias of the witness, or his denial thereof, but, if necessary, should hear the basic facts, if any, upon which such conclusion be founded.

(*Id.* at pp. 253-254 [error for the trial court to refuse to permit cross-examination regarding whether witness believed he had been indicted

in another state and whether any promises had been made or implied in exchange for testifying favorably for the prosecution].) It is well established that "a prosecution witness can be impeached by "a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of [the State] by aiding in the conviction of the defendant." (*Id.* at 255-256; see also *Wilkerson v. Cain* (5th Cir. 2000) 233 F.3d 886. 890-891 [error where trial court restricted cross-examination of key witness regarding letters written to prison administrators concerning a transfer request]; *United States v. Fowler* (D.C. Cir.1972) 465 F.2d 664, 665-666 [error in narcotics prosecution to disallow cross-examination of undercover narcotics agent regarding the circumstances of his termination where counsel suspected the reason was drug use].)

The witness's own state of mind regarding his/her motive to fabricate, bias, or the existence of undue pressure may be explored on cross-examination "even though there may be no reasonable basis for the existence of such a motive." (*People v. Allen* (1978) 77 Cal.App.3d 924, 931; see also *People v. Pantages*, *supra*, 212 Cal. at p. 255; *Davis v. Alaska*, *supra*, 415 U.S. at p. 316.) The witness's state of mind is relevant both at the time the information is given to the police and at the time of testimony. (*People v. Allen*, *supra*, 77 Cal.App.3d at p. 932.)

It is true that not every restriction of cross-examination amounts to a constitutional violation, and the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*See Delaware v. Van Arsdall*, 475 U.S. at pp. 678-679.) However, where the defendant can show the prohibited cross-examination would have produced "a significantly different impression of [the witness's] credibility" (*Id.* at p. 680), the court's exercise

of its discretion in this regard violates the Sixth Amendment and the California Constitution. (See *People v. Frye* (1998) 18 Cal.4th 894, 946.)

In *Davis v. Alaska*, the United States Supreme Court held that the defendant in a burglary case had a constitutional right to cross-examine a crucial prosecution witness about a juvenile burglary adjudication for which the witness was on probation, notwithstanding a state rule making evidence of juvenile adjudications inadmissible. These adjudications were relevant to credibility to show undue pressure because of the witness's vulnerable status as a probationer and because of the witness's possible concern that he might be a suspect in the crimes for which the defendant was being tried. (*Davis v. Alaska*, *supra*, 415 U.S. at pp. 317-318.) The Court emphasized that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," adding that the juvenile's testimony "provided 'a crucial link in the proof . . . of [the defendant's] act.'" (*Id.* at p. 317 (citation omitted). "In this setting," the Court concluded, ". . . the [Sixth Amendment] right of confrontation is paramount to the State's policy of protecting a juvenile offender." (*Id.* at p. 319.)

This Court has held that a person can be impeached in a criminal case by evidence of prior misdemeanor conduct that involves moral turpitude, although the fact of the conviction itself is inadmissible hearsay when offered as evidence that a witness committed misconduct bearing on credibility. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297, superseded in part by statute as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) "Misconduct involving moral turpitude may suggest a willingness to lie...." (*Id.* at p. 295.) Determining whether misdemeanor conduct constitutes moral turpitude and is thus admissible to impeach a witness's veracity is within the trial court's discretion under Evidence Code section

352.[45] The trial court's exercise of that discretion will be upheld unless it was arbitrary, capricious, or patently absurd. (*People v. Jones* (1998) 17 Cal.4th 279, 304.) The conduct underlying a conviction of misdemeanor petty theft is the type of conduct which constitutes an act of moral turpitude. (See *Cheleden v. State Bar* (1942) 20 Cal.2d 133, 134 [misdemeanor petty theft constitutes crime involving moral turpitude]; *In re Rothrock* (1945) 25 Cal.2d 588, 591-592 [attorney obtaining money by drawing four checks in amounts ranging from $3 to $25.07, knowing that he had no account in the bank or insufficient funds, constituted moral turpitude within the disbarment statute].)

In the instant case, the trial court ruled that the conduct underlying Santos's misdemeanor petty theft convictions was admissible, but ruled that evidence of that conduct had to be supplied by someone other than Santos. (5 RT 2415-2417.) Contrary to the trial court's ruling in this case, proof of conduct underlying a misdemeanor conviction for a crime of moral turpitude does not have to come from extrinsic evidence: "[n]othing in the hearsay rule preclude[s] proof of impeaching misdemeanor misconduct by other, more direct means, *including a witness's admission on direct or cross-examination* that he or she committed such conduct." (*People v. Wheeler, supra,* 4 Cal.4th at p. 300, fn. 14, emphasis added; see also *People v. Steele* (2000) 83 Cal.App.4th 212, 223 [trial court erred by disallowing cross-examination of witness regarding misdemeanor conviction "even

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[45] Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

though [appellant] may not have had evidence to controvert a denial by [the witness]"]; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 88-92 [misdemeanor conduct as impeachment properly elicited through cross-examination].)

The trial court erroneously made Capistrano's ability to impeach Santos with conduct critical to the jury's assessment of her credibility, i.e., that she had committed acts involving dishonesty, contingent upon Capistrano presenting extrinsic evidence of those acts. In fact, the law clearly permitted and continues to permit impeachment with conduct underlying a misdemeanor conviction by cross-examination of the misdemeanant. The patent error in restricting the cross-examination of Santos in this regard cannot be disputed.

That Capistrano was permitted to cross-examine Santos regarding her status as a probationer for an unspecified misdemeanor did not mitigate nor cure this error. As in *Davis v. Alaska*, the "accuracy and truthfulness of [the witness's] testimony were key elements in the State's case" and the matter foreclosed to cross-examination was critical to developing evidence of Santos's bias. (*Davis v. Alaska, supra,* 415 U.S. at p. 317.) The conduct underlying Santos's "misdemeanor probation" was of a type that demonstrates moral turpitude, specifically dishonesty, a matter indisputably relevant to the jury's assessment of her credibility. The mere fact of Santos's misdemeanor probation would have given the jury no information from which to infer that she had done anything more serious than engage in minor crime not involving dishonesty, such as driving with a suspended license.

The conduct underlying Santos's prior petty theft convictions and her probationary status as a result of those convictions were relevant and admissible to afford a basis for an inference of undue pressure because of

the Santos's vulnerable status as a probationer and because of Santos's possible concern that she might be a suspect in the crimes for which the defendant was being tried. (*Davis v. Alaska*, *supra*, 415 U.S. at pp. 317-318.) Thus, Capistrano was also erroneously prohibited from cross-examining Santos: (1) regarding whether her probationary status that arose from the petty theft convictions increased the amount of leverage the prosecution had to press for her cooperation; and (2) whether Santos's testimony implicating Capistrano arose from a desire to deflect suspicion away from herself for possession of the property stolen in the charged crimes. Even more so than the witness in *Davis*, the conduct underlying Santos's petty theft convictions was relevant to show Santos's possible concern that she might be a suspect in the crimes for which the defendant was being tried. (*Ibid.*) Santos was on probation for theft crimes and the charged crimes were theft crimes. In *Davis*, evidence of the charged crime, an empty safe, was found near the witness's home and the witness identified the defendant as a man he had seen with a crowbar in the area where the safe was found. (*Id.* at pp. 309-310.) In the instant case, stolen items were not just found in Santos's vicinity — she was initially arrested in connection with the charged crimes and she later produced to the police items in her possession that had been stolen during the crimes.

The defense was erroneously precluded from questioning Santos on still other matters relevant to her credibility. On cross-examination, the defense sought to show that Santos had a practice of supplying methamphetamine on a barter system in exchange for stolen property. She admitted having supplied methamphetamine to defendants on two occasions, but denied that she had received anything of value in exchange and claimed she had done it for altruistic motives to prevent Capistrano from "harassing" his cousin. (6 RT 2519, 2534-2538, 2540-2542.)

However, defense counsel was precluded from cross-examining Santos as to her drug transactions involving anyone other than Capistrano and Drebert. Thus, her veracity on this point was uncontested and the jury was not afforded an opportunity to assess the truthfulness of her testimony after full adversarial testing.

Santos's concerns that she would lose custody of her children or lose her public assistance for her acts in connection with the instant case were directly relevant to the truthfulness of her testimony at trial. In addition to the possibility of prosecution for such activities if she admitted to them, those admissions could have affected her eligibility for public assistance and endangered her custody of her children. (See e.g., 21 U.S.C.A. § 826a [ineligibility for food stamps after conviction of felony-class drug offenses]; Welf. & Inst. Code, § 11251.3 [ineligibility for aid after conviction of felony-class drug offenses]; Civ. Code, § 232(a)(3) [custody termination for habitual use of controlled substances by parent].) This information was relevant to her credibility and probative of her complicity in the instant crimes, and the trial court erred in excluding it under Evidence Code section 352.

In addition, the trial court erred in ruling that the prosecution's contacts with the Department of Social Services on Santos's behalf were irrelevant to Santos's credibility. The prosecution's contacts with the Department of Social Services on Santos's behalf were relevant as a circumstance tending to show that Santos's testimony was or may have been influenced by a desire to attain the aid of the prosecution to prevent losing custody of her children by aiding in the conviction of the defendant.[46]

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[46] Jessica Rodriguez made reference in her testimony to having received threats from investigating officers about having her children

(continued...)

(See *People v. Pantages, supra,* 212 Cal. at pp. 255-256.)

Further, the foreclosure of cross-examination as set forth above was also error because where the prosecution introduces evidence on a particular issue, due process requires that the defendant be allowed to present evidence on this issue as well. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169 [in a capital case, due process does not permit the state to argue future dangerousness to the public as a reason to sentence defendant to death while at the same time exclude evidence from defendant showing that he would never get out of prison]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [due process does not permit the state to rely on a defendant's confession while at the same time exclude evidence from defendant explaining why the confession was unreliable].) Here, the state placed Santos's credibility at issue. It then affirmatively introduced evidence of motives to support her credibility (self-preservation in light of Capistrano's alleged threats) while preventing the defendant from fully impeaching her. This combination of rulings deprived Capistrano of due process as well.

In conclusion, the cross-examination prohibited by the trial court would have produced "a significantly different impression of [the witnesses'] credibility" (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680), and the trial court's exercise of its discretion in this regard violated the Sixth Amendment. (*People v. Cooper* (1991) 53 Cal.3d 771, 817.)

C. The Restrictions On Cross-Examination Were Prejudicial And Require Reversal of Capistrano's Conviction and Judgment of Death

Because these errors violated Capistrano's constitutional rights,

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[46](...continued)
removed from her custody. (9 RT 3286.)

reversal is required unless respondent can prove the error harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684; *Chapman v. California, supra,* 386 U.S. at p. 24.) On the record of this case, the state cannot sustain its burden.

In assessing whether error is harmless, the United States Supreme Court has identified a number of relevant factors, all of which demonstrate that the error in this case was prejudicial and requires reversal: (1) the importance of the witness's testimony to the prosecution's case; (2) whether the testimony was cumulative; (3) existence of evidence corroborating or contradicting the witness on material points; (4) the extent of the cross-examination that was permitted; and (5) the overall strength of the prosecution's case. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684.) As will be shown below, full consideration of these factors demonstrates that the error here was prejudicial.

1. Without Gladys Santos's Testimony, The Prosecution Of Capistrano For The Witters, Weir And Solis Crimes Would Have Failed

The importance of Gladys Santos's testimony to the prosecution's case against petitioner on the capital crime and the crimes against Solis and Weir cannot be overstated. The prosecution's case against Capistrano on those crimes rested on the testimony of Santos.

With regard to the sole capital crime, the Witters homicide, no forensic or eyewitness identification evidence linked Capistrano to that crime. Capistrano was not seen or found with any of the items purportedly taken from the Witters residence. The prosecution's case against Capistrano for that crime depended upon Santos's testimony that Capistrano had confessed to her. In making its case against Capistrano for the Witters homicide in its closing, the prosecution argued mantra-like:

> And you know that John Capistrano committed that murder

because Gladys Santos came in here and testified to you and told you about what John Capistrano had told her.

She told you that he admitted to her that he had strangled a man to death because the man saw him without a mask.

***

He admitted to her his involvement in that murder, and you heard that from Gladys Santos.

(10 RT 3570.)

***

You know that John Capistrano committed that crime because he told Gladys Santos about it.

(10 RT 3590-3591.)

***

You know that John Capistrano committed this robbery-murder because of what Gladys Santos told you he said.

(10 RT 3600.)

Indeed, the prosecution's case for capital murder depended on Capistrano's alleged admissions to Santos, along with another statement she attributed to him, i.e., that at some point after the homicide he called her on the telephone and asked if she wanted an Apple Macintosh computer. (5 RT 2448, 2461.) The only extrinsic evidence admitted against Capistrano that purported to tie him to the capital crime was that he visited his cousin who lived in the same apartment complex as Witters, that he was charged with committing other home invasion robberies where the perpetrators used ski masks, and that he had access to his cousin's car in which ski masks and gloves were found. (10 RT 3597-3600.) However, the evidentiary value of the extrinsic evidence relating to the inferences to be drawn from Capistrano's access to ski masks relates back to and depends upon Santos's testimony about Capistrano's alleged admissions: She testified he said he

killed the man because the man saw him without a mask. (10 RT 3570.) There existed no evidence other than the statement Santos attributed to Capistrano that the perpetrators of the Witters homicide wore ski masks. Without the testimony of Santos, all the prosecution had as proof against Capistrano for the capital homicide was that Capistrano had been to the apartment complex where the victim was found. Clearly, if the jury did not find Santos to be a credible witness, the prosecution did not have a case for capital murder against Capistrano.

The prosecution's case against Capistrano for the Weir and Solis crimes also depended upon the credibility of Santos. Capistrano was not identified as a perpetrator by victims of either the Weir or Solis crimes.

Regarding the Weir crimes, the prosecution again argued "And you know that Mr. Capistrano is the man who did it because he admitted it to Gladys Santos." (10 RT 3573.) The extrinsic evidence of that crime that purported to link Capistrano to the Weir crimes also depended upon the credibility of Santos – she testified that jewelry stolen from the Weirs that she possessed in her apartment belonged to Capistrano. (10 RT 3628.)

Other extrinsic evidence purporting to connect Capistrano to the Weir crimes was that a porcelain angel stolen from the Weirs was found in the apartment of Michael Martinez. Martinez testified that the angel belonged to his roommate Amy Benson, and that Benson hung around Capistrano, Drebert, Pritchard and Vera. (10 RT 3630-3631.) The prosecution argued that a reasonable inference was that the angel came from Capistrano or one of the other people involved. (10 RT 3631.) The prosecution's reasoning here is circular: the evidence that Capistrano, as opposed to Drebert, Pritchard or Vera, was involved in the Weir crimes is based upon Capistrano's alleged admissions to Santos. Thus, her credibility is still central to its case against Capistrano relating to the Weir crimes. If

the jury did not believe her testimony, the prosecution was left with little else to connect Capistrano to the Weir crimes: the only other evidence adduced against Capistrano was that the car stolen from the Weirs was found near where Capistrano was staying and that a car matching the description of his cousin's car was seen near the Weir residence on the date of the crimes. (10 RT 3629.) Standing alone, this evidence is clearly insufficient to connect Capistrano to the Weir crimes.

With regard to the Solis crimes, Santos produced property stolen from Solis, i.e., a laptop computer and an answering machine, which she said was brought into her apartment by Capistrano.[47] Aside from the statements Santos attributed to Capistrano regarding the charged crimes, the stolen property supplied by Santos and her attribution of possession of that property to Capistrano was the only link to the Solis crimes.[48]

2. The Testimony Of Gladys Santos Was Not Cumulative

Santos's testimony was not cumulative of other evidence in the case. By testifying to Capistrano's alleged admissions, she provided the only evidence linking him to the capital charges and the only evidence of intent regarding the homicide and the special circumstances. Her testimony about the laptop computer and the answering machine provided the only

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[47] The jury was instructed pursuant to CALJIC 2.15 that they could find Capistrano guilty of all of the theft-related offenses on the basis of possession of stolen property. Error related to the giving of that instruction is discussed in Argument IX, *post*.

[48] Solis identified Pritchard and Vera as two of the four or five perpetrators. There is indication in the record that these identifications were the product of suggestive identification procedures, however Pritchard and Vera were tried separately and the identifications of those co-defendants were not contested at Capistrano's trial. DNA evidence was presented that neither inculpated nor exculpated Capistrano.

evidentiary link that connected Capistrano to the Solis crimes. Her testimony about Capistrano's admissions as well as production of jewelry stolen in that robbery that she linked to Capistrano provided the only evidence of Capistrano's participation in that crime.

That Santos's testimony was absolutely critical to the prosecution case was underscored by the fact that the prosecutor went to great lengths in his guilt phase closing argument to bolster her credibility. Taking advantage of the court's ruling prohibiting cross-examination on issues related to Santos's credibility and bias, the prosecutor asked jurors to infer that the supposed threats to Santos enhanced her credibility, an inference they might not have drawn if they had heard the cross-examination that the trial court precluded. (*See People v. Daggett* (1990) 225 Cal.App.3d 751, 758 [error in refusing to permit evidence was compounded by prosecutor's argument which misleadingly asked jury to draw inference they might not have drawn if they had heard the excluded evidence]; *People v. Varona,* (1983) 143 Cal.App.3d 566, 569-570 [not only did court err in excluding the evidence, but the prosecutor committed misconduct by arguing to jury that there was no proof that alleged rape victim was a prostitute where the defense was prevented from proving that fact by the prosecutor's objection].) The testimony and argument about the alleged threats was obviously prejudicial to Capistrano above and beyond its effect on the jury's assessment of Santos's credibility. All the while, Capistrano's hands had been tied and he was prevented from exposing to the jury facts which seriously undermined her credibility.

Again and again throughout its guilt phase closing argument, the prosecutor argued that Santos was credible and has no motive to lie:

> First of all, Gladys Santos had absolutely no motive to come in here and tell you anything but the truth.
>
> * * *

You also know that she had no motive to lie. What would be her motive to lie? By coming in here and testifying, she placed herself at risk. She had no reason to do that, except the fact that what she told you was the truth.

You also know that there was no other reason for her to do it. She was not facing any charges at the time. She had been charged with nothing at that point. She wasn't under arrest.

She came in on her own and told Detective Ferrari of the West Covina Police Department what the defendant had told her about that crime because it was bothering her. You saw her testify that she felt bad about it because she should have come in earlier.

She told the truth because there was no reason for her to do anything but tell the truth.

(10 RT 3591-3592.)

So you know that John Capistrano committed this robbery-murder because of what Gladys Santos told you he said. You know that Gladys Santos is telling you the truth because she had no motive.

The crime scene corroborates everything that she said John Capistrano told her. He took the opportunity to threaten her repeatedly, and you know about one threat that Detective Ferrari heard on the phone that was recorded.

(10 RT 3600.)

The prosecutor returned to his theme regarding Santos's credibility in his guilt phase rebuttal argument:

But the most important thing you've got to ask yourself is: what possible motivation does Gladys Santos have to come in and lie?

I submit to you there was not any. She was not under any charges at the time she came to the police station in May to talk to the police officers. She wasn't under arrest for anything. Nothing had been given to her. She came in and told the officers because it was weighing heavy on her mind.

Counsel couldn't even come up with a reason for her

> *to lie*. He threw out some kind of speculation that maybe there was some other relationship going on between Gladys Santos and John Capistrano that would explain or give you some reasonable basis to conclude that she was doing anything other than telling the truth from that stand.
>
> Well, there's no evidence of that . . . and that's because there wasn't any relationship. If there was, you would have heard about it from the defense side of the table. They have subpoena power. The way I bring my witnesses in to court, serve subpoenas on them, that compels somebody to come in to court and testify, testify truthfully.

(10 RT 3688.)

> *There simply is no evidence of any motive for Gladys Santos to do anything but tell the truth*, and, in fact, everything points to the fact that she was. By coming in here and testifying she placed herself at risk, and you know she was at risk because of the threats that were being made to her.
>
> She chose to do it anyway, and the reason she chose to do it is because she's telling the truth. Why would anybody make something like that up to place them in a situation of then having to come in to court and, in front of everybody, testify to that?
>
> *The only reason somebody would do that is because they're telling the truth.*

(10 RT 3689, emphasis added.) Thus, it is beyond doubt that Santos's testimony was the cornerstone of the prosecution's case against Capistrano as to the Witters, Weir and Solis crimes.

3. The Extrinsic Evidence Purported To Corroborate Gladys Santos's Testimony Was Specious And She Contradicted Herself On Material Points

The prosecutor argued that Santos's testimony about Capistrano's statements regarding the Witters robbery homicide was corroborated by the crime scene. (10 RT 3593-3594, 3600.) However, Drebert had confessed in detail to Santos that he was present and involved in the commission of

the homicide. (5 RT 2462-2481; 6 RT 2588-2616, 2682-2683.) The fact that Santos attributed statements to Capistrano that were consistent with the crime scene evidence simply means that the statements attributed to Capistrano conformed to information Santos had already learned about the crime from Drebert. (5 RT 2463-2480.)

Not only was there no extrinsic evidence that corroborated Gladys Santos, she contradicted herself on material points and the restriction of cross-examination prevented defense counsel from establishing that those contradictions were not simply the product of an innocent failure of memory. Her testimony at trial about the origin of this critical evidence differed in key respects from her earlier preliminary hearing testimony. Before Capistrano's jury, Santos testified that *Capistrano* had left a Spectra laptop computer with a plasma screen on top of her refrigerator and that he had brought a telephone answering machine (both from the Solis robbery) there at the same time. (5 RT 2447; 6 RT 2520-2523.) But, at the preliminary hearing, she testified that *Drebert*, not Capistrano, had brought the laptop to her house. (CT 496.) On cross-examination at the capital trial, Santos admitted that she was not present when the laptop was brought to her house, but claimed to have been present when the answering machine was "dropped off." (6 RT 2562-2564.) Further, at the preliminary hearing she testified that Capistrano told her only that he and Drebert were present at the Witters homicide (1 CT 488-495); at trial, she testified that he told her that "Little Giant" (a.k.a. Eric Pritchard) was also present. (5 RT 2442.)

Santos testified that all of the items of property she turned over to the police after she was released from jail were found in the bedroom where Capistrano had stayed. (6 RT 2521-2522, 2527.) She claimed that Capistrano brought the answering machine (from the Solis robbery) to her apartment in December 1995 (6 RT 2520-2521) and the jewelry (from the

Weir robbery) before Christmas 1995 (6 RT 2526). However, Santos also claimed that Capistrano had never stayed in that bedroom — or in her apartment at all — until the three nights before his arrest (on January 19, 1996). (5 RT 2431-2432.)

There were other instances where Santos's testimony before Capistrano's jury contradicted the testimony she gave to Drebert's jury. For example, before Capistrano's jury, Santos denied that Drebert had told her the victim was shaving (6 RT 2549), but before Drebert's jury, Santos testified that *Drebert* said the victim was shaving (5 RT 2467). Also, before Drebert's jury only, Santos said she thought the jewelry belonged to Capistrano's daughter Justine and she had seen Justine wearing it. (6 RT 2630, 2641, 2678-2679.)

Santos's statements to law enforcement conflicted with the corroborating evidence and with her own trial testimony. Santos told the police that Capistrano told her he had cut the victim's throat (6 RT 2559), but at trial, she became less specific because the earlier statement did not conform to the evidence at trial regarding the condition of Witters' body. (5 RT 2446 ["he just slit – cut him, shanked him or cut him. He said he did both."]; 5 RT 2408 [forensic testimony was that Witters' throat was not cut and his body bore no puncture wounds although there were cuts on his wrists].) Defense counsel attempted to show that Santos was describing what she had heard about *Martinez's* injuries rather than Witters. (10 RT 3672, 3675.) However, without an opportunity for effective cross-examination regarding Santos's motives to fabricate, the defense could not show that Santos was deliberately changing her testimony to conform to the forensic evidence adduced at trial rather that suffering an innocent confusion.

4. The Defense Was Foreclosed From Cross Examining Gladys Santos Regarding Important Matters Relevant To The Jury's Determination Of Her Credibility

The defense was completely foreclosed from exploring Santos's prior criminal conduct, the circumstances surrounding her probationary status and factors relevant to her credibility. While defense counsel was permitted to cross-examine Santos about supplying drugs to the defendants, he was not permitted to show that her concerns regarding her child custody and receipt of public assistance were affecting the truthfulness of her testimony. Nor was defense counsel permitted to explore whether it was Santos's practice to receive stolen property from others in exchange for drugs. He had to focus instead on the inherent flaws in her testimony without exposing facts from which the jury could conclude that she had motives to lie and that she had engaged in dishonest conduct constituting moral turpitude and, thus, her trustworthiness was compromised.

In *People v. Steele*, *supra*, 83 Cal.App.4th 212, the trial court's error in disallowing cross-examination regarding the conduct underlying the witness's misdemeanor conviction was held harmless because the jury was aware of the witness's "20-year career as a prostitute and her prior conviction for voluntary manslaughter." (*Id.* at 225.) Unlike *Steele*, the jury in the instant case were unaware of the significant impeaching information available as to Santos that bore directly on her veracity as well as on her motive to lie.

Because Santos was shielded from cross-examination regarding her bias and motive to fabricate, her claim that her motive for providing information to police and testifying was related to what she characterized as threats made to her by Capistrano went largely unchallenged. (5 RT 2457-2458; 6 RT 2570-2571, 2694.) In addition to Santos's somewhat vague

testimony, over Capistrano's best evidence objection, Detective Ferrari testified that on May 15, 1996, he listened to a message from Capistrano on Santos's voice mail. (8 RT 3154-3155.) The message was that Capistrano had gotten copies of the police reports indicating that Santos had talked to the police. (8 RT 3155.) Capistrano said he would send her copies of the reports and "he was gonna see what he had to do." (8 RT 3155.) Had Santos's motives to avoid being implicated in the charged crimes and avoid jeopardizing her probationary status been exposed, it would have also changed the jury's view of what Santos characterized as threats. The content of the phone message could readily have been understood as an objection to Santos deflecting responsibility for her own actions onto Capistrano.

The foreclosure of cross-examination also allowed the prosecutor to argue that Capistrano's allegedly threatening telephone calls were Santos's motive to provide information to the police and for testifying. (10 RT 3591-3592, 3689.) While Capistrano was able to question Santos generally about her bias, the defense was hampered in its ability to mount a tightly focused attack and thus, the prosecution was able to deflect concerns regarding Santos's bias. The jury was therefore left with the impression that any reluctance to cooperate with the police was due to fear of retribution from Capistrano as opposed to fear of adverse legal consequences for herself.

5. The Prosecution's Case Against Capistrano Was Weak

As discussed above and in Argument VII, *post,* without Santos's testimony, the prosecution's case against Capistrano on the Witters, Weir and Solis crimes was weak. Thus, its case against Capistrano turned on Santos's credibility. The fact that the verdict on guilt was a close one, and the importance of Gladys Santos's testimony, is demonstrated by the jury's

request for a readback of Santos's entire testimony. (5 CT 1248; *People v. Williams* (1971) 22 Cal.App.3d 34, 40-41 [request for readback indicates close case]; *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 296 [error in admitting improper opinion testimony prejudicial where jury asked for readback of that testimony].) And in this case, Capistrano was wrongly prohibited from fully and properly vetting the witness on issues critical to the jury's determination of whether she should have been believed.

The trial court's error in limiting the cross-examination of Santos was further exacerbated by the trial court's instructions. The jury was instructed with CALJIC No. 2.21.1 (6th ed. 1996):

> Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only something trivial should be considered by you.

(5 CT 1262.) Thus, the jury was informed that innocent misrecollection was a likely explanation for the inconsistencies in Santos's testimony.

Further, because of the trial court's restriction of Santos's cross examination, the jury did not learn that Santos had been convicted of crimes of dishonesty – i.e., two convictions for theft. Because of the absence of that testimony, the jury was not instructed that a factor to be considered in determining the believability of a witness was "the character of the witness for honesty or truthfulness or their opposites." (CALJIC No. 2.20 (6th ed. 1996); 5 CT 1260.) The trial court's erroneous ruling thus removed from the jury critical factors that could and should have been considered by the jury in assessing the credibility of this important witness.

Additionally, as result of the trial court's evidentiary error, the jury was not allowed to consider prior misdemeanor conduct as a factor relevant to their assessment of Santos's credibility. The trial court modified CALJIC No. 2.20, the instruction listing factors for the jury to consider in determining a witness's credibility, to remove the clauses directing the jury's attention to the past criminal conduct of a witness amounting to a misdemeanor. (10 RT 3717-3718; 5 CT 1260.)

In sum, the trial court erroneous restriction of cross-examination of Gladys Santos violated long-standing state law principles as well as Capistrano's Fifth, Sixth and Fourteenth Amendment rights to confront witnesses against him, to present a defense, to a fair trial, and to due process of law. Further, the error denied Capistrano a reliable guilt determination in a capital case and reliable judgment of death guaranteed by the Eighth Amendment. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Gardner v. Florida, supra,* 430 U.S. at pp. 357-358.) For the reasons set forth above, had Capistrano been permitted to impeach Santos, her credibility would have been seriously undermined. Given that the prosecution's case against Capistrano on all but the Martinez counts relied on Santos, it cannot be said that the error was harmless beyond a reasonable doubt as to the Witters, Solis and Weir crimes. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Even under the state law standard, it is more probable than not that the jury would not have convicted Capistrano on those counts absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Capistrano's conviction and judgment of death must be therefore be reversed.

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VI

PREJUDICIAL *ARANDA/BRUTON* ERROR REQUIRES REVERSAL OF CAPISTRANO'S CAPITAL HOMICIDE CONVICTION

The trial court committed prejudicial error in permitting prosecution witness Gladys Santos to testify about admissions made by joined codefendant Michael Drebert that implicated Capistrano in the capital homicide. This error denied Capistrano his rights to confront witnesses, to a fair trial, to due process of law, and to a reliable capital conviction and sentence under the federal and state constitutions. (U.S. Amends. 5th, 6th, 8th and 14th; Cal. Const., art. 1, §§ 7, 15, 16.) Reversal of Capistrano's conviction of capital murder and his death judgment is required.

A. Capistrano's Jury Learned That Codefendant Michael Drebert Made Admissions That Implicated Capistrano In The Witters Homicide

The prosecution conceded, and the trial court concurred, that because of the *Aranda*[49] problem posed by Drebert's statements to law enforcement and to Gladys Santos implicating both himself and Capistrano in the Witters homicide and the Weir robbery, and because of Capistrano's statements to Santos inculpating himself after being confronted with Drebert's confession to the Witters homicide, that Capistrano and Drebert could be tried together only if dual juries were used. (3 CT 594-598.)

