S082776

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	S082776
	)	
Plaintiff and Respondent	)	
	)	Los Angeles County
v.	)	Superior Court No.
	)	TA037369-01
ENNIS REED,	)	
	)	
Defendant and Appellant	)	
	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

HONORABLE JOHN J. CHEROSKE, JUDGE

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Attorney for Appellant
by appointment of the
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STATEMENT OF APPEALABILITY

This matter comes before the Court as the result of an automatic appeal by appellant Ennis Reed, following a judgment of death entered against him in the Los Angeles County Superior Court on September 29, 1999. (Pen. Code, § 1239(b); 20CT 5654-5661; 6RT 1336-1338.)

STATEMENT OF THE CASE

Appellant Ennis Reed was charged by amended information filed May 25, 1999, with two counts of murder (Pen. Code § 187, subd. (a)), a felony [counts one and three], and two counts of attempted murder (Pen. Code §§ 664/187, subd. (a)) [counts two and four]. (19CT 5307-5311.) The information alleged the special circumstance of multiple murder (§ 190.2, subd. (a)(3)). (19CT 5307-5311.) The information alleged as to counts one and two that appellant personally used an assault rifle (Pen. Code § 12022.5, subd. (b)(2)), and as to counts three and four that appellant personally used a handgun (§§ 12022.5(a) and 1203.06(a)(1)). (19CT 5307-5311.) The information also alleged a great bodily injury enhancement (§ 12022.7, subd. (a)) as to the attempted murder of Carlos Mendez, one strike prior for an attempted murder conviction (§§ 1170.12, subd. (a) and 667, subd. (a)(1)), and one prison prior (§ 667.5). (19CT 5307-5311.)

On February 11, 1999, defense counsel John Schmocker was appointed and trial was set for May 25, 1999. (19CT 5265-5266.) On May 10, 1999, Mr. Schmocker associated Clive Martin as co-counsel. (19CT 5306.)

Jury trial commenced on May 25, 1999. (19CT 5313-5314.) A defense motion to continue the trial to obtain the presence of a key defense witness, Joe Galindo, a military man deployed for training outside of the United States, was denied. (19CT 5313-5314; 1RT 75-76.)

On the third day of trial, appellant's *Wheeler/Batson*[1] motion was denied. (19CT 5318; 2RT 296-297.)

On June 4, 1999, appellant was convicted by a jury on both counts of murder and both counts of attempted murder. (19CT 5334-5335; 4RT 700-702.) The jury found the special circumstance of multiple murder to be true. (19CT 5332, 5334-5335.)

On June 7, 1999, trial on the penalty phase began. (19CT 5336-5337; 4RT 707.) On the same date, the jury began to deliberate regarding penalty. (19CT 5337; 4RT 785-786.) On June 8, 1999, the jury declared itself deadlocked and the court declared a mistrial. (19CT 5424; 4RT791-792.)

A second penalty phase trial began on July 27, 1999. (20CT 5667-5668; 4RT 814.) On August 4, 1999, that jury recommended that the death penalty be imposed. (20CT 5639, 5721; 6RT 1325-1327.)

On September 29, 1999, appellant's motion for new trial was heard and denied. (20CT 5643-5663; 6RT 1334-1336.)

On the same day, the court sentenced appellant to death. (20CT 5654-5661; 6RT 1336-1338.)

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People v. Wheeler (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69.

STATEMENT OF THE FACTS

INTRODUCTION

Judge Cheroske of the Los Angeles County Superior Court presided over appellant's trial. The judge was determined to move this trial along, and his haste led to an unconstitutional guilt verdict and an unreliable penalty verdict.

Trial counsel moved for a continuance in order to present the testimony of eyewitness Joe Martin Galindo, explaining that Galindo had been sent off to perform his duties as a National Guardsman just prior to the trial, and that the National Guard would not tell the defense investigator where Galindo was stationed. Judge Cheroske summarily denied the request, callously remarking, "Well, the request for a continuance is denied. Mr. Galindo being transferred to Yugoslavia – there's no way of knowing if he'll ever come back or when he might come back. So for that reason, the continuance is denied." (2RT 76.) As a result of this decision, Mr. Galindo did not testify at the guilt phase trial or the first penalty phase trial. He returned in time to testify at the retrial of the penalty phase.

During deliberations, the second penalty phase jury asked: "If the jury agrees that 1 of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding [sic] death?" (10CT 2887; 6 RT 1316.) The court answered: "I have met with the lawyers, and the answer as best we can give you is as follows: ¶ That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case. ¶ *The answer is yes.* (6RT 1319-1320 [emphasis added].)

GUILT PHASE

PROSECUTION CASE

THE MURDER OF AMARILIS VASQUEZ AND ATTEMPTED MURDER OF CARLOS MENDEZ

Carlos Mendez and Amarilis Vasquez were husband and wife, and they worked together at Kirk Plastics. (3RT 461.) On September 24, 1996, the couple worked the same shift, from 3:30 in the afternoon to midnight, and they took a lunch break together at around 8 p.m. (3RT 461.) It took about six minutes to drive to Tacos el Unico, a Mexican fast food restaurant on Long Beach Boulevard, in their new Toyota Tacoma pickup truck. (3RT 461-462.) They parked in a stall and got out of the truck and went up to the take-out window. (3RT 462.) They ordered their food to go and returned to the truck to drive back to work. (3RT 463.) Mendez got into the driver's seat and opened the passenger door for Amarilis, who got in. (3RT 463.) They talked for a moment, and then as Mendez was getting ready to start the truck, Amarilis said to Mendez in Spanish, "Look at that guy - he has a big pistol." (3RT 463-464.) Mendez looked up and saw a man with a pistol in his hand. (3RT 464-465.) The man was already approaching the truck from the corner when Mendez first saw him. (3RT 465-468; People's Exhibit 1; People's Exhibit 15.) He was walking "a little slow." (3RT 468-469.) The man was holding the gun in his right hand with his right index finger in the trigger guard, and the gun was pointed down at the ground. (3RT 469-469.) According to Mendez, the weapon was a pistol, not a rifle, and it was about 10 to 12 inches long. (3RT 469, 488-489.)

Mendez told his wife not to worry and started the truck. (3RT 468-470.) The man stood and pointed the pistol at them for three seconds, and then, without saying anything, he started shooting. (3RT 470-472, 492.) It

was dark out when the shooting took place. (3RT 489.) A light in the parking lot and some street lights illuminated the area. (3RT 489-490.) Mendez testified that the shooter was about 22 feet away from the truck when he started shooting, but he also testified that he did not know where the man was when he started shooting. (3RT 476-478; People's Exhibit 14.) From the time when the man walked from the corner up to the point where he started shooting, Mendez was no longer looking at him because Mendez was starting the truck. (3RT 471.) Mendez told him, "Don't shoot; don't shoot," and held his right hand up, palm out, facing the windshield. (3RT 471-472.) Mendez was not looking at the man when he started shooting; but he heard a "big noise" and the window broke and Mendez was shot in the right cheek. (3RT 472-473, 492.) The bullet broke his jaw and knocked out several teeth. (3RT 492.) Mendez testified that Amarilis was shot first, but she did not react or say anything. (3RT 473.) After being injured, Mendez was afraid and "close to death," so he tried to get out of the truck, and he did not see what had happened to his wife. (3RT 473.) As Mendez exited the truck the man shot him a second time, in the left leg. (3RT 473-474; 3RT 492-493.) Bleeding heavily, Mendez forgot about his wife and everything else, and tried to run for help. (3RT 474.) He moved about 15 feet away from the truck, screaming and yelling. (3RT 474.)

When Mendez regained his composure somewhat, he remembered Amarilis and went to the passenger side of the truck. (3RT 475.) He did not see where the shooter went, but the shooting had stopped. (3RT 475-476.) Only the passenger-side window was broken. (3RT 478.) Amarilis was bleeding from her head; Mendez thought she was dead, and he screamed for help. (3RT 476.) His state of mind immediately after witnessing his wife being shot and being shot himself was "out of this world, close to death," and

he felt dead and was crying. (3RT 493.)

Immediately after the shooting, Mendez described the shooter to police as a "male black with a black jacket." (3RT 499, 501.) Later that night Mendez described the shooter in two separate interviews as a black male about 5'8" to 5'11" in height, 20 to 25 years old, clean shaven, short black hair, wearing a black jacket and black pants" (3RT 505), and as a male black adult, 25 years old, wearing black pants and a black jacket, clean shaven, with short hair, 5'11", 150 to 180 pounds, with a medium complexion. (3RT 581-582.)

On January 30, 1997, Detective Paiz of the Compton Police Department showed Mendez some photographs at the police station. (3RT 479-480, 483; People's Exhibit 8.) Before showing him the photos, Detective Paiz gave Mendez an admonition in English. (3RT 479-480.) Mendez immediately picked out photo #6, appellant, the only bald individual in the photo-lineup. (3RT 480.) Mendez circled #6 on the photocopy of the lineup and then he signed it. (3RT 483.) On July 14, 1998, Mendez viewed a live lineup in the presence of Detective Paiz after signing some papers. (3RT 481-484.) Mendez quickly picked out #1, appellant. (3RT 481-482, 484.)

Mendez testified that prior to the shooting, he had never seen the man with the gun before. (3RT 479, 490.) The most distinctive thing about him was his bald head. (3RT 490.) Mendez testified that he remembered what the man was wearing at the time of the shooting, but when asked what that was, he said, "Uh, you know, I really – I remember really his face. You know. But the clothing that he was wearing, you know, I didn't put the attention right away, because at that time when you got scared, you know, you see their – or his face. You know. But he was wearing like a black . . . T-shirt." (3RT 490.) When asked if the shooter was wearing a black T-shirt, Mendez said: "Like a – a – I really – I can't remember pretty well, but I remember his – his face."

(3RT 490.) At trial, Mendez was impeached with his preliminary hearing testimony that the man was wearing a white shirt. (3RT 491.) When asked again what the man was wearing, Mendez explained that he had been "close to death," and only saw the man's face and the pistol; he "didn't have time to look at him." (3RT 497.) Mendez also testified that he saw the gunman for several seconds. (3RT 491-492.) Mendez testified that he did not "put attention with his clothes, because . .. I was afraid, so I saw his face and the gun." (3RT 492.)

At trial Mendez testified that the bald head and the man's eyes were what he remembered. (3RT 494-495.) The head was shaved bald, not naturally bald. (3RT 497.) On cross-examination Mendez testified he could not remember whether the shooter had a beard or a mustache, then he testified that the man did not have a beard or a mustache. (3RT 495.)

Mendez picked a photograph from the photographic lineup, and then he saw in the live lineup the man he had seen in the photographic lineup. (3RT 493-494.) Mendez testified that could identify appellant in court because appellant's face is the same face he saw *in the photograph.* (3RT 495.) Mendez is Hispanic; the shooter was African-American. (3RT 495.)

The Coroner's Testimony

Dr. Chinwah reviewed the autopsy report prepared originally by a Dr. Gill concerning the analysis or the examination of the body of Amarilis Vasquez, and examined the photographs marked People's 17-A and 17-B. (3RT 544.) The cause of death was a gunshot wound to the head. (3RT 544.) The entry wound was in the right temple area. (3RT 544-545.)

It appeared to Dr. Chinwah that the wounds depicted in the autopsy photographs could have been made by the glass from the shattered window. (3RT 545.) Dr. Chinwah could not estimate the distance of the

firearm from the person who was shot because there was an intervening object (the glass) between the muzzle of the gun and the skin. (3RT 545-546.) The fatal bullet was traveling from right to left, slightly front to back and downward. (3RT 546.)

The Police Investigation

At around 8:15 p.m. on September 24, 1996, Compton Police Officer Robert Childs arrived at 1521 South Long Beach Boulevard at the intersection of Glencoe Street. (3RT 449-451, 457.) The sun was down. (3RT 457.) Under an awning were two vacant handicapped parking stalls, and in a stall next to them there was a new, tan, 1996 Toyota pickup truck. (3RT 451.) A Latin man with blood on his face was outside the truck on the driver's side, and he appeared to be hysterical. (3RT 451-453, 458.) A woman was in the passenger seat, apparently shot twice through the head.[2] (3RT 451.) Her window was rolled up, and there was a hole in the middle of it. (3RT 451, 453.) The rest of the window was shattered. (3RT 451-452.)

The man had been shot in the right cheek and the right thigh, and he was excited because his wife had been shot. (3RT 452, 458-459.) Glass and shell casings were on the ground, to the right side and front of the truck. (3RT 452.) Officer Childs found a bullet on the ground behind the pickup truck and a bullet inside the pickup truck behind the bench seat. (3RT 452.) The parking lot was "reasonably well lit" because the parking lot itself had lights, and the streetlights were on. (3RT 452, 457.) Officer Childs pointed out the bullet casings and some bullet fragments to the homicide detectives who came along later. (3RT 452, 505.) As best he could, Officer Childs

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[2] The coroner explained that there was a single gunshot, with an entry wound and exit wound. (3RT 544-545.)

maintained the scene as he found it until the detectives arrived. (3RT 452.) The distance between the truck and the southwest corner of the parking lot was about 22 feet. (3RT 457-458.) The Zodiac Club is directly north of the taco stand. (3RT 458.) From the pickup truck to the north end of the parking lot where the Zodiac Club is, the distance is 50 to 60 feet - longer than the distance to the corner. (3RT 458.)

Shortly after 8 p.m., Compton Police officer James Lewis interviewed Carlos Mendez at Tacos el Unico. (3RT 498-499.) Mendez was "very, very upset, crying," he was bleeding, and the paramedics had not worked on him. (3RT 500.) This was the only time Officer Lewis talked to Mendez. (3RT 502.)

Homicide detective Michael Paiz arrived late that night to a scene cordoned off with yellow tape, and the shell casings were identified with evidence cards by Detective Dobbin while Detective Paiz was present. (3RT 503, 505-506.) That same night Detective Paiz interviewed Carlos Mendez at a hospital. (3RT 503.) Mendez had already received some treatment, but he was still upset and crying. (3RT 503.) Paiz did not know if Mendez had been notified of his wife's death. (3RT 504.) Paiz wrote on a notepad Mendez's description of the shooter, and later typed up the description in his report. (3RT 504.) Paiz read from his report: "I asked victim Mendez if he could describe the male black subject. Victim Mendez said he was about 5'8" to 5'11" in height, 20 to 25 years in age, clean shaven, short black hair, wearing a black jacket and black pants."[3] (3RT 505.)

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[3] On cross-examination, Detective Paiz testified that he interviewed Mendez the evening after the shooting, at the emergency room at Martin Luther King. At that time Mendez gave Detective Paiz a description of the gunman. (3RT 515.) Mendez told him that the gunman was between 5'8" to 5'11" in height. (3RT

Appellant is 5'6" tall and weighs 130 pounds. (1CT 2 [arrest warrant in confidential envelope].)

THE MURDER OF PAUL MORELAND AND ATTEMPTED MURDER OF ROY FRADUIE

The prosecution called Roy Fraduie to testify to the events on the night Paul Moreland was shot. On November 22, 1996, Roy Fradiue spent the evening with his friend Paul Moreland. (3RT 371-372.) Fraduie testified that they first got together at about 5 that afternoon and had "a few drinks" at his uncle's house at 2527 Pearl Street. (3RT 372-373.) Fraduie could not recall how many drinks they had, and he denied that he and Moreland had consumed any drugs. (3RT 373.) On cross-examination, however, Fraduie admitted to drinking Olde English 800 Malt liquor "half a day," on the day of the shooting. Moreover, he was impeached with his preliminary hearing testimony that he was drinking all day. (3RT 393-394, 398.) Fraduie drank until nearly 11 p.m., and felt the effects of the alcohol "somewhat." (3RT 398-399.) While at first Fraduie denied being under the influence of drugs that night, he later admitted he had "smoked a little weed." (3RT 399.)

Fraduie and Moreland left his uncle's house to walk to a store on Long Beach Boulevard. (3RT 373-374.) At around 11 or 11:30 p.m., they stopped at a house on Bennett to check on a plumbing job for Moreland. (3RT 374, 391.) As the two were walking down Glencoe, they passed a group of about ten men standing in a fenced yard in between two duplexes. (3RT 375-376, 389-390; People's Exhibit 6.) A man was standing by the driveway, holding a rifle, and he said something to Moreland as they passed.[4] (3RT 374-

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515.) Mendez did not give a weight as part of the description. (3RT 515.)

[4] Fraduie identified appellant in court as the man who spoke to them. (RT

375, 391.) Fraduie had never seen the man before that night, and he did not know him or any of the other men standing in front of the duplex. (3RT 375, 391.) Fraduie testified that the rifle looked like the rifle marked as People's Exhibit 5. (3RT 375.)

At first the man had the butt of the rifle on his shoulder, holding the trigger guard with his right hand, that part of the stock with the frame area or the back end of the barrel resting on his right shoulder, and pointing it backwards behind his head. (3RT 376-377.) As they walked by the man said something directly to Moreland, but Fraduie could not hear what he said. (3RT 377.) Moreland said, "That's all right," they kept walking, and the man fired the rifle up in the air after Fraduie and Moreland had walked by. (3RT 377.) They were already past the duplex when Fraduie heard, but did not see, the rifle fired. (3RT 377.) Asked how he knew the man shot up into the air, Fraduie testified: "Cause it didn't hit nothing. Because he shot up in the air, and then he brought it down and start shooting. Then he start shooting at us. We had start running." (3RT 377-378.) It was dark, however Fraduie testified that there was a street lamp down the street from the duplex, and another light standard on the other side of Glencoe that helped him to observe the man with the gun. (3RT 394-397; People's Exhibit 1.)

Moreland and Fraduie were initially on the same side of the street as the duplex. (3RT 378.) When the shooting began and they started running, Fraduie and Moreland were about one house down from the duplex. (3RT 379.) Fraduie testified that he did not see the man bring the gun down. "No, I didn't pay no attention. I wasn't trying to see when he was bringing it

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374-375.)

down. I was trying to get out of dodge." (3RT 378.) Fraduie ran on a diagonal to the corner, then down the right side of the sidewalk on Temple. (3RT 379-380.)

Fraduie ran across the street from the duplex and around the corner, down Temple to Greenleaf. (3RT 378.) As Fraduie turned the corner, a bullet hit the pole. (3RT 381.) He hopped the gate "where they grow flowers and stuff," and ran all the way down to Long Beach and Artesia where he saw another friend, who gave him a ride back to his uncle's house. (3RT 378.) Moreland ran the opposite direction down Temple. (3RT 378, 380.) After Fraduie started running, he never looked back at Moreland. (3RT 380-381.) Fraduie did not actually see Moreland get shot; he just saw a man holding a gun. (3RT 392.) After the shot in the air, there was one shot at Fraduie, and then Fraduie heard three or four more shots after about two or three minutes of silence. (3RT 381.) Fraduie did not see anyone else with a gun that night. (3RT 384.)

Fraduie did not return to the area of the shooting that night, and he never saw Moreland alive after that. (3RT 382.) He got a ride back to his uncle's house and his cousin went to tell Moreland's father that Moreland had been killed. (3RT 399.) Although Fraduie denied knowing Moreland had been killed, he admitted he "knew he probably got shot." (3RT 400.) He did not attend Moreland's funeral, nor did he call the police. (3RT 382, 399-400.) Fraduie did not have any contact with the police for several months after the shooting. (3RT 399-400.)

Eventually Detective Paiz interviewed Fraduie. (3RT 383-384, 391.) Fraduie was unable to describe the shooter. (3RT 391-392.) Fraduie testified that he "couldn't tell them right at the present moment, because my mind was like blurry." (3RT 392.) Despite his inability to describe the shooter

to police, at trial Fraduie testified that the person "had low cut hair, about a little shorter than mine," "like a quo vadis" and "like an east coast haircut, real low" - meaning "real short." (3RT 392-393.) At trial Fraduie described the person with the gun as a Black man, whose complexion was "in between colors, about my complexion, but a little – about a lighter shade – about a shade dark." (3RT 394.) The man with the gun did not have any facial hair, and was not wearing a hat. (3RT 397.) Fraduie could not remember the man's clothing. (3RT 397.)

Even later, five or six months after the killing, the Compton police took Fraduie to the Compton Police station, gave him an admonition, and showed him a photographic lineup. (3RT 384-386, 393; People's Exhibit 8.) Fraduie selected appellant's photograph, #6, as the shooter. (3RT 385-386; People's Exhibit 8.) Fraduie testified it took him about 10 minutes to select the photo of appellant. (3RT 386-387.) Fraduie denied any confusion, but admitted that he did not recognize appellant immediately. (3RT 387.) Fraduie testified that he studied the photographs "for a minute" and "for a little while." (3RT 387.) Fraduie said to the detective, "That's him" and pointed to photograph #6. (3RT 389, 393.) Appellant was the only person in the photographic display who had very short hair. Everyone else had longer hair. (3RT 393.)

About one year later, on July 14, 1998, Fraduie observed a live lineup at the jail with Detective Paiz and the prosecutor. (3RT 387, 401.) Appellant was in the lineup with two other men, and Fraduie identified him as the man who had the gun that night. (3RT 387-388; People's Exhibit 9.) This time it did not take "two seconds" to pick appellant out of the lineup. (3RT 388.) Fraduie testified that at the live lineup he saw the person he had seen in the photographic array. (3RT 393.) Fraduie indicated on a form that the

suspect was #1, and signed and dated it July 14, 1998. (3RT 401-402; People's Exhibit 11.)

Fraduie admitted that he was convicted of assault with a firearm in September of 1995, and on another occasion he was convicted of theft. (3RT 400-401.)

Ronald Darby lives near the intersection of Glencoe and Temple, east of the duplex, and he heard some shooting the night Moreland was killed while he was watching TV with his family. (3RT 522-523, 526-527.) He heard three or four shots; then there was an interval of five to ten seconds and then three or four more shots. (3RT 523.) Darby did not go out to see who was doing the shooting, but later he saw a commotion going on among the neighbors about someone laid out in the driveway. (3RT 523-524.) Darby talked to one of the police officers about what he saw, but he could not recall if he told the officer that there was a gap of time between the first set of shots and the second set of shots. (3RT 524.) When his recollection was refreshed with the police report indicating that the gap was two to three minutes, Darby remembered telling the officer about that interval of time, but he testified he thought the gap was five to ten seconds or more. (3RT 524-525.) Darby testified that he might have said two to three minutes back then, but it had been a long time. (3RT 525.) Darby believed the officer took notes when they were talking. (3RT 525.)

The Police Investigation

On November 22, 1996, at around 11 p.m., Compton Police Officer Betor was the first officer on the scene. (3RT 347-349.) Officer Betor saw a body lying in the driveway on the southwest corner of Glencoe and Temple Street. (3RT 349-350; People's Exhibits 1 through 3.) He observed dark spots, which appeared to be blood and bodily tissue. (3RT 351-352.)

Officer Betor found three expended 7.62 by 39 millimeter shell casings at the scene - an assault rifle type of round - and pointed them out to Detective Branscomb, who took the shell casings to the police station and booked them into evidence.[5] (3RT 353-355, 362, 404-408; People's Exhibits 4 and 5.)

There was a public light standard on Temple, south of the location and on the same side of the street; one on the east side of the street opposite from the house where the body was located; and one mid-block. (3RT 632-363, 407-408.) The block of Temple between Glencoe and Greenleaf is 60 to 75 yards long. (3RT 363.) When Officer Betor arrived, there was a motion-activated security light on in the driveway of the house, directly over the body, but Officer Betor did not notice the light going on and off while he was there. (3RT 363, 407.) Detective Branscomb testified that there was a full moon and the sky was clear. (3RT 408.) Detective Branscomb offered his opinion that the place where Moreland was lying was "well lit," but he did not know how well-lit the intersection was. (3RT 409.)

Approximately 24 hours later, in an unrelated matter, Officer Betor and other officers chased a man named Chico McLaine into a duplex just slightly northwest of the homicide scene on Glencoe Street where Moreland's body was found. (3RT 355-358; People's Exhibit 1; People's Exhibit 6.) Lieutenant Wright was the first to enter the building, and Officer Betor followed to see Lieutenant Wright detaining McLaine in the living room of the house. (3RT 356, 367.) Once inside, Officer Betor began checking the

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Exhibit 4-A has five shell casings in it, packaged by the Sheriff's department; however, Detective Branscomb's writing is not on that envelope, and Detective Branscomb could not identify the three casings he collected. (3RT 406-407.) The caliber of the shell casings he picked up on Temple Street is similar to the shell casings found in the envelope 4-A. (3RT 406-409.)

rooms for other people, and he found one other man inside.[6] (3RT 356.) The man was not arrested. (3RT 357.) After clearing the house of people, Officer Betor found in a closet in the hallway an S.K.S. type of rifle that shoots 7.62 by 39 millimeter bullets, and a 30-round magazine. (3RT 357-358, 364.) The magazine was loaded and locked into the frame of the gun. (3RT 358.) Officer Betor thought the gun was significant and seized it because the same type of casings was found at the Moreland homicide scene the night before. (3RT 358, 364-365.) However, at the time, Officer Betor did not have any idea whether the gun or the people in the house had anything to do with the homicide. (3RT 358.) Officer Betor booked the gun and the clip into evidence, and eventually the gun and casings were sent to the Sheriff's lab to determine if the casing matched. (3RT 358-360; People's Exhibit 5.) All of the serial numbers and model numbers had been removed from the rifle, and, when found, the magazine was seated in the magazine feed, and had twelve live rounds in it. (3RT 361, 368-369.) Officer Betor held the rifle, the clip and the ammunition for fingerprint analysis. (3RT 368.) Officer Betor did not make any attempt to determine who lived at the duplex. (3RT 370.)

Compton Police Officer Marvin Pollard was on duty on November 23, 1996. (3RT 412.) One of Officer Pollard's duties is to fill out field interview or "F.I." cards on individuals. (3RT 412-413.) F.I. cards are filled out for people contacted in the field but not processed or booked. (3RT

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[6] The police report Officer Betor prepared following the incident does not mention anything about anyone other than Chico McLaine being in the house. (3RT 365-366.) Lieutenant Wright brought that "mistake" to Officer Betor's attention during the last couple of months before trial. (3RT 367.) Officer Betor did not know if the second man was taken to the police station. (3RT 366.) Neither man was identified by the police as appellant.

413.) At about 10 or 10:30 that night, Officer Pollard contacted appellant on the street in the area of the 1300 block of East Glencoe, near the house at 1315 East Glencoe. (3RT 416, 418.) Officer Pollard did not enter a building there, and he could not remember who else was present. (3RT 417-418.) Officer Pollard filled out an F.I. card, on which he wrote that he had contacted a person named Ennis Reed, and that a man named McLaine was with appellant. (3RT 413-416; People's Exhibit 12.) Officer Pollard identified appellant by a tattoo inscription and, more formally, by his driver's license, indicated by number on the F.I. card. (3RT 414.) Officer Pollard filled the card out based on the information that appellant gave him or the California Identification card that he had. (3RT 414-415.) The weight noted on the card for appellant was 122 pounds. (3RT 419.) Appellant had a tattoo on his left forearm, so Officer Pollard wrote a description of it on the F.I. card. (3RT 414.) The tattoo on appellant's left forearm matches the description on the F.I. card. (3RT 414-415.) Appellant signed the back of the F.I. card. (3RT 415.) Officer Pollard could not recall whether he got the height/weight description of appellant from appellant's identification card or by observing appellant, but it was probably from the California I.D. card. (3RT 416.)

Detective Paiz was never at the scene on the night of the Moreland murder, but he later assumed responsibility for investigating the case. (3RT 508.) Detective Paiz found Fraduie by walking around the streets, asking people who were in the area. First he got a nickname, and then he asked people who that person was; eventually he got an address for him. (3RT 508.) Detective Paiz contacted Fraduie the same day he got his address. (3RT 508-509.) Detective Paiz's first contact with Fraduie was at Fraduie's grandmother's house in Bellflower, but Detective Paiz could not remember the street or the date - or even the month of that first meeting. (3RT 514.)

Detective Paiz did not prepare a report regarding that contact. (3RT 514-515.) Detective Paiz did not take a photographic six-pack with him to the house, but told Fraduie to come to the police station to view one. (3RT 514.)

On April 18, 1997, Fraduie came to the station on his own to view the photographic lineup. (3RT 509, 511, 513.) Fraduie read the admonition, and then he viewed the photographs. (3RT 510.) According to Paiz, it took Fraduie about ten seconds to select appellant's photograph from the lineup, not ten minutes, as Fraduie testified. (3RT 510.) After Fraduie made his selection, Fraduie signed a photocopy and circled his selection on it. (3RT 510-511.)

The Coroner's Testimony

The cause of Moreland's death was multiple gunshot wounds. (3RT 537-538.) There were nine gunshot wounds to various parts of his body. (3RT 539-542.) Several of the wounds were fatal or potentially fatal. (3RT 542.) Dr. Chinwah could not determine the order in which the wounds were inflicted. (3RT 547.) Bullet fragments were recovered from his chest area, abdomen and the left forearm. (3RT 540.)

Moreland's autopsy revealed that he had ingested alcohol, cocaine and phencyclidine (PCP) in the hours preceding his death (3RT 546-549), contrary to Fraduie's testimony that they did not ingest any drugs.

The Ballistics Evidence

A ballistics expert examined the rifle and clip found in the neighborhood of the Moreland shooting. (3RT 437-439.) The rifle's serial number had been ground off, so he had to restore the area around the number with chemicals in order to see the number that had been printed on it before it was "attacked." (3RT 439.) The restored serial number was 03882. (3RT 439-440.)

The expert test-fired the weapon, and it functioned as designed. (3RT 440.) It was a semi-automatic weapon with a detachable magazine that holds 30 rounds. (3RT 440.) The S.K.S. was designed to have a fixed magazine, and once the detachable magazine is added, the weapon is then considered an assault weapon. (3RT 440.)

Three expended shell casings were compared to test-fired shell-casings. (3RT 440.) In the expert's opinion, two of the three shell casings collected by the Compton Police Department from the Moreland homicide scene were positively identified as having been fired from the rifle found in the duplex. (3RT 440-441.) The other cartridge casing had marks that could be due to being cycled through or just run through the action of this particular rifle, meaning a round taken from the magazine can be manually worked, with the bolt on the top pulled to the rear, inserted into the chamber, and then manually extracted. (3RT 441.) Those marks were generated on one of the expended cartridge cases. (3RT 441.)