Death qualification, general voir dire and jury selection for Capistrano and Drebert proceeded separately. (October 8, 1997 [Redacted Jury Voir Dire] 2 RT 1024 et seq.; 2 RT 1248 et seq.)[50]

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[49] *People v. Aranda* (1965) 63 Cal.2d 518.

[50] The reporter's transcript does not otherwise reflect the trial court's explicit decision to empanel two juries. The record does reflect that Capistrano's *Aranda* motion was granted at some point prior to proceeding (continued...)

Both juries, sitting in the same courtroom, heard the testimony of every witness with the exceptions that Capistrano's jury was excused for testimony concerning statements made by co-defendant Michael Drebert to Gladys Santos (5 RT 2462-2481; 6 RT 2575-2616, 2627-2641, 2677-2684) and to law enforcement (8 RT 3187-3190, 3196-3200; Exhs. 54-57) and Drebert's jury was excused for Santos's testimony regarding statements allegedly made to her by Capistrano. (5 RT 2433-2461.)

Prior to opening statements, trial counsel objected to the prosecution's proffer that he could give one opening statement to the two juries without violating *Aranda* by stating that Drebert made a statement to Gladys Santos that implicated him (Drebert) and that Capistrano made a statement to her implicating himself. (4 RT 2007-2008.) Trial counsel argued that under *Aranda*, if the prosecution wanted to mention even the fact of Drebert's statements, it would then have to give two separate opening statements to the respective juries. (4 RT 2008.) Concurring, the trial court instructed the prosecution that "the Drebert jury will not know that Mr. Capistrano made a statement to the witness (Santos) and the Capistrano jury will not know that Mr. Drebert made a statement, all right?" (4 RT 2013.) The trial court further ordered that the prosecution excuse the nondeclarant's jury when it came time to reference the declarant defendant's statements to Santos. (4 RT 2014.)

Prior to Santos's testimony, the prosecutor indicated that he wanted to establish with Santos that she had received information from Drebert implicating Capistrano in the murder because it anticipated that defense counsel would argue that she made up her statement based on what she had

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[50](...continued)
to trial, and that the remedy for the *Aranda* problem in this case was to empanel two juries rather than sever the defendants. (4 RT 2008.)

heard from word out on the street, and that it would undercut her credibility if the jury did not know the specific source of Santos's information was Drebert. (5 RT 2419-2420.) The trial court observed "But if the evidence is that she received information from Mr. Drebert, they can put two and two together, and that defeats the whole purpose of two juries." (5 RT 2419-2420.) The trial court prohibited the prosecution from eliciting that Drebert was the source of Santos's information. (5 RT 2420.) The prosecution then expressed concern that the *Aranda* problem would nevertheless be extant in that Santos would testify that she learned of Capistrano's involvement from someone, whether it be from Drebert or some unknown source. (5 RT 2420.) Trial counsel suggested that Santos be asked whether she received information regarding the homicide from another party, and not that she received information from Drebert that Capistrano was involved in the homicide. (5 RT 2420-2421.)

The trial court then tentatively ruled that the prosecution could elicit that Santos received information from another party who said he was present at the homicide; the court asked if it was correct that Capistrano's jury would learn that there were three other people present. (5 RT 2421.) In response to the trial court's question, the prosecution gave the following answer:

> Mr. Sortino: No, the evidence will be, in terms of the statements that are made to Mr. Drebert's jury, that it was three people, Mr. Pritchard, Mr. Drebert and Mr. Capistrano, and Mr. Drebert [sic] specifically says that Mr. Capistrano implies that Mr. Drebert was there, but doesn't mention a third party.[51]

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[51] This statement does not make sense as spoken and recorded. The prosecution should have said that Ms. Santos will testify that during their conversation Capistrano implied to Santos that Drebert was present at the homicide with him, but that Capistrano did *not* say that a third party was

(continued...)

(5 RT 2421.)

Upon hearing this response, the trial court told the prosecution that it was "going to have to come up with a different way of asking the question." (5 RT 2421.) The prosecution then asked if it could question whether Santos received the information from a civilian source, expressing a belief that it needed to elicit that information to counter an anticipated defense argument that Santos learned of the facts of the homicide from law enforcement. (5 RT 2422.) The trial court then ruled that the prosecution could ask Santos questions which revealed the source of her information was "a civilian source with personal knowledge." (5 RT 2422.)

The following exchange then took place before Capistrano's jury:

> Mr. Sortino: Miss Santos, in December 1995, did you have a conversation with *someone who had indicated that they had been present at a murder*?
>
> A: Yes, I did.
>
> Q: This person that you had the conversation with, that wasn't a police officer; is that right?
>
> A: No, no, it wasn't.
>
> Q: It was another civilian, an ordinary person; is that correct?
>
> A: Yes.
>
> Q: When did this conversation take place in relation to Christmas, 1995?
>
> A: On the person's birthday.
>
> ***
>
> Q: After you had this conversation with this person who said *he* had been at a murder, did you have a conversation with the

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[51](...continued)
present.

defendant, John Capistrano?

A: Excuse me?

Q: After you had this conversation with this person who had told you that he had been at the scene of a murder, or at a murder when it occurred, did you then have a conversation with the defendant John Capistrano?

A: Yes, I did.

Q: How long after you had the initial conversation with this other person was it that you had the conversation with John Capistrano?

A: I waited three days.

***

Q: You waited three days for what?

A: To ask.

Q: To ask who?

A: To confront this person *of what I was told.*

Q: You waited three days to talk to John Capistrano about it?

A: Yes.

***

Q: Where did the conversation take place?

A: In my dining area.

***

Q: The conversation that you had had three days earlier with this other person, where had it taken place?

A: In the dining area.

Q: The conversation that you had with the defendant John Capistrano, how did you start it?

A: I asked him, *"Is it true? Did you really kill someone with a*

belt?"

***

Q: What did he say when you told him that?

A: He said – do you want me to say everything he said?

Q: Yes, tell me what he said.

(5 RT 2433-2436, emphasis added.)

Before she answered, the prosecution asked for a bench conference. (5 RT 2436.) At that conference the prosecution informed the court that Santo's reply would be that Capistrano laughed and asked "Did Mike tell you that? Mike's a pussy." (5 RT 2437.) The prosecution argued there was no *Aranda* problem because the statement Santos would testify to was made by Capistrano. Trial counsel countered there would nevertheless be a problem if Santos was editing her testimony from "Mike told me you killed someone with a belt" to "Did you kill someone with a belt?" The prosecution responded that the statement as proffered was her complete statement and was what she had testified to at the preliminary hearing. (5 RT 2437.) Upon that proffer, the trial court allowed the testimony to proceed:

Q: Miss Santos, you said to the defendant John Capistrano, "Is it true? Did you really kill someone with a belt?" Is that right?

A: Yes, I did.

Q: What did he say to you when you said that?

A: He laughed the first time.

Q: What did you do after he laughed?

A: I asked – I asked him again.

Q: What did you say?

A: "Is it true?"

Q: And what did he say after you asked him the second time?

A: He said that – he said, "That pussy Mike told you, huh?

Q: Sorry, he said what?

A: He said, "That pussy Mike told you, huh?"

Q: "That pussy Mike told you, huh?"

A: Yes.

(5 RT 2437-2438, emphasis added.) When questioned later about who Capistrano said was with him during the homicide, she named "Mike" and "Little Giant."[52] (5 RT 2442.)

Capistrano's jury did not receive any limiting instruction regarding the use of the above testimony.

The trial court erred prejudicially in permitting the prosecution to elicit testimony from Santos that informed Capistrano's jury that codefendant and accomplice Drebert told her that he was present when Capistrano killed Witter's with a belt.

B. The *Aranda/Bruton* Error Was Prejudicial

The Confrontation Clause of the Sixth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right of confrontation includes the right of cross examination. (*Pointer v.*

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[52] Santos never previously attributed Eric Pritchard's presence to Capistrano's statements. Consistent with the prosecution's proffer at trial referred to above, and with its statement during closing argument before Capistrano's jury that Drebert was one of two people involved in the homicide (10 RT 3599), Santos testimony during the preliminary hearing did not include any reference that Capistrano said a third party was present at the Witters homicide. (1 CT 488-495) In contrast, Santos twice testified against Drebert that Drebert told her that he, Capistrano and Pritchard were involved in the homicide. (5 RT 2465-2467; 2 CT 469-473.) Capistrano submits that Santos confused the two statements during her testimony before Capistrano's jury.

Texas (1965) 380 U.S. 400, 404-407.) The high court observed that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Id.* at p. 405.)

The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability and advances the pursuit of truth in criminal trials. (*Lee v. Illinois* (1986) 476 U.S. 530, 540.) The high court explained:

> [T]his truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . ."

(*Ibid.*)

In several cases, the high court has addressed the issue of whether and to what extent the statements of a nontestifying defendant in a joint trial may be admissible against a nondeclarant codefendant. In *Bruton v. United States* (1968) 391 U.S. 123, 126, the Court held that the admission of a nontestifying defendant's confession, facially implicating (i.e., by name) his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment, despite a limiting instruction to the jury to consider the statement against the declarant defendant only. The court reasoned that the risk was too great that the jury would not be able to follow the limiting instruction when faced with such

"powerfully incriminating" evidence.[53] (*Id.* at pp. 135-136.) In *Richardson v. Marsh* (1987) 481 U.S. 200, 208-209, the Supreme Court limited its holding in *Bruton*, ruling that the admission of a nontestifying defendant's confession does not violate the Confrontation Clause if the confession is redacted so as to eliminate the nondeclarant codefendant's name and any reference to his or her existence, and if the court gives the jury a proper limiting instruction. In *Gray v. Maryland* (1998) 523 U.S. 185, 192, 197, the Court addressed an issue left open by *Marsh* and held that the *Bruton* rule extended also to prohibit a redacted confession in which the name of the nondeclarant codefendant is replaced by a blank space, the word "deleted" or a similar symbol. The Court ruled that such redactions result in statements that, considered as a class, so closely resemble *Bruton's* unredacted statements as to warrant the same legal results. (*Ibid.*)

Thus, where a nontestifying defendant's confession incriminating the nondeclarant defendant is not directly admissible against the latter, the

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[53] In *People v. Aranda, supra*, 63 Cal.2d at pp. 530-531, this Court held that a codefendant's extrajudicial statement cannot be admitted into evidence unless certain precautions are taken to remedy its prejudicial effects on other codefendants. A trial court had three options: (1) redact the statement to eliminate all references to the codefendant (if possible); (2) grant a severance of trials; or (3) if the prosecution successfully resists severance and the statement cannot be redacted, then the statement must be excluded. To the extent that the decision in *Aranda* constitutes a rule governing the admissibility of evidence, and to the extent this rule of evidence requires the exclusion of relevant evidence that need not be excluded under federal constitutional law, it was abrogated in 1982 by the "truth-in-evidence" provision of Proposition 8. (Cal. Const., art. I, § 28, subd. (d); *People v. Fletcher* (1996) 13 Cal.4th 451, 465.) Thus, in discussing the error herein, Capistrano uses the terms *Aranda* and *Bruton* interchangeably to assert the same claim of error – the admission in a joint trial of a statement of a non-testifying defendant that inculpates the nondeclarant defendant.

Confrontation Clause bars its admission at their joint trial against the nondeclarant defendant, even if the jury is instructed not to consider it against the nondeclarant defendant, and even if that defendant's own confession is admitted against him. (*Cruz v. New York* (1987) 481 U.S. 186, 193.) Nor is the statement of a nontestifying codefendant which inculpates both the declarant and the nondeclarant defendant made admissible as a statement against the former's penal interest, even where the statement is corroborated by other evidence at trial. (*Lilly v. Virginia* (1999) 527 U.S. 116, 128-129.) The Lilly Court explained:

> We once again noted the presumptive unreliability of the "non-self-inculpatory" portions of the statement: "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."

(*Id.* at p. 133, citation omitted.)

In this case, the trial court properly ruled that Drebert's statements, which inculpated himself and Capistrano were inadmissible against Capistrano and that Capistrano's statements inculpating the both of them were inadmissible against Drebert. Thus, two juries were empaneled to allow the prosecution the statements of the individual defendants inculpating themselves. However, the trial court controverted that ruling by erroneously allowing the prosecution to elicit before Capistrano's jury testimony about Drebert's statements to Gladys Santos.

The trial court first erred when it ruled that the prosecution could elicit from Santos that she learned of the homicide from "a civilian with personal knowledge." Such otherwise rank hearsay could only be admissible in this case as a declaration against penal interest (Evid. Code, § 1230); however, the trial court had previously, and correctly, ruled that pursuant to *Aranda*, the content of Drebert's statements was not admissible

against Capistrano. (See, e.g., 4 RT 2013-2104; see also *Lilly v. Virginia, supra*, 527 U.S. 116.) Then, taking some liberty with the trial court's erroneous ruling, the prosecution asked whether Santos learned of the homicide *from a person who was present at the killing*. Thus, the same problem addressed by *Aranda/Bruton* and its progeny existed in this case: The two defendants were jointly prosecuted, and even though there were two juries, both juries were present for all testimony but that of Santos as to the alleged statements made by individual defendants, so each jury knew that Drebert was jointly charged with Capistrano on the capital homicide. Since there were but two defendants, upon being informed that Santos learned about the homicide from a person who was present and who was not Capistrano, the jury could only conclude that Drebert was the person who told Santos that he was there when someone had killed a man with a belt. Upon hearing that, since there were but two defendants, the jury could only conclude that Drebert said the actual killer was Capistrano. If the jury had any question in that regard, it was surely answered when Santos further testified that, using the information she gained from the other person present at the homicide, she asked Capistrano if it was true that he (Capistrano) had killed someone with a belt, and that Capistrano told her that he knew "Mike" (the given name of Drebert) had told her that. Thus, Capistrano's jury learned from Santos that codefendant Drebert told her that he had been present when Capistrano allegedly killed Witters[54] with a belt, a clear violation of *Bruton* and its progeny.

The improper admission of Drebert's statements inculpating Capistrano was prejudicial. (*Chapman v. California, supra*, 386 U.S. at p.

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[54] Since there was but one homicide charged in this case, the jury would necessarily understand the references regarding killing someone to be to victim Witters.

24.) While Santos further testified that Capistrano admitted killing Witters with a belt (5 RT 2443-2447), this fact does not neutralize the error in admitting Drebert's statements. In fact, that Capistrano's statements "interlocked" with Drebert's bears a positively inverse relationship to the damage caused by the error:

> A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were standing by his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to avoid his confession – on the ground that it was not accurately reported, or that it was not really true when made.

(*Cruz, supra*, 481 U.S. at p. 191.)

Indeed, Capistrano's defense to the capital homicide, as well as the Solis and Weir charges, turned on establishing that Santos was an unreliable witness. (Argument V, *ante*, incorporated by reference herein.) Conversely, the value of introducing the statement of a codefendant that corroborated Santos's report of Capistrano's confession to the homicide was not lost on the prosecution. Little else could explain the prosecution's proffer, insupportable by any admissible evidence, that it needed to attribute the source of the information Santos received to Drebert in order to counter counsel's argument that she (Santos) learned of the homicide from word on the street. (5 RT 2419-2420.) Certainly, if counsel had sought to examine Santos to elicit that she heard a rumor that Capistrano killed someone, the prosecution's objection to the question would have been sustained. Likewise, the prosecution's second reason put forth for the introduction of the source of the information regarding the homicide was that the defense would claim that Santos learned of the homicide from law enforcement. (5

RT 2422.) However, Santos and Detective Ferrari were both available to counter any such claim. Neither reason justifies the introduction of Drebert's statements in violation of Capistrano's constitutional rights. The prosecution nonetheless used these reasons to convince the trial court that it needed to elicit the "context" of Capistrano's alleged admissions to Santos. Once given permission to get to the "context" of the statement, that is, that the source of the information that Santos used to confront Capistrano came from a civilian with personal knowledge of the crime, the prosecution made certain that the jury knew that the person who provided Santos with information on the homicide not only had personal knowledge of the crime, but that he was present at the homicide with a man who did the killing. The prosecution was then able to link Capistrano's response, which it argued posed no *Aranda* problem, to Santos's question about whether he killed someone with a belt – "That pussy Mike told you, huh?" – in order to identity the first person who told Santos of the homicide as Drebert. Thus, the trial court's ruling that Capistrano's jury not learn of Drebert's statements implicating Capistrano was subverted.

There existed no legally valid theory upon which Drebert's statements to Santos were admissible against Capistrano. According to Santos, Capistrano admitted his participation in the homicide to her. She could have properly testified to his admission independent of any reference to the fact of her conversation with another person and without reference to the content of that conversation. However, the prosecution clearly felt it needed to buttress the credibility of Santos with a corroborating statement of a codefendant. The prosecution explicitly asked for the jury to be informed the Drebert was the one who informed Santos of Capistrano's role in the homicide. (5 RT 2419-2420.) When the trial court pointed out that that would defeat the purpose of having two juries in this case, the

prosecution proffered specious reasons for the admissibility of evidence relating to Santos's conversation with Drebert. The real reasons were that the prosecution needed Drebert to corroborate Santos, upon whose credibility the capital case rested (see, e.g., Argument V, *ante*) and because the codefendant's confession would be "enormously damaging" in that "it confirm[ed], in all essential respects, the defendant's alleged confession" as made to Santos. (*Cruz, supra*, 481 U.S. at p. 191.) The importance to the prosecution's case of establishing that Drebert was the person who supplied Santos with the information of the homicide was further evidenced by the emphasis placed on the response – by repeating the question to Santos, who then parroted it back, the prosecution ensured that the jury heard three times that "Mike" had told Santos about the homicide. (5 RT 2438.)

The damage to Capistrano's case was further exacerbated in that the inadmissible statement by Drebert was unaccompanied by any instruction, either before the relevant testimony or during the court's guilt phase instructions to the jury, limiting its use to Drebert only.[55] (9 RT 3336.) This "powerfully incriminating" evidence – Drebert's confession that implicated Capistrano as the actual killer of Witters – was thus improperly admitted against Capistrano. While the evidence that Drebert blamed the homicide on Capistrano is "powerfully incriminating" in and of itself, it was even more devastating in this case, because it corroborated the alleged confession of Capistrano to a homicide to which there otherwise existed no extrinsic evidence of his guilt.

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[55] Nor was the jury instructed to limit the use of other evidence adduced against Drebert only. Before Capistrano's jury, the prosecution argued that the Witters crime continued until the stolen property was loaded into Drebert's car and driven away. (10 RT 3584.) However, that evidence was not presented to Capistrano's jury, but only to Drebert's through Drebert's own admissions. (8 RT 3196-3200; Exhs. 56-57.)

For the foregoing reasons, the admission of the statements of Capistrano's codefendants denied him his rights to confrontation, to a fair trial and to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; the error in permitting the introduction of nontestifying codefendant Drebert's profession of Capistrano's cannot be deemed harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The error also denied Capistrano his right to a reliable guilt and penalty phase verdicts. (See, e.g., *Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357.) Accordingly, his conviction and death sentence must be reversed.

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VII

THE IMPROPER AND PREJUDICIAL JOINDER OF THE COUNTS REQUIRES REVERSAL OF CAPISTRANO'S CONVICTIONS AND DEATH JUDGMENT

The trial court erred first when it denied Capistrano's motion to sever the Martinez, Weir and Solis charges from each other, and again, and more egregiously, when it permitted the joinder of those non-capital charges with the weak capital case involving the homicide of Witters. These errors, individually and cumulatively, denied Capistrano his rights to a fair trial, due process of law and a fair and reliable capital conviction and judgment of death in violation of the federal and state constitutions. (U.S. Const., 5th, 8th and 14th Amends.; Cal. Const., art. 1, § § 15, 16 and 17.)

A. Factual Background

1. Motions Concerning Joinder Of The Martinez, Weir And Solis Offenses

On June 7, 1996, the prosecution filed a motion seeking consolidation of the charges involving Martinez and the Weirs (KA030671) with those involving Solis (KA031580) under Penal Code section 954.[56] (1 CT 181-193.) The prosecution argued that the cases were the same class of crimes, shared a common element in their commission and that facts from both cases would be admissible in separate trials under Evidence Code section 1101, subdivision (b) on the issues of intent, preparation, general plan, and knowledge of the defendant.[57] (1 CT 181-193.) On July 15,

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[56] Capistrano, Drebert, Eric Pritchard and Jason Vera were all jointly charged defendants in case number KA030671, although Capistrano only was charged with the offenses against the Weirs. Capistrano, Pritchard and Vera were joined defendants in the case involving the crimes against Solis in case number KA031580.

[57] The prosecution's boilerplate motion contains no application of the (continued...)

1996, these cases were joined.[58] (1 CT 211-213.)

Capistrano's motion to sever counts[59] was filed November 18, 1996. (1 CT 264-274.) It requested that charges related to the Martinez, Solis, and Weir crimes each be tried separately from each other. (1 CT 264.) Capistrano argued that: (1) the counts were improperly joined under Penal Code section 954 and that severance was necessary in the interest of justice; (2) contrary to the prosecution's contention, the crimes were of different classes and the evidence against Capistrano was extremely disparate in each case; (3) while evidence on counts related to the attack on Michael Martinez was quite strong, there was either no, or poor, identification of Capistrano on the other counts and there was a substantial likelihood that the jury would convict on insufficient evidence; and (4) the charged offenses met none of the criteria in Penal Code section 954 to allow a consolidated prosecution. (1 RT 70-72; 1 CT 269-274.)

Capistrano also joined defendant Vera's motion to sever.[60] (4 Supp

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[57](...continued)
law to the facts of this case.

[58] Trial counsel stated that she believed that the prosecution had the right to consolidate without determining whether severance was appropriate, but asked the court to hear a motion to sever at a future date. (1 RT 18-19.)

[59] At the same time, trial counsel filed a motion to sever defendants. (1 CT 250-263.)

[60] At some point, the charges against Vera had been dismissed due to the Superior Court's failure to hold a juvenile detention hearing and charges were later refiled against him under case KA033346. (See 4 Supp CT 110-112; 1 CT 219-229.) The prosecution moved to consolidate cases KA030671 & KA033346 on October 16, 1996. (1 CT 219-229.) The prosecution filed a Supplemental Memorandum of Points and Authorities in Support of Motion to Consolidate (Case Nos. KA030671; KA031580;
(continued...)

CT 257-267, 1 RT 56.) Vera argued that: (1) there was no commonality with regard to the timing or nature of the offenses, nor commonality of witnesses and that trying the charges together would create a "total atmosphere of guilt" making it unlikely that defendants would have a fair trial; (2) the offenses were not cross-admissible and introduction of evidence of the offenses in the same proceeding would allow the prosecution to bolster its cases and inflame the jury; and (3) there was a danger that the jury would aggregate the evidence and it would spill over to bolster the prosecution's weak case on the Solis rape-robbery charges. (4 Supp CT 259-264.)

At a hearing on the motion on November 19, 1996, trial counsel argued that "there were grave differences in the strength of the people's case against Mr. Capistrano in all three of the incidents." (1 RT 70.) There was a lack of evidence on the Weir charges; the only thing implicating Capistrano was codefendant Drebert's inadmissible confession implicating Capistrano in that crime.[61] (1 RT 71.) The robbery in the Martinez counts was completely incidental to the intent to harm Martinez and therefore not the same class/type of crime. (1 RT 72.) Counsel suggested that the prosecution wanted to go to trial on all charges together in the hope that the positive identification on the Martinez charges would spill over to the rape

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[60](...continued)
KA033346) on November 4, 1996, which sought to consolidate KA033346 which charged Vera alone with the consolidated case against the other defendants. (1 CT 231-234.) While the record does not contain an explicit grant of the prosecution's motions, Vera was arraigned on those charges jointly with Capistrano, Drebert and Pritchard. (1 RT 82-84.)

[61]Gladys Santos did not inform law enforcement regarding statements made to her by Capistrano until May, 1996; no mention of the statement was made in the preliminary hearings on the Weir charges. (1 CT 32-42, 75-78.)

case where there was otherwise a dearth of evidence and where the victim failed to identify Capistrano in a line-up. (1 RT 68, 73.) Trial counsel stated that she was ready to go to trial on the Weir and Martinez charges immediately.[62] (1 RT 72.)

Without any analysis of the prejudice that would flow from joinder, the court denied the motions for separate trials on separate counts.[63] (1 CT 277; 1 RT 73.) After denying the severance motion, the court then continued the entire consolidated case to January 15, 1997, to wait for the DNA results relevant only to the newly joined Solis counts. (1 RT 73.)

However, trial in the consolidated non-capital case did not begin in January as scheduled due to a parade of continuances resulting from the court's attempts to accommodate the schedules of the five attorneys now involved in the case and to allow for a change of counsel for Capistrano.[64] (2 CT 301-306, 317-318, 330, 336; 1 RT 82-106.)

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[62] A defense motion to continue was pending on the Solis counts because the evidence in that case was undergoing DNA analysis. (1 RT 67.) The prosecution indicated that the results of the testing might not be available until mid-January. (1 RT 69.)

[63] The judge stated that his ruling would not preclude the trial court from ordering separate juries on separate counts as deemed appropriate. (1 RT 73.)

[64]On March 17, 1997, Capistrano's counsel, Rita Smith, informed the trial court that the Public Defender's Office was requesting to be relieved as counsel for Capistrano as a result of a conflict that arose in the latter part of February. (CT 336; 1 RT 103-104.) The court relieved the Public Defender's Office, appointed Arthur Lindars to represent Capistrano. (1 RT 105-106.)

2. Motions Concerning Joinder Of The Martinez, Weir And Solis Offenses With Charges Relating To The Witters Capital Case

Meanwhile, on December 19, 1996, the prosecution filed a complaint initiating case number KA034540 against Capistrano and Drebert for the December 9, 1995, robbery and murder of Koen Witters; this complaint also charged Drebert with offenses arising from the Weir offenses.[65] (*Ibid.*) (1 CT 279-282.) The preliminary hearing took place on March 31, 1997. (2 CT 387-536.) The information was filed on April 14, 1997. (2 CT 538-541.)

On April 14, 1997, the prosecution filed a motion seeking consolidation of the Witters offenses (KA034540) with the previously consolidated charges in the Martinez, Weir and Solis offenses (KA030671 & KA031580). (2 CT 545-558.) The prosecution submitted the same arguments for joinder as to the non-capital cases as it had made previously in its opposition to severance of those charges. (2 CT 545-558; see 1 CT 236-249.) In addition, its motion was supported by facts adduced at the preliminary hearing on the Witters offenses, in which Gladys Santos testified that Capistrano and Drebert admitted to her each man's respective involvement in the Witters and Weir offenses. (*Ibid.*)

On April 21, 1997, Capistrano filed objections to the prosecution's consolidation motion, arguing that (1) Drebert's statements regarding the crimes would not be cross-admissible against Capistrano[66]; (2) the sex

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[65] Both Capistrano and Drebert were charged with special circumstances in the Witters homicide; since Drebert was a juvenile when it occurred, he was not death-eligible. (1 RT 128.) For the sake of discussion, the Witters offenses will be referred to herein as the capital case or the capital offenses.

[66] Capistrano filed a filed a separate motion to sever defendants (continued...)

offense charges unique to the Solis case would be unusually likely to inflame the jury; (3) weak cases (Witters, Weir and Solis) were joined with a strong one (Martinez); and (4) the weak capital case would be improperly bolstered by its joinder with the many other non-capital counts. (3 CT 587-592.) Capistrano argued that the logical, non-prejudicial solution to this situation was to join the charges against Drebert relating to the Weir offenses to the non-capital case and then to try the capital case separately from the non-capital case. (*Ibid.*) Codefendant Vera also filed opposition to the prosecution's motion. (3 CT 631-636.)

At a hearing on May 27, 1997, after objection by Pritchard that he would be prejudiced by being tried by a "death-qualified" jury, a decision on consolidation of the capital and non-capital charges was delayed for several days until the prosecution decided to seek the death penalty against Capistrano – the motion to consolidate was then denied. (1 RT 124-129; 3 CT 647-648.) The court recognized the prejudice that would arise from consolidation, but only as to those defendants not charged in the Witters homicide. "I think an overwhelming fact for this court is the undue prejudice for the defendants that are not involved in the alleged murder occurring on December 9th, 1995. I think it would unduly taint their right to a fair trial and the court should deny the motion to consolidate as to [the capital case]." (1 RT 129-130.) The trial court ordered consolidation of the charges against Drebert relating to the Weir offenses into the non-capital case (KA030671); however charges relating to the homicide against both Capistrano and Drebert (KA034540) remained separately charged. (1 RT

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[66](...continued)
pursuant to *People v. Aranda, supra*. (3 CT 573-584.) The trial court denied Capistrano's motion to sever defendants and instead ordered multiple jury panels. (1 RT 117-119.)

127-129; 3 CT 647-648.). At this point, there was one case consisting of the three non-capital crimes in which all four defendants were joined, and a separate capital case in which Drebert and Capistrano were codefendants.

Over three months later, in September 1997, after the capital case had been transferred to a new judge for trial, the prosecution sought to sever the charges pending against Capistrano and Drebert and to consolidate the capital and non-capital charges into one case against those two defendants. (1 RT 171-184; 3 CT 709-726, 761.)

Capistrano opposed joinder of the capital case to the non-capital ones, arguing that to do so would be prejudicial to Capistrano and constitute an abuse of discretion under the criteria set forth in *People* v. *Sandoval* (1992) 4 Cal.4th 155 (more fully discussed below). (3 CT 752.) Capistrano argued that the only "fair and non-prejudicial solution to this situation" was to try the non-capital charges separately from the Witters case. (3 CT 753-754.)

Over Capistrano's objection, and without an analysis of prejudice, the trial court granted the prosecution motion to sever and consolidate. The trial court found that under section 954.1, cross-admissibility was not a requirement for joinder of counts and that it could find no legal reason not to consolidate the charges as requested. (1 RT 171-193; 3 CT 750-755.)

As a result, Capistrano and Drebert were tried jointly before two separate juries, with Capistrano and Drebert being charged with the Witters and Weir crimes, and Capistrano being additionally charged with the Solis and Martinez crimes. The prosecution sought death against Capistrano only.