There were two Compton Police Department file numbers associated with the shell casings: 9645604 and 9645754. (3RT 441.) Much later, the expert received bullet fragments from the Coroner's department listed under the same two numbers. (3RT 441.) He performed a comparison between the bullet fragments received from the coroner's office and those he obtained from the Police Department and formed an opinion about whether or not they were from the same gun. (3RT 442.) The expert testified, that "[b]asically it was an inconclusive opinion" because they had the same general characteristics, meaning the expended bullets had four lands and grooves with a right hand twist, the same measurements and demonstrated by this particular rifle; however, they did not have enough individual characteristics to positively identify them to the rifle or to exclude the rifle. (3RT 442.) Only about half

of the bullet was left. (3RT 442.) The expert could not say that the casing that was passed through the weapon was fired because the marks he was using for the other two were not generated with enough individual characteristics to identify it positively. (3RT 442.) The remaining casing was an expended cartridge casing, meaning it had been fired. (3RT 443.)

Detective Paiz testified that, as a general rule, most semi-automatic firearms expel the expended cartridges up towards the right and slightly back. (3RT 532.) At the prosecutor's request, during trial Detective Paiz went out to the scene of the Moreland murder and inspected the sign post and no parking sign on the west side of Temple, south of Glencoe. (3RT 532-533; People's Exhibit 3.) Detective Paiz saw a bullet hole in the no parking sign. (3RT 532-533.) Detective Paiz offered his opinion that "based on the metal of the signpost" the bullet was moving in a southwesterly direction. (3RT 533-534; People's Exhibits 18-A and 18-B.) Detective Paiz testified that he could tell the bullet hole in the sign was not recent because it was rusty. (3RT 534.) On cross-examination, Detective Paiz admitted that the prosecutor located the bullet hole the same day the prosecutor asked him to look at the sign and directed Detective Paiz to take a photograph of it. (3RT 534.)

Fingerprint Evidence

A forensic identification specialist examined the rifle for fingerprints. (3RT 444-445, 447-448.) No prints of any kind were obtained off of the weapon or the magazine. (3RT 445-446.) Usable fingerprints are found on a weapon in only 6 to 8 percent of cases. (3RT 447.) If there are no latent prints on a firearm, then he can offer no opinion as to who handled that firearm. (3RT 448.)

THE JOINT INVESTIGATION OF THE VASQUEZ AND MORELAND MURDERS

Detective Paiz testified that about four months after the Vasquez murder, in early January of 1997, he was given appellant's name as a possible suspect. (3RT 506.) Detective Paiz obtained a photograph of appellant and put it in a photographic lineup and showed it to Mendez. (3RT 506-507.) Before showing the lineup to Mendez, Paiz showed Mendez the admonition and read it with him. (3RT 507.) Mendez made the identification within seconds, selecting photograph #6. (3RT 507.) Mendez circled #6 on a photocopy of the lineup and signed it. (3RT 507.)

About one year after the Vasquez murder, Paiz arranged for the sheriffs to conduct a live lineup. (3RT 511.) Paiz transported both Fraduie and Mendez to the live lineup. (3RT 511.) When it came time for the sheriffs to bring out the six people in the lineup, Fraduie and Mendez were separated. (3RT 511-512.) Paiz testified that "they were separated from everyone in front at both ends of the chairs." (3RT 512.) The sheriff's department handled the entire procedure and gave Detective Paiz the forms when everything was finished. (3RT 512.)

Months later, Detective Paiz retrieved the rifle and clip, Exhibits 5-A and 5-B, the live rounds of ammunition and the expended shell casings, and the bullet fragments from the Coroner's office, and caused all of those things to be sent to the sheriff's lab. (3RT 512.) The Compton Police Department file numbers for the two cases are: 9645605 for Moreland and 9637686 for Vasquez. (3RT 512-513.)

Detective Paiz arrested appellant on April 25, 1997. (3RT 513.)

DEFENSE CASE

Foster Slaughter works for the City of Long Beach. (3RT 564-565.) In 1996, Slaughter was a member of the Zodiac Motorcycle club on Long Beach Boulevard, and he is familiar with Tacos el Unico, which is off of Long Beach Boulevard just south of the Zodiac Club. (3RT 565-566; People's Exhibit 14.) In the latter part of 1996, Slaughter was near the Zodiac Club when a shooting occurred. (3RT 566-568.) Slaughter was sitting on his bike in the company of other club members, and he heard gunshots coming from behind them. (3RT 568-570; People's Exhibit 14-A.) When he heard the gunshots he jumped off of his bike and rushed his female companions towards the door to get them out of harm's way. (3RT 569.) Slaughter saw Mendez jumping up and down outside of the truck near the gate of the taco stand, and the shooter, who was standing "way in back of the pickup truck," on the other side of the truck in back of the bed, shooting at Mendez towards Long Beach Boulevard. (3RT 569-572.) Slaughter heard three or four shots, got the women closer to the Zodiac building, and then looked over and saw the shooter firing at Mendez. (3RT 579-580.)

Mendez ran to the phone booth to dial 911, but the phone was not working, and he yelled at the bikers to call 911 for him. (3RT 571.) Slaughter was about 50 feet away from the shooter - far enough away that he could not see his face. (3RT 572.) About 10 to 15 seconds passed between the time Slaughter first heard the gunshots and the time he saw the man with the gun behind the pickup truck. (3RT 572-573.) The man shot three or four times at Mendez, who was jumping up and down, and then – when he could not hit Mendez – he ran over to the passenger side of the truck and fired into the truck twice, and then it seemed as though the gun jammed. (3RT 573-575, 578-580.) The shooter reached down and tried to cock the gun, and then he

took off around the corner and ran down the street that runs just in back of the taco stand. (3RT 573-576, 580; People's Exhibit 14.) After the man ran around the corner the police arrived. Slaughter told the officer where the shooter ran, but the police could not find him. (3RT 573.)

At trial Slaughter described the shooter as a black male with long hair, wearing a black beanie or cap, "a big long coat" and blue jeans. (3RT 573.) The hat was not flat and did not have a brim or any lettering on it. (3RT 578.) It was not a baseball cap. (3RT 578.) The hat came down to the man's eyebrows and covered part of his ears, and the man's hair stuck out under the hat. (3RT 578.) The shooter had a "natural" or a Jheri curl, not a close haircut or a shaved head. (3RT 577, 580.) The man had no facial hair, just sideburns that were "normal." (3RT 580.) The shooter was 5'9" to 6 feet tall and weighed 190 to 200 pounds. (3RT 573-574.) It was difficult to estimate the shooter's weight because he was wearing a bulky black coat - but Slaughter estimated he looked about 190 to 200 pounds. (3RT 574, 578.) The jacket was big and puffy, and came down to just above the man's knees. (3RT 576.) Nothing was written on the jacket and it did not have a hood. (3RT 577.) Slaughter could not see the man's shirt or his upper body. (3RT 578-579.) The coat appeared to be zipped up. (3RT 579.) Slaughter is 6'3," and at the time of the incident weighed 192 pounds. (3RT 573.) Slaughter only saw the shooter's face from the side. (3RT 574.)

Appellant was asked to stand up in court, and Slaughter testified that appellant looked different from the man who was doing the shooting, as the shooter was "thicker than him in arm-wise," or the shooter looked like he had been lifting weights, and was solid in the arms. (3RT 574.)

What was *not* included in the defense case was the testimony of Joe Martin Galindo, whom the defense could not call as a witness because

Galindo was out of the country performing his military duties, and because Judge Cheroske refused to continue the trial to accommodate the defense. Mr. Galindo described the shooter as "stocky" (6RT 1129-1130, 1132-1137) and at least as tall as the 6'1" tall Galindo, or taller (6RT 1131-1132), and insisted that the 5'6", 130-pound bald appellant was not the shooter at Tacos el Unico. (6RT 1130-1131.) Galindo's testimony largely corroborated Slaughter's testimony and description of a man who stood 6'1" and weighed 190 pounds (3RT 588-589), and the earliest descriptions given by Mendez of a black man who was about 5'8" to 5'11" in height with short black hair (3RT 505), weighing 150 to 180 pounds.[7] (3RT 581-582.)

REBUTTAL

Compton Police Officer Kenneth Roller interviewed Foster Slaughter on September 24, 1996, at Tacos el Unico. (3RT 580-584.) Slaughter described the shooter as a "male black adult, wearing a three-quarters length black jacket and dark jean pants" - that was the entire description. (3RT 584-586.) Officer Roller testified that if the witness had given more details, he would have written them down. (3RT 586.) Officer Roller also testified that at the time he wrote the report, the suspect was still being sought. (3RT 587.) It would have been important to get as much detail as possible about the suspect. (3RT 587.) Slaughter told Officer Roller that he did not see the shooter's face. (3RT 588.) Officer Roller did not show the report to Slaughter after he prepared it. (3RT 588.)

Officer Roller denied that Slaughter told him the shooter weighed 190 pounds. (3RT 588.) When shown a follow-up report with a suspect description, Officer Roller could not remember where he got the

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[7]See Arguments I and II, *infra*.

description, but it said: "male black with black hair, unknown color eyes, six-foot-one, 190 pounds, age 30, close-cut hairstyle, medium complexion." (3RT 588-589.)

PENALTY PHASE

INTRODUCTION

The first penalty phase trial ended in a jury deadlocked 7 to 5 in favor of life. (2CT 595; 4RT 792, 795-796.) With minor variations, the evidence presented at the penalty phase retrial was essentially identical to that presented to the original jury, except for the addition of Mr. Galindo's testimony.

PROSECUTION CASE

The Vasquez Murder

Carlos Mendez testified that he had lived with Amarilis Vasquez since 1993, but they married five months before she was killed. (5RT 1003-1004.) They worked swing shift together at a credit card manufacturing company. (5RT 1004.)

Regarding the shooting, Mendez testified for the first time at the penalty phase retrial that he told the man not to shoot, offering him the truck or money; but then Mendez immediately contradicted himself, testifying that the window on his wife's side of the car was up and he did not say anything to the man, but just gestured at him. (5RT 1013-1014.) Mendez did not hear the man say anything, and other than raising the gun, the man did not make any gestures. (5RT 1014.) Then the man started firing. (5RT 1015.)

On cross-examination Mendez testified that the shooting was traumatic, he was under a lot of stress that night, he felt "out of this world," and everything happened very fast. (5RT 1024.) The first thing he saw was the gun; he saw the shooter's face and the pistol. (5RT 1024.) Mendez also

testified that he did not really have time to see what the shooter was wearing, never looked to see what the shooter was wearing, and saw only the face and the pistol. (5RT 1024-1026.) Mendez felt he was close to death, and did not have time to see, explaining, "You just try to ... go away from that place." (5RT 1025.) He could not describe the shooter's clothes. (5RT 1025.) At first Mendez denied describing the shooter as 5 feet 11 inches and 150 to 180 pounds, and then admitted perhaps he did. (5RT 1026-1027.) Mendez complained that at the time of the shooting the "police asking too many questions and too many people." (5RT 1027.) Mendez testified that the shooter was a "skinny, skinny guy," a bald guy; Mendez claimed he remembered the man's face exactly and the gun. (5RT 1025, 1027.)

Mendez has remarried, looking for someone who "can fill [his] soul," but he "feels cold;" he tries to buy things; he thought getting married would help but it did not help as much as he had hoped. (5RT 1028-1029.) Mendez testified that nothing made him happy anymore, not even his new wife, because he lost his wife, the one he loved the most, and nobody can take her place. (5RT 1019.)

The Moreland Murder

Roy Fraduie testified that on November 22, 1996, he spent the afternoon and evening with his friend Paul Moreland. (5RT 1044.) Contrary to his guilt phase testimony, Fraduie testified that they got together at around noon.[8] (5RT 1044, 1055.) They hung out at Fradiue's uncle's house on Pearl Street. (5RT 1044.) Fraduie admitted that he and Moreland had spent the day drinking quite a few 40-ounce cans of Olde English 800 malt liquor and

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[8] During guilt phase he testified that they first got together at about 5 that afternoon. (3RT 372-373.)

smoking marijuana, but he denied consuming any other drugs, and denied knowing whether Moreland also smoked marijuana that night. (5RT 1046, 1055-1056, 1064.) Fraduie denied using PCP that day, and testified that if Moreland smoked PCP that day, he did not see him do it. (5RT 1055-1056.)

At about 11 p.m., they decided to go buy more beer. (5RT 1056.) Fraduie and Moreland left his uncle's house to walk back to the store on Long Beach Boulevard. (5RT 1045.) They walked up Glencoe, passing close to 15 men who were in the front yard of a duplex.[9] (5RT 1045, 1047-1048, 1056-1057.) One person in the crowd had a high-powered rifle up on his right shoulder. (5RT 1048-1049.)

Fraduie identified appellant in court as the man standing by the fence with the gun, although Fraduie admitted he did not pay much attention to him. (5RT 1049, 1058.) Fraduie had never seen the man with the gun before, and could not describe what the man was wearing. (5RT 1057, 1063.) As Fraduie and Moreland were walking down Glencoe, the man said something to Moreland, and Moreland said, "Nah, that's all right," or something similar. (5RT 1049.) That was all they said. (5RT 1049-1050.) When the shooter spoke to Moreland, they did not stop, and there was no argument. (5RT 1057.) They heard a gunshot up in the air and Fraduie told Moreland, "Come on, man, let's start walking fast." (5RT 1050.) They started to run, then Fraduie looked back and the shooting started. (5RT 1050.) Moreland was limping and slumping over a little bit, and then he and Fraduie ran in opposite directions. (5RT 1050.) Contrary to his guilt phase testimony, Fraduie testified that he looked back and "seen him come down bringing the

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[9] At the guilt trial Fraduie testified he could not say how many "dudes" were out there. (3RT 375.)

gun down" and that was when he told Moreland to start running.[10] (5RT 1051.)

Fraduie testified that he and Moreland ran in opposite directions down Temple, and the last time Fraduie saw Moreland, Moreland was running north on Temple. (5RT 1052.) Moreland had slumped down as though one of the bullets had hit him.[11] (5RT 1052.) One of the bullets hit a pole near Fraduie and Fraduie kept running and did not look back. (5RT 1052-1053.) Fraduie ran around the corner, down Temple to Greenleaf. (5RT 1053.) He hopped the gate "where they grow flowers" and ran to Artesia where he saw his other friend, who gave him a ride back to his cousin's house. (5RT 1053, 1062.)

Fraduie testified that he heard one shot in the air, and then four more shots, and that there was a gap of five or ten seconds between the first group of shots and the second group of shots.[12] (5RT 1053.) They continued walking down the street, and heard a gunshot and then ran.[13] (5RT 1058.) Fraduie described the route they took, and how at the corner Fraduie ran south while Moreland ran north. (5RT 1058-1059.) After Fraduie got to the nursery

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10

At the guilt phase Fraduie testified that he did not see appellant bring the gun down. "No, I didn't pay no attention. I wasn't trying to see when he was bringing it down. I was trying to get out of dodge." (3RT 378.)

11

Fraduie admitted that this was the first time he had ever told anybody about Moreland slumping. (5RT 1060.)

12

At the guilt phase Fraduie testified that the three or four additional shots occurred after about two or three minutes of silence. (5RT 381.)

13

Later Fraduie changed his testimony: "Naw, we started jogging. We didn't run." (5RT 1060.)

he heard three or four more gunshots. (5RT 1059-1060; RT 1062.) The second gunshot hit the pole as Fraduie was turning the corner. (5RT 1061-1062.)

The rifle in court was similar to the rifle he saw that night. (5RT 1063.) He did not see a handgun. (5RT 1063.) When asked to describe the rifle, Fraduie testified "What I'm gon' do? Stand there and look at the gun and try to get all the details about it? Shit, you crazy. I don't know." (5RT 1063-1064.) The rifle did not have a bayonet or a strap on it. (5RT 1064.)

Fraduie admitted that he had "started to" drink before his testimony. (5RT 1063.)

Ronald Darby testified that he heard gunfire but did not see the shooting. (5RT 1037-1039.) Darby testified that he heard four gunshots, then there was a pause for a minute or two.[14] (5RT 1037, 1040.) Contrary to his guilt phase testimony, Darby stated he looked outside after the shooting and saw just the body in the driveway. (5RT 1041.) Darby did not go outside and did not call the police. (5RT 1040-1041.)

Regarding the bullet hole in the signpost, Detective Piaz offered his opinion that "based on the metal of the signpost" the bullet was moving in a southern direction.[15] (5RT 1067.) Detective Paiz testified he could tell the bullet hole in the sign was not recent because it was rusty, but on cross-examination admitted he had no way of telling how old the bullet hole was.

14

At the guilt phase Darby testified that there was a gap of five to ten seconds. (3RT 524-525.)

15

At the guilt phase Detective Paiz testified that the bullet was moving in a "southwesterly" direction. (3RT 533-534; People's Exhibits 18-A and 18-B.)

(5RT 1067-1068.) The signpost is on the southwest corner of the street, between the driveway area of that house and the corner. (5RT 1068-1069.) Detective Paiz did not try to line up the Glencoe duplex area with the signpost area. (5RT 1069.)

Floyd Moreland was Paul Moreland's father. (5RT 1070.) On November 22, he went to the crime scene on Temple to identify Paul's body and saw Paul in a sitting position with his hat on, and a bullet hole in him. (5RT 1070.) Paul was about 38 years old when he was killed. (5RT 1070-1071.) Floyd and Paul worked with his son every day as plumbers, and Paul was very helpful. (5RT 1071.) They were very close, and Floyd missed him terribly. (5RT 1071.) Paul had two brothers and two sisters and a daughter, who was 16 or 17 at the time of Paul's death. (5RT 1071-1072.) She had lived with Paul when she was younger, but at the time of Paul's death the daughter lived in Detroit with her mother. (5RT 1072.)

Floyd Moreland testified that the photograph designated Exhibit 2 did not show how he found his son when he identified him for the police; rather, Paul was sitting up, slouched against a wall, and not lying down as the photograph shows. (5RT 1072-1073.) Moreland was in the same location, and there was no obvious blood when Fraduie saw him. (5RT 1073.) The coroner's examiner was not there yet, nor were the police. (5RT 1073.)

A woman came to Floyd's house at around 6 or 7 p.m. and told Floyd that Paul was dead. (5RT 1074.) Floyd had seen Paul earlier in the day because they had worked together on a job. (5RT 1074.)

Office Betor's testimony was more dramatic at the penalty retrial than it had been at the guilt trial. He testified that he went to the scene on the night of the shooting and saw Moreland lying in the driveway propped up against the garage door, half in a sitting position and lying position, with the

door supporting his weight. (5RT 1075-1076.) The body was on its back and the head was slightly elevated, and the body may have been moved by the paramedics. (5RT 1078-1079.) One ankle was completely snapped and turned under the body, and his feet were crossed. (5RT 1080.) The left leg bent at the ankle. (5RT 1080.)

Expended 7.62 by 39 millimeter shell casings were found at the scene. (5RT 1077.) In Officer Betor's opinion, there are only three types of rifles that are allowed in this country that can fire a 7.62 by 39 millimeter caliber bullet: the AK-47, the S.K.S. rifle, and the Ruger Mini-30. (5RT 1077-1078.)

Officer Betor repeated the story he told at the guilt phase about chasing Chico McLaine into a house in the same general area 24 hours after the Moreland murder, but this time he stated he was the first officer inside.[16] (5RT 1080-1081, 1083; People's Exhibit 6.) Once inside, Officer Betor began checking the rooms for anybody else, and he found one other person inside besides the suspect they were chasing – a male. (5RT 1081.) This person was never linked to appellant in any way. In a closet Office Betor found a shoulder-fired, wooden stock, gas operated semiautomatic Norinco Brand S.K.S. rifle, with a folding bayonet, which he booked for safekeeping. (5RT 1082-1083.) He did not have a suspect in mind for the Moreland murder at that point, but this rifle could have been the same caliber as the rifle used in that killing. (5RT 1082.) Exhibit 5-A appears to be the same rifle he found in the duplex that night, and it would be the same caliber as the shell casings at the Moreland murder scene. (5RT 1082.)

16

At the guilt phase he testified that Lieutenant Wright was the first in. (3RT 356.)

Jamaal Hall was appellant's state parole agent at the Compton Parole Unit, and an employee of the California Department of Corrections. (5RT 1097.) On September 15, 1992, appellant was convicted of attempted murder on an aiding and abetting theory; in other words, he was not the actual shooter in a drive-by shooting. (5RT 1116; People's Exhibit 21.) Appellant went into custody on September 15, 1992 and stayed in prison until August 3, 1996, when he was paroled. (5RT 1097-1102; People's Exhibits 19 and 20.) Appellant was required to report to the parole office in Compton. (5RT 1098.) Appellant reported to the parole office on August 5, 1996, but Hall has never met appellant. (5RT 1098-1099.)

Forensic pathologist James Ribe testified that the cause of Vasquez's death was a fatal perforating gunshot wound of the head, entering the right part of the right ear, and exiting through the left rear part of the head. (5RT 1103-1106; Exhibits 17-A and 17-B.) Dr. Ribe did not participate in this autopsy and did not see the body. (5RT 1106.)

Moreland died of multiple gunshot wounds. (5RT 1108.) The numbers assigned to the nine bullet wounds were arbitrary. (5RT 1109.) Dr. Ribe read the descriptions of the wounds from the autopsy report. (5RT 1109-1111.)

Moreland's blood tested positive for phencyclidine and cocaine, and his blood alcohol was 0.07 percent. (5RT 1112.) If this was close to the level of his intoxication at the time of his death, Moreland would have had some impairment of judgment and reaction time and coordination. (5RT 1112-1113.) The alcohol and phencyclidine and cocaine had separately intoxicating effects. (5RT 1113.) Phencyclidine causes stimulation of the sympathetic nervous system and can cause people to be excited. (5RT 1113.) It can affect their judgment and behavior in various ways. (5RT 1113.) PCP

can stay in a person's system for hours or days. (5RT 1114.) Cocaine disappears much faster than that – it will normally be completely gone from the system within four hours of last use. (5RT 1114.) Moreland had to have consumed cocaine less than four hours before his death. (5RT 1115.)

DEFENSE

Joe Martin Galindo returned from his military deployment in time to testify for the defense at the penalty retrial. He told the jury that he had just left Tacos el Unico and returned to the front porch at his girlfriend's house, four to five houses down the street, when he heard gunshots and saw a muzzle flash. (6RT 1127-1129.) Galindo looked back at the taco stand and saw a black man with his right arm up. (6RT 1128-1129.) Galindo grabbed his girlfriend and took her into the house, then came back out on the porch in time to see the shooter running towards him.[17] (6RT 1128-1129.) The shooter ran past Galindo at a distance of about 53 feet, and Galindo saw that the man was "stocky" and was wearing dark colored pants, a checkered shirt worn outside his belt, and a black baseball cap.[18] (6RT 1129-1130, 1132-1137.) Galindo is 6'1" tall and weighs 204 pounds. (6RT 1131.) Galindo observed appellant in court and stated that appellant is smaller than the man he saw; Galindo declared appellant was not the shooter at Tacos el Unico. (6RT 1130-1131.) The shooter was at least as tall as Galindo, or taller. (6RT 1132.) The

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Galindo disavowed a statement appearing in Officer Childs' police report to the effect that Galindo saw two men running from the parking lot. (6RT 1133-1134.)

18

Galindo could not recall telling a police officer that the shooter was wearing a long, black jacket, although a police report indicated Galindo had included such a jacket in his description. (6RT 1134.)

man with the gun was alone. (6RT 1132-1134.) After running past Galindo, the man ran around the side of the house on the Northwest corner of Glencoe and Temple. (6RT 1135-1136.) Galindo never saw the man's face. (6RT 1136.)

Foster Slaughter's testimony from the guilt phase was read into the record. (6RT 1137.)

Dolores Sheen is the executive director and principal at Sheenway School and Culture Center at 10101 South Broadway, Los Angeles - a private, independent, nonprofit college preparatory school, grades preschool through 12th grade. (6RT 1160, 1169.) Ms. Sheen had not seen appellant for 15 years; he attended her school for about a year. (6RT 1160.)

Appellant enrolled on May 19, 1986, as a seventh-grader after appellant's mother contacted the school. (6RT 1161.) Appellant was given a series of questions to answer. (6RT 1165; Defense Exhibit D.) Appellant's response to the question, "Why is education important?" was "You to it have." When asked to respond orally, he said, "So I can live on my own." (6RT 1165.) The second question was: "Why am I important." He wrote: "I important." (6RT 1165-1166.) The third question was: "Why is my mother important?" He wrote: "Yes, because is my mother." (6RT 1166.) When asked to respond orally, he said: "She helps me in whatever I need help in." (6RT 1166.) The last question was: "The following are things I want to accomplish in school." He wrote: "To be better." He also said, "To learn," but he could not write that. "To learn, and to get a job in computer, in sports." (6RT 1166.)

Appellant was not performing to his grade level, but Ms. Sheen felt he wanted to, so she discussed appellant's performance with his mother. (6RT 1167.) Appellant started manifesting a behavior problem due to his

difficulty in accomplishing work at his grade level. (6RT 1167.) The school required that the parents participate, but appellant's mother was unresponsive. She was placed on probation because it was "very difficult . . . to . . . establish some type of rapport with her as to the importance of Ennis' education." (6RT 1167.) His mother would call but would not attend the meetings, and appellant had no visible support system. (6RT 1167-1168.) Appellant's mother would occasionally come to the school, but not as requested, and she refused to participate in parenting classes. (6RT 1168.) Appellant stayed at the school for one year, performing scholastically below the 7th grade level. (6RT 1168-1169.) Because he performed at a 3rd or 4th grade level, he was not promoted to the 8th grade, and the school requested that he attend summer school. (6RT 1169-1170; Defense Exhibit E.) He failed to attend, and dropped out of school altogether when he was 13 or 14. (6RT 1224-1225.)

Appellant was assigned homework every night, but he did not complete his assignments. (6RT 1170-1171.) He would sometimes come to school early and try to get his homework done with help from the staff, but he was frequently absent and tardy. (6RT 1171.)

Initially appellant was really interested in school, and he was really eager, but he progressively became disinterested and failed his classes. (6RT 1171.) He would give his teachers a hard time, and then he was suspended, and ultimately expelled to home study, which required parental participation. He did not pass. (6RT 1171-1172.)

Appellant demonstrated behavior disorders. (6RT 1172.) In the second half of the school year appellant was offensive to the teachers, attempted to fight, and was disrespectful to the girls, and "really disrespectful to himself." (6RT 1172.) Appellant was not getting support at home to see him through his rough times. (6RT 1172.) Appellant's mother did not even

complete the enrollment forms, did not complete the form for appellant's records from previous schools, and did not contribute to the regular screening. (6RT 1173.) Parents were required to pay the tuition and do volunteer work, but appellant's mother did not pay all of the tuition. (6RT 1174.) The students were required to wear uniforms, but appellant was constantly out of uniform, which was disruptive. (6RT 1174-1175.) Appellant's mother did not provide him with the proper uniform and clothing, or PE equipment. (6RT 1175.)

Appellant's great-aunt, Dolores Churchill, testified that she has known appellant all of his life. (6RT 1216-1217.) He was born on October 30, 1972. (6RT 1216-1217.) Appellant's mother, Beatrice, has lived with Ms. Churchill in Fullerton for the past seven years, and appellant has also stayed with her from time to time but never actually lived there. (6RT 1214-1215.) Ms. Churchill works as a part-time instructor in human services and childhood development at Santa Ana Community College in Orange County. (6RT 1215-1216.) She is retired from her career as a social work administrator in Los Angeles and Orange counties. (6RT 1216.)

Appellant's father's name was Ennis Reed. (6RT 1217.) Appellant was the youngest of four children, but his siblings were by another father, James Harris, who died. (6RT 1217.) Appellant's parents had a strained relationship from the very beginning, and they did not remain married for long. (6RT 1218.) Appellant's father did not work, and he was unfaithful to Beatrice. (6RT 1219-1220.) They separated before appellant was two years old because the senior Ennis Reed had fathered a child by another woman. (6RT 1218.) Appellant and his father did not have a father-son relationship; although appellant's father would call and promise to come see him or to give him one thing or another, he never kept his word. (6RT 1218.)

Appellant's mother, Beatrice, did not communicate well with her

son, and their relationship was strained and distant. (6RT 1219, 1227-1228.) Although Beatrice was not abusive towards appellant, she was not as close to him as she was with her daughters. (6RT 1219.) When Beatrice was seven months pregnant with him, she had a nervous breakdown and was hospitalized for about two weeks and given outpatient treatment for another 60 days. (6RT 1220.) She has suffered from recurring periods of depression since then, but she has not received treatment for her depression. (6RT 1220-1221.)

After his father left, appellant continued to live with his mother on Ward Street until she lost the house to foreclosure when she lost her job. (6RT 1221.) Then appellant's mother came to live with Ms. Churchill. (6RT 1221.)

Appellant was baptized Catholic, and he attended Our Lady of Victory elementary school in Compton before he went to Sheenway. (6RT 1222-1224, 1227.) In kindergarten and the first three grades, appellant would not pay attention. (6RT 1222.) He would lose his train of thought and would not respond to his teachers. (6RT 1222.) Appellant was always an outsider. (6RT 1222.) His mother put him in private school, hoping he would get more attention there, but that did not seem to help. (6RT 1222.) When appellant was older the teachers recognized that he had learning disabilities. (6RT 1222.) Ms. Churchill discussed appellant's problems with his mother, and they tried to get him tested through the Compton School District. (6RT 1225.) Although the school district agreed to test appellant, he was never formally tested for learning disabilities. (6RT 1225.)

Ms. Churchill continued to see appellant as he grew up, usually at his home. (6RT 1225.) At home, appellant was very quiet, but when they were alone he would talk with her and he had a pleasant demeanor. (6RT 1226.) Appellant was always a clean person, and he kept his room neat and

clean, unlike his siblings. (6RT 1226.) No one ever had to tell appellant to wash his clothes or to clean up his room. (6RT 1226-1227.)