B. Applicable Law

Penal Code section 954 authorizes the state to join two or more offenses of the same class of crimes in one pleading, subject to a trial

court's authority to order separate trials. A trial court should exercise this authority when such is necessary to accord a criminal defendant the fundamental rights to due process and a fair trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448, superseded by constitutional amendment on another ground as stated in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1070; *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.) For example, joinder is the preferable course of action when consolidating charges will avoid harassment of the defendant and avoid the waste of public funds that could arise from having to place the same general facts before different juries. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

The fact that joinder may be preferable under California law does not mean that it is acceptable in all circumstances. In fact, the separate trial of charges may be constitutionally required if joinder would be so prejudicial that it would deny the defendant his Fifth and Fourteenth Amendment rights to a fair trial. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244; see *United States v. Lane* (1985) 474 U.S. 438, 446, fn. 8.) The concept that a consolidated trial may deprive a defendant of due process has been long-recognized in this state. (See *In re Anthony T.* (1980) 112 Cal.App.3d 92, 101-102; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.)

The decision regarding the joinder or severance of counts is one that is within the trial court's discretion. (See *People* v. *Cummings* (1993) 4 Cal.4th 1233, 1284 [denial of severance reviewed for abuse of discretion].) Four factors have traditionally been used to assess whether a trial court's refusal to sever counts constituted an abuse of discretion. An abuse of discretion may be found where: (1) evidence of the jointly-tried crimes would not be cross-admissible at separate trials;[67] (2) certain of the charges

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[67] To a certain extent, the enactment of Penal Code section 954.1 has (continued...)

are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the spillover effect of aggregate evidence on several charges might alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People* v. *Sandoval, supra,* 4 Cal.4th at pp. 172-173; see *Williams v. Superior Court, supra*, 36 Cal.3d at p. 454 [exercise of discretion viewed with highest degree of scrutiny where joinder itself gives rise to special circumstance allegation of multiple murder].)

Overall, the test is basically a simple one. A court should order severance in the trial of otherwise joinable offenses when it appears that separate trials are required in the interest of justice. (*People* v. *Bean* (1988) 46 Cal.3d 919, 935.) Severance "may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." (*Ibid.*) Thus, the criteria developed by appellate courts may be of aid in arriving at the ultimate decision regarding whether to sever or join offenses, but the final test is whether a denial of severance, or the granting of joinder, denied the defendant a fair trial.

It is the defendant's burden to demonstrate a clear showing of potential prejudice arising from the trial court's order granting consolidation or denying severance. (*People v. Osband* (1996) 13 Cal.4th

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[67](...continued)
limited the treatment of cross-admissibility as a primary factor for determining the prejudice from a failure to sever. However, this statute merely means that the absence of cross-admissibility, by itself, does not suffice to prevent joinder. It does not mean that the lack of cross-admissibility is no longer a factor suggesting possible prejudice. (*Belton* v. *Superior Court* (1993) 19 Cal.App.4th 1279, 1286.)

622, 666.) Essentially, assuming the lack of cross-admissibility, this determination revolves around the likelihood of whether a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one of the charged offenses might permit the knowledge of the other charged offenses to tip the balance so that it convicts the defendant. (*People v. Bean*, *supra*, 46 Cal.3d at p. 936.)

Additionally, even if it would not have strictly been an abuse of discretion for the trial court to permit the consolidation of separate counts, reversal may still be required if consolidation resulted in gross unfairness amounting to a denial of due process. (*People v. Arias* (1996) 13 Cal.4th 92, 127.) This is also a principle acknowledged by federal courts.

For misjoinder of counts to be reversible error under federal law, the consolidation must have resulted in prejudice so great that it denied the defendant a fair trial. (*United States v. Lane*, *supra*, 474 U.S. at p. 445, fn. 8; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083.) In assessing this, the reviewing court looks at each count separately to decide if the trial of one count was rendered unfair because of the joinder of that count with one or more of the other counts. (*Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1149; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503.)

Federal courts have recognized the high risk of prejudice that ensues when the consolidation of counts permits evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.) This risk exists because of the belief that jurors at a joint trial cannot adequately compartmentalize damaging information about the defendant; thus, this type of trial often prejudices the jurors' conceptions of the defendant and the strength of the evidence against the defendant on each of

the counts. (*United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) Also, jurors are prone to regard a defendant charged with multiple crimes with a more jaundiced eye and to conclude that the defendant must be bad to have been charged with so many things, and they may convict on one count based on evidence which only applies to another count. (*United States v. Ragghianti* (9th Cir. 1975) 527 F.2d 586, 587; *United States v. Smith* (2nd Cir. 1940) 112 F.2d 83, 85; *United States v. Lotsch* (2nd Cir. 1939) 102 F.2d 35, 36.)

In federal court, consolidation is permitted when offenses are of the same character, are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. (Fed. Rules Crim. Proc., rule 8(a).) Federal courts have recognized that the risk of prejudice is higher when charges are joined because they are similar or of the same character, rather than because they are based on the same transaction or connected together as part of a common scheme or plan. (*United States v. Pierce* (11th Cir. 1984) 733 F.2d 1474, 1477); *United States v. Halper* (2nd Cir. 1978) 590 F.2d 422, 430.)

The law regarding the criteria for joinder or severance is not much in dispute. Courts have noted that while the criteria that have developed regarding severance issues should be used to evaluate the propriety of severance or joinder, the final determination of that issue must be resolved by considering the particular facts of each individual case. (*People* v. *Hill* (1995) 34 Cal.App.4th 727, 735.) When that determination is made here, the result is that the trial court abused its discretion by ordering that the Martinez, Weir, Solis and Witters crimes be joined for trial.

C. The Trial Court Abused Its Discretion First When It Denied Severance of the Martinez, Weir, And Solis Offenses And Again When It Permitted Joinder Of Those Offenses With The Capital Case Involving The Homicide Of Witters

To determine whether the trial court erred in permitting consolidation of these charges, this Court must examine the record as it existed before the trial court at the time of its ruling. (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.) Doing so leads to the conclusion that the trial court abused its discretion first when it denied severance of the Martinez, Weir and Solis charges from each other, and again when it permitted consolidation of the Martinez, Weir and Solis charges with the capital charges involving the homicide of Witters.

1. The Trial Court Erred In Denying Capistrano's Motion To Sever The Martinez, Weir And Solis Offenses From Each Other

In support of its motion for joinder of the Martinez/Weir case with the Solis case, the prosecution argued that the cases were the same class of crimes, shared a common element in their commission and that facts from both cases would be admissible in separate trials under Evidence Code section 1101, subdivision (b) on the issues of intent, preparation, general plan, and knowledge of the defendant. (1 CT 181-193.) Joinder was unopposed, with defense counsel reserving the right to move later for severance. (1 RT 18-19.) When severance of each of these cases from the other was requested by Capistrano, the trial court undertook no analysis of cross-admissibility and no analysis of the prejudice to Capistrano that would result from trial on the joined offenses. The trial court thus abused its discretion by failing to meaningfully weigh the prejudicial effect of joinder against the benefits of that procedure, a "highly individualized exercise, necessarily dependent upon the particular circumstances of each

individual case." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 451-452; *People v. Smallwood* (1986) 42 Cal.3d 415, 425-426 (*Smallwood*).) Capistrano will show that if the trial court had conducted a proper analysis, the trial court would have severed the three non-capital crimes from each other. (*People* v. *Sandoval, supra,* 4 Cal.4th at pp. 172-173.)

a. Evidence Of The Jointly-Tried Crimes Would Not Have Been Cross-Admissible At Separate Trials

If "evidence pertinent to one case [would not] have been admissible [at the trial on another one] under the rules of evidence which limit the use of character evidence or the use of prior similar acts to prove conduct" (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 448), the trial court must

> assess the relative strength of the evidence as to each group of severable counts and weigh the potential impact of the jury's consideration of "other crimes" evidence. I.e., the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of his other criminal activity to tip the balance and convict him.

(*People v. Bean*, *supra*, 46 Cal.3d at p. 936.) While the existence of cross-admissible evidence "is not the sine qua non of joint trials" (*People v. Marquez*, *supra*, 1 Cal.4th at p. 572), whether the evidence of these separate charges was cross-admissible is still a key consideration in deciding whether it was proper to join them for trial. (*People v. Memro*, *supra*, 11 Cal.4th at p. 850.) If "[j]oinder is generally proper when the offenses would be cross-admissible in separate trials" (*People v. Arias*, *supra*, 13 Cal.4th at p. 126), it follows that joinder is less appropriate where the evidence is not cross-admissible. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322.) Moreover, a joint trial on charges that are not cross-admissible is not necessarily more efficient than separate trials would be, and it is only the supposed efficiency of joint trials which offsets the high risk of prejudice

they pose. (*Lewis*, *supra*, 787 F.2d at p. 1322; see also *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084; *United States v. Lotsch*, *supra*, 102 F.2d at p. 36; Hein, *Joinder and Severance* (1993) 30 Amer. Crim. L.Rev. 1139, 1144-1145 ["joinder of counts has a synergistic impact" which bolsters weak charges with evidence of stronger ones; the risk of conviction "rises substantially when offenses are joined"].

Under *Williams v. Superior Court*, *supra*, and its progeny, evidence of separate charges is cross-admissible, and supports joinder, if there is an "evidentiary connection" between the charges, as when they have distinctive "common marks" supporting an inference about identity, motive, or another material fact (*People v. Bean*, *supra*, 46 Cal.3d at pp. 936-938; *People v. Johnson* (1988) 47 Cal.3d 576, 588), or when evidence on one charge "logically support[s]" an inference of guilt on another (*People v. Arias*, *supra*, 13 Cal.4th at p. 128). Offenses committed at different times and places against different victims are considered to be connected when they are linked together by a common element of substantial importance. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 160.) Additionally, there may be cross-admissibility when evidence on one charge logically supports an inference of guilt on another charge. (*People v. Arias*, *supra*, 13 Cal.4th at p. 138.)

The evidence before the trial court at the time of its ruling does not support the theory that evidence of the separate offenses was cross-admissible. The Martinez, Weir and Solis offenses may have been "similar," in a mundane sense, because in each case the crimes occurred inside homes and apartments in the San Gabriel Valley during the same two-month period, but this Court has never suggested that such quotidian similarities between crimes make their evidence cross-admissible. (See *People v. Bean*, *supra*, 46 Cal.3d at pp. 935-937; see also *People v. Catlin*

(2001) 26 Cal.4th 81, 110-112 [evidence is cross-admissible on identity and modus operandi if the crimes have "distinctive common marks"].) However, an examination of the record as it existed before the trial court at the time of its ruling (*People v. Mendoza, supra,* 24 Cal.4th at p. 161) shows that none of the substantive evidence of these three crimes was cross-admissible in any significant way: the offenses were "unrelated" offenses, with different settings, participants, victims, weapons, and alleged motivations. (3 CT 589; see *Calderon v. Superior Court, supra*, 87 Cal.App.4th at pp. 939-941 [a "problem of prejudice" arises when jurors are exposed to evidence of crimes that are "entirely separate episode[s]"].)

To begin, in opposing severance the prosecution proffered facts that were unsupported by the record before the trial court at that point in time. Its assertion that the ceramic angel stolen from the Weir home, and found in Martinez's apartment, had be given to given to Martinez's roommate Amy Benson by Capistrano was unsupported by the evidence – there was no evidence adduced at the preliminary hearings on these offenses (nor at trial, for that matter) as to how Benson had come into possession of the angel. (1 CT 12-85, 106-178.)

With regard to the charges involving the attempted murder of Martinez,[68] Martinez was tied up and beaten with a bat in his apartment by Capistrano, Drebert, Pritchard, and Vera. (1 CT 43.) Unlike the Weir and Solis crimes (and apparently the Witters crime as well), in which the perpetrators were unknown to the victims, the Martinez crime apparently stemmed from a retaliatory motive that grew out of the defendants' prior relationship with Martinez. (1 CT 45-46.) The defendants did not wear

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[68] This was a hearsay prelim under Proposition 115. The evidence was in the form of testimony by investigating officers Dario Aldecoa and Michael Ferrari.

masks or otherwise try to obscure their identities. Although Martinez's car and a backpack that was in the car were taken, the theft appeared to be an afterthought rather than the motive for the event. (1 CT 46, 54.) The backpack was recovered from Gladys Santos's apartment. (1 CT 62.)

With regard to the charges involving the Weir robbery,[69] the Weirs were robbed in their home by three white or Hispanic people who appeared to be in their 20s, but whom the victims were unable to describe or identify. (1 CT 14, 18, 22.) Unlike the Solis crime in which four of the five participants had guns, in the Weir crime, only one of the three participants had a gun. (1 CT 15, 25.) One of the suspects guarded them with a knife from the kitchen. (1 CT 17.) Two had their faces covered and a third had a jacket or sweatshirt pulled up to cover his face. (1 CT 19.) Unlike the other crime victims, Weir and her husband were elderly and they were not tied, but rather just asked to lay on the floor. (1 CT 16.) Christmas presents were taken. (1 CT 17.) A white Ford Taurus was taken. (1 CT 18.) A ceramic angel taken from Weir was found in Martinez's apartment; however, there was no evidence as to how it got there. (1 CT 17, 33.) In February 1996, Gladys Santos gave the police jewelry taken in the Weir robbery. (1 CT 38.) There was no evidence how the jewelry got there. (1 CT 38-39.) The only evidence of Capistrano's alleged involvement in the Weir offenses came from codefendant Drebert's in-custody statement implicating him.[70] (1 CT 36-37.)

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[69] There were two preliminary hearings held up to this point in time on the Weir offenses, one for Capistrano and the other for Pritchard and Vera. (1 CT 12-85; 4 Supp CT 54-99.) There was no additional evidence adduced at the latter hearing, and it is not referenced above.

[70] The trial court ruled that these statements were inadmissible as to Capistrano for purposes of the preliminary hearing on confrontation and due (continued...)

With regard to the charges relating to the Solis crimes, the following evidence was presented at Capistrano, Pritchard, and Vera's[71] preliminary hearing:[72] Like the Weir crime, but unlike the Martinez crime, two men approached Solis and Gonzalez outside as they arrived at their single-family Whittier home and escorted them into their house at gunpoint. (1 CT 108-111.) Solis later identified one of these men as Pritchard. (1 CT 112, 146-147.) Two more men arrived, one of whom Solis later identified as Vera. (1 CT 113, 148.) Two of the men wore beanies and had bandanas over the bottom part of their faces and one wore a ski mask. (1 CT 140-141, 148, 154.) Solis and Gonzalez were tied up on the bed while the men ransacked the house looking for items of value. (1 CT 113-115, 117-118.) One of the men took Solis to a bathroom where he raped her twice and forced her to orally copulate him twice. (1 CT 121-125.) Subsequently, Solis was left in a bedroom where the man she identified as Pritchard came in and forced her to orally copulate him. (1 CT 128-130.) Various items of personal property and a car were taken. (1 CT 137.) Solis did not identify Capistrano in a line-up she viewed, and, in fact, had identified two of the other men in the

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[70](...continued)
process grounds. (1 CT 70.) The superior court later reversed this ruling. (1 RT 116-117.) While this evidence may be sufficient for purposes of the preliminary hearing, Drebert's statements about Capistrano were clearly inadmissible as to Capistrano for purposes of trial and therefore not relevant to the analysis of whether the crimes were cross-admissible.

[71] Charges against Vera were subsequently dismissed and refiled. (1 CT 219-229.) At a second preliminary hearing in September, 1996, additional evidence was elicited in the form of Vera's alibi for the Solis offenses and testimony regarding the suggestive identification procedures used by law enforcement. (Supp 4 CT 154-255.) There was no additional relevant evidence adduced at the latter hearing, and it is not referenced above.

[72] See 1 CT 106-178.

same line-up as possible perpetrators. (1CT 123, 154-169.) The in-court voice and face identifications made by Solis and Gonzalez at Capistrano's preliminary hearing were tainted by a photo show up conducted by the investigating officer.[73] (Supp 4 CT 175-178 [Vera's preliminary hearing].)

The few common features these crimes had were not "distinctive." (*People v. Haston* (1968) 69 Cal.2d 233, 248 [use of guns and masks not distinctive but shared by very many robberies].) The prosecution also argued the significance of the victims being bound with material found in the victim's homes. (1 RT 122.) This opportunistic use of found materials is not in the least distinctive. Moreover, the victims were not bound in every incident, thus undercutting the prosecution's argument that binding was part of a common modus operandi. The motivation in each incident also varied. One of the incidents was clearly an animus-motivated attack on a person known to the defendants (Martinez), whereas there was no personal connection between Capistrano and the other defendants and the victims in the other incidents. The perpetrators of each of the crimes were not armed in the same fashion. In the Solis crime, four of the men had guns. In the Weir crime, only one of the three men had a gun. In the Martinez crime, only Pritchard had a gun. There is no evidence, and no suggestion in the record, that the same gun was used in the three crimes. The locations of the crimes varied: one was an apartment and two were single-family homes. Moreover, even if these crimes were generally similar, in those few, unremarkable ways, the evidence as to each one was almost completely distinct.

Evidence of crimes that are not distinctively similar can be cross-

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[73] The prosecution elected not to introduce at trial any identification evidence from either Solis or Gonzalez as a result of the suggestive identification procedure employed by law enforcement. (7 RT 2845-2867.)

admissible if it has independent evidentiary significance as to each one; i.e., if it helps prove that the defendant committed them all. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 127-128; *People v. Catlin*, *supra*, 26 Cal.4th at pp. 111-112; *People v. Price* (1991) 1 Cal.4th 324, 388.) In *Arias*, this Court held that murder and robbery charges from one incident were properly joined with kidnap and robbery charges from another incident which occurred two weeks later, because the latter charges were "an outgrowth" of the defendant's "desire to flee apprehension" for the earlier crimes. Thus, the murder "supplied evidence of [the] motive" for the kidnaping, while the kidnaping/robbery "indicated consciousness of guilt" as to the murder. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 127-128.)

Here, despite the prosecutor's unsupported assertions, none of the evidence of any of these crimes had independent significance as to any of the others. There was nothing about each of these crimes that provided an element of proof missing from the others. The only arguably cross-admissible piece of evidence was the location of a piece of property stolen from the Weirs, a ceramic angel, in the apartment of Michael Martinez. The mere fact of its presence there may have linked one of the four defendants to the Weir crime in some fashion, however the fact of the crime against Martinez did not. Admitting evidence that the angel was found in a place to which defendants had access did not require the admission of evidence of the crime against Martinez. (See *People v. Guerrero* (1976) 16 Cal.3d 719, 727 ["the possibility of severing relevant from irrelevant portions of evidence should be considered to protect the accused from undue prejudice"].)

The prosecution argued that the crimes were connected by overlapping participants, however that was a contested fact and there was no evidence admissible against Capistrano to prove that this was so. (1 RT

60-61.) The evidence introduced at the preliminary hearings on the charges did not establish Capistrano's identity as one of the perpetrators of any crime, save the crimes against Martinez. These crimes were not sufficiently similar to be admissible on the issue of identity.[74] In fact, the prosecution did not argue in its motion that the evidence was sufficient to be admissible

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[74] Special additional rules exist for determining probative value, and hence admissibility, of other crimes evidence to establish identity. (*People v. Rodriguez* (1977) 68 Cal.App.3d 874, 883; *People v. Alvarez* (1975) 44 Cal.App.3d 375, 383-384.) When another crime is offered to prove identity, there is a special requirement of the "presence of a high degree of distinctiveness in the common marks." (*People v. Rodriguez*, *supra*, 68 Cal.App.3d at p.884). In other words, "[f]or evidence of other crimes to be admissible on that issue [identity], '[t]he device must be so unusual and distinctive as to be like a signature." (*People v. Alvarez*, *supra*, 44 Cal.App.3d at p.383 [quoting McCormick, Evidence (2d ed. 1972) §190, p.449]; see also *People v. Kipp* (1998) 18 Cal.4th 349, 370; *People v. Catlin, supra,* 26 Cal.4th at p. 111; *People v. Wein* (1977) 69 Cal.App.3d 79, 89 ["a unique methodology of peculiar behavior pattern"]; *People v. Guerrero, supra,* 16 Cal.3d at p. 725 ["a particularly distinct manner that tends to inculpate defendant"].) "[W]hen such evidence is introduced for the purpose of proving the identity of the perpetrator of the charged offense, it has probative value only to the extent that distinctive 'common marks' give logical force to the inference of identity. If the inference is weak, the probative value is likewise weak and the court's discretion should be exercised in favor of exclusion." (*People v. Haston*, *supra*, 69 Cal.2d at p. 247.)

People v. Catlin, *supra*, 26 Cal.4th at pp. 111-112, illustrates the kind of facts this Court has found sufficient in this context. In *Catlin*, the evidence of three murders was cross-admissible because they shared these "distinctive common marks": the victims were all "close female relatives" of the defendant (his mother, and two wives); all their deaths benefitted him financially; and they were all poisoned with paraquat, an extremely rare occurrence. (*Ibid.*) That three such distinctively similar crimes occurred in one family raised a "very strong" inference that a common plan was involved. (*Id.* at p. 112.)

under Evidence Code section 1101, subdivision (b) on the issue of identity.[75] (1 RT 60-66; 1 CT 236-249.) While the presence of a known crime partner might under some circumstances be considered to be a mark of similarity, in the instant case, there was no consistently-identified co-participant. (*People v. Haston*, *supra*, 69 Cal.2d at p. 249 [the presence of defendant's crime partner in 10-15 other admitted robberies and in the charged crimes was a distinctive mark of similarity].) Thus, e.g., the evidence of the identification of Capistrano, Drebert, Pritchard and Vera as participants in the Martinez crime did not help prove that any unidentified participant in any other crime was Capistrano. The evidence of these crimes simply was not cross-admissible on that basis. Unlike the situation in *Haston* where an additional similarity was the presence of defendant's usual crime partner, here the evidence showed that the participants in each crime varied. Moreover, at trial, the prosecution also introduced evidence of Drebert's other criminal activities, namely street robberies that were not alleged to have involved Capistrano. (8 RT 3113.) The fact that Drebert was involved in criminal activity that did not involve Capistrano undercuts any argument that Capistrano was Drebert's usual crime partner.

b. Certain Of The Charges Were Unusually Likely To Inflame The Jury Against Capistrano

Even though the unrelated crimes were all charged as robberies, several of them contained inflammatory facts that prejudicially impacted the others. The Solis charges included rape/sexual assault allegations; the

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[75] The prosecution argued that evidence of these crimes was cross-admissible under Evidence Code section 1101, subsection (b) on the issues of intent, preparation, general plan, and knowledge of the defendant Drebert only, vis-a-vis an anticipated defense that Drebert did not possess any felonious intent when he entered Martinez's apartment. (1 CT 246-247.)

Martinez charges involved a brutal and violent attack on someone known to Capistrano; and the Weir charges involved a non-violent robbery. Thus, this factor weighed against joining these charges. (See *People v. Mason* (1991) 52 Cal.3d 909, 933 [it can be error to join an inflammatory charge with a less-egregious one "under circumstances where the jury cannot be expected to try both fairly"].) In considering if the joinder threatened to inflame the jury, the court must "look to whether under the circumstances consolidating an inflammatory offense with a non- or lesser-inflammatory offense would inhibit the jury from trying both fairly." (*Ibid.*) "The danger to be avoided is 'that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime." (*Ibid.* [quoting *People v. Walker* (1998) 47 Cal.3d 605, 623].)

Evidence of both the Martinez attempted murder charges and the Solis rape was inflammatory and therefore carried a substantial risk of causing "undue prejudice" because the circumstances of those offenses were of a type "which uniquely tend[] to evoke an emotional bias against the defendant as an individual and which [have] very little effect on the issues.'" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overuled on other grounds in *People v. Hill, supra,* 17 Cal.4th 800.)

The attack on Michael Martinez was extraordinarily violent and apparently revenge motivated. Martinez was struck repeatedly in the head with a baseball bat (1 CT 49) to the extent that his teeth were knocked out (1 CT 27) and he was in a coma for several days (1 CT 42-43). His neck was cut (1 CT 28). The victim was known to the defendants (1 CT 43-44) and the alleged motivation was revenge for the arrest of Pritchard. (1 CT 59-60.)

Evidence concerning the rape case was extraordinarily prejudicial and was a case in which there was no reliable evidence of Capistrano's

participation. (*People v. Guerrero, supra,* 16 Cal.3d at p. 730 ["evidence of the sexual offense is prejudicial beyond a shadow of a doubt"].) In addition to the obviously repulsive and prejudicial nature of the rape and oral copulation charges themselves, the evidence included Solis being subjected to sexually-oriented taunting by all of the perpetrators. (1 CT 131-133.) There was evidence that suggested that the perpetrators were racists (1 CT 133-134 [told Solis they wouldn't kill her "because she was Mexican" and asked why she married "a white guy"]) and gang-members (1 CT 116-118 [perpetrators referred to their "homies" and "gang insignias"]). There was also evidence that the perpetrators were involved in illegal drug use (1 CT 119-121 [seeking hypodermic needles]) and had serious prior criminal records (1 CT 116-117 [said they all had "3 strikes"]).

The facts of the Martinez and Solis cases, in contrast to the Weir crimes, were of the type likely to evoke an emotional bias against the defendant as an individual and make the jury convict on bad character rather than subjecting the prosecution's evidence to scrutiny.

c. Joinder Of Weak Cases With A Strong Case: The Spillover Effect

Where it appears that, because of the potential prejudice, a weak case will be made stronger by joinder with unrelated offenses, severance is required. (See *Bean v. Calderon*, *supra*, 163 F.3d at p.1086 [potential for undue prejudice from joinder of strong evidentiary case with a weaker one]; *Lucero v. Kerby* (10th Cir. 1998) 133 F.3d 1299, 1315 [danger in consolidation of offenses because state may join a strong evidentiary case with a weaker one hoping that an overlapping consideration of the evidence will lead to convictions of both].)

Even where joinder is technically proper, severance is favored if there is a great disparity between the gravity of the offenses (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 452; *People v. Chessman* (1959) 52

Cal.2d 467, 492; *People v. Morse* (1964) 60 Cal.2d 631), or if, in light of the weight of the evidence offered for the different counts, there is the possibility that the defendant will be convicted due to the prejudicial atmosphere created by the joinder and not by the evidence itself. (*People v. Matson* (1974) 13 Cal.3d 35, 39-40).

The case against Capistrano on the Martinez charges was strong – Martinez identified Capistrano as a perpetrator in that offense. The evidence against Capistrano on the Weir and Solis charges, judged at the time the trial court denied Capistrano's motion to sever, was tangential and relied in large part on the strength of the evidence against his codefendants and Capistrano's presence in an apartment of a mutual acquaintance where goods stolen from Weir and Solis were found.

Viewing the evidence from the vantage point of the trial court at the time that it ruled on the motion for severance, there was a substantial risk that evidence of the attempted murder of Martinez would have a "spillover effect" of improperly bolstering the prosecution's weak evidence implicating Capistrano in the Weir and Solis crimes. For all the foregoing reasons, the trial court erred when it denied Capistrano's motion to sever.

2. The Trial Court Erred In Permitting Joinder Of The Martinez, Weir and Solis Offenses To The Capital Case Involving The Homicide Of Witters

At the time the trial court ruled on the prosecution's motion to consolidate the capital and non-capital charges against Capistrano and Drebert and to try those two defendants separately from Pritchard and Vera, there existed additional evidence before the trial court that had not been before the trial judge who had denied Capistrano's severance motion. The preliminary hearing on the Witters homicide had occurred, and that adduced evidence regarding the homicide and special circumstances charges. It also adduced alleged admissions by Capistrano and Drebert to Gladys Santos

regarding their involvement in the Witters and Weir crimes.[76] (3 CT 709-726, 732-749; compare 1 CT 236-249.) Capistrano objected to joinder of the capital case to those non-capital offenses, arguing that to do so would be prejudicial to Capistrano and constitute an abuse of discretion under the criteria set forth in *People v. Sandoval, surpa*, 4 Cal.4th at pp. 172-173. (3 CT 755.) The trial court abused its discretion in failing to conduct the prejudice analysis and in granting the prosecution's motion as the prejudicial effects of joinder outweighed any potential benefit.

a. The Evidence Was Not Cross-Admissible

Generally, evidence of separate charges is cross-admissible if there is an evidentiary connection between the charges, such as distinctive common marks supporting an inference about identity, motive, or another material fact relevant to the charges. (*People v. Bean*, *supra*, 46 Cal.3d at pp. 936-938; *People v. Johnson, supra,* 47 Cal.3d at p. 578.) The evidence before the trial court at the time of its ruling does not support a finding that such a connection existed between the Martinez, Weir and Solis offenses and the Witters offense. The prosecution argued that the evidence was cross-admissible (an argument the trial court apparently accepted) because:

> Property stolen during the Solis, Weir and Martinez robberies was recovered or obtained from Gladys Santos's apartment, where all four defendants were arrested together shortly after the Martinez robbery. Defendant Capistrano admitted to Santos that he committed the Witters robbery-murder as well at the Weir residential robbery. Defendant Drebert admitted to Santos that he too participated in the Witters robbery-murder.

(3 CT 722.) However, the prosecution failed to show, because it could not,

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[76] DNA evidence relating to the Solis offenses was also not available until after the trial court denied Capistrano's motion to sever the non-capital offenses from each other. (1 RT 59-60, 67-69; 1 CT 276.)

how any of the evidence recovered from Santos's apartment relating to the non-capital offenses would be admissible in the case involving the homicide of Witters if the latter had been tried separately. The fruits of the non-capital crimes, found in a location to which Capistrano had access, might arguably be admissible in a prosecution on those charges. However, that does not provide a legally valid reason to admit such evidence against Capistrano for the Witters homicide.

In addition, with regard to Capistrano's admissions to Santos regarding the Witters and Weir crimes, the fact that one witness would need to testify at two different trials did not make the admissions to the non-capital Weir crime admissible against Capistrano on the capital offense. Those two crimes do not share any distinctive common marks which would support a theory about identity or motive. In fact, as argued above, the evidence in the three non-capital crimes was not cross-admissible to each other. The Witters offense is dissimilar still from any of those three offenses. The Witters offense involved a different type of setting from the Solis and Weir home invasion robberies: Witters was attacked in his apartment, while Weir and Solis were accosted in their garages as they arrived home.. While Martinez was also attacked in an apartment, he was a different type of victim (one who knew his attackers) and the motives for the attack (retaliation) were different from the Witters homicide. (See *Calderon v. Superior Court, supra*, 87 Cal.App.4th at pp. 939-941 [prejudice problems arise when jurors are exposed to evidence of crimes that are entirely separate episodes].) Witters was strangled to death. Martinez was beaten with a baseball bat. The Weirs were unbound and unharmed, while the Solis crime alone involved sexual assaults on the female victim.