When appellant was in his teens he spent some time at a juvenile camp, and Ms. Churchill took Beatrice there at least twice to visit him. (6RT 1225-1226.)

Once appellant was out of his teens, he was considerate towards Ms. Churchill. (6RT 1227.) He would drop by her house in Fullerton and unfailingly ask if there was anything he could do for her, like clean up her backyard or do some heavy labor. (6RT 1227.) He was always a very, very considerate person. (6RT 1227.) Ms. Churchill has never witnessed any uncontrolled periods of anger or problems with appellant's temper, or other behavior problems. (6RT 1227.) He has always been quiet or withdrawn. (6RT 1227.) When Ms. Churchill was with him, appellant was a fine, personable young man. (6RT 1228.)

REBUTTAL

Carlos Mendez testified that he picked appellant's photograph out of a photographic lineup on January 30, 1997 (6RT 1194-1198), and that in July of 1998, it took him about 10 to 15 seconds to pick appellant out of a live lineup of six individuals. (6RT 1198-1200.) The shooter had a shaved bald head, and he was not wearing a hat or a jacket of any kind. (6RT 1200-1201.) The man was wearing a T-shirt and pants, but Mendez could not remember the color. (6RT 1201.) In the seconds he had to observe the shooter, Mendez saw only his face and the pistol. (6RT 1201.) But when interviewed at the scene of the shooting, Mendez said the shooter wore a black jacket, and Mendez described the direction in which the man ran. (6RT 1187-1189, 1191.) Mendez was "very, very upset, crying," and Officer Lewis noticed a lot of blood on him. (6RT 1191-1192.)

Officer Robert Childs testified that on the night of the shooting Joe Galindo described two suspects.[19] (6RT 1205-1207.) He described the shooter vaguely as a male black in a black hat and a long black coat. (RT 1207.) He did not indicate any height or weight. (6RT 1207.) The other person he described only as a male black adult in a plaid shirt. (6RT 1207-1208.)

[19]Galindo denied telling the officer there were two. (6RT 1133-1134.)

ARGUMENT

INTRODUCTION

Mr. Reed's case lacks the heightened reliability required in a capital case, and for that reason his conviction must be reversed.

Mr. Reed was charged, in two separate, unrelated incidents – the Mendez shooting and the Fraduie shooting – with two counts of murder and two counts of attempted murder. The sole special circumstance charged was multiple murder.

When the trial court denied Mr. Reed's request for a continuance in order to present the testimony of a second eyewitness, a domino effect was set in motion. Because the court unreasonably refused to allow time for Joe Galindo, a crucial defense witness, to return to this country from his tour of military duty and testify at the guilt phase, Mr. Reed was deprived of a corroborating witness and a reasonable doubt that he was the shooter in the Mendez case. The guilt phase jury did not get the whole story because they did not hear this witness. That jury could not reach a verdict as to penalty. At the penalty phase retrial Galindo testified for the first time, and that jury was not sure that Mr. Reed had committed one of the murders. Because multiple murder was the only special circumstance, this lingering doubt was critical to the penalty phase determination. Compounding the error, the court refused to give a lingering doubt instruction, even when the jury requested it. Then, in response to the jurors' question, the judge gave an instruction that directed the verdict for death. Finally, when the jury came back with its verdict for death, the court discovered the verdict was not unanimous when one juror disavowed it during polling. Instead of properly instructing the jury to avoid coercion of the holdout juror or jurors, the court sent the jury back, stating only: "It appears we do not have a unanimous verdict. I'm going to return the verdict form to

you and ask that the jurors go back into deliberations, please. Thank you."

I. BY REFUSING TO GRANT APPELLANT'S MOTION TO CONTINUE THE TRIAL TO ALLOW WITNESS JOE GALINDO TO TESTIFY, THE TRIAL COURT UNREASONABLY RESTRICTED APPELLANT'S ABILITY TO PRESENT HIS DEFENSE IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND TO PRESENT A DEFENSE, AND PRECLUDED A FAIR AND REASONABLE TRIAL REQUIRED BY DUE PROCESS AND THE EIGHTH AMENDMENT

A. Introduction

On May 25, 1999, the first day of trial, appellant's counsel, John Schmocker, made an oral motion to continue the trial because he had been unable to obtain the presence of a crucial defense witness, Joe Galindo, due to the witness' military service. (2CT 456; 2RT 75-76.) The court summarily denied the continuance, unreasonably restricting appellant's ability to present his defense in violation of his Sixth Amendment right to the effective assistance of counsel, and to present a defense. The denial also precluded a fair and reasonable trial as required by due process, in violation of the Fourteenth and Eight Amendments.

Mr. Galindo was a member of the National Guard. Because Mr. Galindo was suddenly deployed, and through no fault of defense counsel, it was impossible to serve Mr. Galindo personally. Even so, trial counsel caused a subpoena to be properly issued and sub-served, and continued in his attempts to obtain Mr. Galindo's presence. (20CT 5650.) Shortly before trial a National Guard colonel advised the defense investigator that he believed Galindo would be made available to come to court as a witness. (20CT 5650.) That Galindo was sent off to perform his duties as a National Guardsman just prior to the trial, and was therefore not available, was not the fault of defense counsel or

appellant. That the National Guard would not tell the defense investigator where Galindo was stationed also was not the fault of trial counsel or appellant. Nevertheless, the trial court unreasonably refused appellant's motion to continue the trial.

The case proceeded to trial without Mr. Galindo's testimony that a much taller and heavier man than appellant shot Mendez and Vasquez. His testimony would have corroborated the other defense eyewitness, who also described a taller, heavier man. Without Mr. Galindo's testimony, the prosecutor obtained a conviction on those counts. However, even without Mr. Galindo's testimony, that jury was unable to reach a verdict as to penalty, with the jury split 7 to 5 in favor of life without possibility of parole. (4RT 795-796.)

Mr. Galindo returned from his National Guard deployment in time to testify at the penalty phase retrial. While deliberating, that jury inquired as to whether it could consider its doubt that appellant was guilty of one of the murders (10CT 2887), but the court refused to instruct the jury on lingering doubt. (6RT 1241-1244, 1319-1320.) The jury returned a verdict of death. Appellant's motion for new trial, based on the denial of the continuance, was also denied. (6RT 1335-1336.) The trial court's abuse of discretion in denying appellant's request to delay the trial until Mr. Galindo's presence could be obtained unreasonably restricted appellant's ability to present his defense in violation of appellant's Sixth Amendment right to the effective assistance of counsel, and precluded a fair and reasonable trial and reliable verdicts as required by due process and the Eighth Amendment. Accordingly, appellant's conviction and sentence must be reversed.

B. Facts Pertaining to the Motion

On May 25, 1999, the first day of trial, appellant's counsel, John

Schmocker, made an oral motion to continue the trial, as follows:

THE COURT: People ready?

MR. KNOWLES: Yes.

THE COURT: Defense ready?

MR. SCHMOCKER: Your Honor, I want to raise one problem so the court is aware. Mr. Knowles and I discussed this yesterday. It is about a witness by the name of Joe Galindo.

Mr. Galindo apparently has been transferred within his national guard unit perhaps to Yugoslavia. He is a percipient witness in regards to one of the crimes. And on the basis of his transfer, I would be requesting this matter be continued.

THE COURT: People, anything?

MR. KNOWLES: I'd object to the continuance.

I believe in being a percipient witness, he's referring to the shooting first in time, victim Vasquez. And Mr. Galindo was present at a location where he couldn't actually see the shooting, but he saw a person running away from the area of the shooting and going to a particular location on Glencoe street. And he indicated at the time to the police that he could not identify that person if seen.

Again, he could just give a description, which I believe would be somewhat consistent, somewhat inconsistent with the way the defendant looks.

MR. SCHMOCKER: That's a fair and accurate statement of the facts, Your Honor.

THE COURT: Well, the request for a continuance is denied. Mr. Galindo being transferred to Yugoslavia – there's no way of knowing if he'll ever come back or when he might come back. So for that reason, the continuance is denied.

(2CT 456; 2RT 75-76.) The trial court made no inquiry regarding the estimated length of Mr. Galindo's deployment, nor as to any possible arrangements to secure his testimony without significantly delaying the trial.

Mr. Galindo did not testify at the guilt phase trial or the first penalty phase trial, but he returned in time to testify at the retrial of the penalty phase. (10CT 2845-2846; 6RT 1126-1132.) Galindo testified that he had just left Tacos el Unico and returned to the front porch of his girlfriend's house down the street when he heard gunshots and saw a muzzle flash. (6RT 1127-1129.) Galindo looked back at the taco stand and saw a lone black man with his right arm up. (6RT 1128-1129, 1132-1134.) The shooter – a "stocky" man wearing dark pants, a checkered shirt worn outside his belt, and a black baseball cap – ran past him at a distance of about 53 feet. (6RT 1129-1130, 1132-1137.) Galindo – who is 6'1" tall and weighs 204 pounds – observed appellant in court and stated that appellant is smaller than the man he saw, and was not the shooter at Tacos el Unico. (6RT 1130-1131.) The shooter was at least as tall as Galindo, or taller. (6RT 1132.)

Following Mr. Reed's conviction and the recommendation of death by the penalty phase jury, on September 27, 1999, Mr. Reed filed a motion for new trial as to counts three and four only - the murder of Amarilis Vasquez and the attempted murder of Carlos Mendez – and the multiple murder special circumstance allegation. (20CT 5643-5650.) The motion alleged that the trial court violated Mr. Reed's right to a fair trial and due process when it denied him a continuance in order to present witness Joe Galindo's testimony at trial. (20CT 5644.) On September 28, the People filed their opposition to appellant's motion for new trial. (20CT 5651-5653.)

The court heard argument on the motion for new trial just before sentencing Mr. Reed to death. (6RT 1334-1336.) The court stated it had read

Mr. Reed's written motion, the People's opposition and the investigator's report. (6RT 1334.) Judge Cheroske also stated that he had gone back through his personal notes taken with reference to witness Joe Galindo. (6RT 1334.) Judge Cheroske asked Mr. Schmocker if there was anything he wished to add. (6RT 1334.) Mr. Schmocker argued:

> Yes, I have a comment in regards to Mr. Knowles' brief.
>
> Mr. Knowles points out that at the second penalty phase the jury did hear the testimony of Mr. Galindo and apparently found that it did not raise a residual doubt or lingering doubt in their mind. This puts us, though, in a – I think in a bit of a difficult position. The supreme court, having ruled on this issue of whether or not they should be instructed in regards to lingering doubt, has dictated basically that the trial courts not do so, although in this case it appears to me that it would have been appropriate to define it for them for the purpose of considering Mr. Galindo's testimony.
>
> Secondly, the problem that occurs in a retrial – and I think it's probably endemic to a retrial of a penalty phase – is the situation the jury is put in where, having not heard all of the evidence in regards to the guilt phase, they are put in a difficult position of determining what a residual or a lingering doubt is or what it could possibly have been.
>
> I'd ask the court to consider – seriously consider giving the defendant a new trial in regards to the guilt phase on this one – on these two counts.

(6RT 1334-1335.)

The prosecutor submitted the matter without argument. The court ruled:

> The court finds at this time that there was insufficient evidence that the jury would have a reasonable doubt, and I base that on the totality of all the other evidence, that this defendant

was the person who shot both Mr. Mendez and Miss Vasquez.

> The testimony from Mr. Galindo was at variance with the witness statements that he had given to the police. It was a situation where he only described a male black, six-foot-two, 190 to 200 pounds, wearing a blue or black cap, with something black in his hand running by his house. This was some time after the shots were heard. His testimony was that it was dark; it was some 53 feet away, that he did not see the man's face.
>
> He did, however, pick out someone in a six-pack as photo number 5, and he said, "I picked him out based on the size of the person," but there was nothing to indicate that he had seen the person's face or anything further.
>
> The conflicts were then that he evidently told the police that he saw two people, and he described the clothing of one as a checkered shirt and the other as a long black coat. That is not the testimony that he gave at the time of his appearance here in this court.
>
> The court finds that the defendant's right to a fair trial was not denied. And the motion for a new trial is denied.

(6RT 1335-1336.)

In ruling on the motion for new trial, the court failed to consider the second penalty phase jury's question: "If the jury agrees that 1 of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding [sic] death?" (10CT 2887.) The court also failed to consider his answer to that question: "I have met with the lawyers, and the answer as best we can give you is as follows: ¶ That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case. ¶ *The answer is yes.* (6RT 1319-1320 [emphasis

added].)

C. The Trial Court Erred in Refusing to Grant Appellant's Request for a Continuance

1. Proceedings Leading up to the Request

Appellant cannot be blamed for Galindo's unavailability at the time the trial commenced. As the timeline set forth below demonstrates, the defense was in contact with Galindo as early as September 2, 1998, and Galindo remained available during all of the dilly-dallying by the prosecution – including protracted waffling by the prosecutor as to whether to seek the death penalty. It was not appellant's lack of due diligence that caused Galindo's absence during the guilt phase trial and first penalty trial.

The offenses were committed in 1996. (1CT 237-241.) Appellant was charged with both murders on April 25, 1997, and arrested the same day. (Supp. CT II, 1-2; 3RT 513.) Prosecution was initially delayed because in October of 1997 the court declared a doubt as to Mr. Reed's sanity, and Mr. Reed was sent to Patton State Hospital. (1CT 92-92A; 1RT 12.) He was a patient at Patton for almost six months, returning to court on April 10, 1998. (1CT 96; 1RT 12.) The preliminary hearing took place on May 6, 1998, and appellant was held to answer. (1CT 103-205; 1RT 12.)

Mr. Reed was arraigned on May 20, 1998, represented by Deputy Alternate Public Defender Jerome Haig. (1RT 1-4.) Trial in this case was originally set for July 17, 1998. (1RT 4.) At that point, the People had not decided whether to seek the death penalty. (1RT 4.)

A defense motion for a live lineup was heard and granted on June 15, 1998. (1RT 5-10.) During that hearing, Mr. Haig explained the delay in seeking the live lineup. One of the reasons was that the prosecutor had advised him that she was having difficulty in contacting the witnesses, and Mr.

Haig could not contact them, as he did not have their addresses. (1RT 7.) The court granted the motion over the prosecutor's objection, stating that he wanted it done quickly and did not intend to delay the trial. (1RT 8-9.) At that point, the People still had not decided whether to seek the death penalty. (1RT 9.)

On July 7, 1998, the parties appeared for the third pretrial, with Judge Cheroske presiding. (1RT 1, 11-14.) The case had been reassigned to Deputy District Attorney Rob Knowles at that point. (1RT 11.) The live lineup was still pending. (1RT 11.) The People still had not decided whether to seek the death penalty – a fact that the court characterized as "unreasonable." (1RT 12.) The court stated that it was going to "seriously explore other sanctions for this delay. It's happened to me too many times where this district attorney's office has delayed these cases on making these decisions. It seems to me it's unreasonable they don't have a staff to do that. They ought to expand it or do something. But I'm not going to sit here and delay these cases while they decide when they are going to decide whether they are going to seek a death penalty. It's just not reasonable." (1RT 14.)

On July 17, 1998, the parties appeared for the fourth pretrial. (1RT 15-16.) The Court inquired whether the District Attorney had decided to seek the death penalty. (1RT 15.) Mr. Haig advised the court that he had received a letter from the District Attorney that had been mailed on July 8, advising that the committee was meeting on July 30 to determine the penalty to be sought in this case. (1RT 15.) Mr. Haig also advised the court that if the District Attorney chose not to seek the death penalty, he would be ready for trial in short order, but if the death penalty was chosen, he would need time to prepare for the penalty phase. (1RT 15.) Trial was set for August 14, 1998. (1RT 16.)

On August 6, 1998, the parties appeared and the prosecutor

advised the court that his office had decided to seek the death penalty. (1RT 17.) Mr. Haig told the court that a new rule of court required the superior court to notify the municipal court to prepare a complete transcript of all of the proceedings in the municipal court, and he was uncertain as to the timeline involved in that procedure. (1RT 17-18.) The matter was set for pretrial on September 3, 1998.

On September 2, 1998, Alternate Public Defender Investigator Sherrilyne Headley produced a report indicating that Galindo had told her he had seen the perpetrator of the September 24, 1996, shootings at El Taco Unico. (20CT 5650.) Galindo described the shooter as six feet two inches tall and weighing between 190-200 pounds. (20CT 5650.)

On September 3, 1998, the parties appeared again for pretrial before Judge Cheroske. (1RT 21-23.) Neither party had conducted any penalty phase discovery. (1RT 21.) Mr. Haig asked for a December trial date, and the judge set it for December 2. (1RT 22.)

When the parties appeared on October 29, 1998, for pretrial, the prosecutor had not yet provided his statement in mitigation and aggravation to Mr. Reed's counsel. (1RT 25.)

On November 9, 1998 – nearly six months after appellant was arraigned – Mr. Haig appeared for pretrial with co-counsel Ronald White and announced that the prosecutor had not provided complete discovery. (1RT 27-28.) Mr. Haig advised the court that he had the previous Friday received a memo from the prosecutor stating that a weapon that had been recovered in November of 1996 – two years in the past – was now going to be processed for fingerprints. (1RT 28.)

At the December 1, 1998 pretrial, Mr. Haig announced there was a snag with appointment of a defense expert. (RT 29-30.) Judge Cheroske

expressed some annoyance with the continuing delays in getting to trial and asked if anything else needed to be done. (1RT 30-31.) Mr. Haig gave the court a laundry list of delays created by the prosecution:

> The People have – well there is a weapon that was seized right after one of the homicides in November of 1996. It's a long rifle, an AK-47 type rifle. And the People have recently sent that in for a fingerprints examination and a ballistics examination.
>
> I've already had experts appointed for those two purposes. So when they are done with theirs, I'll do mine. But I haven't got the results back from their examination.
>
> And about a month ago, I received a statement in aggravation from the People that they intended to use prior convictions of my client as factors in aggravation, one of which was an attempted murder. I received – that was an attempted murder conviction. That's listed as one of his priors in the information.
>
> I have received the information, I believe from the D.A.'s file, including arrest reports and things of that nature. I have not received any other information. I don't know whether there is any other information that the People have.
>
> There is also a couple of other convictions – I believe one from Orange County that was, I think, a possession for sale of cocaine, and I think another conviction as well, and I've not received any reports regarding those convictions.
>
> So all I've received are the reports regarding the attempted murder. What I would like, Your Honor – and I think we are going to get a result on the ballistics pretty soon – is to come back the week of the 21st of December, and we can inform the court at that time where we are.

(1RT 31-32.) The next pretrial was set for December 22, 1998. (1RT 34.)

On December 22, 1998, the court called the case as follows:

"This is here for the I-don't-know-how-many-times pretrial." (1RT 35.) Mr. Haig advised the court that the remaining discovery issues involved the weapon seized in connection with the November 1996 homicide. (1RT 35.) The prosecutor had submitted the weapon for more testing, and those tests were still pending. (1RT 35.) Mr. Haig's ballistics expert had been appointed, the tests had not yet been performed. (1RT 36.)

Mr. Haig admitted that he was "a bit behind" on his penalty phase investigation, because he had not been available to work on this case since the middle of September due to back-to-back trials and some surgery he had undergone. (1RT 36.) Mr. Haig also advised the court that Ronald White would no longer be the second chair on this case, but a new attorney, Patrick Thomason, would be appointed. (1RT 36.) Mr. Haig's investigator and paralegal were also assigned to another death penalty case that was due to start in another courtroom in January of 1999. (1RT 37.)

The court pointed out that the gun had been around for awhile, and Mr. Haig said the police had not done anything with it, and then decided to test it once Mr. Haig's ballistics expert was appointed. (1RT 38.) When the court asked if Mr. Thomason would require another six month delay to familiarize himself with the case, Mr. Haig stated that this was his first death penalty case, and Mr. Thomason was going to assist him because Mr. Thomason had some death case experience. (1RT 39.) Mr. Haig then requested March 8, 1999, as a trial date. (1RT 39.)

On January 14, 1999, Mr. Haig appeared with Mr. Thomason and asked for a final pretrial so that they could finalize discovery, discuss juror questionnaires, and argue pretrial motions. (1RT 42-43.)

On February 1, 1999, Mr. Haig appeared for the final pretrial and announced that the Alternate Defender had a conflict. (1RT 46.) John

Schmocker appeared as potential replacement counsel for Mr. Reed. (1RT 46.) The court asked Mr. Schmocker how long it would take for him to determine whether he could accept the case, and Mr. Schmocker responded that he expected it would take until February 11 for him to go over Mr. Reed's file, decide whether to take the case, and make the application downtown. (1RT 46-48.)

The court asked Mr. Schmocker whether he could be prepared for the March trial date. (1RT 48.) Mr. Schmocker estimated that it would take him 60 to 90 days to prepare for trial. (1RT 48.)

On February 11, 1999, Mr. Schmocker accepted appointment in this case. (1RT 50.) He asked that the court set a trial date in mid-April, so that the case would go to trial in mid-May. (1RT 51.) The court asked why it would take so long for Mr. Schmocker to prepare for trial, considering that all of the discovery had been completed, and a draft jury questionnaire had been submitted. (1RT 51.) Mr. Schmocker advised the court that nobody had prepared a jury questionnaire, and that the defense investigation was not complete. (1RT 52.) Mr. Schmocker also advised the court that there were psychological issues, that one doctor had been appointed, but that more work remained to be done as to psychological and psychiatric issues, and he had not yet spoken to the doctor about that. (1RT 52.) Mr. Schmocker had another trial scheduled in March. (1RT 52.)

The prosecutor represented to the court that there were no more discovery materials to be turned over, and no discovery issues. (1RT 53.) Mr. Schmocker disagreed. Mr. Haig had intended to subpoena Compton detectives Reggie White and M.C. Paiz to bring in their complete files in order to confirm that they had turned over all of the discovery, but that had not been done. (1RT 53-54.) Mr. Haig expressed disbelief at the People's representation that

the prosecution had turned over everything the detectives had. (1RT 54.) Mr. Haig also expressed disbelief that there was no arrest report for Mr. Reed. (1RT 54.)

The court nonetheless insisted on picking a firm date, explaining that he had to order a jury panel 60 days in advance of the trial. (1RT 55.) The date chosen was May 25, 1999. (1RT 56.) March 4 was set as the date for discovery compliance. (1RT 57.)

The parties did not appear again until March 17, at which time Mr. Schmocker advised the court that the parties had resolved the discovery issues informally, except for some field identification cards, and some information that should have been memorialized in a police report and was not. (1RT 62.) The prosecutor, Mr. Knowles, explained that on the night of the second murder, several shell casings were found. The next day, in an unrelated case, some Compton Police Officers ran into a house and found a gun, which turned out to be the murder weapon in the shooting the night before. (1RT 63.) The prosecutor represented to the court that during discovery discussions the week before, Lieutenant Wright told the parties that Mr. Reed was one of the people in the house in which the murder weapon was found.[20] (1RT 63.) Lieutenant Wright told the prosecutor and Mr. Schmocker that there was a field identification card "filled out to that effect." (1RT 63.) Lieutenant Wright had promised to locate the card and turn it over, but the parties had not received it. (1RT 63.) Mr. Schmocker told the court that he had prepared a juror questionnaire and provided a copy to the prosecutor.

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At trial, the story changed – nobody testified that Mr. Reed was in the house where the gun was found, and no evidence was presented that he was ever inside that house. (See 3RT 355-362, 364-369.)

(1RT 63-64.) The matter was continued to April 14, 1999, for discussion of the juror questionnaire. (1RT 64.)

On April 14, 1999, the parties discussed the juror questionnaires and how they would be handled at trial. (1RT 65-69.) Mr. Schmocker advised the court that there was still one item of discovery outstanding. (1RT 69.)

The parties convened in court again on April 21, 1999, to finalize the juror questionnaires. (1RT 70-74.)

On May 20, 1999, defense investigator Hoffman drove to the Army National Guard Armory in Los Angeles and spoke with Private Herrera, who told him that Mr. Galindo was assigned to that unit, but was out of the area for training. (20CT 5650.) Private Herrera would not tell the investigator where Mr. Galindo was, referring him to Lieutenant Colonel Cooks, who was unavailable. (20CT 5650.)

On May 21, 1999, investigator Hoffman drove back to the Armory and spoke with Sergeant Letteries, who repeated what Private Herrera had told him. (20CT 5650.) Investigator Hoffman sub-served the subpoena for Mr. Galindo on Sergeant Letteries at that time. (20CT 5650.)

On May 25, the day trial commenced, investigator Hoffman had a telephone conversation with Lieutenant Colonel Cooks, who advised that Mr. Galindo was out of California for summer training. (19CT 5313-5314; 20CT 5650.) Cooks advised Hoffman that he was not permitted to disclose Mr. Galindo's location, but said he would forward the subpoena Hoffman had subserved on Sergeant Lettries to Galindo. (20CT 5650.) Cooks also told Hoffman he believed that Galindo would be made available to come to court as a witness. (20CT 5650.)

The defense motion to continue the trial to obtain the presence of Joe Galindo was denied on the morning of May 25, 1999, on the first day

of trial.[21] (19CT 5313-5314; 1RT 75-76.) The case proceeded to trial without Mr. Galindo's testimony that a much taller and heavier man shot Mendez and Vasquez, and the prosecutor obtained a conviction on those counts. However, even without Mr. Galindo's testimony, that jury was unable to reach a verdict as to penalty.

Mr. Galindo returned from his National Guard deployment in time to testify on appellant's behalf at the penalty phase retrial. While deliberating, that jury inquired as to whether it could consider its doubt that appellant was guilty of one of the murders (10CT 2887), but the court refused to instruct the jury on lingering doubt. (6RT 1241-1244, 1319-1320.) The trial court did, however, respond to the jury's question:

> THE COURT: Your question is as follows:
>
> > "If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?"
> >
> > I have met with the lawyers, and the answer as best we can give you is as follows:
> >
> > That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case.

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21 Investigator Hoffman continued to attempt to obtain Mr. Galindo's presence during the trial. On May 28, 1999, he again drove to the Armory, where he again spoke with Private Herrera, who told him that none of her superiors was available and she did not know when they would be available. When Hoffman asked her if she knew anything about Mr. Galindo's location or if he was coming back from training, she said Hoffman would have to talk to Lieutenant Colonel Cooks about that. (20CT 5650.)

The answer is yes.

(6RT 1319-1320 [emphasis added].)[22]

The jury returned a verdict of death. Appellant's motion for new trial, based on the denial of the continuance, was denied. (6RT 1335-1336.)

The court's denial of the continuance unreasonably restricted appellant's ability to present his defense in violation of his Sixth Amendment right to the effective assistance of counsel, and to a meaningful opportunity to present a defense. The denial also precluded a fair and reasonable trial as required by due process, in violation of the Fourteenth and Eighth Amendments.

2. The Trial Court Here Abused Its Discretion in Refusing Mr. Reed a Continuance to Obtain the Presence of a Material Witness in the Murder of Amarilis Vasquez and the Attempted Murder of Carlos Mendez

(a) The Good Cause Showing for a Continuance

A criminal defendant must show good cause to obtain a continuance of trial. (Pen. Code § 1050, subd. (e); *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Where, as here, the defendant seeks a continuance to secure the attendance of a witness, he must establish that he "exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.) "The absence of a material witness for the defense ... has

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[22]See Argument VII and VIII, *infra*.

long been recognized as a ground for continuance ... [when] the proposed testimony [is] material and cannot be elicited from another source." (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 876.)

While the trial judge has a certain amount of discretion in determining whether a continuance is appropriate, "that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." (*People v. Maddox* (1967) 67 Cal.2d 647, 652). "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend ... an empty formality" (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589) because "it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." (*White v. Ragen* (1945) 324 U.S. 760, 764; see also *Taylor v. Illinois* (1988) 484 U.S. 400, 409 ["The right to offer testimony is thus grounded in the Sixth Amendment"]; *Washington v. Texas* (1967) 388 U.S. 14, 19 ["The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense"]; *Crane v. Kentucky* (1986) 476 U.S. 685, 690 ["Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, [Citation] or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [Citation] the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"].)

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Accordingly, numerous courts have found it to be error when the trial judge denied a defendant's request for a continuance for the purpose of obtaining relevant testimony from an otherwise unavailable witness. (*Jennings v. Superior Court, supra*, 66 Cal.2d 867, 876 [writ of prohibition

granted when court erroneously denied four-day continuance at preliminary hearing to obtain testimony of witness who was present with defendant at crime scene and could be cross-examined about defendant's intent]; *People v. Buckey* (1972) 23 Cal.App.3d 740, 744 [error in unlawful possession case to deny request for continuance to obtain testimony of doctor who had allegedly prescribed controlled substance]; *Bennett v. Scroggy* (6th Cir.1986) 793 F.2d 772, 774-775 [habeas corpus granted where trial judge refused to grant continuance to secure presence of witness who would testify that manslaughter victim had a reputation for violence]; *Hicks v. Wainwright* (5th Cir.1981) 633 F.2d 1146, 1148-1150 [it was error to deny continuance to obtain testimony of expert witness concerning insanity defense, notwithstanding trial court's busy schedule]; *Johnson v. Johnson* (W.D. Mich.1974) 375 F .Supp. 872, 874 [habeas corpus granted when trial judge denied continuance for out-of-state alibi witness, and prosecution had not asserted any special prejudice resulting from delay]; *United States v. Flynt* (9th Cir.1985) 756 F.2d 1352, 1359-1360 (modified on other grounds *United States v. Flynt, supra*, 764 F.2d 675) [contempt order vacated where trial court had denied defendant's request one day prior to hearing for a 30-day continuance for the purpose of obtaining psychiatric examinations and possible expert witness testimony]; *United States v. Powell* (9th Cir.1978) 587 F.2d 443, 446 [reversible error to deny continuance to secure presence of overseas witness whose exculpatory testimony would not be cumulative.])