Contrary to the prosecution's further assertion, the capital crime and

the non-capital crimes were not connected together in their commission. (3 CT 720.) Offenses are connected together in their commission when there is a "common element of importance," such as the same manner of commission or the same felonious intent. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 160.) As explained above, the four crimes simply did not share a common manner of commission. Nor did they share the same felonious intent: the Martinez offenses were motivated by revenge, the Solis offenses were primarily sex crimes, the primary purpose of the Weir offenses was theft, and there is insufficient reliable evidence of the motivation for the Witters homicide.

Importantly, the prosecution did not proffer that the evidence of the non-capital crimes was admissible under Evidence Code section 1101, subdivision (b) on any issue relating to Capistrano. It proffered only that the participation of Drebert in the Witters and Weir crimes was admissible under that code section to show that Drebert shared the felonious intent of Martinez's attackers when he entered the apartment. (3 CT 722.) The prosecution thus acknowledged by implication that as to Capistrano, evidence of the individual crimes was not relevant to prove Capistrano's conduct as to any other crime. (Evid. Code, § 1101, subds. (a) and (b).)

The prosecution essentially conceded that the non-capital cases were not admissible against Capistrano in its case-in-chief as to the crimes against Witters when it said:

> As the cases are currently configured, two trials will be necessary: a trial of all four defendants on the charges arising from the Solis robbery-rape, the Weir robbery, the Martinez robbery-attempted murder, followed a by a second trial on the charges arising from the Witters robbery-murder.
>
> Moreover, the People are seeking the death penalty against defendant Capistrano for the Witters robbery-murder. Evidence of the Solis robbery-rape, the Weir robbery, and the Martinez robbery-

> attempted murder will be offered as evidence in aggravation should the Witters robbery-murder reach penalty phase. This will, in effect, amount to a lengthy third trial in the form of a penalty phase.

(3 CT 723.)

There was no showing before the trial court that the evidence of the non-capital crimes would have been admissible in the guilt phase of Capistrano's trial. The record is devoid of any evidence that the trial court considered cross-admissibility as a relevant factor in making its ruling on joinder, since it did not state its reasons for its ruling. In fact, it seemed to dismiss cross-admissibility as a relevant factor under section 954.1. (1 RT 178.) Any failure to consider cross-admissibility as a factor in its decision as to whether or not joinder was appropriate in this case constituted an abuse of discretion as well. If the trial court had considered the lack of cross-admissibility as a relevant factor, that factor would have militated against joinder.

b. The Prejudicial Effect Of Joinder Outweighed Any Potential Benefits

Since cross-admissibility is not the "sine qua non" of consolidation, and since these offenses are the same class of crime, this Court must still weigh the prejudicial effects of joinder against its benefits to determine whether the trial court erred in consolidating these cases for trial. In doing so, this Court must consider joinder's benefits when juxtaposed against factors such as whether certain of the charges are unusually likely to inflame the jury against the defendant, whether a weak case has been joined with a strong case, and whether any of the charges carries the death penalty. (*People v. Cunningham, supra,* 25 Cal.4th at p. 985; *People v. Mendoza, supra*, 24 Cal.4th at p. 161.) In performing this balancing test here, the result is that the trial court should have perceived that joinder would be highly prejudicial to the defendant.

Consolidation of charges is generally a preferred method of trial because it promotes efficiency. It avoids the needless harassment of the defendant that results from separate trials and the waste of public funds that results from presenting the same general facts before separate juries. (*People v. Ochoa, supra,* 19 Cal.4th at p. 409.) In this case, the defendant opposed consolidation so harassment was not an issue. Additionally, since there was no overlap whatsoever between the facts of the Witters offense and the Martinez, Weir and Solis offenses, the same general facts would not have been presented to separate juries.

Since harassment of the defendant and repetition of testimony were not valid considerations in ordering consolidation, there was no public purpose to be served by trying all of these cases together. If there was no public policy reason for consolidated trials, they should not have been ordered if the defendant would be prejudiced by consolidation. When examining the factors elucidated above, it is inescapable that such a likelihood of prejudice existed at the time the trial court entered its consolidation order.

The consideration of whether certain of the charges would inflame the jury against the defendant is a complex one. As this Court has made clear, the issue is not necessarily whether the jury would have its passions aroused more by one crime than the others, but rather whether the jury can be expected to try both, or all, crimes fairly. The danger to be avoided is that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case on another crime. (*People v. Mason, supra,* 52 Cal.3d at pp. 933-934.)

Regardless of the manner by which the Witters offense came to fruition, there was no evidence presented to indicate that it was not a first or second degree murder, and Capistrano is not attempting to minimize the

offense. However, despite the fact that it was a murder offense, it is not unreasonable to believe that a juror would find the fact that the Solis gang rape or the brutal beating of Martinez in a cold-blooded and calculated manner to be more inflammatory than the facts surrounding the Witters offense. As such, it is reasonable to believe that a juror would look at the Solis and Martinez offenses and believe that Capistrano would have committed the Witters offense as part of a violent crime wave. Thus, the jury would not be trying the Witters offense fairly.

The factual differences between the Martinez and Witters offenses also affect that factor which addresses whether a weak case has been joined with a strong case. Although respondent will undoubtedly contend, as the prosecutor did below, that there is no weak case here, the proof relating to Capistrano's guilt of the Witters offense is substantially weaker than the proof relating to his complicity in the Martinez offense. In the Martinez case, Martinez knew Capistrano before the crime and lived to identify Capistrano as one of the perpetrators. Indeed, Capistrano's presence during that crime was not disputed at trial. (10 RT 3649.) In contrast, with no physical or eyewitness evidence connecting him to that crime, Capistrano's guilt of the Witters offense depended upon one witness, Gladys Santos, whose veracity was strongly contested. (See Argument V, *ante*.)

The cases from this Court recognize the general principle that it is often prejudicial to join weak charges with strong ones because the latter may bolster the former. Consequently, this Court has advanced the view that only when the evidence on each count is overwhelming, or at least extremely strong, can a reviewing court be confident that prejudice did not result from the joinder of charges. (See *People v. Odle* (1988) 45 Cal.3d 386, 404; *People v. Lucky* (1988) 45 Cal.3d 259, 278.) When that standard is applied to the facts extant here, a prejudice finding is required. There

was simply more evidence of Capistrano's complicity in the Martinez, Weir and Solis offenses – Martinez identified Capistrano as one of the perpetrators, DNA evidence did not exclude Capistrano as the perpetrator of the Solis crimes, Solis made an in-court voice identification of Capistrano at the preliminary hearing, and evidence stolen in all three offenses was recovered in areas to which Capistrano had access. Such evidence did not exist regarding Capistrano's complicity in the Witters offense – that case turned on the credibility of one witness. It was only by consolidating the offenses for trial that the state was able to garner the advantage of the spillover effect from the Martinez, Weir and Solis offenses – a spillover effect that was prejudicial to Capistrano's opportunity to obtain a fair trial on the Witters capital case.

The prosecution posited judicial economy as an import factor in favor of consolidation of the non-capital and capital offenses. However, judicial economy is not a valid reason for joinder. Because capital offenses were charged, this Court must "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; see also, *People v. Lucky*, *supra*, 45 Cal.3d at p. 277; *Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.) And for the same reason, the trial court was required to assess the likely effect of joinder, and carefully weigh whether any likely conservation of judicial resources outweighed the prejudicial impact of that procedure. Yet, the court gave no analysis to the prejudice to Capistrano from joinder, perhaps incorrectly believing that a prejudice analysis was irrelevant after the enactment of Prop 115. (1 RT 178-179.) That cursory treatment of the question was clearly inadequate, since "questions of life and death were at stake." (*Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.)

The prosecution's final successful motion for joinder was decided by

a different judge than that who had denied the previous motion. (CT 648, 761, 778-779.) The judge who denied joinder *did* consider the prejudice to the defendants who were not charged in the capital crime.[77] Pritchard's counsel argued that severance was required due to prejudicial "guilt by association" arising from joinder of counts. (CT 643-644; 1 RT 120-121; *People v. Biehler* (1961) 198 Cal.App.2d 290, 298.) *Biehler* addressed the danger that the jury would not be able to segregate the evidence on each count and that

> the jury might have formed the impression on the basis of the totality of the evidence that the defendants were a gang of depraved robbers, and based their determination of individual guilt as to each offense partly on that impression.

(*Biehler* at p. 303.) On that basis the prosecution's motion for consolidation of the capital and non-capital charges as to all defendants was denied. (1 RT 127-129.) This is precisely why the joinder of all charges was prejudicial to Capistrano. The presence of the non-capital charges tainted the jury's view of the capital charges as the jury would see the non-capital charges as relevant to Capistrano's propensity to rob and commit acts of violence.

After considering the four factors enumerated above, the trial court was required to weigh the potential prejudice and the benefits of joinder. (*People v. Bean*, *supra*, 46 Cal.3d at p. 936; *Smallwood*, *supra*, 42 Cal.3d at p. 430.) If the court had performed that weighing, it would have realized that a joint trial would not yield any substantial benefits. While these cases involved one common witness, Gladys Santos, none of her testimony would have been repeated at separate trials; since the evidence of the charges was

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[77] The prosecution alleged that Pritchard and Vera were involved in the capital crime although they were not charged. (1 CT 232, 555.)

not cross-admissible, "there simply was no significant judicial economy to be gained from joinder." (*Smallwood*, *supra*, 42 Cal.3d at p. 430.)

Here, as in *Smallwood*, "'[t]he only real convenience served by permitting joint trial of [these] unrelated offenses against the wishes of [Capistrano] was the convenience of the prosecution in securing a conviction.'" (42 Cal.3d at p. 430, quoting *United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 738.) Moreover, even if separate trials would have involved additional time and expense, they would have been *more* efficient in the most important sense, because they would have produced more reliable verdicts, untainted by the prejudicial effect of exposing the jury to evidence of other crimes. (See *Smallwood*, *supra*, 42 Cal.3d at p. 428.) And of course, "the pursuit of judicial economy must never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 451-452.)

The prosecution argued that even though two trials would be required, judicial economy favored joinder because the evidence of the other crimes would be admissible in Capistrano's penalty phase. (3 CT 746.) The prosecution did not cite any legal authority for the proposition that the trial court should consider the admission of other crimes evidence at the penalty phase as a reason for joinder – because none exists. In addition, the likely acquittals in separate prosecutions would have prevented the prosecutor from presenting evidence of those crimes in a penalty phase. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587.) Moreover, without the prejudice to Capistrano from joinder, Capistrano was unlikely to be convicted on the capital charges and there never would have been a penalty phase. Therefore, the trial court erred by both failing to consider whether the crimes were cross-admissible and by accepting the prosecution's argument which had no basis in law. The trial court thus

abused its discretion in permitting joinder of the Martinez, Weir and Solis offenses to the Witters offense.

D. Joining These Charges Rendered The Resulting Trial Fundamentally Unfair

Even assuming the trial court's rulings were correct at the time they were made, reversal of the convictions and death sentence is required, because joinder actually "resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.) The verdicts, including the death verdict, were clearly the product of a "spillover effect" of just the kind that supports severance of unrelated charges. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322; *Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 88.) The joinder of these charges permitted the state to use direct evidence regarding Capistrano's participation in the Martinez offense to influence the jury's consideration of the Weir, Solis and Witters offenses. Consolidation of these charges permitted the jury to draw the conclusion that if Capistrano was the type of person to commit the Martinez offenses, he was the type of person who would commit the other offenses, including capital murder.

Joinder of these offenses permitted the prosecution to specifically argue that the Martinez offense supported finding Capistrano guilty of the Weir, Solis and Witters offenses. The prosecution bootstrapped from the identification of Capistrano, Drebert, Pritchard and Vera by Martinez to construct the theory that Capistrano and the same companions were a de facto gang and to urge the jury to hold them joint and severally liable wherever any one of them was identified as acting in the company of unidentified companions.

Although the consolidated offenses were factually separable, the prosecution argued connections that did not exist, put facts not in evidence before the jury to overcome the separation and urged the jury to conflate the

evidence to overcome the lack of sufficient evidence as to Capistrano relating to the Weir, Solis and Witters offenses.

1. The Joinder Resulted In Prejudice Because It Allowed The Prosecutor To Pursue An Improper Guilt By Association Theory, To Inflame The Jury, And To Cumulate The Evidence As To Each Charge To Obscure The Weaknesses In Its Cases As To The Witters Homicide

With the exception of the Martinez charges, the identity of Capistrano as a participant in all of the charged crimes was a key contested issue in the case. To overcome the dearth of reliable or relevant evidence to establish Capistrano's involvement, the prosecution used improper argument, inflammatory terminology, and irrelevant evidence to meet its burden by characterizing Capistrano and the other defendants as a de facto gang.

Although the Martinez crime was not cross-admissible as to the other crimes on the issue of identity, that was precisely how the prosecutor used it. The prosecutor bootstrapped from the strong identification of Capistrano, Drebert, Pritchard and Vera in the Martinez incident to the theory that they were a de facto gang and that where one of the four was identified, one of the unidentified persons must have been Capistrano. The erroneous joinder of all of the unrelated charges allowed the prosecutor to gloss over the gross deficiencies in the evidence of Capistrano's guilt of the charges and urge conviction on the basis of guilt by association.

> "The technique ... of guilt by association [is] one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is Personal."

(*Joint Anti-fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 179.) Severance should generally be granted in the face of prejudicial

association with codefendants. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932.)

The prosecutor began his guilt phase case with the Martinez crime although it had occurred the latest in time of all of the offenses so that the strong evidence of identity of Capistrano as one of the perpetrators would overcome the lack of evidence of Capistrano's participation in the other crimes. Capistrano, Drebert, Pritchard, and Vera were unmasked and known to Martinez from prior association. (4 RT 2165-2167.) Much of the prosecution's questioning of the witnesses to this offense was focused on establishing the uncontested fact that Capistrano, Drebert, Pritchard, and Vera all knew one another. (4 RT 2125-2130, 2161-2165, 2217-2219.) The prosecution then used the uncontested identifications as a roster of participants in crimes where either none of the participants was identified or where persons other than Capistrano were identified. In fact, the prosecutor repeatedly encouraged the jurors to cumulate the evidence of the four charges and assume from the presence of one of the four Martinez participants that an unidentified participant was necessarily Capistrano.

With regard to the Solis crime, the prosecutor argued that the jury should assume that Drebert and Capistrano were the two unidentified men who perpetrated the Solis offenses because Solis had identified two of the perpetrators that she saw as Pritchard and Vera. (10 RT 3612-3614.) The prosecutor further asked the jury to conclude that Capistrano was the rapist because he was the tallest of those four. (10 RT 3614.) The only basis for the prosecutor to have been able to make this argument was by using the Martinez crime impermissibly as the template for the non-identified participants in the other crimes.

The prosecutor went even further in his guilt phase rebuttal argument, encouraging the jurors to believe that because the four

participants in the Martinez offense were arrested together on January 19, 1996 (the day of the Martinez offense), they necessarily committed the Solis crime together over a month before on December 15, 1995.

> You know that he [Capistrano] was involved ... [because] Julie Solis identifies Pritchard and Vera and Michael Drebert,[78] and the four of them match the descriptions of the people that came into her house.

(10 RT 3693.)

> He was arrested with three others. For a total of four. Two of the people that were arrested with him were positively identified by Julie Solis. He and the other person arrested matched the description of the other two.

(10 RT 3699.)

In addition to portraying the four as a de facto gang, the prosecutor downplayed contrary evidence that undercut this theory. For example, Gonzalez testified that five men were involved in the Solis incident, yet the prosecutor consistently argued that Capistrano was one of the *four*. (8 RT 3004; 10 RT 3572, 3609-3611, 3613-3614, 3693.)

Even more tenuously, the prosecutor argued that because *Drebert and Vera* were "caught" together on January 6, 1996, in Montebello and were in possession of gloves and masks, the jury should infer that Capistrano was a participant in the Solis rape and the Witters homicide by virtue of his possible access to the car where the gloves and masks were found.[79] (10 RT 3599-3600.) The prosecutor even went so far as to argue

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[78] Michael Drebert was neither identified in or charged with this offense.

[79] Not only were these items irrelevant to Capistrano's guilt of the charged crimes, but the masks did not match the descriptions of the masks used in those offenses. Solis said that the mask of the person who raped her (continued...)

that the masks and gloves found in the car were *the same* ones used in the Weir robbery even though there was no evidence that this was so. (10 RT 3629.)

The prosecutor used the combined weight of the charges to overcome the weakness of the evidence of Capistrano's participation in the Weir offense. Weir was unable to identify anyone in line-ups she viewed or at trial. (8 RT 3090.) In his opening statement, the prosecutor told the jury that Capistrano and Drebert were involved in the Weir robbery. (4 RT 2057.) However, evidence of Drebert's involvement was not presented to Capistrano's jury. The only evidence of Capistrano's involvement came in the form of Gladys Santos'sunreliable testimony. (See Argument V, *ante*.) The evidence was so weak as to the Weir crime, that no reasonable jury would have found Capistrano guilty without the prejudicial atmosphere created by evidence regarding the other charged crimes and the prosecutor's use of a guilt by association theory.

The Weir and Solis crimes were not sufficiently similar to be cross-admissible on the issue of identity, yet the prosecutor argued that the jury should conclude that Capistrano raped Solis because those crimes had the same modus operandi citing the mundane and commonplace facts that they both occurred in houses with detached garages and long driveways and were perpetrated by people wearing masks. (10 RT 3623-3624.) None of

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[79](...continued)
was homemade, unlike the machine-made masks found in the car and that at least three of the men involved wore bandanas, not masks. (7 RT 2911-2912, 2918, 2919; 8 RT 2989; People's Exhibits 50, 51.) Solis's husband testified that maybe three of the five participants wore ski masks and others had bandanas. (8 RT 3005-3006.) In the crime closest in time to the finding of the masks in Montebello, Weir testified that only two of the three participants wore masks; however, if the masks in the car were theirs, all the participants should have had them.

those facts either alone or in combination rendered the crimes sufficiently similar to constitute a signature which would have warranted using them to overcome the deficiencies in the proof of each.

2. Joinder Permitted Inflammatory Evidence Suggesting Gang Membership

Some of the prejudice to Capistrano from the joinder came via codefendant Drebert. Drebert did not contest his involvement in the Witters homicide or the Weir robbery. (October 8, 1997 [Redacted Jury Voir Dire] RT 1021.) Because only Drebert's mental state was at issue, it was in his interest to establish that, not only was Capistrano a participant in the charged offenses, but that he was a participant in such a way that reduced Drebert's culpability. To this end, Drebert's counsel made a point questioning witnesses in a way that assumed Capistrano's involvement and suggested that Capistrano was a gang leader.

When cross-examining Ruth Weir, Moreno elicited testimony to suggest that Capistrano was involved and was the leader of the crime:

Q Mrs. Weir, on December 23rd, did it appear -- is it three gentlemen that invaded your home?
A Yes.
Q Did it appear to you that there was one of the three that was the leader or that ordered the other two?
A Yes.
Q And how would you characterize that individual's voice or orders?
A I don't know exactly what you mean.
Q Well, was it forceful? Was it whisper?
A No, he was forceful.
Q And did you hear the voice of the other two at all?
A Not really.

(8 RT 3093-3094.) The implication here was that since Capistrano was the largest and oldest of the suspect, that the man with the forceful voice was him.

Drebert's defense counsel added to the prosecutor's guilt by association arsenal by eliciting from a defense witness, Jessica Rodriguez, that "They were always all together." (9 RT 3283-3284.)

In support of his improper guilt by association theme, the prosecutor took every opportunity to refer to Capistrano and the others in ways to make the jury consider them to be members of a gang.[80] He elicited testimony from Martinez that Martinez didn't trust Capistrano because he looked like a gang member (4 RT 2169); he prepared a stipulation that Capistrano and Pritchard were seen in a car with "two other cholo-type gang members" (5 RT 2244); he elicited testimony from officer Preston regarding the arrest that Capistrano and the other arrestees were "male Hispanic gang member types" with "shaved heads" (5 RT 2252, 2266). In closing argument he referred again to Martinez's testimony, saying that Martinez "had the audacity to not want gang members hanging around his apartment complex." (10 RT 3575.)

Sortino also elicited information from Martinez's neighbor in the Lida Apartments, Jose Canales, that suggested that gang members connected to Capistrano or Drebert were hiding from the police in his apartment against his will. (4 RT 2127-2128.) The prejudicial impact of this irrelevant testimony was exacerbated when Drebert's counsel returned to it on cross-examination. Moreno elicited testimony that implied that Capistrano was somehow connected to those menacing Canales in his

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[80] "[I]t is error for the prosecutor to draw a connection to a group engaged in criminal activity when it serves no purpose and is without foundation," *United States v. Santiago* (9th Cir. 1994) 46 F.3d 885, 890, quoting *United States v. Dickens* (9th Cir. 1985) 775 F.2d 1056, 1058; see also *United States v. Love* (6th Cir. 1976) 534 F.2d 87. *See also United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 594 ["Appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial."].

apartment.

Q Mr. Canales, you had indicated that Johnny had hung out almost on a daily basis at the Lido Apartments during the month of December, January, 1996, correct?

***

The witness: Yes.

***

Q Now, this incident where some strangers were in your home, had the door been broken in or something?

A No. Actually, I had come back, I think, from the hospital picking up some of Yvette's medicine, and when I walked in, I just seen a crowd of faces I didn't know, so I just told them to get out of my house, because I didn't even look at them. I turned, I told Yvette, I go, "what are they doing here?" And I knew they -- you know, they had some association with the people across the way, and I just told them to get out of my house.

Q So are you saying that Yvette was in the apartment in the company of these people who were in the apartment?

A Yeah.

Q And Yvette resides in that apartment, your apartment?

A Yes.

Q And you didn't approve of her keeping company with these people?

A Well, she told me it was -- that they just came at the door and said, "can we come in?"

Q And she permitted them in?

A Yes.

Q And Mr. Drebert, you're not certain he was there at all?

A No.

(4 RT 2135-2137.)

The prosecutor also placed before the jury irrelevant and prejudicial testimony regarding the parentage of Capistrano's daughter Justine. The prosecutor elicited from Gladys Santos that she took care of Justine "who I thought was [Capistrano's] daughter" (5 RT 2430). Later, over defense objection, the prosecutor was permitted to question Jessica Rodriguez about the parentage of Justine. (9 RT 3248-3249.) Rodriguez testified that

Justine was not Capistrano's actual daughter. (9 RT 3288.) There was no legitimate evidentiary purpose for this information. That, in conjunction with the irrelevant and prejudicial testimony that the other defendants called Capistrano "dad" (4 RT 2165; 5 RT 2427, 2428; 9 RT 3284), merely served to raise a prejudicial inference suggestive of a "gang family."

This Court has recognized that allegations of gang membership can have an inflammatory effect on the jury in the context of joinder:

> The implication that gangs were involved and the allegation that [the defendant] is a gang member might very well lead a jury to cumulate the evidence and conclude that [the defendant] must have participated in some way in the murder[] or, alternatively that involvement in one [crime] necessarily implies involvement in the other.

(*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453.) That is precisely what happened here and precisely what the prosecutor intended to happen. The Ninth Circuit has also disapproved the use of gang membership and guilt by association to supply elements of proof:

> Our cases make it clear that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error. Evidence of gang membership may not be introduced, as it was here, to prove intent or culpability. See *Mitchell v. Prunty*, 107 F.3d 1337, 1342-43 (9th Cir.1997), cert. denied, 522 U.S. 913 (1997) (reversing the conviction and holding that evidence of membership in a gang cannot serve as proof of intent, because, while someone may be an "evil person," that is not enough to make him guilty under California law), overruled on other grounds by *Santamaria v. Horsley*, 133 F.3d 1242, 1248 (9th Cir.1998); see also *United States v. Garcia*, 151 F.3d 1243, 1244-46 (9th Cir.1998) (reversing the conviction and stating that it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members). In this regard, we have stated that testimony regarding gang membership "creates a risk that the jury will [probably] equate gang membership with the charged crimes." *United States v. Hankey*, 203 F.3d

> 1160, 1170 (9th Cir.2000) (internal quotations and citations omitted). We further stated that where, as here, "gang" evidence is proffered to prove a substantive element of the crime (and not for impeachment purposes), it would likely be "unduly prejudicial." *Id.* In sum, the use of gang membership evidence to imply "guilt by association" is impermissible and prejudicial. *Garcia*, 151 F.3d at 1246.

(*Kennedy v. Lockyer* (9th Cir.2004) 379 F.3d 1041, 1055-1056.)

3. The Prosecutor's Argument Exacerbated The Prejudice From Joinder

The prosecutor urged the jury to draw improper inferences regarding identity from a slew of irrelevant facts and facts not in evidence. During closing argument the prosecution argued that Capistrano, Drebert and Vera had participated in the capital crimes despite the fact that no admissible evidence was before the jury regarding such participation. The prosecutor stated that the Witters robbery "occurred and continued to occur after all that property was loaded into Michael Drebert's car" (10 RT 3584) although no evidence had been admitted in Capistrano's trial regarding Drebert's participation in this fashion. There was no evidence whatsoever of Vera's participation in the capital crime, yet the prosecutor argued that he, too, had been a participant:

> On January the 6th of 1996, in the city of Montebello, Michael Drebert, one of the two people involved in this murder, and *Jason Vera, one of Mr. Capistrano's group who helped him commit the murder* and was also identified as a participant in the Martinez attempted murder, and was also identified as a participant in the Solis robbery-rape, those two individuals are caught in that car, and guess what's in it? You've got them here, ski mask and gloves.

(10 RT 3599-3600, emphasis added.)

The aggregation of the charges allowed the prosecutor to urge the jurors to consider propensity evidence to overcome the lack of proof of

Capistrano's participation in the charged crimes. During closing argument, the prosecutor referred to Capistrano as "a residential robber." (10 RT 3597.) The multiple charges also provided a support for the prosecutor's improper observation that after the defendants were arrested "this crime spree in the East San Gabriel Valley finally came to a halt." (4 RT 2041.) There was no evidence presented about crime rates in that area or a drop in that crime rate after defendants' arrest.

Particularly because the prosecution charged and prosecuted the capital case on a felony murder simpliciter theory and Capistrano was subject to a death sentence without a finding of intent to kill, the failure to sever the charges was intolerably prejudicial and reversal is mandated. (*People v. Harvey* (1984) 163 Cal.App.3d 90, 105; see Argument XII, *post*, incorporated by reference herein.) The only intent necessary for the jury to find Capistrano guilty of felony murder and to find the special circumstances true was the intent to commit the underlying felony. In essence, Capistrano could be sentenced to death for a mere intent to steal. In the absence of the propensity evidence suggested by the multiple robbery charges in the unrelated crimes, the only evidence regarding Capistrano's intent with regard to the alleged robbery or burglary came in the form of Capistrano's alleged statements to Gladys Santos which were of questionable reliability.[81] (See Argument V, *ante*.) Santos was the only source of evidence with regard to both Capistrano's identity and intent as to the Witters and Weir crimes. The corpus delicti rule requires that there be evidence of each element of a crime, including intent, independent of

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[81] Santos testified with regard to the Witters crime that Capistrano stated that he had been "scoping to rob." (5 RT 2441.) Even if this statement was made, it does not definitively establish the intent to rob, as "to rob" is common lay parlance for mere theft.

Capistrano's statements. (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 681; CALJIC No. 2.72.) There was no other evidence that would have supplied the independent corroboration necessary to establish the specific intent to commit robbery or burglary; therefore the jury must have looked to the other charged crimes for evidence of propensity and guilt by association. "[N]o witnesses were able to identify defendant, and no physical evidence linked him with the crimes. Thus any evidence of defendant's prior criminal behavior could easily have influenced the jury to convict." (*People v. Rivera* (1985) 41 Cal.3d 388, 393 [error where prior offense admitted to prove identity even in light of defendant's properly admitted confession].)

Moreover, evidence that property had been taken from the Witters apartment was speculative at best. The property alleged to have been taken was last seen in the apartment two weeks prior to the homicide. (5 RT 2344, 2352-2354, 2357.) Witters was preparing to leave the country and may have made other arrangements to ship his property or have sold it. (5 RT 2325, 2338, 2350-2351, 2355.) The prosecutor referred in his opening statement to evidence that a cell phone was missing and was used after the homicide, but he failed to put on evidence to prove this. (4 RT 2052-2053.) The only other evidence purporting to tie Capistrano to the property allegedly taken from the Witters apartment was in the form of testimony by Santos about Capistrano asking her if she knew of someone who wanted "a large computer." (5 RT 2447-2448.)

With the exception of the strong evidence of Capistrano's involvement in the Michael Martinez incident, the evidence as to each other charge was extremely weak as to Capistrano. The evidence on the Martinez charge spilled over and bolstered the other three. Thus, what this Court foresaw in *Williams* happened here: "the jury [] aggregate[d] all of the

evidence, though presented separately in relation to each charge, and convict[ed] on [all] charges in a joint trial, whereas, at least arguably, in separate trials, there might not be convictions on [all] charges." (*Id.* at p. 453.)

These arguments palpably demonstrate the gross unfairness that resulted from the trial court's consolidation order. Without that order, the prosecutor would have been unable to argue to the jury that the combined weight of all the evidence demonstrated Capistrano's guilt of the Weir, Solis and particularly the Witters offenses. The verdict on those counts illustrates how inordinately prejudicial joinder was here, because it shows that the jurors did not "successfully compartmentalize[] the evidence" on each charge. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; *Featherstone v. Estelle*, *supra*, 948 F.2d at 1503-1504.)

The prosecutor's arguments show the "gross unfair[ness]" of joining these unrelated charges, not only because the prosecutor was allowed to argue that the combined evidence of all the charges proved Capistrano's guilt on each one, but because he did so by using the odious theory of guilt by association. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127; see *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084 ["the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities"]; *Kennedy v. Lockyer* (9th Cir.2004) 379 F.3d 1041, 1055-1056 [gang membership cannot be used to prove intent]; *McCleskey v. Kemp* (1987) 481 U.S. 279, 309 fn. 30 [prosecutorial argument using race or ethnicity as an element of proof violates a criminal defendant's due process and equal protection rights]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974; *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 594 ["Appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth

Amendment right to a fair trial."].)

E. Reversal Is Required

As the result of joinder, Capistrano was substantially prejudiced (see *People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1318 [refusing to sever "joinable" charges is reversible error when it results in demonstrable prejudice]), and, in any event, rendered the trial and the jury's verdicts "fundamentally unfair," in violation of the federal and state constitutions. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal.Const., art I, §§ 15, 16, and 17; *People v. Arias*, *supra*, 13 Cal.4th at p. 127; *Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503.)

The prejudicial impact of joinder of counts cannot be understated, especially as it applies to the capital case. The case against Capistrano on the Martinez case was solid, and Capistrano did not contest involvement in that revenge-motivated beating. (10 RT 3648-3649.) In contrast, the prosecution's case against Capistrano on the other charges, and particularly on the capital murder charges, was extremely weak. There was no physical nor eyewitness evidence linking him to the capital crime. The capital case, standing alone, depended upon the veracity of Gladys Santos. Rather then build a capital case upon such a weak foundation, the prosecution successfully sought to strengthen its case against Capistrano by adding other counts that fostered a prejudicial impression that Capistrano was a "residential robber" (10 RT 3597) and thus as guilty of all of the charged crimes, including the capital crime, as he was of the Martinez crimes.

Finally, without the prejudicial impact of joinder of offenses, trial on the Weir and Solis crimes would have resulted in acquittal. Penal Code section 190.3 states in relevant part, "in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted." (See, e.g., *People v. Balderas* (1985) 41 Cal.3d

144, 201, fn. 28; *People v. Melton* (1988) 44 Cal.3d 713, 754; *People v. Robertson* (1989) 48 Cal.3d 18, 47; *People v. Sheldon* (1989) 48 Cal.3d 935, 951; *People v. Fierro* (1991) 1 Cal.4th 173, 231.) Thus, evidence of the Weir and Solis crimes would not have been admissible as aggravation at the penalty phase of Capistrano's capital trial. For all the foregoing reasons, joinder of counts rendered Capistrano's death sentence unreliable. (See *Gardner v. Florida, supra,* 430 U.S. at p. 363-364, (conc. opn. of White, J.), quoting *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Johnson v. Mississippi, supra,* 486 U.S. 578, 586.) .

It was obvious from the outset that Capistrano had no chance for a truly fair trial if these charges were tried jointly. Proceeding with a joint trial in the face of that obvious potential for prejudice was both an abuse of discretion and grossly unfair, and violated Capistrano's right to due process. Thus, reversal is required because the state cannot sustain its burden of proving that the federal constitutional errors involved in joining these charges were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

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VIII

CAPISTRANO WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW DUE TO THE ABSENCE OF AN INSTRUCTION ADVISING THE JURY THAT IT SHOULD CONSIDER ONLY THE EVIDENCE PERTAINING TO EACH SPECIFIC COUNT OF THE INFORMATION WHEN CONSIDERING CAPISTRANO'S GUILT OF THAT PARTICULAR COUNT

A. Introduction

A contested issue at trial was whether the state should be permitted to join the Martinez, Weir, Solis and Witters offenses for presentation to the same jury. (See Argument VII, above.) While the trial court instructed the jury pursuant to CALJIC No. 17.02 (5 CT 1308), it was not a sufficient safeguard to guarantee Capistrano a fair trial on all of the charged offenses.[82] The trial court's instruction pursuant to CALJIC No. 17.02 advised the jurors they were to decide each count separately. However, CALJIC No. 17.02 does not address the more critical issue of whether the jurors can use evidence of one crime, even if not cross-admissible in the trial of the other crimes, as evidentiary support for a conviction on those counts to which that evidence does not pertain. The failure to provide an instruction informing the jurors they could not use evidence of one crime to convict Capistrano of the other crimes violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7, subdivision (a), and 15, of the California Constitution. It also deprived Capistrano of his right to an unbiased jury and his right to a

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[82] The jury was instructed as follows: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (10 RT 3748-3749; 5 CT 1308.)

fair and reliable penalty determination. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 15, 16, and 17.). Further, permitting the jury to use evidence which was not cross-admissible on one count to support a conviction on a separate count effectively lowered the prosecution's burden of proof in violation of the Fifth and Fourteenth Amendments to the federal constitution.

B. The Trial Court Erred By Failing To Sua Sponte Instruct The Jurors They Could Not Merely Combine All Of The Evidence Introduced Regarding All 16 Counts In Determining Capistrano's Guilt Of Each Separate Offense

1. This Type of Instruction Was Necessary To Prevent The Jury From Rendering Convictions Based Upon Irrelevant And Inadmissible Evidence

A well-established legal principle that should have governed the jury's consideration of these consolidated charges was that where a defendant is tried in a proceeding that includes more than one charge, a conviction for each charged offense may be rendered only when the conviction is based upon evidence that is relevant to that particular offense. For example, the Court of Appeal specifically rejected the state's argument in *In re Anthony T., supra,* 112 Cal.App.3d at p. 101, that because two or more counts may be properly joined for trial, the fact finder may consider all of the evidence in assessing guilt on all of the charges. The Court of Appeal held that each count in a pleading charges a separate and distinct offense, and the trier of fact may not consider the supporting evidence in one case when rendering a judgment on the other case. In addition, it is inappropriate for a prosecutor to make an argument to a jury that asks jurors to aggregate the evidence when considering guilt on separate counts which are being tried together. (*People v. Stewart* (1985) 165 Cal.App.3d 1050, 1057, fn. 9.)

Courts presume that it is permissible to try separate offenses together

because reasonable efforts will be made to impress upon the jury that it must not aggregate all of the evidence when determining the defendant's guilt of each charge, but rather that the jury should separate the evidence and the charges and make individual determinations of guilt. This can be achieved by ensuring proper instruction from the trial court and by preventing the prosecutor from arguing that evidence should be aggregated. (See *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382, 389; see also *People v. Cunningham, supra,* 25 Cal.4th at p. 985-986 [prejudicial effect of joinder dispelled by instruction not to consider defendant's status as a felon in deciding other charges]; see also *Bean v. Calderon, supra,* 163 F.3d at pp. 1084-1085; *Herring v. Meachum* (2nd Cir. 1993) 11 F.3d 374, 378 [joinder of separate murder charges not prejudicial because jury instructed to not use evidence of one charge to determine defendant's guilt of another charge].)

Here, the trial court failed to instruct the jury in this manner and the prosecutor gave a final argument that encouraged the jury to aggregate the evidence. In California, a trial court has a duty to give cautionary instructions that may be called for by the state of the evidence. (*People v. Ford* (1964) 60 Cal.2d 772, 799.) The instruction the court gave in this case – CALJIC No. 17.02 – was inadequate. It instructed the jurors on the procedure they were to follow in assessing Capistrano's guilt of each of the individual charges. It told them that they were to consider guilt of each count separately and return a verdict for each count; thereby directing a procedural approach rather than directing a substantive manner of consideration. Thus, this instruction fulfilled a procedural purpose by directing the jury as to the appropriate manner of deliberation. However, it critically failed to provide proper direction to the jury regarding the more substantive issue of whether it was appropriate to aggregate the evidence of

all charges when deciding guilt on any one charge.

The necessity for providing this type of instruction can be seen by looking at the analogous situation of the introduction of other-crimes evidence pursuant to Evidence Code section 1101. It is a violation of the Due Process Clause to admit evidence of other crimes committed by a defendant without giving the jury a limiting instruction identifying the purpose for which the evidence was admitted. (*Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337, 341.) The reason for this requirement, as recognized by this Court, is that evidence the defendant committed other crimes cannot be used to show his criminal propensity in deciding whether the defendant is guilty of the crime at bar. (*People v. Alcala* (1984) 36 Cal.3d 604, 631.)

This Court has noted the "potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder." (*People v. Garceau* (1993) 6 Cal.4th 140, 186; see *People v. Gibson* (1976) 56 Cal.App.3d 119, 129 [admitting other-crimes evidence poses severe risk of prejudice because of its possible misuse as propensity evidence].) In a case such as Capistrano's, the necessity to provide an instruction which guides the jury in how to marshal the evidence as it considers each count is of even greater necessity than in a case where other crimes evidence has been introduced. In the latter case, the evidence of other crimes has been found to be relevant and admissible, but only for a specific purpose. Therefore, relevance being a given, the purpose of the instruction is to merely point out to the jury the specific reason why the other crimes evidence is relevant, e.g., identity, motive, etc.

Here, the need for an instruction directing the jury to marshal the evidence was greater because much of the evidence placed before the jury was not relevant evidence that served a limited purpose that needed to be

identified, but was irrelevant evidence that was absolutely inadmissible in determining Capistrano's guilt of some of the charges. This created a scenario where Capistrano could be convicted by use of evidence that was totally inadmissible, as opposed to a scenario where a defendant may be convicted by use of evidence that was admissible, but properly should only have been used for the specific purpose justifying its admission.

Only relevant evidence may be admitted against a defendant at trial. (Evid. Code, § 350.) Relevant evidence is defined as any evidence having a tendency in reason to prove or disprove any disputed fact of consequence to determination of the action. (Evid. Code, § 210.) There can be little doubt that much of the evidence admitted against Capistrano at trial was irrelevant to one or more of the charges brought against him. (See Argument VII, *ante*, incorporated by reference herein.) For example, that evidence stolen from the victims in the non-capital cases was recovered in the apartment in which Capistrano was arrested bore no relevance to the Witters homicide. Likewise, that Capistrano was charged with premeditated attempted murder of Martinez, motivated by revenge, bore no relevance to the Witters felony-murder homicide.

Even assuming that the cases were properly joined (see Argument VII, *ante*), evidence of the non-capital offenses still bore no relevance to the Witters offense. Similarly, evidence of the Witters offense bore no relevance to the Martinez, Weir and Solis offenses. Yet, because of the joinder, all of this evidence was placed before the same jury. Under these circumstances, the only way Capistrano's right to have the jury render a conviction upon relevant evidence could have been protected was for the trial court to provide the jury with an appropriate instruction.

2. The Circumstances Of This Case Required A Sua Sponte Alteration of CALJIC No. 17.02 To Direct The Jury To Segregate The Evidence Appropriate To Each Count

A trial court must, on its own motion and without request, instruct the jury on all general principles of law relevant to the case. (*People v. Horton* (1969) 1 Cal.3d 444, 449.) The general principles of law governing a case are those principles closely and openly connected with the evidence adduced before the court which are necessary for the jury's proper consideration of the case. (*People v. Wilson* (1962) 66 Cal.2d 749, 759; see *People v. Marks* (1988) 45 Cal.3d 1335, 1345.)

Under the facts of this case, the trial court was obligated to provide an instruction to the jury that advised the jury of the proper manner for assessing Capistrano's guilt of each of the charged offenses. This could have been done readily and easily by merely altering CALJIC No. 17.02 to inform the jury that it should decide each count separately on the law and the evidence applicable to it. The trial court's failure to provide this instruction denied Capistrano due process and a fair trial.

This Court has previously addressed the necessity for sua sponte instructions regarding both the limited admissibility of evidence and the necessity for providing an instruction pursuant to CALJIC No. 17.02. An analysis of these cases is helpful for understanding why the trial court had a sua sponte duty to provide a proper instruction regarding the general principles of evidentiary use rather than merely instruct the jury pursuant to the standard version of CALJIC No. 17.02.

This Court has held that as a general principle there is no duty for a trial court to instruct sua sponte on the limited admissibility of evidence of past criminal conduct. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64.) However, the Court has also noted that there may be an occasional

extraordinary case where a trial court may need to provide such an instruction sua sponte in order to protect the defendant's fair trial rights.[83] (*Id.* at p. 64.)

Regarding the necessity for instructing on the principles reflected by CALJIC No. 17.02, this Court has similarly held that such an instruction need not be given sua sponte (see *People v. Beagle* (1972) 6 Cal.3d 441, 456, overruled on other grounds in *People v. Castro* (1985) 38 Cal.3d 301), while leaving open the possibility that under some circumstances there may be a sua sponte obligation to provide such an instruction in a capital case. (See *People v. Morris* (1991) 53 Cal.3d 152, 215, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824.) Although the trial court provided instruction pursuant to CALJIC No. 17.02 in this case, an analysis of the cases where this Court found no error when a trial court failed to instruct sua sponte with CALJIC No. 17.02 sheds light on why the instruction given here was an incomplete statement of the legal principles applicable to Capistrano's case.

The seminal case for the proposition that there is no sua sponte duty to instruct pursuant to CALJIC No. 17.02 is *People v. Beagle, supra,* 6 Cal.3d 441. *Beagle* specifically states this proposition and cites to two cases: *People v. Holbrook* (1955) 45 Cal.2d 228 and *People v. Bias* (1959) 170 Cal.App.2d 502. However, an examination of both *Holbrook* and *Bias* reveals that the trial courts in both those cases gave exactly the type of instruction Capistrano contends was warranted in this case.

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[83] Even though this is not a case involving other-crimes evidence which has been admitted pursuant to Evidence Code section 1101, the principles that attach to sua sponte instructions for that type of evidence are analogous because this Court sometimes equates instructions relating to evidence which has a limited admissibility to the type of situation where an instruction pursuant to CALJIC No. 17.02 would be called for. (See *People v. Caitlan* (2000) 26 Cal.4th 81, 153.)

In *Holbrook*, the issue on appeal was actually whether the trial court should have sua sponte given the jury a limiting instruction that it could not consider specific evidence pertaining to one count when it considered guilt of the other count. This Court held that the trial court had no sua sponte duty to highlight the particular evidence at issue since it had "properly instructed the jury that each count charged a separate offense and that the jury 'must consider the evidence applicable to each offense as though it were the only accusation.'" (*People v. Holbrook*, *supra*, 45 Cal.2d at p. 233.) It was the Court's view that if the defendant desired a pinpoint instruction he should have requested one. Thus, rather than support *Beagle's* proposition that the trial court need not sua sponte instruct that the jury must decide each count solely on the law and evidence applicable to it, *Holbrook* supports the proposition that such an instruction is a correct statement of the law. Since the trial court in *Holbrook* gave such an instruction, the *Holbrook* Court never actually reached the point asserted in *Beagle*, but rather merely held that if a defendant desired a more specific instruction than one on the general principle of law, the defendant needed to specifically request it. All Capistrano is asserting here is that he was entitled to the same type of instruction that was found appropriate in *Holbrook*.

Bias is similar to *Holbrook*. The trial court in *Bias* also instructed the jury to consider only the evidence applicable to each count in arriving at its verdict. The defendant in *Bias* was actually challenging that instruction on appeal and the appellate court found that the instruction was proper. (*People v. Bias*, *supra*, 170 Cal.App.2d at p. 510.) Once again, this hardly supports an inference that this type of instruction need not be given sua sponte.

The final point to note regarding *Beagle* is that in *Beagle* all of the

evidence was deemed to be relevant as to both counts before the jury. (*People v. Beagle*, *supra*, 6 Cal.3d at p. 456.) This informs the Court's holding that the type of instruction given in *Holbrook* and *Bias* was unnecessary. Here, that is not the case. Even the most generous reading of the state's theory of cross-admissibility in this case would not yield the result that the Witters homicide would be admissible at a separate trial or separate trials of the Martinez, Weir and Solis offenses, or that any of those non-capital offenses would be admissible at a separate trial of the Witters offense.

Recently, this Court revisited the use of an instruction seemingly like the one Capistrano asserts should have been given in this case. In *People v. Caitlan* (2001) 26 Cal.4th 81, the defendant requested an instruction that evidence should be considered only as it related to each offense charged as if that offense were the only accusation before the jury. This Court held that such an instruction was properly refused because the other-crimes evidence at issue was admissible as to both of the counts and because the evidence regarding the murder of one of the victims would have been cross-admissible at a trial of the murder of the other. This Court also found that to the extent the defendant was seeking to have the jury arrive at a verdict as to each count separately, the trial court's instruction pursuant to CALJIC No. 17.02 protected that right. (*Id.* at p. 153.)

Caitlan is instructive because it demonstrates that this Court does in fact recognize that there is a difference between the right of the jury to consider all of the admissible evidence as supportive of guilt on all of the counts and the procedural concept of arriving at separate verdicts for each count. In *Caitlan*, the jury was told to reach its verdicts by considering each count separately, but there was no need for a separate instruction addressing the evidentiary issue because the other-crimes evidence was relevant to both

counts and the evidence of each murder was cross-admissible as to the other murder. Once again, that is different from the instant case, where there is no complete cross-admissibility between the Witters offense and the other offenses.

An examination of the cases, both pre-*Beagle* and post-*Beagle*, which address situations where it may have been appropriate for the trial court to instruct in a manner which Capistrano claims was necessary here, leads to the conclusion that the dogmatic statement in *Beagle* that such an instruction is not necessary sua sponte is without support. A more appropriate phrasing might be that it is unnecessary to provide such an instruction where the evidence at issue is Evidence Code section 1101 evidence which is relevant to all of the counts or where all of the evidence is cross-admissible. In this case, we are not concerned with Evidence Code section 1101 evidence and not all of the evidence was cross-admissible. Thus, the instruction should have been given.

The United States Supreme Court has recognized that when one defendant is being tried for multiple offenses, and is thus subject to a situation where evidence relating to one crime may influence the jury as to a totally different charge, the defendant is protected because the jury is given an instruction limiting the evidence to its proper function. (*Spencer v. Texas* (1967) 385 U.S. 554, 562.) This is what ensures that the defendant is receiving due process and a fair trial. A sua sponte instruction was necessary here to protect Capistrano's right to due process and a fair trial.

This is especially true when, as here, one of the factors put forth by the state for granting consolidation was that the court would surely instruct pursuant to CALJIC No. 17.02. The Court did so instruct, and that protected Capistrano in the procedural matter of having the jury consider

each count separately. However, as discussed above, it did not suffice to protect the substantive right of Capistrano to be convicted of a crime based solely upon admissible evidence relevant to that particular crime; a right which *Spencer* highlighted. The situation here is analogous to that addressed by this Court in *People* v. *Castillo* (1997) 16 Cal.4th 1009, where the Court recognized that misleading instructions "implicate the court's duty to give legally correct instructions. Even if the court has no *sua sponte* duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*Id.* at p. 1015.) Here, having protected one aspect of Capistrano's right to not suffer unnecessarily from the consolidation order, the trial court needed to go further and protect the other aspect of that right.

A defendant is entitled to a reversal when a conviction is not based on admissible evidence submitted under proper instruction. (*People v. Hours* (1978) 86 Cal.App.3d 1012, 1019.) As to the Witters count, there was an overwhelming amount of irrelevant evidence that the jury was permitted to consider and there was no instruction provided which told them that they could not consider it as evidence of defendant's guilt of that offense. Consequently, Capistrano was denied due process and a fair trial on that count. All or virtually all of the evidence relating to the Witters offense was not admissible on the non-capital counts, and the nature of the evidence relating to the Witters homicide was so prejudicial as to warrant reversal of those counts as well.

C. The Trial Court's Failure To Provide A Proper Instruction To The Jury Regarding The Manner In Which It Should Assess Defendant's Guilt Of Each Count Lowered The State's Burden Of Proof Below A Constitutionally Acceptable Level

For a defendant to receive a constitutionally acceptable trial the jury must be correctly instructed on the defendant's presumption of innocence and the meaning of reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) In this case, the jury was instructed pursuant to CALJIC No. 2.90.[84] (CT 2100.) However, the combination of this instruction with the trial court's failure to provide a proper instruction regarding the manner in which the jury was to assess the evidence, resulted in a lowering of the state's burden of proof below a constitutionally acceptable level.

The jury was properly instructed that before it could render a conviction it needed to find Capistrano guilty beyond a reasonable doubt. However, the jury was also instructed that it could arrive at this

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[84] The jury was instructed as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in a case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (10 RT 3724; 5 CT 1274.)

determination by engaging in a "consideration of all the evidence . . . ." (5 CT 1274.) This instruction, combined with the absence of an instruction informing the jury that guilt could only be appropriately found by considering the evidence which related to each count, meant that the jury was free to aggregate all of the evidence in assessing Capistrano's guilt, regardless of whether it pertained to the specific count the jury may have been discussing at the time. This enabled the jury to render a guilty verdict on any one count regardless of whether the jurors actually believed the evidence pertaining to that particular count demonstrated Capistrano's guilt beyond a reasonable doubt. This resulted in a lowering of the acceptable burden of proof.

Consideration of the recent case of *People v. Armstead* (2002) 102 Cal.App.4th 784 demonstrates that Capistrano's assertion is not some fanciful fear borne of idle speculation. *Armstead* was also a case where the defendant was tried on multiple charges before a single jury. During deliberations, the jury sent out the following note:

> CALJIC [No.] 2.90 includes the phrase "consideration of all the evidence" in the second paragraph. Does this phrase mean, (1) all of the evidence presented throughout the trial, or (2) all of the evidence presented per count? In other words, do we base our judgment on each count based solely on the evidence related specifically to the exact robbery and/or victim?

(*Id.* at p. 790.)

The trial court provided an answer which told the jury it could consider evidence of the other charged crimes in deciding each count, but that such consideration was limited to showing identity, motive or intent. (*Id.* at p. 790-791.) Because this issue was not litigated during the course of

the trial, the Court of Appeal found that the trial court's answer constituted a due process violation. (*Id.* at p. 795.)

As the juror note in *Armstead* reveals, Capistrano's concern that the jury may have utilized evidence that would be otherwise inadmissible to convict him of each count is well-founded. This fear is especially well-founded when one considers the fact that the prosecutor repeatedly told the jurors that they could consider the aggregate of all the evidence in considering Capistrano's guilt of each count. (See Argument VII, *ante*.)

The law is clear that barring its proper introduction under some theory such as other-crimes evidence, a jury should not be permitted to convict a defendant of a crime alleged in one count by using evidence relevant solely to another count. That is exactly what happened here. The principle of law that our legal system does not countenance a conviction under these circumstances is one that is essential to a defendant's right to a fair trial, and under the circumstances in this case the trial court erred by not sua sponte instructing the jury in accordance with this principle.

Because the failure to instruct on this principle of law prevented Capistrano from receiving a fair trial and impacted his right to due process of law, the prosecution bears the burden of demonstrating beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Under the facts of this case, the state cannot meet that burden. As a consequence, the judgments of conviction must be reversed.

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IX

GUILT PHASE INSTRUCTIONS IMPERMISSIBLY LIGHTENED THE PROSECUTION'S BURDEN OF PROOF AND DENIED CAPISTRANO HIS RIGHT TO A JURY TRIAL, TO DUE PROCESS OF LAW AND TO A RELIABLE CAPITAL TRIAL

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40 (per curiam), overruled on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 317 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, which individually and collectively violated the above principles and enabled the jury to convict Capistrano on a lesser standard than is constitutionally required. Because the instructions violated the United

States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.90, 2.01, and 2.02)

The jury was instructed that Capistrano was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (10 RT 3724; 5 CT 1274.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 (6th ed. 1996) defined reasonable doubt as follows:

> It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(10 RT 3724; 5 CT 1274.)

The jury was given two interrelated instructions – CALJIC Nos. 2.01 and 2.02 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence.[85] Except for the fact that they were directed at different evidentiary points, these advised Capistrano's jury that if one interpretation of the evidence "appears to you to be reasonable

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[85] CALJIC No. 2.01 [circumstantial evidence re: guilt of crimes (5 RT 3714-3715; 5 CT 1256); CALJIC No. 2.02 [specific intent or mental state re: crimes] (10 RT 3726-3727; 5 CT 1279). CALJIC No. 2.02 was limited to counts 1, 2, 3, 4, 5, 10, 12, 13, 14, 16 and the special circumstance allegations.

[and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (10 RT 3715; 5 CT 1256.) These instructions informed the jurors that if Capistrano *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This twice-repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating Capistrano's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find Capistrano guilty on all counts and, therefore, to find the special circumstance allegations to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find Capistrano guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty" [italics added].) Thus, the instructions improperly

required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Capistrano rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [italics added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana,* (1979) 442 U.S. 510, 524.)

Here, the instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (10 RT 3715.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. All the more, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find Capistrano guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. Further, the instructions were prejudicial given the context of this case. Since there was no physical evidence linking Capistrano to the crime, the prosecution's case for capital murder rested upon the testimony of Gladys Santos, who testified that Capistrano admitted the crime to her. The instructions placed the burden on Capistrano to come forward with evidence that Santos was lying. This error was compounded by the erroneous denial of Capistrano's Sixth Amendment right to cross-examine Santos, as set forth in Argument V, *ante*, incorporated by reference herein.

The erroneous instructions were prejudicial with regard to guilt in that they required the jury to convict Capistrano if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict Capistrano because he might have been guilty, rather than because they believed him guilty beyond a reasonable doubt. In addition, the constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations in this case since there was no direct evidence other than the suspect testimony of Gladys Santos.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Capistrano by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989)

48 Cal.3d 879, 893.)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Capistrano's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22 and 2.27)

The trial court gave five other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (10 RT 3710-3712; 5 CT 1250-1251.); CALJIC No. 2.21.1, regarding discrepancies in testimony (10 RT 3718-3719; 5 CT 1260); CALJIC No. 2.21.2, regarding willfully false witnesses (10 RT 3719; 5 CT 1263); CALJIC No. 2.22, regarding weighing conflicting testimony (10 RT 3719; 5 CT 1264); and CALJIC No. 2.27, regarding sufficiency of evidence of one witness. (10 RT 3719-3720; 5 CT 1265.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated Capistrano's constitutional rights as enumerated above by misinforming the jurors that their duty was to decide whether Capistrano was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against

the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (10 RT 3711.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (10 RT 3715.)

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (10 RT 1262-1263 [italics added].) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[86] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element

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[86] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. (But see *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-825 [CALJIC No. 2.50.01 contrary to *Winship* and *Sullivan* and, under *Boyde v. California, supra,* 494 U.S. at pp. 384-385, error not cured by correct reasonable doubt and presumption of innocence instructions].)

of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

> Furthermore, CALJIC No. 2.22 provided as follows:
> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(10 RT 1264.) This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S.

at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (10 RT 1265), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Capistrano's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction on a lesser showing – that he or she must find Capistrano not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Instructions Allowed The Jury To Determine Guilt Based On Motive Alone

The trial court instructed the jury under CALJIC No. 2.51 (6th ed. 1996):

> Motive is not an element of any of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(10 RT 3720; 5 CT 1266.) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to Capistrano to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof.

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Because CALJIC No. 2.51 is obviously aberrant (compare CALJIC No. 2.15), it prejudiced Capistrano during deliberations. The instruction appeared to include an intentional omission allowing the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo, supra,* 16

Cal.4th at p. 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. The jury was instructed that an unlawful killing during the commission of a burglary or robbery is first degree murder when the perpetrator has the specific intent to commit burglary or robbery. (10 RT 3728; 5 CT 1281.) Much later in the instructions, the trial court defined the mental states required for robbery and burglary. (10 RT 3734-3736; 5 CT 1290, 1293.) These definitions were incorporated by reference into the instructions on the robbery-murder and burglary-murder special circumstances. (10 RT 3732-3733; 5 CT 1287-1288.) However, by informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on the one fact that the prosecutor's capital murder case demanded and that Capistrano

contested – i.e., that the jury find that Capistrano had the intent to rob or burgle Witters. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana, supra,* 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony-murder allegation was that Capistrano killed Witters in order to rob and/or burgle. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.)

> A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime,

> does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, italics added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, italics added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: "But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful."

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, italics added.) Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was

charged with child annoyance, which required that the forbidden acts be "motivated by an unnatural or abnormal sexual interest or intent." (*Id.* at pp. 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if Capistrano had the intent to rob and/or to burglarize, but was also told that motive was not an element of the crime. Since "motive" and "intent" are interchangeable in common parlance, as explained above, the motive instruction here constituted federal constitutional error.

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on Capistrano to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Capistrano of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Capistrano to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

The motive instruction given in this case diluted the prosecution's

obligation to prove beyond a reasonable doubt that Capistrano had a specific intent with regard to robbery and burglary. CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent for robbery and burglary was unnecessary for guilty verdicts on the first degree murder and a true finding of the special circumstance allegations. Accordingly, this Court must reverse the judgments on counts one through three and the special circumstance allegations because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

D. CALJIC No. 2.15 Unconstitutionally Lightened The Prosecution's Burden of Proof By Creating An Improper Permissive Inference And By Allowing "Slight Corroboration" To Establish Guilt

In this case, the prosecution charged Capistrano with crimes arising from four separate incidents, each of which included counts of robbery, home invasion robbery in concert and carjacking. The prosecution also alleged special circumstance murder based on robbery and burglary. At the conclusion of the guilt phase, the trial judge instructed the jury according to CALJIC No. 2.15 (6th ed. 1996), as follows:

> If you find that the defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of robbery, home invasion robbery in concert, or carjacking. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attributes of possession -- time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's

> conduct, or any other evidence which tends to connect the defendant with the crime charged.

(5 CT 1259; 10 RT 3716-3717.).[87]

This instruction is unconstitutional because it created an improper permissive inference and it reduced the prosecution's burden of proof. The instruction also improperly allowed the jury to use evidence of possession as to one crime to convict on an unrelated crime. Moreover, the instruction should not have been given in this case because the evidence of such possession was insufficient to warrant the instruction.

1. CALJIC No. 2.15 Created An Improper Permissive Inference Which Lightened The Prosecution's Burden Of Proof

As a general rule, a jury may be instructed that if it finds a fact to be true, it may presume or infer the existence of an ultimate fact necessary for conviction. As the United States Supreme Court has noted:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime – that is, an "ultimate" or "elemental" fact – from the existence of one or more "evidentiary" or "basic" facts.

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[87] The following counts charged the types of crimes delineated in CALJIC No. 2.15 as given in this case: Count 1, robbery special circumstance as to Witters on December 9, 1995; Count 3, robbery of Witters on December 9, 1995; Count 4, home invasion robbery in concert of Jane Doe on December 15, 1995; Count 5, home invasion robbery in concert of Edward G. on December 15, 1995; Count 10, carjacking of Edward G. on December 15, 1995; Count 12, home invasion robbery in concert of Ruth Weir on December 23, 1995; Count 13, home invasion robbery in concert of Patrick Weir on December 23, 1995; Count 14, carjacking of Ruth Weir on December 23, 1995; Count 16, home invasion robbery in concert of Martinez on January 19, 1996.

(*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156.)

At a minimum, in order to pass constitutional muster, there must be at least a rational connection between a proven fact and a presumed fact. (*Ulster County Court v. Allen, supra*, 442 U.S. at p. 157.) In the *Ulster County* decision, the United States Supreme Court held that a permissive inference would violate the Due Process Clause of the Fourteenth Amendment when the conclusion the jury is asked to infer has no rational relationship to the proven fact. Further, in *Leary v. United States* (1969) 395 U.S. 6, the Court noted that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (*Id.* at p. 36; *see Francis v. Franklin, supra,* 471 U.S. at pp. 314-315.) Likewise, this Court has found that inferences violate due process "if there is no rational way the jury could draw the permitted inference." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244.)

The rational inference of prior criminal activity that may be drawn from conscious possession of recently stolen property, properly corroborated, is simply that the accused is aware of its stolen nature. In a case where knowledge of the stolen nature of the property is an element of the crime, that an inference of that knowledge may be drawn from unexplained possession of that property is an inference universally recognized in Anglo-American jurisprudence. (*Barnes v. United States* (1973) 412 U.S. 837, 843.)