Four factors bear on whether a trial court has properly exercised its discretion in granting or denying a continuance to obtain a witness's testimony: (1) the length of time needed to obtain the witness's testimony and the inconvenience or prejudice resulting from that delay, (2) defendant's diligence in locating the witness and obtaining his presence in court, (3) the

anticipated substance of the witness's testimony, and (4) the degree to which the witness's testimony is likely to be useful or favorable to the accused. (*People v. Laursen* (1972) 8 Cal.3d 192, 204; *People v. Buckey, supra*, 23 Cal.App.3d at p. 744.) While these factors must be evaluated on a case-by-case basis, ultimately the question becomes "whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Laursen, supra*, 8 Cal.3d 192, at p. 204.) Further, in order for a continuance to be warranted, the defendant need not show that the proffered testimony is "vital," only that it is material. (*Jennings v. Superior Court, supra*, 66 Cal.2d 867, at p. 876.)

(b) The Length of Time Needed to Obtain The Witness's Testimony Was Not Excessive, And The Inconvenience or Prejudice Resulting From that Delay Would Have Been Minimal

The court's sole reason for denying the continuance was that "there's no way of knowing if [Galindo will] ever come back or when he might come back." (2RT 76.) However, neither the prosecutor nor the court made any effort to determine how long Galindo would be gone. As it turned out, the length of time actually needed to obtain Galindo's testimony was no more than two months, as Galindo was available to testify at the penalty phase retrial on July 30, 1999. (See 5RT 1121, 1124, 1126-1137.) The prosecutor did not argue any prejudice to his case if the continuance were granted. The inconvenience or prejudice resulting from a two-month delay would certainly have been minimal, if any, especially in view of the prior delays caused by the prosecution and the seriousness of the charges and potential penalty Mr. Reed faced.

As a preliminary step, it would certainly have been reasonable

for the court to grant a short continuance to allow the court or the parties to contact the National Guard to get a firm answer as to how long Galindo would be out of the area on military duty, when he would be available to testify if no special arrangements were made, and what special arrangements might be possible to make him available. While the Compulsory Process clause does not guarantee the actual attendance of witnesses sought by the defense, the government must itself exercise due diligence in a good faith effort to secure the attendance of subpoenaed witnesses. (*Maguire v. United States* (9th Cir. 1968) 396 F.2d 327, 330; *United States v. Murphy* (6th Cir. 1969) 413 F.2d 1129, 1139; *Johnson v. Johnson, supra*, 375 F.Supp. 872, 875; and see generally, Westen, Compulsory Process II, 74 Mich.L.Rev. 191, 277-81 (1975).)

The court was obviously piqued because of the delays, but the court should not have been taking it out on Mr. Reed. Mr. Reed made only one motion for continuance – the motion made on the first day of trial – and it was summarily denied. As detailed elsewhere in this argument, all of the previous delays were either attributable to the prosecution failing to produce discovery and failing to decide in a timely fashion whether to seek the death penalty, or they were unavoidable due to the conflict of interest and competency issues.[23]

Therefore, the length of time needed to obtain Galindo's testimony was not excessive, and the inconvenience or prejudice resulting from that delay would have been minimal.

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[23]See detailed discussion in subsection (c), *post.*

(c) Defense Counsel Demonstrated Sufficient Diligence In Locating the Witness and Obtaining His Presence in Court

A party must employ the legal means of compelling the attendance of witnesses, or present a sufficient excuse for not doing so, before being entitled to a continuance on the grounds of the witness' absence. (*People v. Collins* (1925) 195 Cal. 325, 333.) Where service is impossible or unavailing, it is an abuse of discretion to deny a continuance where a witness is amenable to process and the applicant has caused a subpoena to be properly issued and delivered to the proper officer with sufficient information so that the witness could be found. (*Ibid.*) The failure to serve a subpoena on a witness does not preclude a continuance where service is rendered impossible by the witness' sudden departure from the state (see *Loicano v. Maryland Cas. Ins. Co.* (1974) 301 So.2d 897, 901), or where attendance cannot be procured by subpoena. (*Allen v. Downing* (1840) 3 Ill. 454.)

Applying these principles, it is clear trial counsel demonstrated sufficient diligence in attempting to locate and secure Galindo's presence in court, and the prosecutor did not dispute that showing. Witness Galindo was a member of the National Guard. Because of his sudden deployment, through no fault of defense counsel, it was impossible to serve Mr. Galindo personally. Even so, trial counsel caused a subpoena to be properly issued and sub-served on Sergeant Lettries. (20CT 5650.) On May 20, 1999, five days before the trial was set to begin, defense investigator Harold J. Hoffman drove to the Army National Guard Armory in Los Angeles and inquired of Private Herrera as to Galindo's whereabouts. (20CT 5650.) Private Herrera told investigator Hoffman that Galindo was assigned to their unit, but he was out of the area on training and she could not tell the investigator where he was. (20CT 5650.)

Private Herrera advised investigator Hoffman that he should talk to Lieutenant Colonel Cooks, but he was not available at that time. (20CT 5650.)

On May 21, 1999, Investigator Hoffman went to the National Guard Armory to serve Galindo with a subpoena for trial. (20CT 5650.) He spoke with Sergeant Letteries, who told him the same thing Private Herrera had told him. Investigator Hoffman sub-served the subpoena on Sergeant Lettries. (20CT 5650.) On May 25, 1999, Investigator Hoffman spoke with Lieutenant Colonel Cooks by telephone. Colonel Cooks advised Hoffman that Galindo was out of California for summer training. He stated that he was not allowed to disclose Galindo's location, but that he would forward the subpoena to him. (20CT 5650.) Colonel Cooks advised Investigator Hoffman that he believed Galindo would be made available to come to court as a witness. (20CT 5650.) On May 28, 1999, Investigator Hoffman again went to the Armory in an attempt to obtain Galindo's presence at trial, but he was unable to locate him. (20CT 5650.)

That Galindo was sent off to perform his duties as a National Guardsman just prior to the trial is not the fault of defense counsel or appellant. That the National Guard would not tell the defense investigator where Galindo was stationed also was not the fault of trial counsel or appellant.

The fact that the case had been pending for some time did not justify denying the motion to continue the trial date. Although the police investigation of Mr. Reed began around January of 1997, Mr. Reed was not arrested and charged until April 25, 1997. (3RT 449-451, 479, 513.) It is nobody's fault that a doubt was declared as to Mr. Reed's competence to stand trial in October of 1997, that he was found incompetent to stand trial in mid-December of 1997, and that he was not found competent again until

mid-April of 1998. (1CT 47, 53, 93, 95-96.) The prosecution sought a continuance of the preliminary hearing on April 28, 1998, and the preliminary hearing was not held until May 6, 1998. (1CT 98-100, 103.) The information was not filed and Mr. Reed was not arraigned until May 20, 1998. (1CT 237-243.) A defense motion for a live lineup was heard and granted on June 15, 1998. (1RT 5-10.) The delay in seeking the live lineup was not the fault of the defense, as the prosecutor had advised defense counsel Haig that he was having difficulty contacting the witnesses, and Mr. Haig could not contact them, as he did not have their addresses. (1RT 7.)

It was not Mr. Reed's fault that the District Attorney delayed for months the determination whether to seek the death penalty (1RT 4, 9, 12, 14-15, 17 [no decision until August 6, 1998]), or that the prosecution delayed in turning over discovery. (1RT 21, 25, 27-28, 35-36, 42-43, 52-54, 62, 69 [discovery still pending from the prosecutor as of April 14, 1999].) It also was not Mr. Reed's fault that his first attorney, Mr. Haig, did not declare a conflict until the fourteenth pretrial on February 1, 1999, and that Mr. Haig's replacement, John Schmocker, was not appointed until February 11, 1999, with the trial date of May 25, 1999 set at that point. (2CT 317-319.) The continuance in question was the only continuance requested by Mr. Schmocker. Thus, the delay in bringing this matter to trial was primarily due to the District Attorney's actions and to matters beyond the control of the defense.

The fact that Mr. Schmocker could not state an exact date that Galindo would return was also beyond his control. The National Guard personnel would neither tell the investigator where Galindo was stationed, nor would they state precisely when Galindo would return; however, on May 25, 1999, Lieutenant Colonel Cooks advised the investigator that he believed

Galindo would be made available to come to court as a witness. (20CT 5650.) When, on May 28, 1999, the investigator tried again to pin down a time that Galindo would be available to testify, Private Herrera told him that neither Lieutenant Colonel Cooks nor Sergeant Letteries was available and Private Herrera did not know when they would be available. (20CT 5650.) As stated above, the court could have granted a shorter continuance to permit the parties or the court to determine Galindo's precise whereabouts and when he would be available, as opposed to denying the motion outright.

Further, even if there were a serious dispute about defense counsel's diligence, the continuance should still have been granted, given the rights implicated. (See *United States v. Flynt, supra*, 756 F.2d 1352, 1359-1360 [although defendant "might have exercised greater diligence than he did," the court finds "the degree of diligence to have been sufficient" because "the continuance would have served a useful purpose, granting the request would not have inconvenienced the court, the other party or any witnesses, and (defendant) has suffered severe prejudice as a result of the denial of his motion"].) Mr. Reed faced a capital trial, with the possibility that the jury would return a verdict of death, the ultimate prejudice.

(d) The Anticipated Substance of Galindo's Testimony Was Material and Crucial to Mr. Reed's Defense, and Was Favorable to Mr. Reed

The right to compulsory process permits the defendant to compel the attendance at trial of only those witnesses who have information which is material (*Jennings v. Superior Court, supra*, 66 Cal.2d 867, 876), that is, capable of affecting the outcome of the trial, and favorable to the defense. (*United States. v. Valenzuela-Bernal* (1982) 458 U.S. 858, 861, 873, 102 S.Ct.

3440, 73 L.Ed.2d 1193.)

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.... This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

(*United States v. Valenzuela-Bernal, supra*, 458 U.S. 858, at p. 868.)

Factors included in determining materiality for purposes of the right to compulsory process are the relative importance of the issue, the extent to which the issue is in dispute, the number of other witnesses who have testified on the issue, and the credibility of the witness in relation to other witnesses. (See *State v. Garza* (1985) 109 Idaho 40, 43, 704 P.2d 944.) Materiality also involves concerns that the absent witness have information that might have affected the outcome of the trial (*Com. v. Lahoud* (1985) 339 Pa. Super. 59, 66, 488 A.2d 307), or that a reasonable basis be shown to believe that the desired testimony would be both helpful and material to the defense. (*United States v. Ginsberg* (2nd Cir. 1985) 758 F.2d 823, 831.)

Judging by these standards, Galindo's testimony was not only material, it was crucial to Mr. Reed's defense. The importance of the issue – the identity of the shooter – was paramount. There was no motive for the Tacos el Unico shooting, and no physical evidence linking Mr. Reed to the crime. The prosecution case rested entirely on the testimony of Mendez and the reliability of his identification of Mr. Reed as the shooter. Two eyewitnesses, Foster Slaughter and Joe Galindo, described the shooter as a much taller and heavier man than Mr. Reed. Mendez, the lone prosecution witness, had been subjected to two suggestive identification procedures and

had viewed Mr. Reed sitting as the sole defendant at counsel's table at the preliminary hearing, cementing Mendez's belief that Mr. Reed was the "devil" who had killed his wife. Defense counsel failed to raise any objections to the suggestive identification procedures, and no expert testified as to the unreliability of eyewitness identifications, even though it was crucial that the defense counter Mendez's certainty in order to raise a reasonable doubt. Absent expert testimony, two independent eyewitnesses would have been much stronger than just one witness testifying that the man who did the shooting was a considerably larger man than Mr. Reed. The descriptions offered by the two defense witnesses was also similar to Mendez's initial description of the perpetrator, creating in effect three consistent observations of a perpetrator who did not resemble Mr. Reed, significantly undermining Mendez's emphatic assertions that Mr. Reed was the shooter.

Galindo's testimony cannot fairly be characterized as "cumulative." As defined by Black's Law Dictionary, cumulative evidence is "additional evidence of the same character as existing evidence and that supports a fact established by the existing evidence." (Black's Law Dictionary, Seventh Edition, p. 577.) Galindo's testimony was not cumulative because it not only served to bolster Slaughter's testimony, it also expanded it. (See *Com. v. G.D.M., Sr.* (Pa.Super. 2007) 926 A.2d 984, 989.) Evidence that bolsters, or strengthens, existing evidence is not cumulative, but rather is corroborative. (Black's Law Dictionary, Seventh Edition, at 577.) Galindo's testimony expanded Slaughter's testimony in two critical ways.

First, Slaughter and Galindo observed the shooter from different angles and during different stages of the incident. Slaughter observed the shooter at the scene of the shooting in the parking lot at the corner of Long Beach Boulevard and Glencoe, and saw him – from the back – run out of the

parking lot and around the corner, to Glencoe. (3RT 569-576, 579-580.) Galindo observed the shooter from the front and side as the man fled along Glencoe in the direction of Temple Street.[24] (6RT 1128-1129, 1136-1137 [the man's shirt was outside his belt]; People's Exhibit 1.) These different angles and sequences gave the two witnesses distinctly different opportunities to observe the clothing of the shooter and his build. Slaughter described the man as wearing a puffy, knee-length black jacket, but he was not sure whether the jacket was zipped up. (6RT 1149-1150, 1153, 1155-1156.) Slaughter could not see the man's shirt or his upper body. (3RT 578-579.) Galindo described the shooter as wearing a checkered shirt, but he could not recall describing a jacket to the police. (6RT 1129-1130, 1132-1137.) Had the initial jury heard from Galindo as well as Slaughter, the jurors could reasonably have inferred that when Slaughter observed him, the shooter was wearing an unzipped jacket, and that the checkered shirt did not become visible until the shooter was running away and the jacket flapped open as he ran. The jurors could also have reasonably inferred that the jacket made more of an impression on Slaughter while the shirt made more of an impression on Galindo, due to the sequence of events and their opportunity to observe. The jurors could also have reasonably determined that two eyewitnesses who were not emotionally invested in the shooting more reliably observed and remembered details about the shooter that Mendez could not – including the fact that the shooter was

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When arguing against granting the continuance, the prosecutor misrepresented the facts by stating that Galindo was present at a location where he could not actually see the shooting, but saw a person running away from the area of the shooting and going to a particular location on Glencoe Street. (2RT 76.) In fact, Galindo testified that he saw the shooter's arm raised, and saw the muzzle flash. (6RT 1127-1129.)

much taller and heavier than Mr. Reed. Together, these unemotional and unbiased observations would have undermined Mendez's reliability and his identification of Mr. Reed as the killer.

Second, Galindo's testimony expanded upon Slaughter's somewhat equivocal description (and Mendez's earliest description) of the shooter as a man who was larger than Mr. Reed. (6RT 1150 [shooter was "thicker than [Reed] arm-wise"; shooter looked like he had been lifting weights; was "solid in the arms"]; 6RT 1149-1150; [shooter was 5'9" to 6 feet tall and weighed 190 to 200 pounds]; 6RT 1155 [but Slaughter could not see the man's shirt or his upper body].) Because Galindo saw the man running in his direction and apparently saw the jacket blowing open as the man ran, the jury could infer that Galindo had a better opportunity to view the shooter's build than did Slaughter, whose opportunity to observe was impeded by the puffy jacket. Clearly Galindo's testimony was favorable to the defense, as it clarified and bolstered Slaughter's ambiguous testimony that the perpetrator of the Mendez shooting was considerably taller and heavier than Mr. Reed.

In fact, both witnesses were vital to the defense case, especially since there are so many variables the jury must consider in determining the credibility of any given eyewitness. (See CALJIC No. 2.92.) Galindo was the only defense witness who testified definitively that Mr. Reed was not the shooter, but was not able to do so until *after* the first jury had returned a guilty verdict.[25] In the context of the entire case, therefore, Galindo's testimony was not cumulative of Foster Slaughter's testimony; rather, it was corroborative.

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Moreover, the penalty retrial jury was instructed to accept the guilt verdict reached without the benefit of Galindo's testimony when deliberating regarding penalty, despite their doubts regarding one of the murders. (See Argument VII, *infra*.)

(e) The Denial was an Abuse of Discretion

When a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion. (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333, citing *People v. Locklar* (1978) 84 Cal.App.3d 224, 230.) An accused has a fundamental right to present witnesses in his defense. (*Chambers v. Mississippi, supra*, 410 U.S. 284, 302.) A defendant has a due process right to present exculpatory evidence. (*Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964, at p. 970, relying on *Chambers v. Mississippi, supra*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297.) Thus, a defendant should not be denied access to witnesses who may provide exculpatory evidence.

In an analogous case, *Childs v. State* (1927) 146 Miss. 794, 112 So. 23, the defendant was accused of murder and convicted after the court refused to grant a continuance to allow the defense to locate two witnesses who would testify to the elements of self defense. (*Childs, supra,* 146 Miss. at 797, 112 So. at 23.) The *Childs* Court reversed the defendant's conviction, holding:

> It will be observed that this was very important and vital testimony for the defendant, and the mere reading to the jury from the application, and the admission that this witness, if present, would have so testified, would not cure the error of the court in trying the case, in the absence of this witness, if the testimony was not cumulative as is contended here by the Attorney General's office ... [¶] It is our opinion, moreover, that the testimony of the witness Crum, who was a disinterested person, could not be considered cumulative under the circumstances, for we think that, instead of Crum's testimony being cumulative, it would have been strictly corroborative of the testimony of appellant and his infant son.
>
> But whether we say it was corroborative, or additional proof of

> the fact sworn to by the appellant and his son, and in this sense was cumulative, can make no difference, as we see it, because, in no view, do we think the testimony of Crum would have been useless or unnecessary as being cumulative; it was valuable testimony. Therefore the court erred in putting the appellant to trial without the witness Crum.

(*Id.* at 798, 112 So. 23.)

So it was in Mr. Reed's case: The trial court erred in putting Mr. Reed to trial without his witness, Mr. Galindo.

Galindo's testimony was valuable, necessary testimony that added substantially to the defense case. Galindo observed the shooter running back towards him, rather than standing still, as Slaughter had seen him. (6RT 1128-1129.) Galindo clearly saw that the man was "stocky" and was able to observe his build without the puffy jacket that obscured Slaughter's view. (6RT 1129-1130, 1132-1137.) Galindo is 6'1" tall and weighs 204 pounds. (6RT 1131.) The shooter was at least as tall as Galindo, or taller. (6RT 1132.) Galindo observed appellant in court and stated that appellant is smaller than the man he saw, and was not the shooter at Tacos el Unico. (6RT 1130-1131.) In light of this crucial testimony, delivered only after appellant had been found guilty, it is clear the court erred in forcing appellant to trial without witness Galindo.

In view of the critical nature of the issue before the trial court, the materiality of the evidence to be presented, and the procedural posture of the hearing on the motion, granting the motion for continuance would have accomplished substantial justice. (*People v. Zapien* (1993) 4 Cal.4th 929, 972; *People v. Iocca* (1974) 37 Cal.App.3d at 73, 79-80.) The trial court abused its discretion in refusing a continuance to permit counsel to bring Mr. Galindo to court, and in denying even a short continuance to determine when Mr. Galindo

would become available, instead of summarily denying appellant's motion for a continuance. Under the circumstances, the abuse of discretion resulted in prejudice to defendant, and the matter must be remanded for a new guilt trial.

D. The Error is Reversible With No Showing of Prejudice

Denial of fundamental constitutional rights is not excused by want of prejudice. (*People v. Fontana, supra*, 139 Cal.App.3d 326, 334.) The erroneous denial of Mr. Reed's continuance motion violated his Sixth Amendment right to counsel, and his Fifth, Sixth and Fourteenth Amendment rights to present a defense. (*Gardner v. Barnett* (7th Cir. 1999) 175 F.3d 580; *United States v. Gallo* (6th Cir. 1985) 763 F.2d 1504; *Bennett v. Scroggy*, *supra,* 793 F.2d 772.) Accordingly, even without a showing of prejudice, a new trial is warranted.

E. Even if a Showing of Prejudice is Required Here, Appellant's Conviction Must Be Reversed

Under any standard of prejudice, Mr. Reed's conviction must be reversed.

Galindo's testimony was crucial to Mr. Reed's defense on the only issue in this case – the identity of the shooter. There was no motive for the Tacos el Unico shooting, and no physical evidence linked Mr. Reed to the crime. The prosecution case rested entirely on the testimony of Mendez and the reliability of his identification of Mr. Reed as the shooter. Two eyewitnesses, Foster Slaughter and Joe Galindo, described a much taller and heavier man than Mr. Reed as the shooter. Mendez, the one prosecution witness, initially described a taller, heavier man as the shooter; his description changed over time. Mendez was subjected to two suggestive identification procedures and viewed Mr. Reed sitting as the sole defendant at counsel's table at the preliminary hearing, cementing Mendez's belief that Mr. Reed was the

"devil" who had killed his wife. No expert testified as to the unreliability of eyewitness identifications. In order to raise a reasonable doubt, the defense had to counter Mendez's emphatic identification of Reed as the shooter. With only Slaughter's testimony regarding the physical characteristics of the shooter, the jury could easily be swayed by Mendez's passion. A second eyewitness whose description of the fleeing shooter closely matched that of Slaughter would have added much weight to Slaughter's description.

As argued above, Galindo's testimony cannot fairly be characterized as "cumulative." Galindo's testimony expanded upon Slaughter's testimony and provided additional facts not offered by any other witness. Slaughter and Galindo observed the shooter from different angles and during different stages of the incident. Slaughter observed the shooter standing or walking at the scene of the shooting in the parking lot at the corner of Long Beach Boulevard and Glencoe, and saw him – from the back – run out of the parking lot and around the corner, to Glencoe. (3RT 569-576, 579-580.) Galindo observed the shooter from the front and side as the man fled along Glencoe in the direction of Temple Street. (6RT 1128-1129, 1136-1137; People's Exhibit 1.) These different angles and sequences gave the two witnesses distinctly different opportunities to observe the clothing of the shooter and his build. Slaughter described the man as wearing a puffy, knee-length black jacket, but he was not sure whether the jacket was zipped up. (6RT 1149-1150, 1153, 1155-1156.) Slaughter could not see the man's shirt or his upper body. (3RT 578-579.) Galindo described the shooter as wearing a checkered shirt, but he could not recall describing a jacket to the police. (6RT 1129-1130, 1132-1137.) The jurors could reasonably have inferred that when Slaughter observed him, the shooter was wearing an unzipped jacket, and that the checkered shirt did not become visible until the

shooter was running away and the jacket flapped open as he ran. The jurors could also have reasonably inferred that the jacket made more of an impression on Slaughter while the shirt made more of an impression on Galindo, due to the sequence of events and their opportunity to observe. The jurors could also have reasonably determined that two eyewitnesses who were not emotionally invested in the shooting observed and remembered details about the shooter that Mendez could not – including the fact that the shooter was much taller and heavier than Mr. Reed. These unemotional and unbiased observations undermined the reliability of Mendez's identification of Mr. Reed as the killer, and both of them were necessary to the defense.

Galindo's testimony was also crucial to the defense because it expanded upon Slaughter's somewhat equivocal description of the shooter as a man who was larger than Mr. Reed. (6RT 1150 [shooter was "thicker than [Reed] arm-wise"; shooter looked like he had been lifting weights; was "solid in the arms"]; 6RT 1149-1150; [shooter was 5'9" to 6 feet tall and weighed 190 to 200 pounds]; 6RT 1155 [but Slaughter could not see the man's shirt or his upper body].) Because Galindo saw the man running in his direction and apparently saw the jacket blowing open as the man ran, the jury could infer that Galindo had a better opportunity to view the shooter's build than did Slaughter, whose opportunity to observe was impeded by the puffy jacket. Clearly the absence of Galindo's testimony at trial prejudiced Mr. Reed, as it clarified and bolstered Slaughter's ambiguous testimony that the perpetrator of the Mendez shooting was considerably taller and heavier than Mr. Reed.

Additionally, the fact that Mr. Galindo was a member of the National Guard might have made his testimony more credible in the eyes of the jury than that of Mr. Slaughter, who was a biker. The jury might reasonably have believed that Mr. Galindo, as a National Guardsman, was the more

credible and reliable witness due to his military training. Galindo was the only defense witness who testified definitively that Mr. Reed was not the shooter. The first penalty jury did not hear Mr. Galindo's testimony and reached a stalemate; the second penalty jury eventually reached a verdict after instruction from the trial court,[26] but had a question about whether death was still on the table.

For the above reasons, the error must be found to be prejudicial, and appellant's convictions as to Mendez and Vasquez must be reversed.

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See Argument VII, *infra*, regarding the trial court's erroneous instruction following the jury's question.

II. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS FOR THE MURDER OF AMARILIS VASQUEZ AND THE ATTEMPTED MURDER OF CARLOS MENDEZ

A. Introduction

The only evidence offered by the prosecution at trial to connect Mr. Reed to the shootings of Amarilis Vasquez and Carlos Mendez was Mendez's eyewitness identification. There was no physical evidence placing Mr. Reed at the scene. Mendez observed the shooter in the dark and under extraordinarily stressful circumstances; he was traumatized and confused at the scene, and was receiving emergency medical treatment for a gunshot wound as the police questioned him; his identification was cross-racial, rendering it less reliable; suggestive identification procedures administered by the police contributed to the unreliability of Mr. Mendez's identification of Mr. Reed as the perpetrator; and multiple identification proceedings created the unacceptable risk that a false memory was created in Mr. Mendez's mind. Initially, Mr. Mendez said he was unable to remember the shooter's face, and he was impeached at trial on his multiple inconsistencies regarding the descriptions he gave. Appellant respectfully submits that the unreliable, uncorroborated eyewitness identification by Mr. Mendez is insufficient to sustain Mr. Reed's conviction in this capital case. The reliability of Mr. Mendez's identification is further undermined by testimony the first jury was not allowed to hear – the description given by another eyewitness of a shooter who was taller and heavier than appellant, corroborating the description given by an eyewitness who testified for the defense at the guilt phase.

A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a rational fact finder beyond a

reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.) While the jury as fact-finder is entitled to determine the credibility of witnesses in arriving at a verdict, that verdict cannot be based on evidence that is so inherently unreliable as to render it insufficient to support the conviction. Appellant's rights to due process, a fair guilt trial and a reliable penalty phase determination were violated here, and his convictions for the murder of Amarilis Vasquez and the attempted murder of Carlos Mendez must be reversed. Moreover, because the only special circumstance alleged was multiple murder, the penalty verdict must also be reversed.

B. Standard of Review

A conviction can be reversed on the grounds of insufficiency of the evidence only when "it ..(is) made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." (*People v. Resendez* (1968) 260 Cal.App.2d 1, 7, citing *People v. Newland* (1940) 15 Cal.2d 678, 681.) "Evidence, to be 'substantial' must be 'of ponderable legal significance... reasonable in nature, credible, and of solid value.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

The appellate court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Mosher* (1969) 1 Cal.3d 379, 395.) "The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*Ibid.*) The court does not, however, limit its review to only the evidence favorable to the respondent; the issue is resolved as to the whole record, and not isolated

bits of evidence selected by the respondent. (*People v. Johnson, supra*, 26 Cal.3d at 577.) Due process mandates that the standard for evaluating the sufficiency of evidence in a criminal case is whether any rational trier of fact could find guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-318; 99 S.Ct. 2781, 2788-2789.)

The evidence must be substantial enough to support the finding of each essential element of the crime. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) Substantial evidence is that which is reasonable, credible and of solid value. (*Ibid.*) Reversal is not warranted if the findings are reasonable and supported by the evidence, even if a contrary finding might also be reasonable. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "Whether the evidence presented at trial is direct or circumstantial, under *Jackson* and *Johnson* the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Towler* (1982) 31 Cal. 3d 105, 1257.)

More specifically to this case, in passing on sufficiency of the evidence of eyewitness identification to sustain a conviction, consideration must be given to (1) the opportunity the eyewitness had to observe the assailant, (2) the lapse of time between the offense and the first identification procedure; (3) whether the initial description compares favorably with the person accused; and (4) the effect of any emotion, such as extreme fright, experienced by the witness during the encounter which might lessen the value of his later selection of the accused as the culprit. (*United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1363.)

C. The Evidence Presented by the Prosecution Was Insufficient To Support Appellant's Convictions for the Murder of Amarilis Vasquez and the Attempted Murder of Carlos Mendez in the Tacos El Unico Shooting

The only question before the jury in this case was the identity of the shooter. The sole incriminating evidence introduced by the prosecution against appellant was the eyewitness identification testimony of the surviving victim, Carlos Mendez. Mendez's identification of appellant as the shooter is insufficiently reliable evidence to support appellant's convictions for the murder of Amarilis Vasquez and the attempted murder of Mendez because it is not supported by substantial evidence and is inherently incredible. No reasonable jury could find Mendez's identification reliable enough to conclude beyond a reasonable doubt that appellant was the perpetrator.

1. Mendez's Account of the Shooting

Mendez testified at trial that, a little after 8 p.m., as he and his wife, Amarilis, were sitting in their truck after dark in the parking lot of Tacos el Unico, Amarilis said, "Look at that guy - he has a big pistol." (3RT 463-464, 489.) In response to the district attorney's questions about what Mendez noticed about the man, Mendez essentially described, in detail, a pistol in a man's hand. (3RT 464-465, 469 [gun in his right hand with his right index finger in the trigger guard; gun pointed down at the ground]; 3RT 469, 488-489 [weapon was a pistol, not a rifle, and it was about 10 to 12 inches long].) Mendez testified that, after observing the pistol, he told his wife not to worry and started the truck. (3RT 468-470.) The pistol was pointed at them "for like, uh, three seconds," and then the shooting started. (3RT 470-472, 492.)

Mendez testified that the shooter was about 22 feet away from

the truck when he started shooting, but he also testified that he did not know where the man was when he started shooting. (3RT 476-478; People's Exhibit 14.) From the time the man walked from the corner up to the point where he started shooting, Mendez was no longer looking at him because Mendez was starting the truck. (3RT 471.) Mendez heard a "big noise" and the window broke and a bullet entered his jaw, knocking out several teeth. (3RT 472-473, 492.) After Mendez was shot in the face, he did not see the shooter again. (3RT 187.) Mendez was shot a second time, this time in the leg, as he tried to get out of the truck. (3RT 473-474, 492-493.) Mendez tried to run for help, but only got about 15 feet away from the truck. (3RT 474.) The shooting had stopped at that point, and the shooter was gone. (3RT 475-476.)

Mendez also testified that after he was shot the first time, in the jaw, he "felt like I was dying, I was killed." (3RT 472.) He was out of "this world." (3RT 473.) When he was shot a second time, Mendez's panic increased: "I thought I was – I was, you know, close to death, so running for – because at that time, I forgot my wife, I forgot everything." (3RT 474.)

On cross-examination, Mendez testified that the shooter was bald and was wearing "like a black shirt – I mean T-shirt," but added, "I don't remember pretty well." (3RT 489-490.) Trial counsel highlighted Mendez's dubious memory, confronting him with his preliminary hearing testimony that the shooter's shirt was white. (3RT 491.) When the district attorney sought on redirect to clarify Mendez's cross-examination answer, Mendez responded: "You know, I really, you know, that was seconds, so I used, so, as I'm saying, I was close to death . . I really, you know, didn't have time to look at him, you know, you know, like a couple minutes and look, you know, what he, how is he dressing or what the color race or like...." (3RT 497.)

Mendez testified that he had never seen the shooter before the

attack, but when shown a photographic line-up four months later, he insisted the shooter looked the same as the photograph he picked out (3RT 483), and the person he picked out of a live line-up was the person he had seen in the photographic line-up. (3RT 49.) Trial counsel quizzed Mendez about whether the shooter had any facial hair, obtaining equivocal responses until he returned to the subject of the man's baldness, which Mendez affirmed was the primary characteristic he noticed, "and his eyes." (3RT 494-495.) Mendez had never before mentioned the shooter's eyes.

2. The Evolving Descriptions Mendez Gave

Within an hour after the shooting Mendez – "very, very upset, crying" and bleeding – gave Officer Lewis a description of the shooter. (3RT 499, 501.) The entire description was "male black with a black jacket." (3RT 501.)

Later that night, while Mendez was being treated at the hospital, he told Detective Paiz the shooter was 20 to 25 years old, about 5'8" to 5'11" tall, clean shaven, short black hair, wearing a black jacket and black pants. (3RT 505.)

At some unspecified time, Mendez described the gunman to the police as being 5'11" and between 150 and 180 pounds, and bald.[27] (3RT 494.)

At the preliminary hearing, Mendez testified that the shooter was bald and wore a white shirt. (3RT 491.) On cross-examination at trial, Mendez testified that the shooter was wearing black. (3RT 490.) When challenged about the clothing description, Mendez testified that he was afraid

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These early descriptions given by Mendez were very similar to the descriptions given by the two defense witnesses, Foster Slaughter and Galindo. (See pp. 23-24, 68-69, 71, 74, *supra*, and 92-94, *infra*.)

and his opportunity to observe the shooter was brief, he did not pay attention to the clothes, but he insisted he saw the shooter's face and the gun. (3RT 492.)

3. The Suggestive Identification Procedures

The shooting occurred on September 24, 1996. (3RT 461.) More than four months later, on January 30, 1997, Detective Paiz showed Mendez a series of six photographs at the police station. (3RT 479-480, 483; People's Exhibit 8.) The only bald individual in the lineup was appellant, in photo #6, and he was wearing a white T-shirt. (People's Exhibit 8.) Mendez immediately picked out photo #6. (3RT 480.) A year and a half later, on July 14, 1998, Mendez picked appellant out of a live lineup. (3RT 481-482, 484.) Mendez testified that he picked the man he had previously seen in the photograph. (3RT 493-494.) Mendez also testified that he could identify appellant in court because appellant's face was the same face he saw in the photograph. (3RT 495.)

4. Mendez's Identification of Appellant as the Shooter Is Not Substantial, Credible Evidence

As Justice Frankfurter noted in 1927: "The identification of strangers is proverbially untrustworthy [and] [t]he hazards of such testimony are established by a formidable number of instances in the records of English and American trials." (*United States v. Wade* (1967) 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149.) Similarly, the Ninth Circuit characterized eyewitness identifications as "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith, supra*, 563 F.2d 1361, at p. 1365.) The Second Circuit has observed that "[c]enturies of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies

a defendant previously unknown to the witness is highly suspect [and] the least reliable, especially where unsupported by corroborating evidence." (*Jackson v. Fogg* (2d Cir.1978) 589 F.2d 108, at p. 112.) In *Wade*, the United States Supreme Court recognized that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade, supra*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149.) The court noted "the high incidence of miscarriage of justice" caused by such mistaken identifications, and warned that "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*Id.* at pp. 228, 229, 87 S.Ct. at p. 1933.)

In *Fogg, supra*, 589 F.2d 108, the court upheld an order vacating a robbery-murder conviction on habeas corpus because pre-lineup procedures were unduly suggestive and because the four eyewitnesses had only a brief opportunity to observe the gunman under stressful conditions and showed varying degrees of certainty in their identifications of the defendant. There was no other evidence connecting the defendant with the crime. Writing for a unanimous court, Judge Lumbard observed that "[c]enturies of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence." (*Id.* at p. 112.)

Some of the reasons for that unreliability were discussed in *United States v. Russell* (6th Cir.1976) 532 F.2d 1063, 1066: "There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation

was made at a time of stress or excitement.... [T]his danger is inherent in every identification of this kind, ..." As the Circuit Court noted, "This problem is important because of all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive." (*Id.* at p. 1067.)

The rule that the testimony of a single witness is sufficient to prove identity (see Evid.Code, § 411) is premised in part on the assumption that an eyewitness identification is generally reliable. (*People v. McDonald* (1984) 37 Cal.3d 351, 364 [overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 912-924].) Yet one circuit court judge has declared that premise to be "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith, supra*, 563 F.2d 1361, 1365 [conc. opn.].) Another circuit court judge has called on the courts to face up to the reliability problems of eyewitness identification, to inform themselves of the results of scientific studies of those problems, and to allow juries access to that information in aid of their fact-finding tasks. (*United States v. Brown* (D.C.Cir.1972) 461 F.2d 134, 145-146, fn. 1 (conc. & dis. opn.).)

In *Brown*, Judge Bazelon pointed out "[o]ne critical problem [of eyewitness identifications] concerns their reliability, yet courts regularly protest their lack of interest in the reliability of identifications, as opposed to the suggestivity that may have prompted them, arguing that reliability is simply a question of fact for the jury. [Citation.] There already exists, however, great doubt – if not firm evidence – about the adequacy and accuracy of the process. Unquestionably, identifications are often unreliable – perhaps consistently less reliable than lie detector tests, which we have in the past excluded for unreliability." (*Id.* at p. 145, fn. 1.)

Since the 1970's, empirical studies of the psychological factors affecting eyewitness identification have supported the conclusion that they are often unreliable. (See *Eyewitness Testimony: Psychological Perspectives* (Wells & Loftus edits. 1984) [hereinafter *Eyewitness Testimony: Psychological Perspectives*]; *Evaluating Witness Evidence: Recent Psychological Research and New Perspectives* (Lloyd-Bostock & Clifford edits. 1983); Sobel, *Eyewitness Identification: Legal and Practical Problems* (2d ed. 1983); Loftus, *Eyewitness Testimony* (1979); Yarmey, *The Psychology of Eyewitness Testimony* (1979); see also Johnson, *Cross-Racial Identification Errors in Criminal Cases* (1984) 69 Cornell L.Rev. 934 [hereinafter *Cross-Racial Identification Errors*]; Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification* (1977) 29 Stanford L.Rev. 969 [hereinafter *Expert Psychological Testimony*].)

In an article published in February of 2009, Gary Wells and Deah S. Quinlivan, experts on eyewitness identification issues, noted that the United States Supreme Court's ruling concerning suggestive eyewitness identification procedures (*Manson v. Braithwaite* (1977) 432 U.S. 98) has not been revisited by the Court in the intervening thirty-plus years. (See Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test In Light of Eyewitness Science: 30 Years Later*, 2009, 33 Law & Human Behavior, 1 [hereinafter "Wells 2009"].) Wells notes that, in the meantime, scientific studies of eyewitnesses have progressed, and exonerations based on DNA evidence not available to the *Manson* court in 1977 show that mistaken identification is *the* primary cause of convictions of the innocent. Ironically, recent studies have found that suggestive identification procedures inflate the eyewitnesses' reliability

standing on three of the five reliability criteria articulated in *Manson*[28] – view, attention, and certainty – that were used to decide whether the suggestive procedures were a problem. (Wells 2009, *supra*, at pp. 9-13.) Wells concluded that the net effect of the *Manson* analysis is to undermine the very safeguards intended by the United States Supreme Court and to destroy incentives to avoid suggestive procedures. (*Ibid.*) As to the numbers of the wrongly convicted, Wells notes:

> The known DNA exoneration cases can only be a fraction of the innocent people who have been convicted based on mistaken eyewitness identification evidence. There are several reasons why the true numbers would have to be dramatically higher than 200. First, in a large percentage of the old cases (in which convicted persons claim to have been misidentified) the biological evidence for DNA testing has deteriorated, has been lost, or has been destroyed. Moreover, virtually all DNA exoneration cases involved sexual assault because those are the cases for which definitive biological evidence (contained in semen) is available to trump the mistaken identification. Such biological evidence is almost never available for murders, robberies, drive-by shootings, and other common crimes that have relied on eyewitness identification evidence. A recent study of lineups in Illinois indicates that only 5% of lineups conducted in Chicago, Evanston, and Joliet were sexual assault cases (Mecklenburg 2006). Most lineup identifications were for non-sexual assaults, robberies, and murders for which there is almost no chance that DNA would be available to trump a mistaken identification. In addition, we would normally expect sexual assault victims to be among the most reliable of eyewitnesses because sexual assault victims usually have a longer and closer look at the culprit than other crime witnesses (compared to robberies, for instance). For these reasons, the DNA exoneration cases can only represent a fraction, probably a very small fraction, of the people who have been convicted based on mistaken eyewitness identification.

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[28](1) view, (2) attention, (3) description, (4) passage of time, and (5) certainty.

(Wells 2009, at p. 2.) Appellant falls into that class of defendants who cannot benefit from DNA evidence to exonerate him in the event of a mistaken identification, as there was no DNA evidence left at the scene of the Mendez shooting by the shooter; indeed, there was *no* evidence other than Mendez's identification linking Mr. Reed to the crime.

The California Commission on the Fair Administration of Justice has recognized the urgent need for safeguards and improvements in the administration of criminal justice in California. (California Commission on the Fair Administration of Justice, Report and Recommendations Regarding Eye Witness Identification Procedures (April 13, 2006), p. 1.) The Commission addressed a comprehensive compilation of all exonerations in the United States from 1989 through 2003 published by a group of researchers at the University of Michigan. The study identified 340 cases in which there was an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted. Of the 340 cases, 60% had been convicted of murder, and 36% had been convicted of rape or sexual assault. Of the 340 cases, 27 involved convictions obtained in California. (*Id.* at p. 2.)

The Commission's findings make a compelling argument that Mr. Reed's convictions and the imposition of the death penalty on him are unreliable, especially in light of the lack of any DNA or other corroborating evidence:

> One explanation for the high prevalence of rape and sexual assault cases among exonerations is recent improvements in DNA technology that can now be used not only to identify a perpetrator of rape at trial, but also to clear an individual of the crime both before and after conviction. Mistaken eyewitness identification was involved in 88% of the rape and sexual assault cases. This suggests that unexposed mistaken

> identification could be present in other convictions that heavily rely upon eyewitness identifications, such as robbery cases where DNA evidence is not normally present. Among the 80 cases in which rape defendants were subsequently exonerated and the race of both parties was known, 39 of the cases involved black men who were wrongfully convicted of raping white women, and nearly all of these cases involved mistaken eyewitness identification. Since less than 10% of all rapes in the United States involve white victims and black perpetrators, the fact that a disproportionate number of the rape exonerations involve white victims misidentifying black suspects suggests that the risk of error is greater in cross-racial identifications. Research has consistently confirmed that cross-racial identifications are not as reliable as within-race identifications.

(*Ibid.*) The Commission concluded that "the risk of wrongful conviction in eyewitness identification cases exists in California, as elsewhere in the country, and that reforms to reduce the risk of misidentification should be immediately implemented in California. (*Id.* at p. 3.)

The Commission recommended a number of reforms including: (1) double-blind identification procedures, where the person displaying the photo lineup or operating a live lineup does know who the suspect is; (2) sequential display of photos and lineup participants (when double-blind procedures are used); (3) instructions to the witness that the suspect may or may not be in the photos or lineup, and that failure to make an identification will not end the investigation; (4) identification procedures should be videotaped where possible, or at least audiotaped, and a still photo of a live lineup should be taken if video is not available; (5) witnesses should be asked to make a statement regarding the certainty of their identification, and should not be given feedback as to the accuracy of their identification until the statement of certainty has been made and recorded; and (6) identification procedures should be conducted, whenever practicable, with only one witness

at a time, or at least the witnesses should be separated so they will not be aware of the responses of any other witnesses. (*Id.* at pp. 5-6.)

These protocols were not followed in appellant's case. There is no indication in the record that anyone other than Detective Paiz was present when Mendez was presented with the photo lineup, and there is no record of the interchanges with Mr. Mendez, so we do not know whether he told Mr. Mendez the suspect may or may not be in the lineup. (See 3RT 479-481, 493, 506-507.)[29] Additionally, Detective Paiz transported Mendez and Fraduie, the witness to the Moreland murder, to the police station together to view the live lineup. (3RT 502, 511.) The two witnesses viewed the live lineup at the same time in the same room. (3RT 511-512.) It appears that the two witnesses had opportunities to converse and compare their perceptions, and that each was in a position to overhear what the other was saying or observe how the other was reacting during the live lineup. The identification procedures, therefore, were both suggestive and unreliable.

(a) Mendez Had Little Opportunity to Observe

Mendez's opportunity to observe the shooter was extremely limited and severely compromised by his serious injuries. Moreover, the initial photographic lineup in which Mendez identified appellant was unduly suggestive (see section 5(a), below), rendering subsequent in-person identifications unreliable.

The events of the assault on Mendez and his wife's murder unfolded rapidly and in a surprising and unexpected fashion: a stranger

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The record does reveal that Mr. Reed was the only person in the photo lineup who was bald. This significant fact is discussed in greater detail at pp. 104-106, *infra*.

suddenly approached with a gun, raised it, pointed it at Mendez and Vasquez, and then fired. Despite artificial lighting in the area, much of the scene was dark, and Mendez only observed the man with the gun at a distance. (3RT 489.) Although Mendez testified he was able to focus on the shooter, he also testified that – immediately upon seeing the man with the gun – he attempted to start his truck in order to get away. (3RT 464-470.) Moreover, Mendez admitted he was not looking at the man as the man approached because he was starting the truck. (3RT 471.) Mendez was also not looking at the man when the man started shooting. (3RT 472-473, 492.) Mendez testified that he was looking at his wife as she was shot first.[30] (3RT 473.)

Mendez testified that the shooter was about 22 feet away from the truck when he started shooting, but he also testified that he did not know where the man was when the shooting started. (3RT 476-478.) If Mendez did see the shooter at 22 feet, he might have had a very brief opportunity to observe facial features, but Mendez contradicted himself as to whether he ever saw the shooter's face, and witness Foster Slaughter's testimony sharply contradicted Mendez's entire account of the shooting.[31]

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[30] Slaughter's testimony contradicts this testimony. Slaughter testified that the man shot three or four times at Mendez, who was jumping up and down, and then – when he could not hit Mendez – he ran over to the passenger side of the truck and fired into the truck twice, and then it seemed as though the gun jammed. (3RT 573-575, 578-580.) The shooter reached down and tried to cock the gun, and then he took off around the corner and ran down the street that runs just in back of the taco stand. (3RT 573-576, 580; People's Exhibit 14.)

[31] See detailed discussion in Argument II.C.4(b)(i), *infra*.

(b) Other Witnesses With Greater Opportunity to Observe Described a Different Shooter, and a Different Shooting

Two witnesses who were not under the terrible stress suffered by Mendez, and who had greater opportunity to observe the Tacos el Unico shooting, testified for the defense – one at the guilt phase and one at the penalty phase retrial[32] – that a man much larger than appellant shot Mendez and Vasquez.

(i) Witness Foster Slaughter

At the guilt phase, Foster Slaughter testified that he was with friends, sitting on his motorcycle outside of the Zodiac Club, in the same parking lot where Mendez's truck was parked. He heard gunshots coming from behind them. (3RT 568-570; People's Exhibit 14-A.) After hearing three or four gunshots, he jumped off of his bike and hurried his female companions to safety in a nearby doorway. He then looked over and saw the shooter firing at Mendez. (3RT 569, 579-580.) Slaughter saw Mendez jumping up and down outside of the truck near the gate of the taco stand; the shooter, who was standing "way in back of the pickup truck," on the other side of the truck in back of the bed, was shooting at Mendez in the direction of Long Beach Boulevard. (3RT 569-572.)

Slaughter was about 50 feet away from the shooter and could not see his face. (3RT 572.) About 10 to 15 seconds passed between the time Slaughter first heard the gunshots and the time he saw the man with the gun behind the pickup truck. (3RT 572-573.) Slaughter observed the man fire

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32 Witness Joe Galindo was not available to testify, due to his National Guard duty, and the court would not delay the trial to obtain his testimony. (See discussion in Argument I, *supra*.)

three or four times at Mendez, and then fire another two shots into the car after missing Mendez, who was jumping up and down. (3RT 579-580.) Contradicting Mendez's testimony that his wife was shot first (3RT 472-473), Slaughter testified that the shooter first fired at Mendez, then ran over to the passenger side of the truck and fired into the truck twice where Vasquez was seated in the passenger seat, and then the gun jammed. (3RT 573-575, 579.) Mendez did not testify that the shooter walked around the truck. Casings were found at the passenger side front of the truck, corroborating Slaughter's account of the shooting. (3RT 452.)

Slaughter testified that after the gun jammed the shooter reached down and tried to cock the gun, and then he took off around the corner and ran down the street behind the taco stand. (3RT 573-576, 580; People's Exhibit 14.) It is clear from Slaughter's detailed testimony that he had far greater opportunity to observe the shooter and the shooting than did Mendez, and was under far less stress.

At trial Slaughter described the shooter as a black male with long hair, wearing a black beanie or cap, "a big long coat" and blue jeans. (3RT 573.) The hat was not flat and did not have a brim or any lettering on it, was not a baseball cap, and it came down to the man's eyebrows and covered part of his ears, and the man's hair stuck out under the hat. (3RT 578.) The shooter had a "natural" or a Jheri curl, and not a close haircut or a shaved head. (3RT 577, 580.) The man had no facial hair, just sideburns that were "normal." (3RT 580.) The shooter was 5'9" to 6 feet tall and weighed 190 to 200 pounds. (3RT 573-574.) It was difficult to estimate the shooter's weight because he was wearing a bulky black coat - but Slaughter estimated he looked about 190 to 200 pounds. (3RT 574, 578.) The jacket was a bomber jacket, big and puffy, and came down to just above the man's knees. (3RT 576.) Nothing was

written on the jacket and it did not have a hood. (3RT 577.) Slaughter could not see the man's shirt or his upper body. (3RT 578-579.) The coat appeared to be zipped up. (3RT 579.) Slaughter is 6'3," and at the time of the incident weighed 192 pounds. (3RT 573.) Slaughter only saw the shooter's face from the side. (3RT 574.)

On the night of the shooting Slaughter described the shooter to police as a "male black adult, wearing a three-quarters length black jacket and dark jean pants." (3RT 580-586.) A follow-up report contained the description: "male black with black hair, unknown color eyes, six-foot-one, 190 pounds, age 30, close-cut hairstyle, medium complexion." (3RT 588-589.)

Appellant was asked to stand up in court, and Slaughter testified that appellant looked different from the man who was doing the shooting, as the shooter was "thicker than him in arm-wise," or the shooter looked like he had been lifting weights, and was solid in the arms. (3RT 574.)

The first descriptions given to police by Mendez were closer to the descriptions Slaughter gave the police at the time of the shooting – a male black in a black jacket and black pants, around 5'8" to 5'11" tall, black hair, between 150 and 180 pounds (3RT 494, 501, 505; 5RT 1027) – than the shorter, skinny bald guy in a white T-shirt he described much later and identified as the shooter at the preliminary hearing and at trial. (1CT 181-183, 191-192; 3RT 490, 494-495, 497; 5RT 1025-1027.)

(ii) Joe Martin Galindo

While Joe Martin Galindo was unavailable to testify at the guilt phase,[33] he was an eyewitness to the shooting, and his testimony at the penalty

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See discussion regarding the trial court's error in denying Mr. Reed's request for a continuance in Argument I, *supra*.

phase demonstrates the unreliability of Mendez's identification of appellant as the shooter. Galindo had just left Tacos el Unico, returning to the front porch at his girlfriend's house four to five houses down the street, when he heard gunshots and saw a muzzle flash. (6RT 1127-1129.) Galindo looked back at the taco stand where he saw a black man with his right arm raised. (6RT 1128-1129.) Galindo grabbed his girlfriend and took her into the house, then came back out on the porch in time to see the shooter running towards him. (6RT 1128-1129.) The shooter ran past Galindo at a distance of about 53 feet. Galindo saw that the man was "stocky" and was wearing dark colored pants, a checkered shirt worn outside his belt, and a black baseball cap. (6RT 1129-1130, 1132-1137.) Galindo is 6'1" tall and weighs 204 pounds. (6RT 1131.) Galindo observed appellant in court and stated that appellant is smaller than the man he saw, and was not the shooter at Tacos el Unico. (6RT 1130-1131.) Galindo testified that the shooter was at least as tall or taller than he. (6RT 1132.) The man with the gun was alone.[34] (6RT 1132-1134.) After running past Galindo, the man ran around the side of the house on the Northwest corner of Glencoe and Temple. (6RT 1135-1136.) Galindo never saw the man's face. (6RT 1136.)

Galindo's description of the shooter, like Slaughter's description and Mendez's own descriptions prior to the police identification procedures, clearly indicates that a man much larger than appellant shot Mendez and Vasquez. Galindo emphatically denied in his penalty retrial testimony that appellant was the shooter. Galindo's and Slaughter's descriptions (1) were

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Galindo disavowed a statement appearing in Officer Childs' police report to the effect that Galindo saw two men running from the parking lot. (6RT 1133-1134.)

consistent throughout, (2) were consistent with each other as to the major characteristics of the shooter, and (3) were fairly consistent with Mendez's initial descriptions of the shooter.

(c) The Lapse of Time Between The Shooting and The First Confrontation Was Too Great For The Identification Of Appellant to Be Reliable

The shooting occurred on September 24, 1996. The first identification procedure – a photographic lineup – occurred on January 30, 1997, more than four months later. (3RT 461, 479-480, 483; People's Exhibit 8.)

The greatest memory loss following an event occurs soon after the event. (Wells 2009, *supra*, p. 13.)

> " ... The shape of the forgetting curve is a negatively decelerating function of time. This means that each time frame (whether measured in minutes, hours, or days) produces a greater loss in memory than the same time frame that follows it. Hence, more memory is lost in the first hour than in the second hour, more in the first day than the second day, more in the first week than in the second week, and so on. This forgetting function is one of the oldest phenomena in scientific psychology, dating back more than 100 years (e.g., Ebbinghaus 1885)." [Citation omitted.] "In general, eyewitness identification experiments show that the elapsed time between witnessing an event and later identification accuracy is negatively correlated with accurate identifications and positively correlated with mistaken identifications (see Cutler and Penrod 1995; Shapiro and Penrod 1986)."

(*Id.* at p. 14.)

Recent studies have established that post-event influence is more significant than mere passage of time in its effect on memory.

> "Post-event influence" refers to the fact that eyewitnesses' recollections of an event can be affected by "information"

> acquired well after the witnessing event has occurred... (Loftus and Greene 1980). People will even extract information from questions in ways that change their later testimony. For instance, after viewing a car-pedestrian accident, people who were asked 'Did another car pass the red Datsun while it was stopped at the stop sign?' were later much more likely to report that they saw a stop sign than were those not asked that question, even though it was a yield sign (Loftus et al. 1978). The point of post-event influence as it relates to the time interval between the witnessed event and the identification is that greater amounts of time permit greater opportunity for post-event influences to affect memory: Detectives can inadvertently insert information into their questions, witnesses can have their memory contaminated by other witnesses, witnesses can glean "facts" from newspaper stories about the crime, and so on. Hence, it is not just forgetting that is a problem with the passage of time, it is also the fact that time passage permits events that can create changes in how the witness remembers the original event. Later, witnesses cannot effectively parse what they actually saw from what they might have acquired later.

(Wells 2009, *supra*, at p. 14.)

Wells notes that "there is an interaction between the passage of time and susceptibility to post-event influences. The longer the time between the witnessed event and the introduction of misleading post-event information, the greater the effect of the misleading information on witness's subsequent reports (Loftus et al. 1978)." (*Ibid.*) The record does not indicate what interaction Mendez had with the police or other individuals who might have suggested "facts" to him about the physical description of the shooter. However, the record establishes that there was a four-month period in which Mendez's recollection would have faded significantly, with or without post-event influences, rendering the identification of appellant as the perpetrator unreliable. Of particular importance here is the suggestiveness of

the photo line-up, which included only one individual exhibiting the single characteristic Mendez said was primary to him – the bald head – and that individual was Mr. Reed. (See People's Exhibit 8 [photographic lineup].)

(d) The Initial Description Given to Investigators By Mendez Does Not Compare Favorably With Appellant

The initial descriptions Mendez gave to investigators do not compare favorably with appellant. To put it in the language of *Smith, supra*, 563 F.2d 1361, 1363, the statements Mendez gave to officers immediately after the crime were "inharmonious" with Mendez's testimony. The first description given approximately one hour after the shooting was "male black, black jacket." (3RT 501.) This description is so generic as to be worthless for identifying anyone.

Later that night, while Mendez was being treated at the hospital, he told Detective Paiz the shooter was 20 to 25 years old, about 5'8" to 5'11" tall, clean shaven, short black hair, wearing a black jacket and black pants. (3RT , 505.) No estimated weight was given. At some unspecified time, Mendez described the gunman to the police as being 5'11" and between 150 and 180 pounds, and bald. (3RT 494.) Appellant is 5'6" tall, and his ID card near the time of the shooting indicated he weighed 122 pounds. (1CT 2; 3RT 419.) At the preliminary hearing and at trial, Mendez testified that the shooter was bald and wore a white shirt. (3RT 491.)

Tracking Mendez's descriptions, the shooter morphed from a tall, solidly built man with black hair, wearing black clothing, to a short, skinny bald man wearing a white T-shirt. This transformation occurred with the assistance of the suggestive photographic lineup, where Mendez made a very positive identification, selecting the one individual who had a bald head. (3RT

480; People's Exhibit 8.) The shooter's baldness was the one consistent descriptor given by Mr. Mendez. (See 3RT 489-491, 494-495; 5RT 1025; 1027; 6RT 1200-1201.) Especially in light of the testimony of two other eyewitnesses that the shooter was a tall, heavy-set man who was not appellant (3RT 588-589; 6RT 1130-1132), Mendez's identification of appellant as the shooter is unreliable.

(e) Mendez's Extreme Emotions during the Shooting Lessens the Reliability of Mendez's Later Selection Of Appellant as the Culprit

Mendez's own testimony establishes that he was in a state of mortal fear at the time of the shooting: he was severely injured, traumatized and confused. Mendez believed he himself may have been mortally wounded. Additionally, he saw his wife murdered and was overwhelmed with emotion. Mendez was attempting to escape from the shooter throughout the event, first by attempting to start his truck before the shooting even started, and then attempting to flee the truck after being shot in the face and while being shot in the leg. Mendez described his state of mind immediately after witnessing his wife being shot and being shot himself as "out of this world, close to death." He was crying and felt he was dying. (3RT 493.)

Despite Mendez's testimony that he focused on the shooter's facial features *and* the gun, it is only natural that as a result of Mendez's terror and pain, his attention was not on the features of the man who was doing the shooting, but on the large pistol pointed at him and his wife.

> Humans have a limited capacity for processing information. As a result, attention paid to one stimulus necessarily results in a reduction of attention paid to other stimuli (Kahneman 1973). The *weapon focus effect* illustrates this phenomenon. Eyewitness experiments have consistently shown that the presence of a weapon (e.g., a gun or knife in the

> hand of the culprit) leads to a reduced ability to recognize the face of the culprit later (see Steblay 1992, for a meta-analysis of these studies). The dominant explanation is that the weapon draws attention, thereby pulling attention away from the culprit's face. Eye tracking research has generally confirmed the selective attention interpretation of weapon focus effect (Loftus et al. 1987).

(Wells 2009, *supra*, p. 11 [emphasis in original].)

Mendez's testimony is consistent with this "weapon focus effect." His observation of the shooter commenced with Amarilis saying, "Look at that guy - he has a big pistol." (3RT 463-464, 489.) Thereafter, Mendez essentially described, in detail, a pistol in a man's hand. (3RT 464-465, 469 [gun in his right hand with his right index finger in the trigger guard; gun pointed down at the ground]; 3RT 469, 488-489 [weapon was a pistol, not a rifle, and it was about 10 to 12 inches long].) Mendez testified that, after observing the pistol, he told his wife not to worry and started the truck. (3RT 468-470.) The pistol was pointed at them "for seconds" and then the shooting started. (3RT 470-472, 492.)

Mendez's first description to the police, given within a hour of the shooting, did not include a description of the shooter's face. (3RT 501 ["male black with a black jacket"].) The second description included the terms "clean shaven" and "short black hair," but no description of facial features. (3RT 505 [20 to 25 years old, 5'8" to 5'11" tall, clean shaven, short black hair, black jacket, black pants].) By the time Mendez testified at trial he was insistent that he had seen the shooter's face (3RT 490, 492, 497), but this assertion is more likely attributable to the identification procedures rather than Mendez's actual observation of the shooter's face. (See discussion in section 5, below.) Mendez's primary – and only consistent – recollection was that the

shooter had either very short hair or was bald. (3RT 490-491, 489-490, 494-495; 5RT 1025, 1027; 6RT 1200-1201.) Baldness was the main characteristic that was poorly represented in the photographic lineup, in that Mr. Reed was the only person of the six depicted who was bald. (People's Exhibit 8.)