However, possession under such circumstances affords no rational basis from which it can be inferred, inter alia, that the stolen property was taken by means of force or fear, or whether it was taken from the immediate

presence of the victim, or whether it was taken with the intent to permanently deprive. As the Eleventh Circuit noted, "[w]here the charge is robbery . . . , much more caution in the application of the inference is warranted." (*Cosby v. Jones* (11th Cir. 1982) 682 F.2d 1373, 1381, fn. 16.)

Regarding the crime of receiving stolen property, the permissive presumption authorized by CALJIC No. 2.15 to infer "guilty knowledge" is proper because once it is shown that the defendant knowingly possessed recently stolen property, it is almost a "sure thing" that the defendant knew that the property was stolen and that he was thus guilty of receiving stolen property. (*People v. Anderson* (1989) 210 Cal.App.3d 414, 421, citing *People v. McFarland* (1962) 58 Cal.2d 748.) However, it is not proper to infer the existence of any element of the crimes of robbery, home invasion robbery in concert or carjacking from mere "guilty knowledge" of the tainted nature of the property. There is no rational connection between conscious possession of stolen property and how that property was taken. At most, a proper inference would only support a finding of guilt as a receiver of stolen property or as an accessory after the fact.

In the instant case, CALJIC No. 2.15 improperly allowed the jury to utilize Capistrano's alleged possession of the stolen property to resolve the factual question of whether the crime was a robbery, home invasion robbery in concert or carjacking. Because CALJIC No. 2.15 did not call for a finding of the necessary foundational facts, it permitted the jury to assume that robbery, home invasion robbery in concert, and carjacking had been committed. It instructed the jury that if it found the defendant had possession of recently stolen property, only "slight" corroboration not itself enough to show guilt was necessary to find defendant guilty of those crimes.

By excluding consideration of the necessary foundational elements, the instruction gives more weight to possession of stolen property than common sense dictates. As Justice Cardozo noted in a similar context:

> The people say that these acts of possession and concealment stamp the defendant as the murderer. They do, we think, beyond question justify the inference that in some way and at some stage he became connected with this crime. But the question remains: In what way and at what stage. . . .
>
> . . . .
>
> Only half of the problem, however, has been solved when guilty possession fixes the identity of the offender. There remains the question of the nature of the offense. . . . Is the guilty possessor the thief, or is he a receiver of stolen goods?

(*People v. Galbo* (N.Y. 1916) 112 N.E. 1041, 1043-1044.)

In addition, where the proof the inference is supposed to supply is identity, the inference functions in a manner contrary to law. This court has specifically disapproved the use of CALJIC No. 2.15 in non-theft offenses because as to those offenses, there is no rational connection between possession and the underlying crime. (*People v. Prieto* (2003) 30 Cal.4th 226, 248-249.) However, the practical effect of using CALJIC No. 2.15 to establish a defendant's identity as the perpetrator of theft offenses will be to establish identity as to the non-theft crimes arising from the same incident, which in this instance include rape, oral copulation, and attempted murder. In fact, the prosecutor specifically argued that possession of stolen property was evidence of Capistrano's identity as to the *rape* charges. (10 RT 3615-3616.)

CALJIC No. 2.15, permitted the jury to conclude an ultimate fact, that is, that Capistrano was guilty of robbery, home invasion robbery in concert and carjacking, on the basis of very limited and disputed evidentiary

facts. If a jury concluded, as it was permitted to under CALJIC No. 2.15, that Capistrano was guilty of those crimes simply because there was conscious possession of stolen property and some slight corroboration, the jury never considered whether, using the instructions delineating the statutory elements of these crimes, Capistrano was guilty of those crimes beyond a reasonable doubt. Because of the improper permissive inference the jury did not have to do so. This is acceptable if there was a rational connection between the evidentiary and the presumed facts, but violates due process if there was no such connection, as in the instant case.

The jury instructions given must be considered as a whole. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.) These instructions, when considered in conjunction with CALJIC No. 2.15, told the jury that, although the prosecution must generally prove the elements of robbery, home invasion robbery in concert, and carjacking, possession of recently stolen property plus "slight corroboration" sufficed in defendant's case. What was not stated – and should have been stated if the jury was to properly apply the instruction – was that the jury first had to find all of the elements of the robbery, home invasion robbery in concert, and carjacking, before using the inference to connect defendant to these crimes.

Furthermore, since a jury is ordinarily instructed (as was the jury in this case) that not all jury instructions apply (CT 1318 [CALJIC No. 17.31]; 10 RT 3756) the jury is told that it does not need to use an instruction if it does not find it applicable. If it finds possession under CALJIC No. 2.15, the jury does not need to consider the instructions delineating the elements of robbery, home invasion robbery in concert, and carjacking. Thus, it is clear that otherwise correctly instructing a jury with the elements of these crimes and special allegation does not cure the error in

instructing a jury with an irrational permissive presumption. (See *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1037, citing *United States v. Rubio-Villareal* (1992) 967 F.2d 294, 299-300 [holding that a passing reference to consider all evidence will not cure a defective permissive inference where the jury is allowed to convict on a few isolated facts].)

Consequently, instructing the jury pursuant to CALJIC No. 2.15 violated defendant's right to due process because it allowed the jury to conclude that defendant committed robbery, home invasion robbery in concert, and carjacking, based upon proof that he possessed recently stolen property, even though there was no rational connection between the proved fact and the inferred fact. The instructional error here also effectively eliminated from the jurors' consideration an essential element of the robbery, home invasion robbery in concert and carjacking charges, thus impermissibly lightening the prosecution's burden of proving all elements of each charged crime beyond a reasonable doubt, in violation of the Sixth, Eighth, and Fourteenth Amendments.

The use of CALJIC No. 2.15 in this case also violated the right to trial by jury as guaranteed by the Sixth Amendment of the United States Constitution. In a criminal prosecution where the fact to be inferred may be used as proof of one of the elements of the crime, the prosecution must meet the reasonable doubt standard. The improper presumption at issue in this case withdrew an element from the jury's consideration by shifting the burden of proof of an element of the crime to the defendant. An instruction which leads the jury to assume that facts have been proven, when in actuality they are in dispute, unconstitutionally withdraws the issue from the jury's consideration. (See, e.g., *United States v. Desoto* (10th Cir. 1991) 950 F.2d 626, 632.) Such an arbitrary determination also violates the

Eighth Amendment requirement of reliability. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

2. The Quantum Of Evidence of Corroboration Allowed By CALJIC No. 2.15 To Support The Inference Violates The Due Process Clause

CALJIC No. 2.15 allows a jury to convict the defendant of robbery, home invasion robbery in concert, and carjacking, when his possession of stolen property is combined with "slight" corroborating evidence of his participation in the theft. Use of the term "slight" renders the instruction constitutionally defective by telling the jury that the defendant may be convicted on the basis of proof which does not rise to the standard of beyond a reasonable doubt. An instructional error which misadvises the jury regarding the reasonable doubt standard requires *per se* reversal. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 279-281.)

In defining the "slight corroboration" necessary to infer guilt, the instruction delivered at Capistrano's trial stated:

> As corroboration, you may consider the attributes of possession -- time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, *or any other evidence which tends to connect the defendant with the crime charged.*

(CT 1259 (emphasis added).)

In *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, the trial court first instructed the jury that "slight evidence" of a defendant's participation in a conspiracy would suffice for conviction. (*Id.* at p. 500.) After a defense objection to this instruction, the court then instructed the jury that "as to that slight or little evidence, you must be convinced, beyond a reasonable doubt, that he participated." (*Ibid.*) In holding the instructions to be unconstitutional, the Fifth Circuit Court of Appeals reasoned that

"[t]he 'slight evidence' reference can only be seen as suffocating the 'reasonable doubt' reference." (*Ibid.*) The identical analysis applies to CALJIC No. 2.15. By its use of the term "slight," CALJIC No. 2.15 tells the jury that guilt may be inferred on the basis of evidence which does not rise to the standard of proof beyond a reasonable doubt.

The unmistakable effect of CALJIC No. 2.15 was to permit the jury to find that Capistrano committed home invasion robbery in concert, robbery, and carjacking upon proof less than beyond a reasonable doubt. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364.) The same constitutional command "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." (*Francis v. Franklin, supra,* 471 U.S. at p. 313.)

In California, proof of possession of stolen property has been approved as the basis for an inference of guilt of burglary and theft where there was corroboration that itself *tended to show guilt.* (*People v. McFarland, supra,* 58 Cal.2d at p. 754.) "Corroborating evidence must implicate the defendant in the crime and must be related to some act or fact, which is an element of the crime, though it need not be sufficient in itself to establish the elements of the crime." (*People v. Garcia* (2000) 84 Cal.App.4th 316, 325, *citing People v. Zapien* (1993) 4 Cal.4th 929, 982.) By contrast, under CALJIC No. 2.15, the jury is permitted to find identity or intent on the basis of evidence that *does not even connect a defendant to the crime charged.* Evidence connecting a defendant to the crime charged

is listed as a category of corroboration, but it is listed *as an alternative* to the attributes of possession, the defendant's conduct, and the defendant's opportunity to commit the crime. (5 CT 1259.)

CALJIC No. 2.15 also told the jury both "that defendant had an opportunity to commit the crime charged" and that such fact constituted slight corroboration for purposes of the inference. (5 CT 1259.) This portion of the instruction was improper for at least two reasons. One, it violated Capistrano's right to jury trial by removing a factual finding from the jurors. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724 [it is constitutional error where the judge's instructions have the effect of directing a guilty verdict by eliminating other relevant considerations if the jury finds one fact to be true]; in accord, *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398 ["A jury verdict, if based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime, is error"]; *United States v. McClain* (5th Cir. 1977) 545 F.2d 988, 1003 [Where the jury is not given an opportunity to decide a relevant factual question, it deprives a defendant of his right to jury trial and reversal is required even where the record contains evidence that would support a finding of guilt under a correct view of the law].) Two, the instruction also told the jury, contrary to law, that proof of an opportunity to commit the crime charged constituted sufficient corroboration. However, proof of a mere opportunity raises no more than a suspicion of guilt and that quantum of corroboration is insufficient as a matter of law. (*People v. Robbins* (1915) 171 Cal. 466, 470-471; *People v. Morton* (1903) 139 Cal. 719, 725 ["opportunity alone is not sufficient, especially where others had the like opportunity"].)

Because CALJIC No. 2.15 failed to contain a constitutionally

adequate description of "corroborating" evidence, it was error to give the instruction in this case. The prosecutor argued Capistrano's identity on the basis of a guilt by association theory that overtly relied on bootstrapping from the identification of Capistrano as a participant in the Martinez crime to argue that he was a participant in crimes where he was not identified. (See Argument VII, *ante*.) CALJIC No. 2.15 failed to make it clear that any corroborating evidence had to connect Capistrano to the charged crimes and that connection by association with the perpetrators of any of the robberies was insufficient corroboration. Proof "that appellant had associated with the actual perpetrators of the crime . . . gives rise only to a suspicion of guilt that he advised, encouraged and participated in the crimes." (*People v. Braun* (1939) 31 Cal.App.2d 593, 601, citing *People v. Fagan* (1893) 98 Cal. 230; see also *People v. Robinson* (1964) 61 Cal.2d 373, 399-400 [defendant's fingerprints in cousin's car found at scene of crime insufficient corroboration of accomplice testimony].)

Capistrano's association with codefendants may indicate that he was an accessory after the fact to the charged crimes or a receiver of stolen property, however, it does not rationally show that he was involved in the taking. Capistrano's connection to known participants does not provide the necessary nexus between the taking and the stolen property to constitute a "connection to the crime."

CALJIC No. 2.15 impermissibly lightened the state's burden of proof in violation of the Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 7, 16, and 17 of the California Constitution. Although the jury was given other instructions stating that the standard of proof was beyond a reasonable doubt, as the United States Supreme Court observed, "[l]anguage that merely contradicts and does not explain a constitutionally

infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin, supra,* 471 U.S. at p. 322.)

3. The Use Of CALJIC No. 2.15 To Infer Guilt Of Multiple, Unrelated Crimes At Once Violated Capistrano's Right To Due Process

CALJIC No. 2.15 allowed the jury to infer Capistrano's guilt of all of the charged crimes based on a finding that he was in possession of property taken in one of the charged crimes. It also permitted the jury to use Capistrano's connection to one of the charged crimes as corroboration sufficient to support the inference as to all of the charged crimes. CALJIC No. 2.15 is constructed to be used for a single crime. In the present case, defendant was charged with crimes arising from four separate incidents, each of which included allegations of robbery, home invasion robbery in concert, and/or carjacking. CALJIC No. 2.15 was modified to refer to robbery, home invasion robbery and carjacking, but failed to instruct the jury that the property stolen in a particular crime was only sufficient to support the inference as to the crime during which that particular property was taken.

The complete lack of evidence of possession as to some of the counts also would have suggested to the jurors that it was appropriate to use CALJIC No. 2.15 in this constitutionally flawed manner. As given in this case, CALJIC No. 2.15 was specifically made applicable to three carjacking counts arising from two separate incidents. However, there was *no evidence whatsoever* in the record of Capistrano's possession of any car taken as to any of the carjacking counts.[88] Due to the complete lack of

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[88] The prosecutor argued that Capistrano was connected to the Solis crime because Solis's Honda Accord was found near the home of

(continued...)

evidence of possession as to the carjacking counts, the upshot of the instruction was that the jury was told to infer guilt of carjacking from possession of property other than a car. This alone would have led the jurors to assume that a finding of possession as to *any* item of property stolen *in any one of the four crimes* was sufficient to find Capistrano guilty of *all* of the crimes. In essence, in this case, CALJIC No. 2.15 directed the jurors to use Capistrano's possession of the fruits of one theft to infer his propensity to have committed the other thefts and found him guilty on that improper basis.

This error caused by the instruction is most egregious as to the Witters robbery, to the theory of first degree felony-murder with robbery as the underlying felony, and the robbery-murder special circumstance. The prosecution adduced no evidence that Capistrano was in possession of any item allegedly stolen from the Witters residence. Since the instruction did not preclude its application to these counts and allegation, the jury was free to infer guilt of same from Capistrano's possession of stolen property from any of the other charged crimes. For example, the home invasion robbery in concert of Martinez (Count 16) was one of the crimes to which CALJIC No. 2.15 was applicable. (3 CT 800, 5 CT 1259.) Capistrano had a prior relationship with and was known to Michael Martinez, who identified Capistrano as a participant in the crimes against him. (4 RT 2172, 2206-2207.) A backpack belonging to Martinez was located in a search of Santos's apartment where Capistrano, Drebert, Pritchard, Vera, and Santos

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[88](...continued)
Capistrano's longtime girlfriend in Baldwin Park. (10 RT 3694.) What undermined the prosecutor's argument and what the jury did not know was that Solis's car was recovered directly across the street from the home of friends of *Anthony Vera*. (Supp 4 CT 247.)

were arrested, about four hours after the arrest. (5 RT 2302-2305.) There was no evidence of any other stolen property having been located during the search.

Assuming that the jury found these facts, under the terms of CALJIC No. 2.15, they were permitted to use the identification of Capistrano by Martinez as corroboration sufficient to find him guilty of all of the unrelated offenses listed in the instruction. In fact, it is likely that they did so. The prosecutor argued strenuously that Capistrano's association with his codefendants provided a basis to identify him as a participant in crimes where he was not otherwise identified. (See e.g. 10 RT 3599-3600, 3613-3614.) In short, the jury was told that any evidence connecting Capistrano to one of four crimes would be the corroboration sufficient to infer guilt of all of the crimes. Allowing CALJIC No. 2.15 to be applicable to multiple crimes at once provided a vehicle for the jury to give effect to the prosecutor's improper guilt by association theory and allowed Capistrano to be convicted based on his association with known participants rather than his own culpability.

4. It Was Error To Instruct The Jury With CALJIC No. 2.15 Because There Was Insufficient Evidence To Show That Capistrano Was In Possession Of Stolen Property

Instructing the jury with CALJIC No. 2.15 was also error in this case because there was either no evidence or a factual dispute about whether Capistrano was in possession of items taken in the charged crimes. Therefore, the presumption allowed by CALJIC No. 2.15 is not rational as applied in this case. The jury was incorrectly given the instruction as if the facts underlying the presumption had been established when, in fact, they had not.

In *United States v. Bamberger* (3rd Cir. 1972) 456 F.2d 1119, the United States Court of Appeals found error and reversed on an instruction similar to CALJIC No. 2.15. In so doing, the court said:

> Without proof of the . . . basic fact of possession, there can be no reasonable justification for the inference. For without possession, there is no rational basis for applying the laws of probability or likelihood, the sole justification under human experience 'in ordinary affairs of life,' [citation] for the inference. . . . Without proof of possession, there can be no rational basis to the inference of guilt. (*Id.*, at p. 1134-1135.)

In *People v. Morris* (1988) 46 Cal.3d 1, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, 545, this Court held that prior to instructing the jury with CALJIC No. 2.15, the trial judge must determine that it is clear and undisputed that the property in the defendant's possession was stolen. It is error to give this instruction when the evidence was "conflicting or unclear" that the defendant was either in possession of stolen property or that the property possessed was in fact stolen. (*Id.*, at pp. 40-41; see also *People v. Rubio* (1977) 71 Cal.App.3d 757, 768.) As this Court noted in *Morris*, where factual uncertainty exists as to any of the foundational facts presumed by CALJIC No. 2.15, a jury may conclude that the presumed foundational fact has been established, when, in reality, it has not. This Court stated that "[w]here the question is open, an unqualified instruction on possession of 'stolen property' might lead the jury to assume that the issue has actually been settled." (*People v. Morris*, *supra*, 46 Cal.3d 1, 40.)

As to the capital crime, Capistrano was charged with robbery, burglary, and felony murder based on robbery and burglary special circumstances. (CT 791-792.) Witnesses testified to several items of property, including an Apple computer, being in the Witters apartment

approximately two weeks before the homicide. (5 RT 2344, 2352-2353, 2357.) However, Witters was packed and planning to leave the country for his home in Taiwan on the evening of his death. (5 RT 2338-2339, 2355.) The only evidence purportedly connecting Capistrano to Witters's property was Gladys Santos's testimony that Capistrano had called her and asked if she knew anyone who wanted a large computer. (5 RT 2447, 2461.) According to Santos's testimony, Capistrano did not state that he possessed such a computer, nor did Santos say she had seen such a computer. Moreover, according to Santos, Capistrano made this call to her after December 28, nearly three weeks after the Witters homicide occurred on December 9.[89] The temporal connection between the call and the purported theft was so attenuated as to be non-existent for purposes of the inference under CALJIC No. 2.15. The evidence presented did nothing to establish possession and there was no other evidence that could be interpreted as establishing that Capistrano was in recent possession of property stolen in the Witters crime.[90]

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[89] Santos testified that Capistrano had called to ask her about a large computer after she had the alleged conversation with him about the homicide. (5 RT 2447.) Santos claimed that Drebert first told her about the homicide on the night of his birthday. (5 RT 2434, 2463.) Drebert's birthday is December 25. (CT 790.) According to Santos, she first asked Capistrano about the homicide three days later. (4 RT 2435.)

[90] One of the witnesses testified that Witters was in possession of a cell phone belonging to his employer that he planned to return to his employer on the day he was leaving the country. (5 RT 2338.) A cell phone bill showing that the phone was used after Witters's death was entered into evidence. (5 RT 2345.) In his opening statement, the prosecutor told the jury that he would present evidence that the calls were made to an apartment in the complex where Gladys Santos lived. (4 RT

(continued...)

The tangible evidence of property taken in the Weir crime consisted of chains identified by Weir as having been taken in the home invasion robbery on December 23, 1995 that were given by Gladys Santos to the police on an unknown date. (6 RT 2525-2527; 8 RT 3152-3154.) The evidence of property taken in the Solis crime consisted of an answering machine given by Gladys Santos to the police on January 23, 1996, over a month after it was stolen and several days after the police had searched Santos's apartment. (5 RT 2302-2310; 8 RT 3151-3152.)

Santos testified that all of the items of property she turned over to the police after she was released from jail were found in the bedroom where Capistrano had stayed. (6 RT 2521-2522, 2527.) She claimed that Capistrano brought the answering machine (from the Solis robbery) to her apartment in December 1995 (6 RT 2520-2521) and the jewelry (from the Weir robbery) before Christmas 1995 (6 RT 2526). However, Santos also claimed that Capistrano had never stayed in that bedroom — or in her apartment at all — until the three nights before his arrest (on January 19, 1996). (5 RT 2431-2432.)

Before Capistrano's jury, Santos testified that *Capistrano* had left a Spectra laptop computer with a plasma screen on top of her refrigerator and that he had brought a telephone answering machine there at the same time. (5 RT 2447; 6 RT 2520-2523.) But, at the preliminary hearing, she testified that *Drebert*, not Capistrano, had brought the laptop to her house. (CT 496.) On cross-examination at the capital trial, Santos admitted that she was not present when the laptop was brought to her house, but claimed to

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[90](...continued)
2052-2053.) However, no evidence connecting the calls to the apartment complex was presented.

have been present when the answering machine was "dropped off." (6 RT 2562-2564.)

In *People v. Rubio, supra,* 71 Cal.App.3d 757, disapproved on other grounds in *People v. Freeman* (1978) 22 Cal.3d 434, 438, the Court of Appeal overturned a robbery conviction based on accumulated errors, including the giving of CALJIC No. 2.15. The appellate court found that giving this instruction caused the jury to assume that the evidence established, without dispute, defendant's possession of stolen property, when "[i]n actuality, . . . this was an open question." (*Id.*, at p. 768 [the only evidence of possession was one hundred dollars found in a flower bed near defendant, the same amount of money that had been taken during the robbery of a grocery store].) As the *Rubio* court recognized, CALJIC No. 2.15 should only be given when the evidence establishes defendant's possession of stolen property, because such evidence ". . . tends to identify him as the thief . . ." (*Id.*, at p. 768; 1 Witkin, California Evidence (3d ed. 1986) § 413, p. 386.)

In this case, as in *Rubio, supra*, there was insufficient evidence to warrant an instruction on stolen property because there was insufficient evidence to show that Capistrano possessed stolen property.

5. The Error In Instructing With CALJIC No. 2.15 Requires The Reversal Of Capistrano's Convictions On Counts 1-14, Count 16 And The Special Circumstance Allegations

By using the term "slight," the instruction manifestly tells the jury that guilt may be inferred on the basis of evidence which does not rise to the standard of proof beyond a reasonable doubt. Thus, per se reversal is required whenever the instruction is used. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 279-281 [an instructional error which misadvises the jury

regarding the reasonable doubt standard compels reversal per se].)

In the alternative, the giving of CALJIC No. 2.15 cannot be considered harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 315-316, cert. den. (1993) 506 U.S. 1052 [reversing conviction because of improper permissive presumption using *Chapman* standard].) Using the *Chapman* standard, when a jury has been incorrectly instructed, the conviction can only be affirmed on appeal if the reviewing court is persuaded beyond a reasonable doubt that the error did not "contribute to the verdict." (*Chapman v. California, supra,* 386 U.S. at p. 24; *Pope v. Illinois* (1987) 481 U.S. 497, 502; *People v. Hayes* (1990) 52 Cal.3d 577, 628.) "To determine whether an error 'contributed to' a verdict, a reviewing court does not ask whether a hypothetical jury in a hypothetical trial in which the error did not occur would surely have reached the same verdict." (*People v. Osband, supra,* 13 Cal.4th at p. 744, (conc. and dis. opn. of Kennard, J.), citing *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-280.) "Rather, the reviewing court must ask whether the guilty verdict actually rendered in this trial was 'surely unattributable to the error.'" (*Ibid.*)

It must be recognized that "a reviewing court can hardly infer that the jurors failed to consider [an unconstitutional instruction], a conclusion that would be factually untenable in most cases, and would run counter to a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on other grounds in *Estelle v. McGuire, supra,* 502 U.S. at p. 72, fn. 4) Since jurors obviously considered CALJIC No. 2.15's impermissible inference during their deliberations, only overwhelming

evidence of guilt of the robbery, home invasion robbery in concert, and carjacking charges could support a harmless error conclusion.

In the present case, the evidence of guilt of robbery, home invasion robbery in concert, and carjacking was not overwhelming. Capistrano's identity as a participant in the Weir, Solis, and Witters crimes was the primary contested issue in the case. Capistrano was not identified as a participant by the victims of either the Weir or Solis crimes. Other than the bare fact of Capistrano's association with two people identified as participants in the Solis crime (Pritchard and Vera), the only evidence purporting to "connect" Capistrano to the charged crimes in the Weir, Solis, and Witters cases came through the testimony of Gladys Santos as to statements allegedly made to her by Capistrano. Santos also had in her possession and gave to the police, items of property taken in the Weir and Solis crimes. Santos claimed at trial that Capistrano had brought those items to her apartment.

The jury could have believed the defense theory of the case that Capistrano was not present and not a participant in the Weir, Solis, and Witters crimes, but the permissive inference allowed by CALJIC No. 2.15 permitted them to find him guilty. Even if the jury believed that Capistrano was not a participant in the charged crimes, under the instruction, the jury was permitted to find Capistrano guilty on the basis of possession of stolen property after the fact. If the jury believed that Capistrano was a mere receiver of stolen property, under the instructions they were given, they were permitted to find him guilty of the charged offenses if they found corroboration that did not even connect Capistrano to the commission of the charged crimes. For example, if the jury found that Capistrano was in possession of an answering machine taken in the Solis robbery, under the

instruction given, that fact in conjunction with his association with people (Pritchard and Vera) who were identified by the victim as participants in the crime could have been improperly utilized by the jury to find Capistrano guilty of robbery.

In addition, the instruction erroneously permitted the jury to use possession to find Capistrano guilty of not only the theft related offenses, but the non-theft offenses as well because that is what they were urged by the prosecutor to do. The prosecutor argued that Capistrano was one of the unidentified participants in the Solis crime because he "matched the description" of one of the unidentified people and he was arrested with two of the people identified by Solis a month later after an unrelated crime. (10 RT 3613-3614.) After conceding that a matching description did not prove beyond a reasonable doubt that Capistrano raped Solis, he urged the jury to use the stolen answering machine produced by Santos as evidence of Capistrano's identity as the rapist. (10 RT 3615-3616.)

Therefore, since it cannot be concluded beyond a reasonable doubt that the inference did not contribute to the verdict, the convictions on counts 1-14, count 16 and the special circumstance allegations must be set aside.

E. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each one of the challenged instructions violated Capistrano's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing

circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions]; *People v. Holt* (1997) 15 Cal.4th 619, 676-677 [addressing CALJIC No. 2.15]; *People v. Frye, supra,* 18 Cal.4th at p. 958 [CALJIC No. 2.51 does not shift the burden of proof to defendant]; *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [CALJIC Nos. 2.21.2 and 2.22 do not improperly lessen the prosecution's burden of proof].) This Court has also rejected for the same reasons the due process claims associated with the Sixth Amendment claims raised herein. (See *People v. Rogers* (2006) 39 Cal.4th 826, 888-891.)

While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire, supra,* 502 U.S. at p.72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires

reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 [" [l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [citing *People v. Westlake* (1899) 124 Cal. 452, 457] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[91] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction

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[91] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

was overwhelmed by the unconstitutional ones. Capistrano's jury heard nine separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: Penal Code Section 1096 as set out in CALJIC No. 2.90. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

F. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error that is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282; *Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 822-825.)

If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, as set forth above, that showing cannot be made. In addition, under CALJIC No. 2.51, the prosecutor was relieved of proving an element of first degree felony-

murder – rather, the instructions permitted the prosecution to only establish motive for the jury to conclude that Capistrano was guilty. Further, under CALJIC No. 2.15, the jury was instructed to find Capistrano guilty of crimes with only slight corroboration once they found he possessed stolen property. These instructions, singularly or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of Capistrano's conviction.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) The instructions also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Capistrano to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) Accordingly, Capistrano's conviction and death sentence must be reversed.

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REVERSAL IS REQUIRED BECAUSE CALJIC NO. 17.41.1 VIOLATED CAPISTRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO TRIAL BY A FAIR, IMPARTIAL AND UNANIMOUS JURY

The jury in this case was instructed in the guilt phase with what later became CALJIC No. 17.41.1[92] as follows:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(10 RT 3759; 5 CT 1326.)

In *People v. Engelman* (2002) 28 Cal.4th 436 (*Engleman*), this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate the federal constitution. Capistrano respectfully submits that its provision in his case did violate his rights under the Sixth and Fourteenth Amendments and therefore raises the issue here in order for this Court to reconsider its decision in *Engelman* and to preserve the error for review in federal court.

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 127; *United States v. Brown* (D.C. Cir. 1987) 823 Fd.2d 591, 596.) However, CALJIC No. 17.41.1 pointedly tells each juror

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[92]This instruction was adopted as CALJIC No. 17.41.1 in 1998 and thus was not officially a CALJIC instruction at the time of Capistrano's trial. The instruction was subsequently removed from CALJIC after it was disapproved of in *People v. Engleman* (2002) 28 Cal.4th 436.

that he or she is not guaranteed privacy or secrecy. At any time, the deliberations may be interrupted and a fellow juror may repeat his or her words to the judge and allege some impropriety, real or imagined, which the juror believed occurred in the jury room.

The instruction, in short, assures the jurors that their words might be used against them and that candor in the jury room could be punished. The instruction therefore chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp* (2d Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.) Accordingly, the instruction improperly inhibits free expression and interaction among the jurors which is so important to the deliberative process. (See, e.g., *People v. Collins* (1976) 17 Cal.3d 687, 693.) Where jurors find it necessary or advisable to conceal concerns from one another, they will not interact and try to persuade others to accept their viewpoints. "Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 citing Note, *Public Disclosures of Jury Deliberations* (1985) 98 Harv. L. Rev. 886, 889.) Long ago, Justice Cardozo noted, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.)

The free discourse of the jury has been found to be so important that, as a matter of policy, post-verdict inquiry into the internal deliberative process has been precluded even in the face of allegations of serious improprieties. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 120-

121, 127 [inquiry into juror intoxication during deliberations not permitted]; *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747 [no evidence permitted as to juror compromise].) Under Evidence Code section 1150, '"[n]o evidence is admissible to show the effect of [a] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." These same policy considerations worked to bar CALJIC 17.41.1 so that it may not be allowed to chill free exchange and discourse during deliberations.

Jury trial is a fundamental constitutional right. The federal right to trial by jury is secured by the Sixth and Fourteenth Amendments to the Constitution of the United States. (*Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*); *Duncan v. Louisiana, supra,* 391 U.S. at p. 156.)