(f) The Cross-Racial Factor Undermines the Reliability Of Mendez's Identification of Appellant as the Shooter

Cross-racial identification was an important factor in the Tacos El Unico shootings, where the victim/witness was Hispanic and the shooter was Black. It has been established that an eyewitness is more accurate in identifying a person of his own race than one of another race. (See, e.g., *People v. Dixon* (Ill.App.1980) 87 Ill.App.3d 814, 43 Ill.Dec. 252, 256, 410 N.E.2d 252, 256.) Numerous empirical studies establish the pervasive and even paradoxical nature of this "own-race effect."

"The studies all lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible." (*State v. Long* (1986) 721 P.2d 483, at p. 488.) And yet, as fallible as eyewitness identifications are generally, cross-racial identifications are especially so. (Jennifer L. Devenport, et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 Psychol. Pub. Pol'y & L. 338, 338 (1997).) Generally, there is a much greater possibility of error where the races of the witness and the suspect are different than where they are the same. (*State v. McClendon* (1999) 730 A.2d 1107, 1118 [Berdon, J., dissenting].) The last half-century of empirical studies of cross-racial identifications has shown that eyewitnesses have difficulty identifying members of another race. (See generally, Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Perspectives* (1984); Elizabeth

Loftus, *Eyewitness Testimony* 9 (1979); Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972 (1988) [finding a low rate of recognition accuracy by Blacks, Anglos, and Mexican-Americans, as well as the "own group" bias in all three groups].)

Concern about the frequent inaccuracy of cross-racial identifications is extensively documented in case law and social science data. (See *Brown v. Davis* (6th Cir. 1985) 752 F.2d 1142, 1146.) Some judges have opined the cross-racial nature of an identification may affect accuracy in the same way as proximity to the perpetrator and poor lighting conditions. (See *United States v. Telfaire* (D.C. Cir. 1972) 469 F.2d 552, 560; Bazelon, Chief Judge, concurring.) As the *Brown* court put it: "We are painfully aware of miscarriages of justice caused by wrongful identification. Those experienced in criminal trial work or familiar with the administration of justice understand that one of the great problems of proof is posed by eyewitness identification, especially in cross-racial identification . . . ." (*Brown, supra*, 752 F.2d 1142, at p. 1146.) Another jurist observed: "[I]t is well documented that cross-racial identification is less reliable than identification of one person by another of the same race. Considerable evidence indicates that people are poorer at identifying members of another race than of their own." (*State v. Reddick* (1993) 619 A.2d 453, 467, fn. 1 [Berdin, J., dissenting].)

Mendez is Hispanic, and appellant is Black. Thus, in addition to the brief time he had to observe the shooter, the lighting in the area, the weapon focus effect, and Mendez's state of panic and pain, cross-racial identification factors further undermined the reliability of Mendez's

identification.[35]

5. In Addition to The Smith Factors, The Identification Procedures Further Reduced the Reliability And Credibility of Mendez's Identification of Appellant As the Shooter

As noted above, (see sections 3 and 4), identification procedures followed in this case did not include precautions against possible influences on Mr. Mendez's identification of the shooter. The first identification procedure, the photo lineup, was presented by the detective investigating the case; he was fully aware of which photo was the suspect. The record does not reveal what Detective Paiz said to Mr. Mendez either before or after he picked out Mr. Reed's photograph, but it is quite possible Detective Paiz confirmed to Mr. Mendez that he had picked the right one.

> [N]umerous experiments show that confirmatory suggestive remarks following a mistaken identification (e.g., "Good, you identified the suspect") lead witnesses to inflate their estimates of how much attention they paid to the culprit during the witnessed event (Bradfield et al. 2002; Dixon and Memon 2005; Douglass and McQuiston-Surrett 2006; Hafstad et al. 2004;

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No expert was presented to explain to the jury the unreliability of cross-racial identification. While defense counsel cross-examined Mendez on the lighting in the area (3RT 489-490), the fact that the shooter was a stranger to him (3RT 490), the shooter's physical characteristics and clothing (3RT 490-491, 494-495), the amount of time Mendez had to observe the shooter (3RT 492), the injuries inflicted on Mendez that distracted his attention from the shooter and caused him to feel "out of this world" and "close to death" (3RT 492-493), the distraction caused by seeing his wife shot and killed in front of him (3RT 493), his grief (3RT 493) – defense counsel's only cross-examination as to the cross-racial nature of the identification was to elicit the fact that Mendez is Hispanic and Mr. Reed is African-American. (3RT 495.) Defense counsel also did not question Mr. Mendez regarding the weapon focus effect, or emphasize the length of time between the shooting and the identification procedures.

> Neuschatz et al. 2005; Skagerberg 2007; Smith et al. 2000; Wells and Bradfield 1998; Wells and Bradfield 1999; Wells et al. 2003; see meta-analysis by Douglass and Steblay 2006).The post-identification feedback effect occurs not just in lab-based experiments, but also occurs for actual eyewitnesses to serious crimes (Wright and Skagerberg 2007). In effect, this consistent finding means that witness' reports of their attention are not only malleable, but also that reports of how much attention was paid are affected by suggestive procedures, in this case suggestive feedback.
>
> It is not just suggestive feedback that leads to retrospective distortions of witness' reports of their attention. This same phenomenon of inflating their reports of how much attention they paid occurs when a suggestive photoarray (i.e., the fillers do not fit the witness' description of the culprit) is used (Semmler and Brewer 2007). Again, we see that a suggestive procedure actually enhances the eyewitnesses' standing on a Manson reliability factor.

(Wells 2009, at p. 11.) In this case, Mr. Mendez was presented with a suggestive photographic lineup that contained photographs of five men, of which Mr. Reed was the only individual who was bald. (People's Exhibit 8.) The one consistent descriptor Mr. Mendez has offered in describing the perpetrator was that he was bald. (3RT 490-491, 489-490, 494-495; 5RT 1025, 1027; 6RT 1200-1201.) By the time of trial – after having selected Mr. Reed from the suggestive photographic lineup, having viewed him sitting at the defense table at the preliminary hearing, and after having seen him in a live lineup and selecting him as the person he saw in the photographic lineup (3RT 493-494) – Mr. Mendez was quite certain that Mr. Reed was the man who shot him and his wife. (3RT 464-465.)

(a) The Photographic Lineup Was Suggestive

The photographic lineup was suggestive in that appellant was the

only person in the six-person lineup with a bald head. (People's Exhibit 8.)

> From the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness to make a lineup identification (a suggestion by commission), fails to relieve pressures on the witness to make a lineup selection (a suggestion by omission), cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect. The most common ways in which eyewitness scientists have studied suggestiveness in lineup procedures have been to look at pre-lineup instructions, lineup composition, and suggestive behaviors of lineup administrators.

(Wells, *supra,* at p. 6.)

> Lineup composition refers to the qualities of the fillers in the lineup. A lineup filler is a known innocent person who is in the lineup to help make the procedure fair. A proper lineup has only one suspect (who might or might not be the culprit) and the remaining lineup members are fillers. One of the ways to think about the role of fillers is that they help to establish whether the witness' memory is reliable enough to avoid selecting a filler. But, a dominant reason for using fillers is to help ensure that the procedure is not suggestive of which person is the focus of the police investigation. Accordingly, the qualities of these fillers are presumed to be critical to maintaining low levels of suggestiveness. Research consistently supports the view that using fillers who do not fit the eyewitness' previous verbal description of the culprit dramatically increases the chances that an innocent suspect who fits this description will be mistakenly identified (e.g., Clark and Tunnicliff 2001; Lindsay and Wells 1980; Wells et al. 1993).

(Wells 2009, *supra*, at p. 7.) Psychologists refer to the "nominal" and "functional" size of a lineup: The nominal size is the number of individuals included. The functional size is the number of fillers who fit the initial description given by the witness. (*Id.*) In appellant's case, the functional size

of the photographic lineup was one, because the only individual with a bald head was appellant. (People's Exhibit 8.)

Another factor that lessens the reliability of a lineup is administrator suggestiveness, i.e., verbal or nonverbal cues given by the administrator that might influence the witness.

> It is important to note that most initial identifications of criminal suspects are obtained using photo-lineups rather than live lineups. Unlike live lineups, which might inhibit lineup administrator suggestiveness because defense counsel is present, there is no right to defense counsel at photo-lineups. Instead, photo-lineups are usually conducted by the case detective who directly interacts with the witness in what is, in effect, a conversation about photos.

(Wells 2009, *supra*, at pp. 7-8.) The administrator's behaviors may be intended to influence the witness, but there are unintentional behaviors as well that can have an effect. For instance, the eyewitness might call out the number of a filler photo, and the lineup administrator, knowing that the photo is a mere filler, might urge the witness to make sure she has looked at all the photos before making a decision. Whether intended or not, the message is clear to the witness that the suspect is one of the other photos. In contrast, the mere utterance of the number of the suspect's photo could yield a very different reaction from the lineup administrator, such as "Good, tell me what you remember about that guy." That would lead the witness to stick with that photo even if she had uttered the numbers of filler photos previously. Even without speaking, a lineup administrator can influence an eyewitness through facial expressions and body movements such as head nodding or head shaking. Furthermore, the lineup administrator has a great deal of discretion in deciding when the identification session is over. If the witness picks a filler, the tendency might be to wait to see if she changes her mind or ask if there is

anyone else who stands out. If the witness picks the suspect, in contrast, the session is quickly ended. These discretionary behaviors by the lineup administrator are not necessarily intentional and the lineup administrator might not even be aware that she or he is doing it. Instead, these are natural behaviors that testers display when they think that they know the correct answer or have expectations about how the tested person will or should behave. (Wells 2009, *supra*, at pp. 7-8.)

The lineup administrator was not neutral here. The administrator was Detective Paiz, the lead detective in this case. (3RT 479-480, 483.) The meeting in which Mendez was shown the photo lineup was not recorded. Defense counsel was not present during the photographic display, and no independent, unbiased witness testified to what happened during the procedure.

The dominant view among psychological scientists is that, once an eyewitness has mistakenly identified someone, that person "becomes" the witness' memory and the error will simply repeat itself. (Wells 2009, *supra,* p. 9.) Given the suggestiveness in the composition of the photographic lineup in this case and the fact that the lineup administrator was not neutral, the identification obtained by that procedure is unreliable. This conclusion is supported by the evolution of Mendez's description of the shooter from tall and solidly-built with black hair and black clothing to the skinny, bald black guy in a white T-shirt depicted by appellant's photograph in the photographic six-pack, and the fact that two independent eyewitnesses who did not suffer the stress of the shooting described the shooter as a much larger man than appellant, similar in appearance to Mendez's early descriptions.

(b) The Live Lineup Was Suggestive

Among the suggestive procedures addressed by Wells, and

which occurred here, was conducting a second lineup procedure in which the only person in common was the suspect. (Wells 2009, *supra*, p. 1.) Mendez first viewed a photographic six-pack with appellant in it, and then, a year and a half later, Mendez picked appellant out of a live lineup (*after* having seen Mr. Reed during the preliminary hearing), in which the only common individual to the photo lineup and live lineup was appellant. (3RT 481-482, 484.) As Wells explains:

> [T]he procedure is highly suggestive to the extent that the witness can discern which person is common to both []lineups. Precisely these types of effects have been found in eyewitness identification experiments: Witnesses who encountered a innocent person's photo in an initial identification procedure were more likely to misidentify a different photo of him in a second procedure even if they did not misidentify him in the first procedure, but the effect is especially strong if they also misidentified the person in the first procedure (Brigham and Cairns 1988; Gorenstein and Ellsworth 1980; Hinz and Pezdek 2001; see meta-analysis by Deffenbacher et al. 2006). Although experiments have not directly tested the question of in-court identifications that occur after a pretrial lineup, our understanding of transference and commitment effects leads to the reasonable inference that a mistaken identification prior to trial is likely to be replicated during an in-court identification.

(Wells 2009, *supra*, at p. 8.) Indeed, when asked about the live lineup, Mendez testified that he picked the man he had previously seen in the photograph. (3RT 493-494.)

(c) The Degree of Mendez's Confidence May Have Been Compelling to the Jurors, But It Is Likely His Confidence Indicates That He Was Mistaken

In addition to the counterintuitive aspects of the own-race effect, other psychological factors have been examined in the literature that appear to

contradict the expectations of the average juror. Perhaps the foremost among these is the lack of correlation between the degree of confidence an eyewitness expresses in his identification and the accuracy of that identification. Numerous investigations of this phenomenon have been conducted: the majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative – i.e., the more certain the witness, the more likely he is mistaken. (Wells & Murray, *Eyewitness Confidence, in Eyewitness Testimony: Psychological Perspectives*, pp. 159-162.) Indeed, the closer a study comes to reproducing the circumstances of an actual criminal investigation, the lower is that correlation (*id.* at pp. 162-165), leading the cited authors to conclude that "the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings." (*Id.* at p. 165; see also Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?* (1980) 4 Law & Human Behav. 243.) The average juror, however, remains unaware of these findings: "A number of researchers using a variety of methods have found that people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy." (Wells & Murray, *supra*, at p. 159, citing five recent studies.)

6. Conclusion

Again, appellant's conviction for the attempted murder of Mendez and the murder of Vasquez rested entirely upon the uncorroborated testimony of Mendez. No weapon was recovered, no fingerprints were found, there were no surveillance videotapes, and there was no DNA to link appellant to the shooting. In 1977, Justice Hufstedler expressed her doubts about the validity of "cling[ing] to the notion that the testimony of one witness, if solidly

believed, is sufficient to prove the identity of a perpetrator of a crime" in light of "the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith, supra*, 563 F.2d 1361, at pp. 1364-1365 [Hufstedler, J., concurring specially].) In light of the developments in the science of eyewitness identification since that time, Mendez's testimony must be found not to be substantial, credible evidence sufficient to sustain appellant's convictions for the murder of Amarilis Vasquez and the attempted murder of Carlos Mendez.[36] Furthermore, the trial court's error in refusing to grant a continuance deprived Mr. Reed of important testimony that would have tended to undermine Mendez's identification.[37] Because the penalty of death is qualitatively different from any other sentence, a greater degree of reliability is required in imposing it than was afforded in this case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The convictions must be reversed, and the death penalty vacated.

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[36] Because each of the cases is so weak individually, it is highly likely that, had the Tacos el Unicos case and the Moreland/Fraduie case been tried separately, the jury would not have returned guilty verdicts in either case. Unfortunately, trial counsel failed to move to sever them.

[37] See Argument I, *supra*.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR THE MURDER OF PAUL MORELAND AND THE ATTEMPTED MURDER OF ROY FRADUIE

A. Introduction

Like the case against appellant for the murder of Amarilis Vasquez, the evidence against appellant as the perpetrator in the Moreland/Fraduie case rests on the uncorroborated testimony of another victim, Roy Fraduie. Fraduie's identification was at least as unreliable as that of Mendez, not due to his own injury or emotional involvement with the victim, but because of Fraduie's intoxication on the night in question and his unexplained reluctance to report the incident to authorities.

No witness testified to seeing anyone fire a gun; Fraduie heard, but did not see, a gun being fired. Fraduie also did not see Moreland being shot; he simply saw a man, standing among several men, holding a gun before gunfire broke out, after Fraduie and Moreland had walked past them. Fraduie *never* reported the shooting to the police. The shooting occurred on November 22, 1996. The police located Fraduie five months after the shooting, at which time Fraduie was unable to describe the man he saw holding the gun. On April 18, 1997, Fraduie was shown a suggestive photographic lineup with six men displayed, and he selected appellant.[38] On May 6, 1998, Fraduie saw appellant at the preliminary hearing. On July 14, 1998, Fraduie picked appellant out of a live lineup.

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See discussion of the suggestiveness of the photo lineup in Argument II, *supra*, sections 3 through 5. The lineup was presented by Detective Paiz – the lead detective in this case – and there is no record of what was said during this identification procedure.

The prosecution attempted to bolster Fraduie's identification testimony with evidence that the murder weapon was found in a closet in the duplex outside of which a group of approximately ten to fifteen men had been standing just prior to the shooting. Fraduie had observed a man standing in that group in front of that duplex with a rifle slung over his shoulder as he and Moreland walked by. Moreland testified that the gun the man was holding "looked like" People's Exhibit 5 – determined through ballistics testing to be the murder weapon. However, no one testified that appellant had ever been inside of that duplex or had any connection with the gun. (See 3RT 355-362, 364-370.)

This evidence simply was insufficient to prove appellant was guilty of the murder of Paul Moreland and the attempted murder of Fraduie.

B. The Evidence Presented by the Prosecution Was Insufficient To Support Appellant's Convictions for the Murder of Paul Moreland and the Attempted Murder of Roy Fraduie

The primary evidence introduced by the prosecution against appellant as to counts one and two, was the eyewitness identification testimony of the surviving victim, Roy Fraduie. In addition, the prosecution attempted to draw a link between appellant and the murder weapon, which was found in the closet of a duplex at 1315 East Glencoe. Fraduie's unreliable identification of appellant as the shooter, linked with discovery of the murder weapon in a house to which appellant had no apparent connection, is insufficient evidence to support appellant's convictions for the murder of Moreland and attempted murder of Fraduie. No reasonable jury could find this evidence reliable enough to conclude beyond a reasonable doubt that appellant was the perpetrator.

1. Fraduie's Account of the Shooting

Roy Fraduie testified that he and Paul Moreland had "a few drinks" over the six or seven hours prior to the shooting. (3RT 371-373.) While Fraduie admitted to drinking Olde English 800 Malt liquor "half of a day," he was impeached with his preliminary hearing testimony that he was drinking all day. (3RT 393-394, 398.) Fraduie testified that he drank until nearly 11 p.m., and felt the effects of the alcohol "somewhat." (3RT 398-399.) While at first Fraduie denied being under the influence of any other drugs that night, he later admitted he had "smoked a little weed." (3RT 399.) Moreland's autopsy revealed that he had ingested alcohol, cocaine and phencyclidine (PCP) in the hours preceding his death. (3RT 546-549.)

At around 11 or 11:30 p.m., Fraduie and Moreland were walking down Glencoe Street when they passed a group of about ten men standing in a fenced yard in between two duplexes. (3RT 373-376, 389-391; People's Exhibit 6.) It was dark except for a street lamp down the street from the duplex and another light standard on the other side of Glencoe. (3RT 394-397; People's Exhibit 1.) A man Fraduie had never seen before was standing by the driveway, holding a rifle. (3RT 374-375, 391.) Fraduie did not know him or any of the other men standing in front of the duplex. (3RT 375, 391.) The rifle looked like the rifle marked as People's Exhibit 5 – an S.K.S. type of rifle that shoots 7.62 by 39 millimeter bullets. (3RT 357-358.)

Fraduie observed the man resting the butt of the rifle on his shoulder and holding the trigger guard with his right hand. The part of the stock with the frame area or the back end of the barrel was resting on the man's right shoulder, pointing backwards behind his head. (3RT 376-377.) As Fraduie and Moreland walked by, the man with the rifle said something directly to Moreland, but Fraduie denied hearing what he said. (3RT 377.)

Moreland said, "That's all right." Fraduie testified that they kept walking, and the man fired the rifle up in the air after Fraduie and Moreland had walked by – but then Fraduie admitted he never saw the man fire the weapon. (3RT 377.) Fraduie admitted that he did not see the man bring the gun down. "No, I didn't pay no attention. I wasn't trying to see when he was bringing it down. I was trying to get out of dodge." (3RT 378.) They were already past the duplex when Fraduie heard, but did not see, the rifle fired. (3RT 377.) Asked how he knew the man shot up into the air, Fraduie testified: "Cause it didn't hit nothing. Because he shot up in the air, and then he brought it down and start shooting. Then he start shooting at us. We had start[ed] running." (3RT 377-378.)

Moreland and Fraduie were initially on the same side of the street as the duplex. (3RT 378.) When the shooting began and they started running, Fraduie and Moreland were about one house down from the duplex. (3RT 379.) Fraduie ran on a diagonal to the corner, then down the right side of the sidewalk on Temple, across the street from the duplex and around the corner, down Temple to Greenleaf. (3RT 378-380.) He hopped the gate "where they grow flowers and stuff," and ran all the way down to Long Beach and Artesia where he saw another friend, who gave him a ride back to his uncle's house. (3RT 378.) Moreland ran the opposite direction down Temple. (3RT 378, 380.) After Fraduie started running, he never looked back at Moreland. (3RT 380-381.) Fraduie did not actually see Moreland being shot; he saw a man holding a gun. (3RT 392.) After the first shot was fired, there was one shot fired in Fraduie's direction, and then Fraduie heard three or four more shots after about two or three minutes of silence. (3RT 381.)

2. Fraduie's Evolving Descriptions of the Shooter

Fraduie did not call the police after the shooting, and did not

have any contact with the police for several months. (3RT 382, 399-400.) Eventually Detective Paiz located and interviewed him. (3RT 383-384, 391.) In that initial meeting, Fraduie was unable to describe the shooter. (3RT 391-392.) Fraduie testified that he "couldn't tell them right at the present moment, because my mind was like blurry." (3RT 392.)

Despite his inability to describe the shooter to the police months after the event, at trial – years after the shooting – Fraduie testified very specifically that the person "had low cut hair, about a little shorter than mine," "like a quo vadis" and "like an east coast haircut, real low" - meaning "real short." (3RT 392-393.) At trial Fraduie described the person with the gun as a Black man, whose complexion was "in between colors, about my complexion, but a little – about a lighter shade – about a shade dark." (3RT 394.) The man with the gun did not have any facial hair, and was not wearing a hat. (3RT 397.) Fraduie could not remember the man's clothing. (3RT 397.) These details were provided, of course, after Fraduie had been shown a photo lineup in which appellant was the only individual with very short hair, and after Fraduie had opportunities to view appellant at the preliminary hearing and in a live lineup. (1CT 139; 3RT 392-393, 511-512.)

3. The Suggestive Identification Procedures

On April 18, 1997, five months after the shooting, Detective Paiz took Fraduie to the Compton Police station, gave him an admonition, and showed him a photographic lineup. (3RT 384-386, 393, 511; People's Exhibits 8 and 10.) Fraduie selected appellant's photograph, #6, as the shooter. (3RT 385-386; People's Exhibit 8.) Fraduie testified it took him about 10 minutes to select the photo of appellant. (3RT 386-387.) Fraduie denied any confusion, but admitted that he did not recognize appellant immediately. (3RT 387.) Fraduie testified that he studied the photographs "for a minute" and "for

a little while." (3RT 387.) Fraduie said to Detective Paiz, "That's him" and pointed to photograph #6. (3RT 389, 393.) Appellant was the only person in the photographic display with short hair. Everyone else had longer hair. (3RT 393; People's Exhibit 8.)

On May 16, 1998, Fraduie saw appellant at the preliminary hearing. (1CT 139.)

On July 14, 1998, Fraduie observed a live lineup at the jail with Detective Paiz and the prosecutor. (3RT 387, 401, 511-512.) Fraduie testified that appellant was in the lineup with two other men,[39] and Fraduie identified him as the man who had the gun that night. (3RT 387-388; People's Exhibit 9.) This time it did not take "two seconds" to pick appellant out of the lineup. (3RT 388.) Like Mendez, Fraduie testified that at the live lineup he saw the person he had seen in the photographic array. (3RT 393.) Fraduie indicated on a form that the suspect was #1, and signed and dated it July 14, 1998. (3RT 401-402; People's Exhibit 11.)

4. Fraduie's Identification of Appellant as the Shooter Is Not Substantial, Credible Evidence

As previously noted, eyewitness identification of strangers has been thoroughly documented as highly untrustworthy (*United States v. Wade, supra*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149; *United States v. Smith, supra*, 563 F.2d 1361, 1365),[40] especially where unsupported by

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Detective Paiz testified that there were six people in the live lineup. (3RT 511-512.)

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See detailed discussion of the research on unreliability of eyewitness identification in Argument II, section 4, *supra*, pp. 82-90. See also, *Eyewitness Testimony: Psychological Perspectives, supra*; *Evaluating Witness*

corroborating evidence. (*Jackson v. Fogg, supra*, 589 F.2d 108, 112.) Mistaken identification is common and results in a high incidence of miscarriage of justice. (*United States v. Wade, supra*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149; see also California Commission on the Fair Administration of Justice, Report and Recommendations Regarding Eye Witness Identification Procedures (April 13, 2006).)[41] Eyewitness identifications are particularly unreliable when – as here – the witness' opportunity for observation was insubstantial, rendering his susceptibility to suggestion the greatest. (*United States v. Wade, supra*, 388 U.S. 218, at pp. 228, 229, 87 S.Ct. 1926, 1933.) As in *Fogg*, there was no other evidence connecting Mr. Reed with the shooting, and thus no corroboration of Fraduie's testimony. Fraduie's identification was based upon a single brief observation made at a time of stress or excitement, significantly reducing its value. (*United States v. Russell, supra*, 532 F.2d 1063, 1066.) Fraduie's ability to observe and remember was further impacted by his day of imbibing malt liquor and smoking marijuana. (5RT 1046, 1055-1056, 1064.) The jury was not informed of the reliability problems of eyewitness identifications, to appellant's disadvantage. (See *United States v. Brown, supra,* 461 F.2d 134, 145-146, fn. 1 (conc. & dis. opn.).) Appellant falls into that class of defendants who cannot benefit from DNA evidence to exonerate him in the event of a mistaken identification, as there was no DNA evidence left at the scene of the Fraduie/Moreland shooting by the shooter. (See Wells 2009, at

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Evidence: Recent Psychological Research and New Perspectives, *supra*; Sobel, *Eyewitness Identification: Legal and Practical Problems*, *supra*; Loftus, Eyewitness Testimony (1979), *supra*; Yarmey, *The Psychology of Eyewitness Testimony* (1979); *Expert Psychological Testimony*, *supra*.)

[41]Discussed in detail in Argument II, *supra*, pp. 87-89.

p. 2.)

(a) Fraduie Had Little Opportunity to Observe

Fraduie's opportunity to observe the shooter was extremely limited and severely compromised by his level of intoxication. Moreover, the initial photographic lineup in which Fraduie identified appellant was unduly suggestive,[42] rendering subsequent in-person identifications unreliable.

The events of the shooting unfolded rapidly and in a surprising and unexpected fashion: Fraduie observed a stranger in a crowd of people with a gun slung backwards over his shoulder, noticing the man only because he said something unintelligible to Moreland as they passed by. (3RT 373-377, 389-391.) It was late at night, and despite artificial lighting in the area, much of the scene was dark, and Fraduie only observed the man with the gun very briefly. (3RT 377, 394-397.) Fraudie did not see anyone shooting; he only heard the sound of gunfire as he was running away. (3RT 377-378.) Fraduie admitted that all he witnessed was a man holding a gun. (3RT 392.)

No eyewitnesses other than Fraduie testified.

(b) The Lapse of Time Between The Shooting and The First Confrontation Was Too Great For The Identification Of Appellant to Be Reliable

The shooting occurred on November 22, 1996. The first identification procedure – a photographic lineup – occurred on April 18, 1997, five months later. (3RT 509, 511, 513; People's Exhibit 8.)

Appellant has previously described how the greatest memory loss following an event occurs soon after the event.[43] (Wells 2009, *supra*, p.

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[42]See discussions in Argument II, pp. 82-89 and 102-106, *supra*

[43]See detailed discussion in Argument II, pp. 95-97, *supra*.

13.) Each time frame produces a greater loss in memory than the same time frame that follows it, meaning that more of Fraduie's memory was lost in those first 5 months between the time of the shooting and Fraduie's viewing of the photographic lineup than in the months leading up to his viewing appellant at the preliminary hearing and at the live lineup. (*Ibid.*) "In general, eyewitness identification experiments show that the elapsed time between witnessing an event and later identification accuracy is negatively correlated with accurate identifications and positively correlated with mistaken identifications (see Cutler and Penrod 1995; Shapiro and Penrod 1986)." (*Id.* at p. 14.)

Also, as appellant has previously discussed, studies have established that post-event influence is more significant than mere passage of time in terms of memory.[44] In other words, Fraduie's recollections of the event likely were affected by "information" acquired well after the event occurred. For example, after briefly observing a person with a rifle slung over his shoulder who Fraduie could not describe some months later, Fraduie may have absorbed information from questions and comments made by Detective Paiz and other police officers, the district attorney, or even witness Mendez – with whom Fraduie traveled to view the live lineup, and with whom he likely spent time at the police station – in ways that shaped his subsequent descriptions of the man he saw and influenced his testimony that a man he previously could not describe had a certain haircut and skin color.

The point of post-event influence as it relates to the time interval between the witnessed event and the identification in this case is that the significant amount of time elapsed permitted greater opportunity for post-event influences to affect Fraduie's memory. Detectives may have inadvertently

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[44]See detailed discussion in Argument II, pp. 95-97, *supra*.

inserted information into their questions, Fraduie's memory may have been contaminated by witness Mendez or by newspaper stories about the crime, and so forth. In Fraduie's case, therefore, the problem was not just forgetting due to passage of time, the problem also was the fact that time passage permitted events to create changes in how Fraudie remembered the original event. It would have been impossible for Fraduie to effectively parse what he actually saw from information he acquired later. (See Wells 2009, *supra*, at p. 14.)

Wells notes that "there is an interaction between the passage of time and susceptibility to post-event influences. The longer the time between the witnessed event and the introduction of misleading post-event information, the greater the effect of the misleading information on witness's subsequent reports (Loftus et al. 1978)." (*Ibid.*) The record does not indicate in any detail what interaction Fraduie had with the police or other individuals who might have suggested "facts" to him about the physical description of the shooter. However, the record establishes that there was a five-month period between the time Fraduie witnessed the crime on November 22, 1996, and April 18, 1997, when Fraduie viewed the photographic lineup. (3RT 384-386, 393, 511.) Then Fraduie viewed appellant at the preliminary hearing on May 6, 1998. (1CT 139.) More than one year later, on July 14, 1998, Fraduie rode to the police station with witness Mendez and viewed the live lineup in Mendez's presence. (3RT 511-512.) Throughout those years Fraduie's recollection would have faded significantly, with or without post-event influences, and his identification of appellant as the perpetrator would have been rendered unreliable.