The state right to trial by jury, which also includes the requirement that the jury in felony prosecutions consist of 12 persons and that its verdict be unanimous, is secured by article I, section 16 of the California Constitution (*People v. Collins, supra,* 17 Cal.3d at p. 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) That right is abridged by CALJIC 17.41.1 because it coerces potential holdout jurors into agreeing with the majority. (See, e.g., *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426-1428.)

It is not a satisfactory answer to say that the matter is moot because no juror called any such problem to the court's attention. Such an answer ignores the likelihood that a juror would hold fast to an unpopular decision if he knew that he could not be hauled before the court to account for it. He may, nevertheless, be unwilling to do so if he knows his fellow jurors are

going to report him to the judge. The likelihood of such a "chilling effect" is a strong argument in favor of simply not giving an instruction such as CALJIC No. 17.41.1 in the first place. There is no way to assess how much the instruction chilled speech in the jury room. There is no way to determine what thoughts and arguments were squelched by jurors who anticipated, feared and wished to avoid sanctions at the hands of the trial court.

The giving of the instruction on "the integrity of a trial" amounted to a "structural" defect in the trial mechanism, much like a complete denial of a jury. (*Rose v. Clark* (1986) 478 U.S. 570, 579; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) Automatic reversal of the judgment is the appropriate remedy because where this novel and threatening instruction is given, "there has been no jury verdict within the meaning of the Sixth Amendment." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; *People v. Cahill*, *supra*, 5 Cal.4th at p. 502.)

To be sure, Capistrano recognizes that the appellate courts of this state have followed the Court of Appeal's decision in *People v. Molina* (2000) 82 Cal.App.4th 1329, which held that the provision of CALJIC number 17.41.1 does not require automatic reversal, but rather is subject to harmless error analysis. (82 Cal.App.4th at pp. 1331-1332.) In *Molina*, *supra*, the appellate court held that the giving of the instruction was harmless beyond a reasonable doubt because the jury deliberated less than an hour with no indication of deadlock or holdout jurors. (*Ibid.*)

The *Molina* court's holding that the error is subject to harmless error analysis was incorrect for the reasons set forth above. Furthermore, if the error were subject to harmless error analysis, the *Molina* court's application of the harmless error test was erroneous. Because the instruction abridges

the federal Constitution, if a harmless error analysis applies, then the state bears the burden of proving that its provision was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Therefore, the question is not whether there is any indication that the use of instruction 17.41.1 affected the verdict in any way, as the *Molina* Court held, but rather whether the state can prove beyond a reasonable doubt that use of the instruction did *not* affect the verdict in any way. In this regard, it is not a satisfactory answer to say that the instruction did not affect the verdict because there was no indication of deadlock or a holdout juror and no juror reported any "misconduct." (See *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1331-1332.) Such an answer ignores that the fundamental vice in the instruction is that it deters minority or holdout jurors from revealing themselves for fear of punishment or removal.

The giving of this instruction also removed from the jurors their right to function as the final barrier between an unjust prosecution and conviction. A jury has the inherent right to return any general verdict it wishes. (*People v. Dillon* (1983) 34 Cal.3d 441, 490-493 (conc. opn. of Kaus, J.), 493 (conc. opn. of Kingsley, J.); see *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1136 [noting approval of nullification's existence as a necessary check against judges and prosecutors but holding the jury need not be affirmatively informed of the power to nullify].)

The federal and state constitutions both provide for the right to a jury trial in a criminal case. (U.S. Const., 6th and 14th Amends; *Duncan v. Louisiana, supra,* 391 U.S. at p. 156); Cal. Const., art. 1, § 16.) "A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government." (*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 155.) The right to jury nullification underlies the very concept of the right to trial.

The United States Supreme Court has observed that a system without the discretionary power of jury nullification in a defendant's favor would be "alien to our notions of criminal justice" and unconstitutional. (*Gregg v. Georgia, supra,* 428 U.S. at p. 199, fn. 50.) The existence of jury nullification in mandatory death penalty jurisdictions was an indication of evolving standards of decency leading to the repudiation of automatic death sentences. (*Enmund v. Florida* (1982) 458 U.S. 782, 818, fn. 32 (*Enmund*), dissenting opn. O'Connor.) Thus, should a juror feel during deliberations of the facts that the law is contrary to the juror's conscience, that juror has a constitutional right to follow his or her conscience and vote for acquittal. This right derives from a penumbra of constitutional provisions, including the juror's First Amendment right to freedom of political speech, the Sixth Amendment right to a jury trial, and the Fourteenth Amendment right to due process. (Cf *Griswold v. Connecticut* (1965) 381 U.S. 479, 481-484 [holding that the right of marital privacy finds its source in a penumbra of constitutional provisions].)

This Court has held that a defendant has no right to have the jury affirmatively advised that it may nullify. (*People v. Williams* (2001) 25 Cal.4th 441, 457.) However, the instruction given not only advises the jury that it must follow the law but implies serious consequences inflicted by the judge should a juror choose to suggest nullification. "That shoving the jury in the direction of nullification is something the trial court need not do does not mean that it is permitted to pressure the jury into stifling a spontaneous urge to nullify." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 492-493 (conc. opn. of Kaus, J.); but see *Sparf v. United States* (1895) 156 U.S. 41, 74-80 [upholding trial court that told jurors they had the power to nullify but that they should not exercise that power].)

A jury should not be instructed "in a manner that affirmatively conceals" the truth. (*People v. Arias*, supra, 13 Cal.4th at p. 173; see also *People v. Gainer* (1977) 19 Cal.3d 835, 851-852 [court may not misinstruct the juries that a hung jury means the case will be retried because hung juries do not always result in re-trial].) The instruction given not only deprived the defendant and jurors of the right of nullification but affirmatively concealed the truth that the right exists. Moreover, the instruction misinformed the jurors by suggesting that if they disregard the law and are found out, they are in trouble. (See *People v. Dillon, supra,* 34 Cal.3d 441, 490 ["As far as the average lay juror is concerned, failure to follow the court's instructions invites legal sanctions of some kind and unless the juror is willing to risk a fine, jail or heaven knows what, he or she feels bound to follow the instructions."].) But this is not the truth: "Yet the essence of the jury's power to `nullify' a rule or result which it considers unjust is precisely that the law cannot touch a juror who joins in a legally unjustified acquittal or guilty verdict on a lesser charge than the one which the proof calls for. [Footnote]." (*Ibid.*; see also § 1150 [jury's right to enter a general verdict].)

The right to trial by jury is eviscerated if a juror is denied the right to apply the facts of the case to the law in a manner consistent with that juror's personal sense of morality. As the Ninth Circuit recognized, "the jury must not be reduced to the position of a mere ministerial agent by a direction on their very thought, thereby withholding of a vital right due them." (*Morris v. United States* (9th Cir. 1946) 156 F.2d 525, 529.) As Justice Rosen of the Third Circuit Court Of Appeals has observed: "We must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system." (*United States v. Antar* (3d Cir. 1994) 38 F.3d

1348, 1367 (conc. opn. of Rosen, J.).

For the foregoing reasons, the entire judgment against Capistrano must be reversed.

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XI

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED CAPISTRANO'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED CAPISTRANO ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

At the conclusion of the guilt phase of the trial, the court instructed the jury that Capistrano could be convicted of first degree murder if he killed during the commission or attempted commission of robbery or burglary. (CALJIC No. 8.21; 5 CT 1281.) The jury found Capistrano guilty of murder in the first degree. (5 CT 1336.)

Capistrano contends that the instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. It is Capistrano's contention that the information did not charge Capistrano with first degree murder and did not allege the facts necessary to establish first degree murder, thus he could not be convicted of first degree murder.[93]

Count One of the information alleged that "[o]n or about December 9, 1995, in the County of Los Angeles, the crime of MURDER, in violation of Penal Code Section 187(a), a Felony, was committed by JOHN LEO CAPISTRANO and MICHAEL EUGENE DREBERT, who did unlawfully, and with malice aforethought murder KOEN WITTERS, a human being."

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[93] Capistrano is not contending that the information was defective. On the contrary, as explained hereafter, Count One of the information was an entirely correct charge of second degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the uncharged crime of first degree felony-murder in violation of Penal Code section 189.

(5 CT 791.) Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did unlawfully, and with malice aforethought murder") establish that Capistrano was charged exclusively with second degree malice-murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[94]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[95] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of

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[94] The information also alleged a robbery-murder and a burglary-murder special circumstance in connection with Count One. (5 CT 791.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony-murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not. (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green, supra,* 27 Cal.3d at p. 61)

[95] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[96]

Because the information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try Capistrano for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they

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[96] At the time the murders at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[97] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon, supra,* 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*,

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[97] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

supra, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box, supra,* 23 Cal.4th at p. 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder or murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of

"the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart, supra,* 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra*, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[98]

The greatest difference is between second degree malice-murder and first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Watson, supra*, 30 Cal.3d at p. 295; *People v. Dillon, supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box, supra*, 23 Cal.4th at p. 1212; *People v. Dillon, supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or

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[98] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson, supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.)[99]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict Capistrano of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the

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[99] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

instruction on first degree felony murder also violated Capistrano's right to due process and trial by jury because it allowed the jury to convict Capistrano of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated Capistrano's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638.)

These violations of Capistrano's constitutional rights were necessarily prejudicial because, if they had not occurred, Capistrano could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, Capistrano's conviction of first degree murder must be reversed.

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XII

CAPISTRANO'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Capistrano was subject to the death penalty under the felony-murder special circumstance. It was the sole fact that made 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 as well as international human rights law governing use of the death penalty.

A. California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During An Attempted Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing

Capistrano was found to be death-eligible solely because he was convicted of committing a robbery and burglary. (See Pen. Code, §§ 189, 190.2, subd. (a)(17)(i).) While normally the prosecution, to obtain a murder conviction, must prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing committed during a robbery, or, indeed, during any felony listed in section 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the murder.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated 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*, *supra*, 34 Cal.3d at p. 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.)

Except in one rarely-occurring situation,[100] under this 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.[101] (See *People v. Hayes*, *supra*, 52 Cal.3d at pp. 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

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

[101] 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.)

and the felony 'are parts of one continuous transaction.'"].)[102] The key case on the issue is *People v. Anderson*, *supra,* 43 Cal.3d 1104, where the 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.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite, supra,* 17 Cal.4th at pp. 1264, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp, supra,* 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless

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[102]In fact, the robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied malice murders, so-called "provocative act" murders. (*People v. Kainzrants, supra,* 45 Cal.App.4th at pp. 1080-1081.)

indifference to human life.[103]

In urging the jury to convict Capistrano of first degree murder under the felony murder rule, the prosecutor argued:

> In this case, the charge of murder is a fairly simple one to decide, because in this case we have the theory of felony-murder.
>
> What felony-murder is, felony-murder is automatically first degree murder. The court read to you all an instruction during voir dire, an instruction that described that when a person is involved in certain types of felonies, in this case robberies or burglary, and somebody gets killed during the robbery or the burglary, that person is guilty of first degree murder, whether that person intended to commit a killing, whether that person actually committed the killing himself, whether the killing was accidental or unintentional. It doesn't make any difference.
>
> If the person intentionally commits a robbery or a burglary, or intentionally helps to commit a robbery and a burglary as an aider and abettor, and a victim gets killed, that is first degree murder. That's what's called the felony-murder rule.
>
> The court read it to you before. The court will read it to you again, but the bottom line is the basic elements are, you go in, you do a robbery or you do a burglary, or you help somebody else do a robbery or help somebody else do a burglary, and if the victim gets killed, you are guilty of first degree murder, and that's regardless of whether you killed the person or one of the other people who commits the robbery or burglary kills the person. That's regardless of whether you intend to kill or don't intend to kill. That's even if the person that's killed is killed completely accidentally.

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[103]Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey, supra,* 20 Cal.4th at pp. 1016-1017.)

> You're guilty of first degree murder. Don't have to intend. You don't even have to be the actual killer.
>
> The court again will read you that instruction. That's the theory of murder in this case, and if that's what occurred in this case, it is first degree murder automatically.

(10 RT 3579-3580.) Addressing the robbery-murder special circumstance, the prosecutor emphasized that the act of killing, by itself, proved the special circumstance:

> If you find that John Capistrano was the person who strangled Koen Witters, and that that strangulation occurred during a robbery or during a burglary, the special circumstance is true, regardless of his mental state, regardless of whether he intended to kill or not. It's true if he is the actual killer.

(10 RT 3582.) The jury was instructed pursuant to the standard felony-murder instruction CALJIC No. 8.21 set forth above. (5 CT 1281; 10 RT 3728.)

B. The Felony-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*, *supra,* 428 U.S. 153, the 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, supra,* 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, supra, 536 U.S. 304 [death penalty for mentally retarded defendant].) 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 has addressed the proportionality of the death penalty for unintended felony-murders in *Enmund*, *supra,* 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the 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*, *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. Justice O'Connor, writing for 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*, *supra*, 481 U.S. at pp. 158.) Justice O'Connor 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, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, 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 clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a 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.*

(*Reeves*, *supra*, 524 U.S. at 99, citations and fns. omitted; italics added.)[103]

Every lower federal court to consider the issue – both before and after *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

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[103]See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) (stating that an accidental homicide, like the one in *Furman*, may no longer support a death sentence.)

> 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*, *supra*, 220 F.3d 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 intent 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*, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins*, *supra*, 536 U.S. at p. 312.)

The United States Supreme Court's decision in *Simmons, supra,* 543 U.S. 551, supports Capistrano's Eighth Amendment proportionality argument. In declaring the death penalty for juvenile offenders unconstitutional, the high court reaffirmed that in determining whether a punishment is so disproportionate as to be cruel and unusual, the Court first

considers "the evolving standards of decency" as reflected in laws and practices of the States and then exercises its own independent judgment about whether the challenged penalty furthers the goals of retribution and deterrence. (*Simmons*, 543 U.S. at p. 561.)

Applying this Eighth Amendment framework, the Court found a national consensus against capital punishment for juveniles in large part from the fact the majority of states prohibit the practice. By the Court's calculations, 30 states preclude the death penalty for juveniles (12 non-death penalty states and 18 death-penalty states that exclude juveniles from this ultimate punishment) and 20 permit the penalty. (*Id.* at p. 564.) Even though the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for the mentally retarded chronicled in *Atkins,* the Court found that "'the consistency of the direction of the change'" was constitutionally significant in terms of demonstrating a national consensus against executing people for murders they committed as juveniles. (*Simmons*, *supra*, 543 U.S. at pp. 565-566.) The Court further held that because of the diminished culpability resulting from the adolescents' lack of maturity and underdeveloped sense of responsibility, their vulnerability to negative influences and outside pressures, and their still-developing characters, the penological justifications of retribution and deterrence are inadequate to sustain the death penalty for juvenile offenders. (*Id.* at pp. 568-575.)

Simmons, like *Atkins*, leaves no doubt that, at least with regard to capital punishment, the proportionality limitation of the Eighth Amendment is the law of the land and that the most compelling objective indicia of the nation's evolving standards of decency about the use of the death penalty are the laws of the various states. In this regard, Capistrano has made a far

stronger showing of a national consensus against the death penalty for felony murder *simpliciter* than either Simmons or Atkins made in their respective cases. There are now only five states, including California, that permit execution of a person who killed during a felony without any showing of a culpable mental state whatsoever as to the homicide. Forty-five states – 90% of the nation – prohibit the penalty in this situation. This national consensus on this issue is beyond dispute.

This Court should revisit its previous decisions upholding the felony murder special circumstance and should hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant, whether the actual killer or an accomplice, had an intent to kill or acted with reckless indifference to human life. Because that factual finding is a prerequisite to death eligibility, which increases the maximum statutory penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring, supra,* 536 U.S. at pp. 602-603; see also *Blakely v. Washington* (2004) 542 U.S. 296, 304-305 (*Blakely*); *Apprendi, supra,* 520 U.S. at pp. 493-494.) There is no jury finding in this case that Capistrano intended to kill Mr. Witters or acted with reckless indifference to human life. (*McConnell v. State* (2004) 102 P.3d 606, 620, 623 [reversal of death sentence not required where the defendant admitted he premeditated the intentional killing and evidence supported his admission].)

In *McConnell v. State, supra,* 102 P.3d at p. 624, the Nevada Supreme Court, overruling its prior case law, unanimously held that Nevada's felony murder statute violated the Eighth and Fourteenth Amendments, as well as the state constitution, because it "fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendant to whom it applies." Accordingly, it held

that an aggravating circumstance – the basis for death eligibility in Nevada – could not be based "on the felony upon which a felony murder is predicated." (*Ibid.*) Although *McConnell* is based on the Eighth Amendment's narrowing principle rather than on its proportionality principle asserted in this case, the decision is still instructive.[104]

In addition, the Nevada Supreme Court imposes the very constitutional requisite that Capistrano advocates – that there must be proof of a culpable mental state before a felony murderer can be death eligible. The Nevada felony murder aggravating circumstance, unlike the Nevada felony murder statute, "requires that the defendant '[k]illed or attempted to kill' the victim or '[k]new or had reason to know that life would be taken or lethal force used." (*McConnell v. State, supra*, 102 P.2d at p. 623, emphasis omitted.) The Nevada Supreme Court found this requirement to be inadequate, because it permits a jury to impose death on a defendant who killed the victim accidentally. (*Id.* at p. 623, fn. 67.) Consequently, the court held that the mens rea requirement statutorily provided for an accomplice also applies to the actual killer:

> Jurors should be instructed that even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or lethal force would be applied.

(*Ibid.*) Even with this new proportionality limitation, the Nevada Supreme Court held the felony murder aggravating circumstance failed to genuinely

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[104] In Capistrano's view, the narrowing question is, by necessity, an empirical question which must await development in habeas corpus. (See, Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1288-1290, 1326 (1997).) In contrast, resolution of the proportionality question does not rely on empirical data about the operation of California's death penalty statute.

narrow the death eligibility of felony murderers. (*Id.* at p. 624.) Like the Nevada Supreme Court, this Court should recognize the constitutional infirmity of its felony murder special circumstance.

McConnell reduces the number of states that permit imposition of death on a felony murderer without regard to his state of mind. Before *McConnell*, felony murder *simpliciter* was the basis for death eligibility in only six states, including California – Florida, Georgia, Maryland, Mississippi and Nevada.[105] That number now stands at five. This dwindling number underscores that capital punishment for felony murderers without proof of a culpable mental state is inconsistent with contemporary standards of decency that inform the Eighth Amendment's proportionality principle. (See *Atkins, supra* 536 U.S. at pp. 311-312; *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plur. opn. of Warren, J.).)

That at least 45 states (33 death penalty states and 12 non-death

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[105]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:

> [T]o 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.)

penalty states) and the federal government[106] reject felony murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins, supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois)[107] and international opinion[108] also weigh against finding felony murder *simpliciter* a sufficient basis for death-eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (*Report of the Former Governor Ryan's Commission on Capital*

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[106]See 18 U.S.C. § 3591(a)(2).

[107]The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins*, *supra*, 536 U.S. at p. 316, fn. 21.)

[108]The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins*, 536 U.S. at p. 316 n.21; *Enmund*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

Punishment, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf>.) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Id.* at p. 72.)

With regard to international opinion, the Court observed in *Enmund*:

> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker v. Georgia*, 433 U.S. 584, 596, n. 10, 97 S.Ct. 2861, 2868, n. 10, 53 L.Ed.2d 982 (1977). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund*, *supra*, 458 U.S. at p. 796, fn. 22.) International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N.

GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*)[109] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

The imposition of the death penalty on a person who has killed

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[109]The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

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*, *supra*, 458 U.S. at pp. 798-799, quoting *Coker*, *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*, *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*, *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*, (1946) 328 U.S. 463, 484 (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 p. 186 (fn. omitted).

(*Enmund*, *supra*, 458 U.S. at pp. 798-99; accord, *Atkins*, *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." As interpreted and applied by this Court, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and Capistrano's death sentence must be set aside.

In this case, felony murder simpliciter death-eligibility also violates the Eighth Amendment because the only evidence of Capistrano's intent was supplied by the uncorroborated testimony of a single witness who was unreliable and whom the defense was prohibited from fully impeaching. (See Argument V, *ante*.)

Finally, California law making a defendant death-eligible for felony murder *simpliciter* violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the

death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2; see Argument XIV, section C, *supra*, which is incorporated by reference here.) In light of the international law principles discussed previously, Capistrano's death sentence, predicated on his participation in the robbery and burglary of Koen Witters without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

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XIII

CALJIC NO. 2.90 IS CONSTITUTIONALLY DEFECTIVE

The jury in this case was read CALJIC No. 2.90. The judgment should be reversed because the definitions of reasonable doubt and the burden of proof in this instruction were constitutionally deficient in many ways.

A. The Instruction Erroneously Implied That Reasonable Doubt Requires The Jurors To Articulate Reason For Their Doubt

The second paragraph of CALJIC No. 2.90 was given to Capistrano's jury and defined reasonable doubt as follows: "[Reasonable doubt] is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (10 RT 3724; 5 CT 1274.)

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' [Citations.]" (*Cage v. Louisiana*, *supra*, 498 U.S. at p. 39, quoting *In re Winship*, *supra*, 397 U.S. at p. 364.) The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*In re Winship*, *supra*, 397 U.S. at p. 363; see also *Cage v. Louisiana*, *supra*, 498 U.S. at p. 40.) "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" (*Ibid.*) An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof

whatsoever. It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. (See *People v. Loggins* (1972) 23 Cal.App.3d 597, 600-601, citing *People v. Letourneau* (1949) 34 Cal.3d 478, 490-491 [error occurs if a court tells a jury that any burden of persuasion rests on the defense as to the general issue of guilt].) Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

Accordingly, requiring the jurors to articulate expressly concrete reasons for their doubt is constitutionally erroneous. (*People v. Antommarchi* (N.Y. 1992) 604 N.E.2d 95, 98 ["An instruction that requires jurors to supply concrete reasons "based upon the evidence" for their inclination to acquit implicitly imposes on defendants the burden of presenting a defense that supplies . . . the jurors with the arguments they need to legitimize their votes."]; see also *Siberry v. State* (Ind. 1893) 33 N.E. 681, 685.) When jurors are required to articulate reasons for acquitting "[t]he burden . . . is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt." (*State v. Cohen* (Iowa 1899) 78 N.W. 857, 858.) In short, "jurors are not bound to give reasons to others for the conclusion reached. [Citations]." (*Id.* at p. 858.)

The essence of reasonable doubt is a failure of proof: "It is the want of information and knowledge that creates the doubt." (*Siberry v. State*, *supra*, 33 N.E. at p. 684.) Such "want of knowledge" is not necessarily capable of expression as an affirmative or logical "reason" for the doubt which is felt. This would require the juror to "prove a negative." So, such

an instruction unconstitutionally misstates the burden of proof. "It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused, with that degree of certainty required by the law, which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not." (*Id.* at p. 684.)

In the present case the jurors were not expressly instructed that they must articulate reason and logic for their doubt. However, the instructional language implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard. As reasonably interpreted by the jurors (see *Estelle v. McGuire*, *supra*, 502 U.S. 62, 74-75), the instructions required an articulation of their doubts before such doubts could be considered sufficient to acquit.

B. CALJIC No. 2.90 Unconstitutionally Admonished The Jury That A Possible Doubt Is Not A Reasonable Doubt

The language of CALJIC No. 2.90 admonished the jury that "reasonable doubt . . . is not a mere possible doubt . . . ." (10 RT 3724:11-12.) The instruction was unconstitutional because it failed to limit the scope of possible doubt adequately. Unlike an imaginary doubt, a possible doubt may be based on fact. When driving on a two-lane road reasonable drivers do not pass on a blind curve because it is "possible" that a car may be coming in the other lane. Cautious investors regularly give up higher returns and opt for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier

investment. In other words, merely because a doubt is only possible does not make it unreasonable or insignificant. The question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions then the doubt is reasonable, even if it is merely possible. (See, e.g., *Victor v. Nebraska, supra*, 511 U.S. 1, 20-21 [hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be"].)

This formulation of reasonable doubt was approved in *United States v. Wilson* (1914) 232 U.S. 563, 570, and has since been endorsed by a number of state and federal courts. (See, e.g., *Holland v. United States* (1954) 348 U.S. 121, 140; *Hilbish v. State* (Alaska App. 1995) 891 P.2d 841, 850-851.) The federal circuits that provide for definition of reasonable doubt and many states use the *Wilson* hesitation concept. For example, the Eighth Circuit clarifies the "possible doubt" concept by relating it to the notion of reliance: a reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. (*8th Circuit Model Jury Instructions - Criminal* (2000) No. 3.11 [Reasonable Doubt]; see also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* (5th ed. 2000) § 12:10 [Presumption Of Innocence, Burden Of Proof And Reasonable Doubt].)[110]

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[110]Other jurisdictions include similar definitions. (See, e.g., (continued...)

Alternatively, one may say that reasonable doubt "does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture." (*Siberry v. State*, *supra*, 33 N.E. 681 at p. 684.) However, in the present case reasonable doubt was not so defined. Instead, the court admonished the jury that a doubt is not reasonable if it is "merely

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[110](...continued)
Pennsylvania Suggested Standard Criminal Jury Instructions, Pa. SSJI (Crim) 7.01 ¶ 3, sent. 2 (Presumption Of Innocence: Burden Of Proof; Reasonable Doubt) (Pennsylvania Bar Institute, PBI Press); *South Carolina Criminal Jury Instructions* 1-14 (Reasonable Doubt Charge) (South Carolina Bar, 1995); W. Scott Carpenter, & Paul J.McClung, *McClung's Texas Criminal Jury Charges*, § 1 (II)(B)(2) ¶ 4 (proper.chg) (James Publishing, 2000); *Criminal Jury Instructions For The District of Columbia*, Instr. 2.09, (Reasonable Doubt) (Bar Association of the District of Columbia, 4th ed. 1993); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-2 & 1-6-3 (Reasonable Doubt (Alternates 1 & 2)) (State Bar of South Dakota, 2000); *Alaska Pattern Criminal Jury Instructions*, 1.52 (Presumption Of Innocence, Burden Of Proof Beyond A Reasonable Doubt) (Alaska Bar Association, 1987); *Arkansas Model Jury Instructions - Criminal,* AMCI 2d 110 (Introductory Instructions-Reasonable Doubt) (Lexis, 2nd ed. 1997); *Colorado Jury Instructions*, COLJI - Crim 3:04 (Presumption Of Innocence-Burden Of Proof Generally-Reasonable Doubt) (West, 1983); *Connecticut Selected Jury Instructions - Criminal* 2.8 (General Jury Instructions-Reasonable Doubt) (The Commission on Official Legal Publications Judicial Branch, 3rd ed. 1996); *Idaho Criminal Jury Instructions*, ICJI 103A (Reasonable Doubt (Alternative)) (Idaho Law Foundation, Inc., 1995); *Maryland Criminal Pattern Jury Instructions*, MPJI-Cr 1.04 (Reasonable Doubt) (Micpel, 1999); *New Mexico Uniform Jury Instructions - Criminal*, UJI Criminal 14-5060 (Presumption Of Innocence; Reasonable Doubt; Burden Of Proof) (Lexis, 1998); *Instructions for Virginia & West Virginia* 24-401 (Reasonable Doubt Defined Generally) (Lexis, 4th ed. 1996); *Wisconsin Jury Instructions - Criminal*, WIS-JI-Criminal 140 (Burden Of Pool And Presumption Of Innocence) (University of Wisconsin Law School, 2000); *6th Circuit Pattern Jury Instructions - Criminal* 1.03 (Presumption Of Innocence, Burden Of Proof, Reasonable Doubt) (1991). *[Do we know if these are still accurate?]

possible." Such a definition unconstitutionally allowed the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.

Moreover, by stating that merely possible doubt was unreasonable, the instruction unconstitutionally implied some obligation by the accused to raise a probable doubt as to his or her guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

C. The Instruction Was Deficient Because It Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence

The instructional language which defined and explained the presumption of innocence was the first paragraph of CALJIC No. 2.90 which provided as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the prosecution the burden of proving him guilty beyond a reasonable doubt." (10 RT 3724:3-10.) The instruction omitted one of the most fundamental underpinnings of the presumption of innocence, i.e., that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt.

The essence of the presumption of innocence is that the defense has no obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. (*In re Winship, supra*, 397 U.S. 358; see *People v. Hill*, *supra*, 17 Cal.4th at p. 831 ["[T]o the extent (the prosecution) was claiming there must be some affirmative evidence

demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence . . . ."]; see also *State v. Miller* (W. Va. 1996) 476 S.E.2d 535, 557 [if requested court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (lst Cir. 1983) 721 F.2d 840, 843; Federal Judicial Center, *Pattern Criminal Jury Instructions* (1988) No. 22 ["[A] defendant has an absolute right not to . . . offer evidence."].)

As the judge told the jury in *Maccini*:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. . . . This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. . . . [The fact that the defendant has the opportunity] to bring out certain facts by way of cross-examination and by way of argument and analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so.

(*United States v. Maccini, supra,* 721 F.2d at p. 843, fn. 6.) An instruction explaining that the defendant has no obligation to produce evidence is especially important in cases, such as this one, where the defense does present affirmative evidence because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proven or disproven the facts in issue.

When considering the instructions as a whole (as required by the instructions (10 Rt 3712; 5 CT 1252; CALJIC No. 1.01) and presumed by

the law)[111], the jurors were reasonably likely to assume that the defense had the burden of producing sufficient evidence to raise a reasonable doubt. The instructions from which such an erroneous assumption would have been made included the following:

-- "Respective Duties of Judge and Jury." (10 RT 3710-3712; 5 CT 1250-1251; CALJIC No. 1.00.) This instruction described the jurors' duties in terms of "determin[ing] the facts" and "reach[ing] a just verdict . . . " These descriptions implied a weighing of the evidence presented by both parties to determine what actually happened which would be consistent with the jurors' natural intuition. However, the jurors's duty under the presumption of innocence is not to determine the ultimate truth but rather to determine whether the prosecution had proved guilt beyond a reasonable doubt and, hence, this instruction was misleading.

-- "Production of All Available Evidence Not Required." (10 RT 3715; 5 CT 1257; CALJIC No. 2.11.) The jury was instructed: "Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence." (CALJIC No. 2.11.) This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that the defense had the obligation to

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[111]"Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 324-325, fn. 9.)

present evidence. By expressly telling the jury that neither side is required to "call . . . all" potential witnesses to an event or "produce all objects or documents . . ." the instruction suggested that the production of evidence by both sides was required. (See, e.g., *Commonwealth v. Bird* (Pa. 1976) 361 A.2d 737, 739 [reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness]; *State v. Mains* (Or. 1983) 669 P.2d 1112, 1117.)