(c) The Statement Fraduie Gave to Detective Paiz Upon His First Contact With Him Was Inharmonious With Fraduie's Testimony

The statement Fraduie gave to Detective Paiz in his first interview after the crime was "inharmonious" with his testimony. (*United States v. Smith, supra*, 563 F.2d 1361, 1363.) In his statement to police Fraduie was unable to give any description of the shooter (3RT 391-392), yet two and a half years later – at trial – Fraduie was able to provide a detailed description of the shooter's hair and skin tone. (3RT 392-394, 391.)

It is only natural that Fraduie's attention was not on the features of the man holding the rifle, since eyewitness experiments have consistently shown that the presence of a weapon in the hand of the culprit leads to a reduced ability to recognize the face of the culprit later.[45] The dominant explanation is that the weapon draws attention, pulling attention away from the culprit's face. Eye tracking research has generally confirmed the selective attention interpretation of weapon focus effect. (Wells 2009, *supra*, p. 11.) Fraduie's inability to give any description when questioned by the police is consistent with this "weapons effect." He saw a man with a rifle slung over his shoulder and kept moving; then he heard the shooting start. Unfortunately, the record does not reveal how Fraduie went from no recollection to a fairly detailed description of the man with the rifle.

Despite his inability to give *any* description to the police initially, Fraduie testified at trial that the person with the gun was a Black man whose complexion was "in between colors, about my complexion, but a little

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See detailed discussion of "weapon focus effect" in Argument II.C.4(e), *supra*, pp. 98-100.

– about a lighter shade – about a shade dark," with "low cut hair, about a little shorter than mine," "like a quo vadis" and "like an east coast haircut, real low" – meaning "real short." (3RT 392-394) The man with the gun did not have any facial hair, and was not wearing a hat. (3RT 397.) Fraduie could not remember the man's clothing. (3RT 397.) A reasonable, scientific explanation for Fraduie's "recovered" memory is that it was created by the suggestive identification procedures and by Fraduie's contacts with the police, witness Mendez, and the prosecutor, whether purposeful or inadvertent.

(d) Fraduie's Intoxication at the Time of the Shooting Lessens the Reliability of Fraduie's Later Selection Of Appellant as the Culprit

Common experience and science inform us that alcohol consumption has an impact on an individual's ability to observe and remember details. Alcohol interferes with the individual's ability to perceive and encode the crime rather than by affecting retrieval. (See Curt R. Bartol & Anne M. Bartol, *Psychology and Law: Theory, Research and Applications* 228 (3d ed. 2004), at 242; see also Bartol & Bartol, *supra*, at 242 [noting that ninety percent of the sixty-four eyewitness experts in Kassin's survey agree with the following statement: "Alcoholic intoxication impairs an eyewitness' later ability to recall persons and events."]; Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research, A New Survey of the Experts*, 56 Am. Psychologist 405, 410 (2001), at 408 tbl.1, 412 tbl.4.)

Furthermore, intoxicated eyewitnesses may be more susceptible to suggestion and post-event information than sober eyewitnesses. (Soraci et al., at 288 ["Finally, it is likely that individuals who have consumed alcohol may be less resistant to the effects of suggestion and post-event information. If true, more precautions need to be taken during their interviews and

interrogation."].) Accordingly, it may have been especially important to avoid suggestion and post-event information when questioning Fraduie, who was intoxicated at the time of the event. (*Ibid.*) As previously pointed out, it appears that Fraduie may have been exposed to at least some suggestion and post-event information prior to trial. The record does not indicate in any detail what interaction Fraduie had with the police or other individuals who might have suggested "facts" to him about the physical description of the shooter. However, Detective Paiz admitted on cross-examination that he conducted a first interview with Fraduie prior to the date Fraduie came to the police station to view the photographic lineup. (3RT 513-514.) Detective Paiz said he could not remember the street or the date of that first contact, and he did not prepare a report regarding that contact with Fraduie. (3RT 514-515.) In addition, the record establishes that there was a five-month period between the time Fraduie witnessed the crime on November 22, 1996, and April 18, 1997, when Fraduie viewed the photographic lineup. (3RT 384-386, 393, 511.) Then Fraduie viewed appellant at the preliminary hearing on May 6, 1998. (1CT 139.) More than one year later, on July 14, 1998, Fraduie rode to the police station with witness Mendez and viewed the live lineup in Mendez's presence. (3RT 511-512.) The opportunity for post-event information and suggestion was significant in this case, and renders Fraduie's identification of Mr. Reed unreliable.

At the very least, Fraduie was drunk when he saw the man with the gun slung over his shoulder. He had spent the day drinking with Moreland (3RT 393-394, 398), and may have consumed more than the alcohol and marijuana he admitted to ingesting, given that the autopsy revealed cocaine and PCP in Moreland's blood. (3RT 546-549.) Fraduie's considerable intoxication is the likely explanation for his inability to give any description

of the man with the gun during his initial contact with Detective Paiz. Therefore, his identification of appellant as the man he saw with the gun is unreliable, and cannot support his conviction for killing Moreland and attempting to kill Fraduie. As the only thread connecting appellant to the Moreland shooting, it is insufficient to support his conviction for that crime and for attempting to kill Fraduie.

(e) The Identification Procedures Further Reduced the Reliability of Fraduie's Identification of Appellant as the Shooter

(i) The Photographic Lineup Was Suggestive

Appellant has previously described the manner in which the lineup composition rendered the photographic lineup suggestive, and how that lineup did not conform to reliable identification protocols. (See detailed discussion in Argument II. at pp. 82-89 and 103-106, *supra*.) The photographic lineup was suggestive in that appellant was the only person in the six-person lineup with a bald head. (People's Exhibit 8.) The lineup administrator – Detective Paiz – was not neutral. (3RT 479-480, 483.) The meeting in which Fraduie was shown the photo lineup was not recorded. The prior meeting between Fradiue and Detective Paiz was never documented. (3RT 513-515.) Defense counsel was not present during the photographic display, and no independent, unbiased witness testified to what happened during the procedure.

The dominant view among psychological scientists is that, once an eyewitness has mistakenly identified someone, that image "becomes" the witness' memory and the error will simply repeat itself. (Wells 2009, *supra*, p. 9.) That certainly appears to be the case here, since Fraduie was unable to give any description of the perpetrator during that first, undocumented,

meeting with Detective Paiz. (3RT 391-392, 513-515.) Given the suggestiveness in the composition of the photographic lineup and the fact that the lineup administrator was not neutral, the identification obtained by that procedure is unreliable. This conclusion is supported by the evolution of Fraduie's description of the shooter from no description at all to a detailed description of a haircut and a skin color. The suggestiveness of the photographic lineup was compounded by Mr. Fraduie's observation of Mr. Reed at the preliminary hearing (1CT 139), and his viewing of him a short time later at the live lineup. (3RT 511-512.)

(ii) The Live Lineup Was Suggestive

Among the suggestive procedures addressed by Wells, and which occurred here, was conducting a second lineup procedure in which the only person in common was the suspect. (Wells 2009, *supra*, p. 1.) Fraduie first viewed a photographic six-pack with appellant in it; then he saw appellant at counsel's table at the preliminary hearing, and then, more than a year later, Fraduie picked appellant out of a live lineup, in which the only common individual to the photo lineup and live lineup was appellant. (1CT 139; 3RT 387, 393.) As Wells explains:

> [T]he procedure is highly suggestive to the extent that the witness can discern which person is common to both []lineups. Precisely these types of effects have been found in eyewitness identification experiments: Witnesses who encountered a innocent person's photo in an initial identification procedure were more likely to misidentify a different photo of him in a second procedure even if they did not misidentify him in the first procedure, but the effect is especially strong if they also misidentified the person in the first procedure (Brigham and Cairns 1988; Gorenstein and Ellsworth 1980; Hinz and Pezdek 2001; see meta-analysis by Deffenbacher et al. 2006). Although experiments have not directly tested the question of in-court identifications that occur after a pretrial lineup, our

> understanding of transference and commitment effects leads to the reasonable inference that a mistaken identification prior to trial is likely to be replicated during an in-court identification.

(Wells 2009, *supra,* at p. 8.) Indeed, when asked about the live lineup, Fraduie testified that he picked the man he had previously seen in the photograph (3RT 393), as had Mendez.

(iii) The Degree of Fraduie's Confidence May Have Been Compelling to the Jurors, But It Is Likely His Confidence Indicates That He Was Mistaken

Appellant has previously described the studies that have found no statistically significant correlation between confidence and accuracy, and which have found that in a number of instances the correlation is negative – i.e., the more certain the witness, the more likely he is mistaken. (Wells & Murray, *Eyewitness Confidence, in Eyewitness Testimony: Psychological Perspectives*, pp. 159-165.) The authors conclude that "the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings." (*Id.* at p. 165; see also Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?* (1980) 4 Law & Human Behav. 243.) The average juror, however, remains unaware of these findings: "A number of researchers using a variety of methods have found that people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy." (Wells & Murray, *supra*, at p. 159, citing five recent studies.)

Appellant's conviction for the attempted murder of Fraduie and the murder of Moreland rested upon the uncorroborated testimony of Fraduie. Although a weapon was recovered, no fingerprints or other identifying marks were found on it, there were no surveillance videotapes, and no DNA to link

appellant to the shooting. In 1977, Justice Hufstedler expressed her doubts about the validity of "cling[ing] to the notion that the testimony of one witness, if solidly believed, is sufficient to prove the identity of a perpetrator of a crime" in light of "the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith, supra*, 563 F.2d 1361, at pp. 1364-1365 [Hufstedler, J., concurring specially].) In light of the developments in the science of eyewitness identification since that time, Fraduie's testimony must be found insubstantial, incredible evidence insufficient to sustain appellant's convictions for the murder of Moreland and the attempted murder of Fraduie.

5. The Evidence Was Insufficient to Establish That The Murder Weapon Was Ever In Appellant's Possession; Therefore, the Location of the Weapon Coupled With Fraduie's Testimony Identifying Appellant as the Man With the Gun is Insufficient to Support Appellant's Conviction

(a) Facts Relied Upon by the Prosecutor Purportedly Connecting the Murder Weapon to Appellant

At about 10 or 10:30 p.m. on November 23, 1996, roughly 24 hours after the Moreland/Fraduie shooting, a police officer contacted appellant on the street near 1315 East Glencoe. (3RT 416, 418.) The officer did not enter any building there, and he could not remember who else was present. (3RT 417-418.) The officer filled out an F.I. card, on which he wrote that he had contacted a person named Ennis Reed, and that a man named McLaine was with him. (3RT 413, 416; People's Exhibit 12.)

At around 11:00 or 11:30 that same night, officers chased a man named Chico McLaine into a duplex just slightly northwest of the spot on

Glencoe Street where Moreland's body was found. (3RT 355-358; People's Exhibit 1; People's Exhibit 6.) A second man, not appellant, was found in the house but not arrested. (3RT 356-357, 367.) An officer found in a hall closet the rifle later determined to be the murder weapon in the Moreland case. (3RT 357-358, 364-365.) The rifle, the clip and the ammunition had no fingerprints on them. (3RT 368.) Nobody made any attempt to determine who lived at the duplex where the rifle was found. (3RT 370.)

The prosecutor argued on closing that the rifle was "physical evidence [that] tends to support what Mr. Fraduie said about the events of that night." (4RT 651.) The prosecutor also argued: "The defendant was there the next day. You have the F.I. card. You know it's him." (4RT 652.) "It's the same guy. The defendant had a gun. No one else did."[46] (4RT 652-653.)

(b) No Evidence Connected the Gun to Appellant

The cases addressing evidence of constructive possession are instructive here. Possession may be actual or constructive and may be shared with other persons. (*People v. Neese* (1969) 272 Cal.App.2d 235, 245.) A defendant has actual possession of a firearm that is in his immediate possession or control. (*People v. Pena* (1999) 74 Cal.App.4th 1078,1083.) He has constructive possession of a firearm that is not in his physical possession, but over which he knowingly exercises control or the right to control. (*Ibid.*; CALJIC No. 12.44.) A person may exercise dominion and control over the weapon through an agent acting at his direction. (*People v. Pena, supra*, 74 Cal.App.4th 1078, 1083; see *People v. White* (1958) 50 Cal.2d 428, 431,

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Trial counsel failed to object to the prosecutor's inaccurate portrayal. (4RT 652-653.)

[constructive possession of narcotics].) Possession may be established by circumstantial evidence and any reasonable inferences to be drawn from it. (*People v. Williams* (1971) 5 Cal.3d 211, 215.) For example, possession may exist where the firearm is located in an area that " '... is immediately and exclusively accessible to the accused and subject to his dominion and control.'" (*People v. Francis* (1969) 71 Cal.2d 66, 71.) However, the mere fact that the defendant is present near the weapon does not establish possession. (See *People v. Land* (1994) 30 Cal.App.4th 220, 223-224, and cases cited therein [receipt of stolen property]; *People v. Glass* (1975) 44 Cal.App.3d 772, 777 [possession of a controlled substance].)

Here, there is no substantial evidence in the record to establish or support an inference that appellant exercised control, or the right to control, the rifle found in the duplex. No witness testified to seeing appellant in the duplex where the rifle was found. No witness established any connection between appellant and the duplex, other than he was standing on the street near the duplex. The evidence offered by the prosecutor could not establish that appellant ever exercised control of, or the right to control, the weapon. (See, e.g ., CALJIC No. 12.44.) Therefore, the evidence that appellant was in the vicinity of the duplex where the weapon was found, and that the man standing next to him at the time the F.I. card was filled out happened to be chased into that duplex on the same evening, does not establish any connection between appellant and the premises where the murder weapon was found, or the weapon itself. Likewise, no inference can reasonably be drawn that the evidence of the rifle corroborates Fraduie's identification of appellant as the shooter – and yet that is precisely the inference the prosecutor asked the jury to draw. (4RT 651-653.)

6. On the State of This Record, the Lack of Evidence Requires Reversal

In *People v. Blakeslee* (1969) 2 Cal.App.3d 831, the Court of Appeal overturned a murder conviction based upon circumstantial evidence. In *Blakeslee*, the defendant and her brother resided with their mother in an apartment complex. At 7:20 p.m., the defendant's brother left the apartment after an argument with their mother, accompanied by the defendant. The defendant spent some time with her brother listening to tapes in the carport. Her brother left. (*Id.* at pp. 833-834.) Their mother remained in the apartment reading. (*Id.* at pp. 833-834.) The defendant encountered a neighbor around 7:35 p.m. as defendant was carrying newspapers out of her mother's apartment, and they spoke briefly in the courtyard. (*Ibid.*) About 10 minutes later, a returning neighbor heard loud sounds. (*Id.* at p. 834.) Shortly thereafter, defendant went to a neighbor's apartment because her mother had been shot. (*Ibid.*) At about 8:00 p.m. defendant's brother returned. (*Id.* at p. 835.)

Defendant claimed that after dumping the newspapers in the trash, she went for an 11-mile drive. (*Id.* at p. 835.) The defendant's brother owned a .22 caliber rifle that was missing after the shooting. The defendant knew how to use the weapon. The rifle had to be reloaded each time after firing, and because the bullets shattered on impact, they could not be used to identify the gun from which they had been fired. The coroner testified the victim was shot with a .22 caliber weapon. (*Id.* at p. 835.) At trial, the defendant recanted her story about the 11-mile drive, claiming she concocted the story to protect her brother. (*Id.* at p. 836.) To sum up, in *Blakeslee*, the evidence established only that the defendant and her brother had both quarreled with the victim, their mother, that both had access to a rifle (belonging to the brother), and that the defendant had offered police a false

account of her movements (intended, she testified, to protect her brother). The evidence was thus at least as consistent with the brother's guilt as with the defendant's. (*Blakeslee, supra*, 2 Cal.App.3d 831, 837-840.)

The *Blakeslee* court found insufficient evidence to convict, concluding, "No one witnessed the shooting, no one placed defendant in the apartment at the time of the shooting, no one saw defendant with a weapon, and no one identified defendant with any particular weapon." (*Id.* at p. 838.) The Court noted that one factor relevant to the question of whether the evidence was sufficient to inspire confidence in the defendant's guilt was "the absence of evidence we would normally expect to find in a murder prosecution based upon circumstantial evidence. The absence of evidence ... may have as great an impact on the substantiality of a case as any which is produced, for the absence of evidence which would normally be forthcoming can undermine the solidity of the proof relied on to support a finding of guilt." (*Id.* at p. 839.) In particular, the Court noted that among the evidence that would be considered "central to the charge of murder" would be "evidence to establish a connection between a murder weapon and the defendant, either tangible evidence such as fingerprints, palm prints, or powder burns, or testimonial evidence linking the defendant in some manner to a weapon, which evidence we do not have." (*Id.* at pp. 838- 840.)

In the Moreland killing, there is evidence of a murder weapon, and evidence linking the bullets that killed Moreland to that weapon.[47] The problem is that there is no substantial, credible evidence linking *appellant* to that weapon. There were no fingerprints, palm prints or powder burns. The

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There was, however, a dispute as to the chain of custody of the shell casings presented as evidence in the Moreland case. (See 3RT 551-556.)

weapon was found in a residence to which appellant was not connected, such that he could be said to have constructive possession of the weapon found in the closet of that residence.[48] There is only testimony by Fraduie that he briefly glimpsed a man he initially could not describe – whom he later identified as appellant only after multiple suggestive identification procedures – standing in a group of men, holding a gun that *looked like* the gun designated as People's Exhibit 5. (3RT 376.) There is no eyewitness to the shooting itself. There is no eyewitness who testified that appellant fired the gun. There is no circumstantial evidence from which the jury could infer motive for this shooting. There is no evidence of flight that would support a finding of consciousness of guilt. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1030.)

Appellant's conviction has less evidence to support it than did the defendant's conviction in *People v. Trevino* (1985) 39 Cal.3d 667. In that case, this Court held there was no evidence of a motive for murder on the part of the defendant, who was a friend of the victim; the conviction rested entirely on an equivocal eyewitness identification and a fingerprint from the defendant in the victim's apartment, where he had previously been a guest. (*Id.* at pp. 667, 676, 696-697.) Here, the evidence of motive was even weaker, as there was no relationship between appellant and Moreland or Fraduie that might have provided a motive, and no evidence of any other motive, such as robbery. There was no physical evidence whatsoever to link appellant to the shooting. All the prosecution could offer was an identification made by a witness who was a stranger to appellant, who was drunk and high on drugs, had little opportunity to observe the man he saw holding a gun, at night, illuminated

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[48]See discussion in section III.5.(b), *supra*.

only by a nearby streetlight, standing in a group of men, did not volunteer his observations to the authorities, and was repeatedly subjected to suggestive identification procedures.

A reasonable jury could not find beyond a reasonable doubt that the circumstantial evidence proved defendant's guilt.[49] The convictions must be reversed, and the death penalty vacated.

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[49] Because each of the cases is so weak individually, it is highly likely that, had the Tacos el Unicos case and the Moreland/Fraduie case been tried separately, the jury would not have returned guilty verdicts in either case. Unfortunately, trial counsel failed to move to sever them.

IV. APPELLANT ESTABLISHED A PRIMA FACIE CLAIM OF RACIAL DISCRIMINATION DURING VOIR DIRE OF THE GUILT PHASE JURY, ENTITLING HIM TO A REVERSAL

A. Introduction

A prosecutor's use of peremptory challenges to strike prospective jurors because of their race or gender violates both the federal and state constitutions, specifically the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution, and violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, § 16 of the California Constitution.[50] (*Batson v. Kentucky, supra*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131, 128 L.Ed.2d 89, 114 S.Ct. 1419; *People v. Wheeler, supra,* 22 Cal.3d 258, 276-277, *People v. Griffin* (2004) 33 Cal.4th 536, 553.) The guilt trial in this case took place in 1999. Subsequent to 1999, the United States Supreme Court decided a number of cases that clarify the duties of trial and state appellate courts in assessing "*Wheeler/Batson*" motions, including *Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129, and *Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196. To make a *prima facie* case for a *Wheeler/Batson* violation "the defendant must make a *prima facie* showing that the challenge was based on an impermissible ground, such as race." (*United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919.) This is a burden of production, not a burden of persuasion. (*Ibid.*)

During guilt phase jury selection, the first eighteen jurors to go

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In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the United States Supreme Court eliminated the requirement that the defendant and the stricken juror be of the same race.

into the jury box were Gladys Beard [Seat #1], a white female; Juror number 5645 [Seat #2], a white female; Juror number 1450 [Seat #3], an Asian/Filipino male; Corinne Tate [Seat #4], a white female; Juror number 2801 [Seat #5], a white male; Juror number 6761 [Seat #6], a Black female; Janice Clark [Seat #7], a Black female; Jacqueline Wilson [Seat #8], a white female; Kevin Wees [Seat #9], a white male; Bert Abron [Seat #10], a black male; Juror number 1923 [Seat #11], an Hispanic male; Billie Lawrence [Seat #12], a black female; Nickey Wright [Seat #13], a black male, Mary Cole [Seat #14], a black female, Betzaida Campizta [Seat #15], an Hispanic female; Juror number 0744 [Seat #16], a white female, David Wilcox [Seat #17], a white male; and Juror number 9937 [Seat #18], a white male. (3CT 692, 1016; 1772; 1808; 1823; 1861; 1879; 2149; 2275; 2311; 2438; 2528; 2546; 2565; 2601, 2619, 2673; Supplemental CT III 99; 2RT 276-277.)

During the first round of peremptory challenges, the prosecutor excused Corinne Tate [Caucasian female], Bert Abron [Black male], Billie Lawrence [Black female], Betzaida Camptiza [Hispanic female], and Janice Clark [Black female]. (4CT 1014; 7CT 1808, 1861, 1879; 9CT 2438; Supplemental CT III 103-105; 2RT 290-292.) During the second round of peremptory challenges, the prosecutor excused Bruno Blanco [Hispanic male], Nickey Wright [Black male], and Mary Cole [Black female]. (3CT 692; 7CT 1772; 8CT 2185; Supplemental CT III 107; 2RT 296.)

Following the peremptory challenge to Mary Cole, defense counsel raised a *Wheeler* objection.[51] (2RT 296-297.) Defense counsel

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People v. Wheeler, supra, 22 Cal.3d 258, is California's counterpart to *Batson v. Kentucky, supra,* 476 U.S. 79. A *Wheeler* motion is considered the procedural equivalent to a challenge under *Batson*. (*Ford v. Georgia* (1991) 498 U.S. 411, 418-419, 111 S.Ct. 850, 112 L.Ed.2d 935; *Paulino v. Castro*

pointed out that the prosecutor had excused by peremptory challenges five African-Americans out of the eight challenges exercised to that point (roughly 63% of his challenges). (2RT 297.) Trial counsel asserted, "Well, it doesn't look like, in regards to the last one, there was any – that it was justifiable, and I think it was done on the basis of race." (2RT 297.) The Court ruled: "All right. The court is going to find that there has not been a showing of a strong likelihood and that the burden has not been met at this point in time, so accordingly the *Wheeler* motion is denied." (2RT 297.)

After the *Wheeler* objection was heard and denied for failure to demonstrate a *prima facie* case, the prosecutor exercised peremptory challenges against two more Black women - LaShawn Stringer and Annie Fortson. (7CT 2003-2005; 9CT 2363-2365; 2RT 308, 314.)

Of the twelve jurors originally seated on the guilt phase jury, three were African-American, five were White, one was Hispanic, and three were Asian/other. (9CT 2528, 2546, 2565, 2583; 10CT 2601, 2619, 2637, 2655, 2673, 2691, 2709, 2727; Supp. CT III 196.) Just before the guilt phase jury was instructed, one of the African-American jurors, juror number 4 [8060], was replaced by an Hispanic juror, [5838]. (2CT 474; 10CT 2746; Supp. CT III, 196; 3RT 598-600.)

The trial court applied an incorrect standard in determining that appellant had failed to make a *prima facie* case. At the time of appellant's trial, California courts misunderstood *Batson* to call for a determination whether it was "more likely than not" that the prosecutor's challenges were racially motivated. The correct standard is whether the facts known at the time that the motion is made gave rise to an inference of discriminatory purpose.

(C.A.9 2004) 371 F.3d 1083, 1088, n. 4)

(*Johnson v. California, supra*, 545 U.S. 162, 173.) Currently, when this Court confronts a pre-*Johnson* trial court finding of no *prima facie* case, and the record does not show application of the correct legal standard, this Court is to "review the record independently to 'apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People v. Bonilla* (2008) 41 Cal.4th 313, at p. 341, citing *People v. Bell* (2007) 40 Cal.4th 582, 596; accord, *People v. Williams* (2006) 40 Cal.4th 287, 310.) Prior to *Johnson* and *Miller-El v. Dretke*, judicial review of trial court rulings had been guided by application of a deferential standard to a trial court's factual findings, which had only to satisfy a "substantial evidence" requirement. (See *People v. Huggins* (2006) 38 Cal.4th 175, 227-228; *People v. Avila* (2006) 38 Cal.4th 491, 541.) This is no longer the standard.

Moreover, on appeal it is not necessary to establish a "pattern" of exclusion of members of a cognizable group. The state and federal constitutions are violated by the improperly-motivated removal of even a single juror belonging to a cognizable group. (*People v. Bell, supra,* 40 Cal.4th 582, 598, fn. 3.)

B. Appellant Made a Prima Facie Case that the Prosecutor Was Exercising Peremptory Challenges to Remove Prospective Jurors Solely on the Basis of Group Bias

The trial court here erred in finding no *prima facie* case by holding Mr. Reed to a "strong likelihood" standard. *Batson* does not permit California courts to require at step one that the party objecting to a peremptory challenge show a "strong likelihood" or even that it is "more likely than not" that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. (*Johnson v. California, supra,* 545 U.S. 162, 168,

125 S.Ct. 2410, 2416.) By producing evidence sufficient to permit the trial judge to draw an inference that discrimination had occurred, appellant made a *prima facie* showing that the prosecutor was exercising peremptory challenges to remove prospective jurors solely on the basis of group bias. (*Id.* at p. 2417.) The trial court's error in applying the "strong likelihood" standard requires that the *prima facie* case be reevaluated. (*Ibid.*)

1. The Law Governing *Wheeler/Batson* Claims

The trial court erroneously denied the *Batson* claims at the first stage of the *Batson* analysis, where a defendant must make out a *prima facie* case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Batson v. Kentucky, supra*, 476 U.S. 79, 93-94 (citing *Washington v. Davis* (1976) 426 U.S. 229, 239-242.) A defendant can make out a *prima facie* case of discriminatory jury selection based on the totality of relevant facts about the prosecutor's conduct. (*Miller-El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317, 2324.) In *Johnson v. California, supra,* 545 U.S. 162, 125 S.Ct. 2410, the United States Supreme Court decided whether *Batson* "permits California to require at step one that `the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.' [Citation omitted]." (*Id.* at p. 2416.) The Court concluded that California's "more likely than not" standard was the wrong yardstick by which to measure the sufficiency of a *prima facie* case. (*Ibid.*)

The *Johnson* Court explained that *Batson* provides no support for California's "more likely than not" rule, and that a *prima facie* case of discrimination can be made out by offering a wide variety of evidence, provided that a party demonstrates that "the sum of the proffered facts gives `rise to an inference of discriminatory purpose.'" (*Johnson v. California,*

supra, 545 U.S. 162, at p. 163.) A *prima facie* case of purposeful discrimination may be made "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." (*Batson v. Kentucky, supra*, 476 U.S. 79, at 96, 106 S.Ct. 1712 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); citations omitted).

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the Constitution. The defendant must first make a *prima facie* showing that the prosecution has exercised a peremptory challenge on the basis of race. (*Batson v. Kentucky, supra,* 476 U.S. at pp. 96-97.) That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the petit jury on account of their race. (*Id.* at p. 96.) If a defendant makes this showing the burden shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at p. 97.) The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Id.* at p. 98.)

In *People v. Wheeler, supra*, 22 Cal.3d at pages 276-277, decided eight years before *Batson*, this Court presaged *Batson* by holding that a party may not employ peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*People v. Sims* (1993) 5 Cal.4th 405, 428, citing *Wheeler, supra*, 22 Cal.3d at p. 276; *People v. Fuentes* (1991) 54 Cal.3d at 713; see also *Powers v. Ohio, supra*, 499 U.S. 400.) When a trial court denies a *Wheeler* motion without finding a *prima facie* case of group bias, as happened in this case, the reviewing court considers the entire

record of voir dire to evaluate the trial court's ruling. (*People v. Howard, supra,* 1 Cal.4th 1132, 1155; *People v. Sanders* (1990) 51 Cal.3d 471, 498.)

The appellate court's review of a finding of no *prima facie* case is not limited to the argument of counsel upon bringing the *Wheeler* motion. "This is because other circumstances might support the finding of a *prima facie* case even though a defendant's showing has been no more detailed than in the case before us. Nor should the trial court blind itself to everything except defense counsel's presentation." (*People v. Howard, supra*, 1 Cal.4th 1132, at p. 1155.) Indeed, *Wheeler* emphasized that such rulings require trial judges to consider "all the circumstances of the case" (*People v. Wheeler, supra*, 22 Cal.3d 258, at 280) and call upon judges' "'powers of observation, their understanding of trial techniques, and their broad judicial experience.'" (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1092, quoting *People v. Wheeler, supra,* 22 Cal.3d 258, at 281.)

2. Application of the Law to This Case

(a) Statistical Disparity Demonstrates Group Bias

Group bias may be demonstrated by a showing that a party "has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his [or her] peremptories against the group." (*People v. Wheeler, supra*, 22 Cal.3d 258, at 280.) The jury venire panel for the guilt phase in this case consisted of a total of 122 people, including 42 Blacks [35% of the total panel]; 49 Whites [40% of the total panel]; 16 Hispanics [13% of the total panel]; and 15 Asians or other race [12% of the total panel]. (2CT 434-449, 458-461.) Of the 42 Black panel members, two were seated as jurors, but only one deliberated on the jury –

Juror No. 6.[52] (1CT 196; 9CT 2583; 10CT 2619; 3RT 594-600.) There were no Black alternate jurors. (See 1CT 196.) At the time the *Wheeler* objection was made, the prosecutor had exercised a total of eight peremptory challenges (2RT 290-297), and had used his peremptory strikes overall to exclude 6 of the eligible African-American venire members, or roughly 15% of the total eligible African-American venire members and 75% of his peremptory strikes exercised to that point. By contrast, the prosecution used only three of his peremptory challenges overall to remove White venire members, or roughly 6% of the total White venire members. Of the twelve jurors who decided the guilt phase, one, or 6 % was African-American; six, or 50%, were White; two, or 12.5%, were Hispanic; and three, or 25%, were Asian or other.