-- "Sufficiency of Circumstantial Evidence Generally." (10 RT 3714-3715; 5 CT 1279; CALJIC No. 2.01.) The circumstantial evidence instruction also exacerbated the deficiencies of the presumption of innocence instruction. It is true that CALJIC No. 2.01, paragraph 2 stated that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (10 RT 3714; see also CALJIC Nos. 2.02 and 8.83; 10 RT 3726-3727, 3757; 5 CT 1279, 1289.) However, this paragraph reasonably addressed only the prosecution's evidence and did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

-- "Witness Willfully False." (10 RT 3719; 5 CT 1263; CALJIC No. 2.21.2.) This instruction further implied that the defendant was required to produce evidence to raise a reasonable doubt by admonishing the jury to evaluate a witness's testimony in terms of whether "the probability of truth favors his or her testimony . . . ." When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency

may prejudicially mislead the jurors.

-- "Sufficiency of Testimony of One Witness." (10 RT 3719-3720; 5 CT 1265; CALJIC No. 2.27.) The jury was instructed: "Testimony concerning any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends." By specifically referring to "any fact required to be established by the prosecution . . . ," this instruction suggested by implication that some facts were required to be proven by the defense. Hence, the instruction contributed to the misleading message of the instructions as a whole that the defense has a burden as to affirmative defense theories to raise a reasonable doubt.

In sum, the instructions as a whole perpetrated the misconception that the defense had the burden of raising a reasonable doubt.

D. The Instruction Was Deficient Because It Failed To Explain That Capistrano's Attempts To Refute Evidence Did Not Shift The Burden Of Proof

Given the failure to explain that Capistrano had no obligation to present affirmative evidence, it follows that the instructions erroneously failed to explain that Capistrano's presentation of evidence did not alter the burden. The prosecution's burden of proof is not satisfied merely by the rejection or disbelief of the defense evidence. "[D]isbelief of a witness does not establish that the contrary is true, only that the witness is not credible. [Citations]." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 704.) In other words, "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation]." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Lubin v. Lubin*

(1956) 144 Cal.App.2d 781, 795; see also *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137; *Moore v. Chesapeake & O.R. Co.* (1951) 340 U.S. 573, 576 [disbelief of a witness will "not supply a want of proof"]; *Mandelbaum v. United States* (2nd Cir. 1958) 251 F.2d 748, 752 ["The disbelief of a witness does not necessarily establish an affirmative case."]; *People v. Goodchild* (Mich. 1976) 242 N.W.2d 465, 469-470, quoting *People v. O'Connor* (Mich. 1973) 529 N.W.2d 805, 808 ["[M]ere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion."].)

Accordingly, when the prosecution has failed to present sufficient credible evidence to meet its burden of proof, the jury should not be permitted to utilize its disbelief of the defendant's testimony or other defense evidence to conclude that the prosecution's burden has been met. The failure to adequately inform the jury concerning this principle violated Capistrano's federal constitutional rights to trial by jury and due process by allowing the jury to convict Capistrano even though the prosecution did not meet its burden of proving him guilty beyond a reasonable doubt. (U.S. Const., 6th &14th Amends.)

E. The Jurors Should Have Been Told A Conflict In The Evidence And/Or A Lack of Evidence Could Leave Them With Reasonable Doubt

CALJIC No. 2.90 was incomplete and misleading because it failed to expressly inform the jury that reasonable doubt could be based on a conflict in the evidence and/or a lack of evidence. Reasonable doubt may arise from a conflict in the evidence, lack of evidence or a combination of the two. (See *Georgia Suggested Pattern Jury Instructions - Criminal Cases* (2nd ed. 2000) part 2 (D) p. 7 [Instruction D].) This is so because two equally probable conflicting inferences do not overcome a burden of proof. When

conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Rexall v. Nihill* (9th Cir. 1960) 276 F.2d 637, 644; *Reliance Ins. v. McGrath* (N.D. Cal. 1987) 671 F.Supp. 669, 675; *Estate of Obernolte* (1979) 91 Cal.App.3d 124, 129 ["Equal probability does not satisfy a burden of proof."].)

F. CALJIC No. 2.90 Failed To State That The Presumption Of Innocence Continues Throughout The Trial

It is well recognized that the presumption of innocence continues throughout the trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (Va. 1932) 166 S.E. 541, 545-546; see also *State v. Goff* (W.Va. 1980) 272 S.E.2d 457, 463 [the burden never shifts to the defendant].) Therefore, it is improper to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. (See *United States v. Payne* (9th Cir. 1990) 944 F.2d 1458, 1462-1463; see also *People v. Johnson* (Ill.App.Ct. 1972) 281 N.E.2d 451, 453; *People v. Attard* (N.Y. App. Div. 1973) 346 N.Y.S.2d 851; *State v. Tharp* (Wash. App. 1980) 616 P.2d 693, 700; *Washington Pattern Jury Instructions - Criminal* (2nd ed. 1994) WPIC 1.01 (Advance Oral Instruction-Introductory) comment [words "during your deliberations" inserted into instruction "to avoid any suggestion that the presumption could be overcome before all the evidence is in"].) "It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been

adduced to overcome the presumption, thus shifting the burden upon the accused. [Citations.]" (*Wisconsin Jury Instructions- Criminal, WIS-JI-Criminal* (2000) 140 [Burden of Proof and Presumption of Innocence] Comment, p. 4.) Hence, CALJIC No. 2.90 as given in the present case was deficient because it did not assure that the jury would not shift the burden to the defense at some point before completing its deliberations.

G. CALJIC No. 2.90 Improperly Described The Prosecution's Burden As Continuing "Until" The Contrary Is Proved

The judge used CALJIC No. 2.90 to instruct the jury, in pertinent part, as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved . . . ." (10 RT 3724:3-5.) Use of the term "until" in this instruction undermined the prosecution' s burden of proof. Use of the word "until"- is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented. In apparent recognition of how use of the term "until" fails to comport with *Winship* and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." (See, e.g., *Idaho Criminal Jury Instructions* ICJI No. 1501 ["unless"]; Oklahoma Uniform Jury Instruction Crim (2nd ed.) No. 1 [same]; *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161, 172 [same]; Criminal Jury Instructions--New York CJI (New York) (lst Ed. 1983) No. 3.05 ["unless and until"]; Ky. Rev. Stat., § 532.025 [same]; *Criminal Jury Instructions For The District of Columbia*, Instr. 1.03 (Bar Association of the District of Columbia, 4th ed. 1993) [same]; Uniform Criminal Jury Instructions (Oregon) No. 1006 [same]; 1st Circuit Model Instructions Criminal No. 1.01 [same]; 8th

Circuit Model Instructions, Criminal No. 1.01 [same].)[112] Hence, the instruction in the present case was deficient because it implied that the prosecution would meet its burden. Moreover, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations.

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[112]Alternatively, it has been recommended that the jury be more directly instructed on this point as follows: "The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt." (Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions*, § 4.01, Form 4-1 (1994).) Another alternative is the following instruction from *United States v. Walker* (7th Cir. 1993) 9 F.3d 1245, 1250: "The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty."

XIV

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris, supra*, 586 F.2d at p. 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams, supra,* 22 Cal.App.3d at pp. 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The defense was erroneously prevented from cross-examining the key witness in the prosecution's case for capital homicide, Gladys Santos, on issues relevant to the jury's determination of her credibility. (See Argument V, *ante*.) Compounding that error, the prosecution was then erroneously allowed to corroborate the alleged confession to the homicide made by Capistrano to Santos through the introduction of Drebert's statement blaming Capistrano for the crime. (See Argument VI, *ante*.) The

prosecution was further erroneously allowed by the trial court to bolster its weak case against Capistrano for capital murder by joining the homicide to an unrelated case in which Capistrano had been identified as one of the perpetrators, and then the trial court failed to restrict adequately the jury from using evidence of one crime to find Capistrano guilty of another crime or crimes. (See Arguments VII and VIII, *ante*.) The trial court's multiple errors relating to guilt phase instructions lessened the prosecution's burden of proof. (See Argument IX, *ante*.)

The cumulative effect of these errors so infected Capistrano's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. 14th Amend.; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Capistrano's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Capistrano's trial. (See *People v. Hayes, supra,* 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing that in

penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

With regard to the penalty phase, the erroneous exclusion of prospective jurors (see Arguments I and II, *ante*), alone or in combination with other erroneous rulings during voir dire (see Arguments III and IV) requires a new penalty phase. The errors committed at the penalty phase of Capistrano's trial include numerous instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of Capistrano's convictions and death sentence.

XV

IF THE CONVICTION PURSUANT TO ANY COUNT IS REVERSED OR THE FINDING AS TO ANY SPECIAL CIRCUMSTANCE IS VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The jury made its decision to impose a death judgment after having convicted Capistrano of 16 counts involving different crimes against various people. The jury also found the special circumstance that the homicide was committed during the course of a robber and a burglary. If this Court sets aside the convictions on any of the counts or the findings on any of the special circumstances, the entire matter must be remanded for a new sentencing determination. (See *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal].)

Penal Code section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, Capistrano's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, inter alia, "the circumstances of the crime of which the defendant was convicted." (6 CT 1413-1414.)

A reversal of any of the charges or allegations would significantly alter the landscape the jury was considering when making its determination to assess death. The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reversal of any of the counts or the vacating of any of the special circumstances. Accordingly, to

meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, Capistrano must be granted a new penalty trial, to enable the fact finder to consider the appropriateness of imposing death.

Moreover, in *Ring, supra,* 536 U.S. at p. 607, the United States Supreme Court applied the rule of *Apprendi*, *supra,* 530 U.S. 466 to capital sentencing procedures, and concluded that specific findings the legislature makes prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In California, jurors must determine two critical facts at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt.

Further, this Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring*, *supra*, 536 U.S. at p. 589 [quoting *Apprendi*, *supra*, 530 U.S. at p. 483].) Accordingly, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced.

XVI

THE TRIAL COURT DENIED CAPISTRANO HIS RIGHTS TO DUE PROCESS AND A JURY TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN IT IMPOSED AGGRAVATED AND CONSECUTIVE SENTENCES BASED ON FINDINGS OF FACT NOT FOUND BY CAPISTRANO'S JURY

The trial court sentenced Capistrano to the upper term on sentences or enhancements and imposed consecutive terms relating to non-capital counts to which Capistrano was convicted. (12 4294-4301.) To justify the imposition of aggravated and consecutive sentences, the court itself found aggravating factors concerning the commission of those crimes that were not found true by Mr. Capistrano's jury. (*Ibid.*) In do doing, the trial court violated Capistrano's constitutional rights to notice of aggravating facts in the information, application of the reasonable doubt standard, and a jury trial. (*Blakely, supra,* 542 U.S. 296.)

Under *Blakely*, the prosecution was required to plead the factors in aggravation upon which it wished to rely and the court was required to employ the beyond a reasonable doubt standard in adjudicating those factors. Neither of these constitutional safeguards was granted to Capistrano. Here, the trial court made its factual findings under the preponderance of the evidence standard. (California Rules of Court, rule 4.420(b) ["Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."].)

In *Apprendi, supra,* 530 U.S. at p. 490, the Supreme Court held:

> 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.) "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely*, *supra*, 542 U.S. at p. 303, emphasis in original.) After *Blakely*, when a court makes additional findings to justify the imposition of an aggravated sentence other than the bare fact of a prior conviction, it violates a defendant's constitutional right to a jury trial as set forth in *Apprendi*.

Capistrano recognizes that his claim has been previously rejected by the California Supreme Court. In *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held that *Blakely* does not apply to California's determinate sentencing law or to the imposition of consecutive sentences. However, the United States Supreme Court has granted certiorari in a case where it will consider the merit of the holding in *Black*. (*Cunningham v. California,* No. 05-6551.)[113] It is Capistrano's expectation that *Black* will be overruled in *Cunningham* while this appeal is pending.

In *Blakely*, the trial court imposed an aggravated sentence based on a finding that the defendant acted with deliberate cruelty. The Supreme Court held that the imposition of the aggravated sentence based on that finding violated *Apprendi*'s rule entitling a defendant to a jury determination of any fact used to impose greater punishment than the maximum otherwise allowable for the underlying offense.

> Our precedents make clear [] that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant "statutory maximum" is not the maximum

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[113] *Cunningham* was argued on October 11, 2006. (See http://www.supremecourtus.gov/docket/05-6551.htm.)

> 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.

(*Id.* at pp. 303-304, emphasis in original.)

Blakely applies to this case. "When a decision of [the Supreme] Court results in a 'new rule,' the rule applies to all criminal cases still pending on direct review. [Citation.]" (*Schriro v. Summerlin* (2004) 542 U.S. 348, 350.) Furthermore, the issue is not waived due to the lack of a constitutional objection below. The California Supreme Court explained in *People v. Vera* (1997) 15 Cal.4th 269, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental constitutional rights." (*Id.* at p. 276.) Among the fundamental constitutional rights listed in *Vera* is the constitutional right to a jury trial. (*Id.* at pp. 276-277, citing *People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see also *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5 ["Defendant's failure to object [] would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial"].)

There is an additional reason why a finding of waiver would not be appropriate in this case. Appellate courts will not insist upon an objection in a lower court where it would have been futile at the time made. Thus, in *People v. Birks* (1998) 19 Cal.4th 108, the California Supreme Court rejected a waiver argument where an issue was presented for the first time on review because a lower court would have been bound by controlling

precedent to reject any objection. (*Id.* at p. 116, fn. 6.) In this case, an objection that aggravating factors had to be submitted to a jury or admitted by the defendant would have been futile because California law clearly provided that sentencing facts are found by judges, not juries. "[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned." (*People v. Wiley* (1995) 9 Cal.4th 580, 587.)

> [U]nder provisions of the Determinate Sentencing Act, trial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether "there are circumstances in aggravation or mitigation of the crime," a determination that invariably requires numerous factual findings.

(*Ibid.*)

Because an objection based on *Apprendi* would have been futile, and since the issue involves Capistrano's fundamental right to trial by jury, it must be addressed on appeal despite the lack of objection below.

As to the denial of a jury trial regarding sentencing facts, the U.S. Supreme Court has recently held that per se reversal is not required. (*Washington v. Recuenco* (2006) ____ U.S. ____ [126 S. Ct. 2546; 165 L. Ed. 2d 466].) Rather, the test is whether the error is harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 24.

As the court held in *Recuenco*, the denial of a jury trial requires application of the special test found in *Neder v. United States* (1999) 527 U.S. 1. (*Recuenco, supra*, 126 S. Ct. at pp. 2551-2552.) Under the *Neder* test, the failure to have the jury pass on a factual question cannot be deemed harmless if "the defendant contested the omitted [issue] and raised evidence sufficient to support a contrary finding . . . ." (*Neder, supra*, 527 U.S. 1,

19.)

Under the harmless error standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, reversal is required. The jury did not make the findings cited by the court to justify imposition of the upper term. There is, therefore, no basis to find the error was harmless. All aggravated sentences and consecutive sentences imposed in this case must therefore be reversed.

Insofar as the court used the lesser standard of preponderance of the evidence rather than beyond a reasonable doubt, per se reversal is required. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281 [reversal per se is required when the jury is misinstructed on the meaning of the reasonable doubt standard].) Under *Blakely*, the trial court should have applied the beyond-a-reasonable-doubt standard. An error that deprived a defendant of the requirement of proof beyond a reasonable doubt is structural error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

The same result is required as to the error in failing to give Capistrano notice of the factors in aggravation. Since the People failed to plead factors in aggravation, per se reversal is compelled. (*Cole v. Arkansas* (1948) 333 U.S. 196, 201-202 [judgment reversed where the defendant was convicted of an offense which had not been charged].)

As noted, this court is bound by the California Supreme Court's recent decision in *People v. Black*, *supra*. However, the conclusion reached in *Black* has been rejected by other courts. (See *State v. Natale* (2005) 184 N.J. 458, 482 [878 A.2d 724].) Other state courts have reached contrary conclusions. (See e.g., *State v. Shattuck* (2005) 704 N.W.2d 131 [2005 Minn. LEXIS 476]; *State v. Allen* (2005) 359 N.C. 425, 433 [615 S.E.2d 256]; *State v. Schofield* (2005) 2005 ME 82 [876 A.2d 43, 49-50]; *Lopez v. People* (Colo. 2005) 113 P.3d 713, 728; *State v. Hughes* (2005) 154 Wn.2d

118 [110 P.3d 192]; *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 681-685; *State v. Dilts* (2004) 337 Ore. 645, 654 [103 P.3d 95]; *State v. Brown* (2004) 209 Ariz. 200, 202-204 [99 P.3d 15].) Based on these authorities, Capistrano asserts that his sentence violated *Blakely*.

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XVII

CAPISTRANO'S SENTENCES FOR CARJACKING ON COUNTS 10 AND 14 MUST BE STAYED PURSUANT TO PENAL CODE SECTION 654

Capistrano was sentenced to separate consecutive terms for the home invasion robberies of Julie Solis and Edward Gonzalez (Counts 4 and 5). (12 RT 4296-4297, 4299; 6 CT 1537.) Additionally, he was sentenced to a consecutive term for the carjacking of Solis and Gonzalez (Count 10.) (12 RT 4297, 4299.) Likewise, he was sentenced to separate consecutive terms for the home invasion robberies of Ruth and Patrick Weir (Counts 12 and 13), and to a consecutive term for the carjacking of Ruth Weir (Count 14). (12 RT 4298-4299; 6 CT 1537.) Trial counsel objected to the consecutive sentences on Counts 10 and 14 on the ground that Penal Code section 654 precluded sentencing on those counts. (12 RT 4280-4281.) The trial court should have stayed imposition of punishment on those counts.

The relevant section of section 654 provided in part:

> An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provision, but in no case can it be punished under more than one.

The carjacking and robbery of the same victims here constituted "the same act." As to each carjacking count, Capistrano and the other perpetrators approached the victims as they parked their cars in a free-standing garage next to their respective homes. Money was taken from Solis and Gonzalez while they were in their garage; Gonzalez then led the perpetrators into the house were more personal items and the keys to one of his cars was stolen. (8 RT 2895-2906, 2967-2968, 3001-3008, 3021.) With regard to the Weirs, personal items, including the car keys, were stolen

while the victims were in the house. (8 RT 3052-3081.) The long-standing rule is that "... the theft of several articles at the same time constitutes but one offense . . . ." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 419-420 [citations omitted].) In *Dominguez*, the Court of Appeal found no error in the trial court's decision not to separately punish the defendant for both the crimes of robbery and carjacking. (*Ibid.*) In this case, the robbery of the victims of their cars and other possessions constituted a single transaction; separate punishment for those crimes is thus precluded by section 654. Capistrano requests this Court stay the sentences imposed for carjacking on Counts 10 and 14 and order the abstract of judgment corrected to reflect the term for those counts is stayed.

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XVIII

THE ABSTRACT OF JUDGMENT IS INCORRECT AND MUST BE CORRECTED BY THIS COURT

The trial court sentenced Capistrano to life in prison for the attempted premeditated murder of Michael Martinez (Count 15). (12 RT 4295, 4301.) This was the maximum sentence for that crime authorized by statute. (Pen. Code, §§ 664.) However, the abstract of judgment reflects a sentence of life without the possibility of parole. (6 CT 1539.)

Capistrano requests this Court to correct the abstract of judgment to reflect the proper sentence on Count 15 of life in prison with the possibility of parole.

> "It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. [Citation.] The court may correct such errors on its own motion or upon the application of the parties."

(*In re Candelario* (1970) 3 Cal.3d 702, 705.) Courts may correct clerical errors at any time, and appellate courts that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [citations omitted].)

Since Capistrano's abstract of judgment does not accurately reflect the oral judgment of the trial court, Capistrano requests this Court order the Los Angeles County Superior Court to prepare a corrected abstract of judgment which reflects a sentence of life with possibility of parole on Count 15. (*Id.* at p. 188.)

XIX

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF[114]

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As set forth elsewhere in this brief, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. (See Argument XXIII, *post.*) As discussed herein, juries 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 intercase proportionality review not required; it is not permitted. (See Argument XXI, *post.*) 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 –

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[114] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court held that "[r]outine instructional and constitutional challenges," will be deemed "fairly presented" for the purposes of state and subsequent federal review so long as the appellant's brief: (1) identifies the claim in the context of the facts; (2) notes that the Court has rejected the same or a similar claim in a prior decision; and (3) asks the Court to reconsider that decision. However, in order to ensure that the federal courts deem these challenges fairly presented to the state courts and thus fully preserved for federal review, Capistrano submits more than the minimum briefing suggested in *Schmeck.*

whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[115]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held 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,

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[115] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of violent criminal activity (Pen. Code, § 190.3 subsection (b)) must be proved beyond a reasonable doubt. (See Arguments XX and XXI, *post.*)

[or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi, supra,* 530 U.S. at pp. 471-472, *Ring*, *supra*, 536 U.S. at p. 607, and *Blakely, supra,* 542 U.S. at pp. 300-313.

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

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) 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 pp. 478.)

In *Ring*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing 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.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring*, *supra*, 536 U.S. at p. 609.)[116] The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Id.*)

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[116] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely, supra*, 542 U.S. at p. 300.) 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 of the 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." (*Blakely*, *supra*, 542 U.S. at p. 303, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[117] Only

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[117] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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 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 at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is

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[117](...continued)
1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

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.[118] 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, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (12 RT 4260; 6 CT 1434; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. 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

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[118] 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 not merely discretionary weighing, 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.* at p. 460.)

punishment notwithstanding these factual findings.[119]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code, 190.2 subsection (a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g., *People v. Prieto, supra,* 30 Cal.4th at p. 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "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. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "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

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

crime." (*Blakely*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find

the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[120] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring*'s applicability 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. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of

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[120] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its 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, supra*, 46 Cal.3d at p. 448.)

an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *People v. Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' [Citation omitted.] No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, italics added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan, supra,* 53 Cal.3d at pp. 977-978.)

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. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process 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, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating

factors are not sufficiently substantial to call for leniency"]; 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.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 542 U.S. at p. 304.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[121]

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[121] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532

(continued...)

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be

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[121](...continued)
U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman*, *supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi*, *supra*, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

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"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . 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.

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

The final 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 eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination 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 any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*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 Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. 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.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three

distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. 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*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [same]; *People v. Thomas* (1977) 19 Cal.3d 630, 632 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *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] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, 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.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that 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 need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California, supra*, 524 U.S. at p. 732.) In *Monge*, the 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.'" (*Monge v. California, supra*, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with

a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes, supra,* 52 Cal.3d at p. 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

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

burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

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

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by

the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[122]

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

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater

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[122] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so

told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and

unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1992) 1 Cal.4th 103, 462-464 (cert. granted on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802); see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[123]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to

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

jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[124]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina, supra,* 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524 U.S. at p. 732; accord *Johnson v. Mississippi, supra*, 486 U.S. at p. 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not

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[124] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf. *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based on a plurality vote of nine out of twelve jurors].)

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

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[125] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of

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[125] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).)

such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Yist*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid

> discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is

the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

Compounding the errors, the jury instruction failed to inform the jurors about the burden of proof (see Argument XX, *post.*) This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California, supra,* 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

A defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer considers it. However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was

explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

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

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

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

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. 14th; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. 8th & 14th; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. 14th; Cal. Const., art. I, § 7.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an

instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

In the penalty phase, the trial court instructed the jury with CALJIC No. 8.88[126] on the weighing process. This instruction was vague and

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

(continued...)

imprecise, failed to describe the weighing process accurately that jurors must apply in a capital case, was improperly weighted toward death and deprived appellant of the individualized, moral judgment required under the federal Constitution. This instruction, which formed the centerpiece of the trial court's description of the sentencing process, violated appellant's rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution.[127] (See e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.) Reversal of the death sentence is required.

B. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death

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[126](...continued)
deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree. ¶Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (12 RT 6 CT 4260-4262.)

[127] As previously set forth, appellant recognizes that this Court has rejected arguments challenging CALJIC No. 8.88 in cases such as *People v. Prieto, supra,* 30 Cal.4th at p. 264 and *People v. Catlin, supra,* 26 Cal.4th at p. 174. However, for the reasons stated below, those decisions should be reconsidered.

instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[128]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court

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[128] 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*, *supra*, 428 U.S. at p. 202.)

identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. at p. 235.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. 8th and 14th), the death judgment must be reversed.

C. The Instructions Failed To Convey The Central Duty Of Jurors In The Penalty Phase

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 at p. 1037.) Indeed, 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, supra,* 40 Cal.3d at p. 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]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 (disapproved on other grounds in People v. Combs 2004 34 Cal.4th 821, 860); *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under

CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it 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; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing

scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (6 CT 1434.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." (6 CT 1435.)

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. 8th and 14th) denies due process (U.S. Const., Amend. 14th; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

D. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[129] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. at p. 377.)

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

By failing to conform to the specific mandate of Penal Code section

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

190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States, supra,* 157 U.S. at p. 310.)[130]

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[130] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra*, 412 U.S. at p. 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal

(continued...)

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

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

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

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a

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[130](...continued)
benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

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

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

appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

E. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes, supra,* 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

The instructions given in this case resulted in this capital jury not being properly guided on this crucial point. The death judgment must therefore be reversed.

F. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XXI

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious 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. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 [opinion of Stewart, Powell, and Stevens, JJ.].)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the

proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198; *Proffitt v. Florida, supra,* 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam, supra,* 28 Cal.4th at p. 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 119 (9th Cir. 1982). As litigation exposes the failure of these

factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967. 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[131]

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[131] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 9-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § .055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 ns. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-) (Law. Coop. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) 90); Wyo. Stat. § 6-2-103(d)(iii) (1988).

ny states have judicially instituted similareview. See *State v.* 1973) 283 So.2d 1, 10; *Alford v. State* (la. 1975) 307 So.2d eople v. Brownell (Ill. 1980) 404 N.E.2181, 197; *Brewer v.*

(continued...)

The present case exemplifies why intercase review should be mandatory in a capital case. This was a robbery gone bad, a single victim felony murder which in other counties in this state would have never been charged as a capital offense. The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United States Supreme Court in *Pulley* had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review

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[131](...continued)
State (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre, supra,* 572 P.2d at p. 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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XXII

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford v. Kentucky, supra,* 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. In 2005, Liberia and Mexico abolished the death penalty and in 2006, the Philippines also abolished it. Forty countries have abolished the death penalty for all crimes since 1990. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of August 2006), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty

International, August 2006.) The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency moving to abolish capital punishment worldwide. (See *Ring*, *supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2005, ninety-four per cent of all known executions took place in China, Iran, Saudi Arabia and the United States. (Amnesty International, *supra*, "Facts and Figures on the Death Penalty," August 2006.) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 1000 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty international, *supra, About the Death Penalty*.) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[132]

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[132]Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit: (continued...)

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins, supra,* 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 (dis. opn. of Brennan, J.).)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International,

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[132](...continued)

> The cases of Derrick Jamison and the other 118 individuals released from death row since 1973 demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of lethal error . . .

(*Ibid*; in February 2005, Derrick Jamison became the 119th wrongfully convicted person to be released from death row on the grounds of innocence.)

imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law*, Amnesty International website, *supra*.)

Additional support for this position is also evident by the adoption of international and regional treaties providing for the abolition of the death penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[133]

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

(continued...)

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

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

Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-781; see also 43 Cal.3d at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284;

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[133](...continued)
the International Covenant on Civil and Political Rights (1993) 6 Harv. Hum. Rts. J. 59.

McKenzie v. Daye (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray, supra,* 477 U.S. at p. 534 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

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XXIII

CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

California's death penalty scheme fails to require that the jury make a written statement of findings and reasons for its death verdict. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional (*People v. Fauber* (1992) 2 Cal.4th 792, 859), that holding should be reconsidered as the failure has deprived appellant of his Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and meaningful appellate review of his death sentence.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449, citing *In re Podesto* (1976) 15 Cal.3d 921, 937-938.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentencing choice. (*Ibid*; Pen. Code, § 1170, subd. (c).) Because the Eighth and Fourteenth Amendments afford capital defendants more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a non-capital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that the sentencing entity in a capital case is constitutionally required to identify for the record the aggravating and

mitigating circumstances found and rejected.

As discussed previously in this brief, the decisions in *Apprendi, supra*, 530 U.S. 466, *Ring, supra*, 536 U.S. 584, and *Blakely, supra*, 542 U.S. at pp. 304-305, require that a jury decide unanimously and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know which, if any, of the aggravating factors in this case were found by all of the jurors.

Moreover, the Court itself has stated that written findings are "essential to meaningful [appellate] review." (*People v. Martin, supra*, 42 Cal.3d at pp. 449-450.) Explicit findings in the penalty phase of a capital case are especially critical because of the magnitude of the penalty involved (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 305) and the need to address error on appellate review. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.) California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot adequately assess prejudice where, as in appellant's case, aggravating factors have been improperly considered.

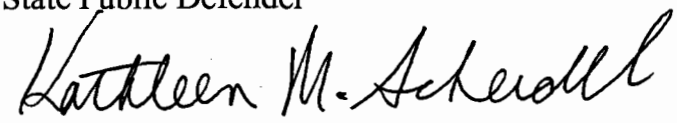
Accordingly, the failure to require written findings regarding the sentencing choice deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection of the law, and meaningful appellate review of his death sentence. This constitutional deficiency in California's death penalty law requires reversal of appellant' s death sentence and remand for a new penalty trial.

CONCLUSION

Capistrano requests the relief requested above be granted, including but not limited to the reversal of Capistrano's convictions and his judgment of death.

DATED: November 6, 2006

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(b)(2))

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant John Capistrano in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 106,289 words in length.

Kathleen M. Scheidel

KATHLEEN M. SCHEIDEL
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. John Leo Capistrano* No.: KA 034540
Calif. Supreme Ct. No. S067394

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on November 6, 2006, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Margaret Maxwell, D.A.G
300 South Spring St., 5th Floor
Los Angeles, CA 90013

Addie Lovelace
Death Penalty Coordinator
Los Angeles County Superior Court
210 West Temple, Room M-3
Los Ageles, CA 90012

Hand Delivered on November 8, 2006
John L. Capistrano
(Appellant)

Each said envelope was then, on November 6, 2006, sealed and deposited in the United States mail at San Francisco, 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 November 6, 2006, at San Francisco, California.

Glenice Fuller
DECLARANT