Although Blacks were 35% of the total panel, they were only 6% of the seated jury, and although Whites were just 40 % of the total panel, they were 50% of the jury who decided the case. "Happenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell,* 537 U.S. 322, at p. 342, 123 S.Ct. 1029.) More recently, the Ninth Circuit has held that, because a defendant need not establish a *prima facie* case by a preponderance of the evidence, but need only raise an inference of discrimination, "a defendant can make a *prima facie* showing based on a statistical disparity alone." (*Williams v. Runnells* (9th Cir. 2006) 432 F.3d 1102, 1107.) Thus, in *Williams v. Runnells, supra*, the Ninth Circuit observed that the defendant had made a *prima facie* case by showing that the prosecutor had used three of his first four peremptory challenges to strike African-American prospective jurors, where

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On June 22, 1999, just before the jury was instructed, Juror No. 4 – a Black woman – was replaced by the first alternate, an Hispanic male. (2CT 474; 3RT 598-600.)

there were only four African-Americans on the panel.[53] (*Ibid.*)

The Ninth Circuit regularly finds a *prima facie* case when the prosecution strikes two or more minority prospective jurors, and leaves a lesser number of, or no, minority prospective jurors on the jury. (See *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [*prima facie* case when prosecution struck all three black prospective jurors)]; *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099 [*prima facie* case when prosecutor struck all three black jurors]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698 [prosecutor struck the only two Hispanics].)

Other circuit courts are in accord. (See *United States v. (James Lamont) Johnson* (8th Cir. 1989) 873 F.2d 1137, 1139 ["inference" of discrimination where prosecution "struck black veniremen at a disproportionate rate and struck Blacks who did not respond during voir dire but did not strike whites who similarly did not respond"]; *United States v. Chalan* (10th Cir. 1989) 812 F.2d 1302, 1312 [*prima facie* case where government struck three of four Indians for cause, and then struck last Indian peremptorily; "If all the jurors of a defendant's race are excluded from the jury, we believe that there is a substantial risk that the government excluded the jurors because of their race."].)

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The penalty phase retrial jury selection proceedings in this case, during which no *Wheeler* objection was raised, indicate unfettered bias on the part of the prosecutor. That panel consisted of 162 individuals: 56 Blacks (35 %); 54 Whites (33 %); 26 Asians/other (16 %), and 26 Hispanics (16 %). Ten of the first eleven peremptory challenges by the prosecutor to the penalty phase panelists were to Blacks – that is over 90 %. Three Blacks sat on the jury, comprising 25% of the jury, where Blacks were 35% of the venire. By contrast, eight Whites sat on the jury, comprising 67% of the jury, where Whites were only 33 % of the venire.

The fact that there was one African-American on Mr. Reed's jury in no way undercuts his claim that he was deprived of a jury of his peers. "That one black served on the jury, while a significant fact that may be considered as circumstantial evidence, does not itself bar a finding of racial discrimination." (*Bui v. Haley* (4th Cir. 2003) 321 F.3d 1304, 1318; see also *People v. Davis* (2009) 46 Cal.4th 539, 583.)

(b) Comparative Analysis of the Challenged Veniremen and the Seated Jurors

In addition to the statistical showing that supports an inference of improper motive in the prosecution's exercise of peremptory challenges, side-by-side comparisons of some Black venire panelists who were struck and non-Black panelists allowed to serve provide further evidence supporting appellant's claim that the trial court erred in failing to find a *prima facie* case. (*Miller-El v. Dretke, supra,* 545 U.S. 231, 232,125 S.Ct. 2317, 2319.) If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination. (Cf. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147 [in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"]). Because the entire record may be considered in reviewing a finding of no *prima facie* case (*People v. Howard, supra,* 1 Cal.4th 1132, 1155; *People v. Sanders, supra,* 51 Cal.3d 471, 498), such a comparison is relevant here.

(i) Characteristics of The Challenged Veniremen

(A) Bert Abron

Bert Abron, a 40-year-old Black man, was born and raised in Los Angeles, had lived in Compton for 14 years, and worked as a supervisor for the postal service. (7CT 1861.) He was formerly employed as a county worker. (7CT 1861.) His father was a career air force "service man" and his mother was a housewife. (7CT 1861.) Mr. Abron was married and had three teenaged children. (7CT 1862.) His education consisted of some college, but no degrees or certificates. (7CT 1862.) Mr. Abron belonged to church groups and owned no firearms. (7CT 1863.) He was not connected with the criminal court, but he had friends in law enforcement; specifically the Long Beach Police; in fact, Mr. Abron had wanted to be a policeman, but did not go far in the process. (7CT 1864.) He had a negative experience with the Culver City Police in 1984. (7CT 1864-1865.) In 1988 Mr. Abron's car was stolen and he reported the incident to the Hawthorne police, but no arrests were made. (7CT 1865.) Nevertheless, Mr. Abron had no complaints about the way the case was handled. (7CT 1865.)

Mr. Abron's brother was the victim of a carjacking in 1989. (7CT 1865.) The same brother was arrested by Culver City Police in 1984, was convicted of robbery and did time in prison, but Mr. Abron assured the court that this fact would not affect his ability to evaluate the credibility of law enforcement witnesses. (7CT 1865-1866.) Mr. Abron felt the system was fair to his brother. (7CT 1866.)

Mr. Abron had performed prior jury service, both criminal and civil. (7CT 1867.) In the 1992 criminal case, a murder charge, the jury did not reach a verdict but hung 9-3. (7CT 1866.)

Mr. Abron had no feelings about the charged offenses, and no religious or moral beliefs that might make jury service difficult for him. (7CT 1866.) He stated he could follow instructions by the court even if he disagreed with the law, and he could judge the credibility of witnesses. (7CT 1867-1868, 1870-1871.) He could view photos of wounds or a dead person and not be prejudiced by them. (7CT 1868.)

Mr. Abron's answers to the death qualification questions were moderate. (7CT 1871-1875.) He wrote that he had "no general feeling" about the death penalty, "[b]ut it's the law in California." (7CT 1872.) He described himself as "moderately in favor of" the death penalty, agreed that his view had not changed in the past 10 years, and stated that he had no moral or religious beliefs that would prevent him from voting for the death penalty. (7CT 1873.) Mr. Abron believed death is worse than life without possibility of parole, and that the death penalty is imposed "about right." (7CT 183). Mr. Abron was not a member of any organization or association that advocates for or against death penalty, and did not feel obliged to accept the view of his church. (7CT 1874.) He strongly disagreed with the statement that anyone who kills another person should always get the death penalty, but he also strongly disagreed with the statement that "anyone who intentionally kills another person should never get the death penalty." (7CT 1874.) He stated that he could be fair and impartial. (7CT 1874.)

(B) Billie Lawrence

Billie Lawrence, a 59-year-old Black woman, had lived in South Central Los Angeles for 27 years. (4CT 1016.) She worked as an assembly worker for 21 years. (4CT 1016.) Her father was a janitor; her mother a home-care worker. (4CT 1016.) Her husband was a pressman for the Los Angeles Times, and they had one grown child. (4CT 1017.) Ms. Lawrence

had attended Compton College for one semester, but received no degrees or certificates. (3CT 1017.) She had not performed any military service, and she did not belong to any groups or organizations. (4CT 1018.) She did not own a firearm. (4CT 1018.) She was not connected with the criminal court or law enforcement, nor did she ever want to be in law enforcement. (4CT 1019.) She had no negative experiences with law enforcement. (4CT 1019.)

In 1984 Ms. Lawrence's purse was taken and she reported the incident to the police, but there were no arrests. (4CT 1020.) Nobody close to her has been a victim of a crime involving violence, she has never been a witness to a crime, and nobody close to her had been arrested or charged with a crime. (4CT 1021.) Ms. Lawrence sat on a jury in a criminal case involving drugs, and the jury reached a verdict. (4CT 1022.)

Ms. Lawrence had no feelings about the charged offenses, and expressed no religious or moral beliefs that might make jury service difficult for her. (4CT 1022.) She could follow the instructions given by the court even if she disagreed with the law, and she could judge the credibility of witnesses. (4CT 1022-1025.) She stated she could view photos of wounds or a dead person and would not be prejudiced by them. (4CT 1023.)

Ms. Lawrence's feelings about the death penalty were mixed. (4CT 1026-1030.) She believed background information about a defendant is not relevant to penalty. (4CT 1027.) Her general feelings about the death penalty were, "I would be fair." (4CT 1027.) She indicated she was "strongly against" the death penalty, and that view had not changed in the past 10 years; however, she had no moral or religious beliefs that would prevent her from voting for the death penalty. (4CT 1028.) She believed life without possibility of parole is worse than death. (4CT 1028.) She stated that the death penalty is imposed too often. (4CT 1028.) She was not a member of any organization

or association that advocates for or against the death penalty. (4CT 1029.) She "strongly disagreed" that anyone who kills another person should always get the death penalty, and she "strongly disagreed" that "anyone who intentionally kills another person should never get the death penalty. (4CT 1029.)

(C) Janice Clark [Black female]

Janice Clark was a 40-year-old Black woman who was born and raised in Los Angeles. (7CT 1808.) She had been a systems engineer for eight months, and worked as a systems analyst before that. (7CT 1808.) Her father was an insurance salesman; her mother a housewife. (7CT 1808.) She was married and had a 15-year-old child. (7CT 1809.) She had attended four years of college, but had received no degrees or certificates; she was at the time of trial a student in math. (7CT 1809.) She was a member of Alpha Kappa Alpha. (7CT 1810.) She did not own any firearms. (7CT 1810.) She kept up with the television news. (7CT1810.) She had no connections with the criminal court or law enforcement. (7CT 1811.) She had wanted to be in law enforcement; but took no steps towards that goal. (7CT 1811.) She had no negative experiences with law enforcement. (7CT 1811.) She had never been a victim of crime, nobody close to her had been a victim of a crime involving violence, and she had never witnessed a crime. (7CT 1812-1813.) Her husband was arrested or charged with "drugs" in 1977, and was convicted. (7CT 1813.) She felt the outcome was fair and the system was fair. (7CT 1814.)

Ms. Clark had no prior jury service. (7CT 1814.) She had no feelings about the charged offenses, and no religious or moral beliefs that might make jury service difficult. (7CT 1814.) She could follow instructions by the court even if she disagreed with the law. (7CT 1814.) Like the other

prospective jurors, she could view photos of wounds or a dead person and would not be prejudiced by them. (7CT 1815.) She could follow the jury instructions and base her decisions on the evidence received in the trial, and she could judge the credibility of witnesses. (7CT 1815-1816A.)

Ms. Clark did not display any bias for or against the death penalty. (7CT 1817-1821.) She believed information about the defendant might possibly be relevant to penalty. (7CT 1818.) Her general feelings about the death penalty were: "Each case is unique. The death penalty must be considered very carefully. It is a decision for a juror to live with for the rest of their life." (7CT 1818.) She said she was neutral about the death penalty and that her view had not changed in the past 10 years. (7CT 1819.) She had no moral or religious beliefs that would prevent her from voting for the death penalty. (7CT 1819.) She believed life without possibility of parole was worse than death, and that the death penalty is imposed "about right." (7CT 1819.) She was not a member of any organization or association that advocates for or against the death penalty. (7CT 1820.) She strongly disagreed that anyone who kills another person should always get the death penalty, and strongly disagreed that "anyone who intentionally kills another person should never get the death penalty." (7CT 1820.) She stated that she could fairly and impartially evaluate the evidence. to render a verdict. (7CT 1820.)

(D) Nickey Wright [Black male]

Nickey Wright was a 45-year-old Black male born and raised in Louisiana, and a resident of Compton at the time of trial. (7CT 1772.) Mr. Wright worked as a flagman for the railroad, having previously worked in security. (7CT 1772.) His father was a construction worker, and his mother was a homemaker. (7CT 1772.) Mr. Wright was married and had two

teenaged children. (7CT 1773.) Mr. Wright he had 13 years of schooling, but had obtained no degrees or certificates. (7CT 1773.) He had served in the Army, but not in combat. (7CT 1774.) He did not belong to any groups or organizations and did not own any firearms. (7CT 1774.) His source of news was television and newspapers. (7CT 1774.) He was not connected with the criminal court or law enforcement. (7CT 1775.) He had never wanted to be in law enforcement, but he also had no negative experiences with law enforcement. (7CT 1775.)

Mr. Wright had never been a victim of crime, and nobody close to him has been a victim of a crime involving violence. (7CT 1776.) He had never been a witness to a crime, and nobody close to him had been arrested or charged with a crime. (7CT 1777.) Mr. Wright had no prior jury service. (7CT 1778.) He had no feelings about the charged offenses, and no religious or moral beliefs that might make jury service difficult. (7CT 1778.) Mr. Wright stated that he could follow instructions by the court even if he disagreed with the law, and he could base his decisions on the evidence and judge the credibility of witnesses. (7CT 1778-1779, 1782.) He could view photos of wounds or a dead person and would not be prejudiced by them. (7CT 1779.) Mr. Wright stated he could judge the credibility of witnesses. (7CT 1779.) Mr. Wright did not know any of the parties or witnesses, but he was familiar with the location of Tacos El Unico, one of the murder scenes. (7CT 1780.) Mr. Wright seemed confused as to the burden of proof, stating that a defendant has to prove his innocence. (7CT 1781.)

Mr. Wright expressed a moderate attitude about the death penalty. (7CT 1782-1786.) He stated that he was "moderately in favor of" the death penalty; and that his view had not changed in the past ten years. (7CT 1784.) He had no moral or religious beliefs that would prevent him from

voting for the death penalty, and believed that life without possibility of parole is worse than death. (7CT 1784.) He believed the death penalty was imposed "about right." (7CT 1874.) He was not a member of any organization or association that advocates for or against the death penalty, and his religious organization had no opinion regarding the death penalty. (7CT 1875.) He "strongly disagreed" that anyone who kills another person should always get the death penalty, because someone might act in self-defense. (7CT 1875.) He "strongly disagreed" that "anyone who intentionally kills another person should never get the death penalty." (7CT 1785.) Mr. Wright believed he could fairly and impartially evaluate the evidence to render a verdict. (7CT 1785.)

(E) Mary Cole [Black female]

Mary Cole, a 63-year-old Black woman, was born and raised in Shreveport, Louisiana, and had lived in South Central Los Angeles for the past 35 years. (3CT 692.) She was a retired clerk. (3CT 692.) Her father was a truck driver and her mother was a maid. (3CT 692.) Her husband operated a company called "Cole's Towing." (3CT 693.) Ms. Cole had two grown children, one a clerk, the other unemployed. (3CT 693.) Ms. Cole had a 12th grade education. (3CT 693.) She possessed a firearm that belonged to her father. (3CT 694.) She followed television news. (3CT 694.)

Ms. Cole had no connections with the criminal court or law enforcement. (3CT 695.) She never wanted to be in law enforcement, and has had no negative experiences with law enforcement. (3CT 695.)

Ms. Cole stated that she had never been a victim of a crime, nobody close to her had been a victim of a crime involving violence, and she had never been a witness to a crime. (3CT 696-697.) Ms. Cole's husband was arrested or charged with a crime about ten years prior to this trial, but she did

not record the details of that incident on her questionnaire. (3CT 697.)

Ms. Cole had not previously served on a jury. (3CT 698.) She had no feelings about the charged offenses, and she had no religious or moral beliefs that might make jury service difficult. (3CT 698.) She stated that she could follow instructions given by the court even if she disagreed with the law, and she could judge the credibility of witnesses and base her decisions on the evidence received in this trial. (3CT 698-699, 701.) Ms. Cole could view photos of wounds or a dead person without being prejudiced by them. (3CT 699.)

Ms. Cole was another moderate on the death penalty, but leaned toward favoring it. (3CT 702-706.) Her general feeling about the death penalty was, "it is OK in some cases." She stated she was "moderately in favor of" the death penalty, and that her view had not changed in the past ten years. (3CT 703.) Ms. Cole had no moral or religious beliefs that would prevent her from voting for the death penalty. (3CT 704.) She believed the death penalty was imposed "about right." (3CT 704.) She was not a member of any organization or association that advocates for or against the death penalty. (3CT 705.) She agreed "somewhat" with the statement that anyone who kills another person should always get the death penalty," but she qualified it by saying, "you may have to kill to save your life." (3CT 705.)

(ii) Comparison of Challenged Panelists with Non-Black Jurors

Although the prosecutor was not called upon to give his reasons for excusing the minority jurors, an analysis of the reasons typically offered by prosecutors during a *Wheeler/Batson* challenge is useful here for purposes of comparison. "If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence

tending to prove purposeful discrimination." (*Miller-El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317, at p. 2321.) A typical justification offered for challenging Black panelists is the fact of an arrest or conviction of a relative, no matter how distant the relative or remote the criminal charge. (See *People v. Wheeler, supra*, 22 Cal.3d 258, 277, fn. 18; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Fields* (1983) 35 Cal.3d 329, 348; *People v. Allen* (1989) 212 Cal.App.3d 306, 312; *People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1112 [juror's brother-in-law convicted of murder]; *People v. Turner* (2001) 90 Cal.App.4th 413, 419; *Wade v. Terhune* (9th Cir.2000) 202 F.3d 1190, 1198-1199.)

No doubt the prosecutor in this case would have attempted to justify the challenges to African-American panelists Abron, Clark and Cole with the fact that their relatives had suffered arrests and/or convictions for crimes. (7CT 1865-1866 [Abron's brother arrested in 1984, convicted of robbery, did time in prison]; 7CT 1813 [Clark's husband was arrested or charged with "drugs" in 1977, was convicted]; 3CT 697 [Cole's husband was arrested or charged with a crime, but she did not know the details of that incident].) However, if the prosecutor was concerned about relatives having been arrested, then he should also have challenged Juror number 5 [badge number 2801], a White male juror whose daughter was arrested in 1996 and charged with possession of drugs (10CT 2606); Juror number 8 [badge number 9716], a Filipino male whose brother-in-law was arrested and charged with a misdemeanor in 1991 (CT 2660); and Juror number 11 [badge number 1923], a Mexican male, whose brother was arrested in 1993 on unknown charges. (10CT 2714.) Alternate juror No. 1 had a brother who was arrested 12 or 13 years before for shoplifting, but the juror did not know if criminal charges were filed; the brother was fined. (10CT 2751.) (See *Miller-El v. Dretke,*

supra, 545 U.S. 231, 250, fn. 8; 125 S.Ct. 2317, 2330.)

None of the challenged veniremen had ever been arrested, but Alternate Juror No. 3, a white male, *was* arrested and charged with disturbing the peace by fighting, and the charges were later dropped. (10CT 2787.) Alternate juror No. 4, a white male, was arrested in 1986 by Los Angeles County Sheriffs for possession of an illegal knife; criminal charges were filed; and he was given a fine and probation. (10CT 2805.) He complained that his defense attorney charged "to [sic] much money!!" (10CT 2805.)

A showing that the peremptorily challenged jurors share only their membership in the group, being in other respects - such as sex, age, occupation, and social and economic background - as heterogeneous as the community as a whole, is a factor indicative of a *prima facie* case of group discrimination. (*People v. Wheeler, supra,* 22 Cal.3d 258, at 280, fn. 27.) Here, the Black prospective jurors who were challenged had nothing in common other than their ethnic origin, again suggesting an improper basis for their exclusion. (*People v. Howard, supra*, 1 Cal.4th 1132, 1204.) Nor did they display any bias for the defense. Some of the challenged jurors leaned to the prosecution's side in their responses. Mr. Abron had wanted to be a police officer, had friends in law enforcement, and was "moderately in favor of" the death penalty. (7CT 1864, 1871-1875.) Ms. Clark had also wanted to be in law enforcement, and had no negative experiences with the police. (7CT 1811.) Mr. Wright had no negative experiences with law enforcement, expressed the belief that a defendant must prove his innocence, and was "moderately in favor of" the death penalty. (7CT 1775, 1781, 1782-1786.) Ms. Cole had no negative experiences with law enforcement and was "moderately in favor of" the death penalty. (3CT 695, 702-706.)

Juror No. 2, a white female who deliberated in this case, agreed

with the rule that a defendant does not have to prove his innocence, "but only because it is the law." (9CT 2556.) During voir dire she expressed her opinion that the defendant "should be able to say something, you know, like "I wasn't there," or something." (2RT 288.) Likewise, although Juror No. 3, an Asian/Filipino male, who described himself as "moderately in favor of" the death penalty, "agrees somewhat" that anyone who kills another person should always get the death penalty," and "strongly disagrees" that "anyone who intentionally kills another person should never get the death penalty." (9CT 2577-2578.)

On his questionnaire, Juror No. 8 expressed his opinion that a criminal defendant is required to prove his innocence - "defendant has a constitutional right to prove he is innocent unless proven guilty." (10CT 2664.) He also indicated, without explaining, his belief that background information about a defendant is not relevant to penalty. He did not respond to the question soliciting his general feelings about the death penalty. (10CT 2666.) Although he indicated he was "moderately in favor of" the death penalty; he "agrees somewhat" that anyone who kills another person should always get the death penalty, and "disagrees somewhat" that "anyone who intentionally kills another person should never get the death penalty. (10CT 2667-2668.) Alternate juror No. 2 described herself as "moderately in favor" of the death penalty, but her other answers indicated she was strongly in favor of it - she indicated her belief that the death penalty is imposed "too seldom," commenting that "there is [sic] people in prison that should have had the death penalty." (10CT 2774-2778.) Alternate juror No. 3 described himself as "strongly in favor" of the death penalty. (10CT 2794.)

Juror No. 11, like Ms. Clark and Mr. Abron, wanted to be in law enforcement, and he applied to the Los Angeles Police Department, going all

the way to the background check. (10CT 2712.)

The above comparative analysis indicates that the peremptorily challenged jurors shared only their membership in the group, being in other respects as heterogeneous as the community as a whole.

(c) The Prosecutor Failed to Question the Challenged Jurors on Voir Dire

"A prosecutor's failure to engage Black prospective jurors 'in more than desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is another factor that may support an inference that the challenge is in fact based on group bias. [Citations omitted.]" (*People v. Turner* (1983) 42 Cal.3d 711, at p. 727, citing *People v. Wheeler, supra*, 22 Cal.3d 258, 281; *Miller-El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317, 2328.) **The prosecutor asked not a single question of any challenged panel member on voir dire.** (See 2RT 289, 295.) This fact alone suggests that the prosecutor was exercising challenges based on group bias. (See *People v. Howard, supra*, 1 Cal.4th 1132, 1204.)

The trial court may have believed that no *prima facie* case was established because many African-Americans remained in the panel at the time of the challenges. However, the fact that some African-Americans remained on the panel does not establish that others were not improperly excluded. A single discriminatory exclusion violates a defendant's right to a representative jury. (*People v. Fuentes, supra*, 54 Cal.3d 707, 716, fn. 4.) Had the trial court instead considered the factors discussed in *Wheeler* and *Batson*, it would have found an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. (*Johnson, supra*, 545 U.S. 162, 125 S.Ct. 2410, 2416-2417.)

Considering all of the evidence of the relevant circumstances, it

is apparent that a *prima facie* showing was made and that the prosecutor should have been compelled to state his reasons for excluding minorities. The trial court abdicated its duties under *Wheeler* and *Batson* by denying the motion without requiring the prosecutor to explain his challenges. (See *People v. Snow* (1987) 44 Cal.3d 216, 226, and *People v. Hall* (1983) 35 Cal.3d 161, 168.)

The court here articulated, and relied upon, the incorrect "strong likelihood" standard when evaluating appellant's *Wheeler* objection. (2RT 297.) Where, as here, the record demonstrates a *prima facie* case of group bias, meaning that it presents evidence sufficient to support an inference of discrimination, the trial court's failure to require an explanation for the peremptory challenges in question is error. (*People v. Snow, supra*, 44 Cal.3d at 226; *People v. Motton* (1985) 39 Cal.3d 596, 608; *People v. Allen* (1979) 23 Cal.3d 286, 294; *People v. Wheeler, supra*, 22 Cal.3d 258, at 283.)

C. The Error is Prejudicial Per Se and Requires That Appellant's Conviction be Reversed

The net effect of the trial court's error was a jury that included one Black woman, two jurors who believed a criminal defendant must prove his innocence, and from which most of Mr. Reed's peers who were eligible for jury service had been peremptorily eliminated. The trial court's failure to find a *prima facie* case regarding the prosecutor's peremptory challenge of prospective jurors Abron, Clark, Lawrence, Cole, and/or Wright was prejudicial error. The court made its ruling during a time when the standard applied in California courts for finding a *prima facie* case was impermissibly high. Because the improper dismissal of even one prospective juror who is otherwise fit to serve is reversible error *per se*, Mr. Reed is entitled to a new trial.

V. THE VERSION OF CALJIC NO. 2.92 GIVEN IN THIS CASE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, TO MEANINGFULLY PRESENT A DEFENSE, TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND TO RELIABLE GUILT AND PENALTY VERDICTS, WHERE APPELLANT'S CONVICTION DEPENDED UPON UNCORROBORATED EYEWITNESS IDENTIFICATIONS

A. Introduction

Two parts of the CALJIC No. 2.92 instruction on eyewitness identification factors were stricken over defense objection: 1) "whether the witness had prior contacts with the alleged perpetrator," and 2) "the witness' capacity to make an identification." (3RT 558-559.) Defense counsel requested the "prior contacts" language because the fact that Mr. Reed had no prior contacts with the two eyewitnesses made any identification by those witnesses less reliable. (3RT 559.) Defense counsel requested the language on capacity because of Mr. Fraduie's state of intoxication at the time of the Moreland shooting.[54] (3RT 559-560.) The court suggested using the language, "[a]ny other evidence relating to the witness' ability to make an identification" instead. (3RT 560.) Defense counsel again objected to the striking of the language about prior contacts. (3RT 560.) The court gave the instruction using the language "any other evidence relating to the witness' ability to make an identification and omitting the language requested by the defense. (3RT 613-614.)

The court's striking of the two requested phrases was reversible

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Although counsel did not argue it, the language on capacity would also have informed the jury's consideration of the reliability of Mendez's identification testimony, given the serious injuries he suffered and the state of panic he admitted he was in. (See discussion at Argument II, *supra*, pp. 99-101.)

error.

B. The Language on Prior Contacts and Capacity to Make an Identification Were Necessary to the Defense Case and Should Not Have Been Stricken

Appellant was convicted of two separate crimes solely upon uncorroborated eyewitness identifications rendered by a single victim to each crime who were strangers to the perpetrator, who had very limited opportunity to observe under stressful conditions, and – in the Moreland and Fraduie shooting – a witness who was intoxicated. The jury was instructed in the language of CALJIC No. 2.92, Factors To Consider In Proving Identity By Eyewitness Testimony, as follows:

> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
>
> [The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]
>
> [The stress, if any, to which the witness was subjected at the time of the observation;]
>
> [The witness' ability, following the observation, to provide a description of the perpetrator of the act;]
>
> [The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]
>
> [The cross-racial [or ethnic] nature of the identification;]
>
> [Whether the witness was able to identify the alleged perpetrator

in a photographic or physical lineup;]

[The period of time between the alleged criminal act and the witness' identification;]

[The extent to which the witness is either certain or uncertain of the identification;]

[Whether the witness' identification is in fact the product of [his] own recollection;] and

Any other evidence relating to the witness' ability to make an identification.

(2CT 526-527; 3RT 613-614.) Missing from the instruction as given by the trial court are the two additional factors requested by trial counsel, regarding lack of prior contacts with the identified subject, and the capacity of the witness to make reliable observations.

The use note for CALJIC No. 2.92 states, "[t]his instruction (or a comparable one) should be given when requested in a case in which identification is a crucial issue *and there is no substantial corroborative evidence.* (*People v. Wright* [1988], 45 Cal.3d 1126, 1143, 248 Cal.Rptr. 600, 609, 755 P.2d 1049, 1059 (1988).)" (CALJIC No. 2.92 [emphasis in original].)

In *Wright,* the Supreme Court held that CALJIC No. 2.92 "should be given ... in a case in which identification is a crucial issue...." (*People v. Wright, supra*, 45 Cal.3d at p. 1144.) "[T]he listing of [eyewitness identification] factors to be considered by the jury will sufficiently bring to the jury's attention the appropriate factors, and ... an explanation of the *effects* of those factors is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate. The instruction should list the applicable factors in a neutral and nonargumentative instruction, thus

effectively informing the jury without improperly invading the domain of either jury or expert witness." (*Id.* at p. 1143 [fn. omitted, emphasis in original].) The Court generally approved giving standard instructions concerning eyewitness identification factors, provided defense counsel is given an opportunity to suggest additional or supplemental factors. (*Ibid.*; see *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1383.) On closing, defense counsel argued to the jury that eyewitness identification was inherently unreliable in view of the conflicting eyewitness identification testimony, the conditions under which the witnesses observed the perpetrator, and the suggestive identification procedures. (4RT 672-685.) Defense counsel also argued that Fraduie had been drinking all day, had taken drugs, and did not see anyone fire a weapon. (4RT 672-674.) Defense counsel failed to mention the lack of prior contacts, or that the witnesses were strangers to the people they identified as the perpetrators.

The language requested by defense counsel was standard language routinely included in CALJIC No. 2.92, not a modification. The rejected factors were warranted by the evidence. Therefore, the trial court improperly struck them.

C. The Court's Error was Prejudicial

The trial court's error in rejecting the standard language requested by defense counsel was not harmless because it is reasonably probable that appellant would have received a more favorable result had the requested instruction been given. (See *People v. Ward* (2005) 36 Cal.4th 186, 214; *People v. Wright, supra,* 45 Cal.3d 1126, 1144.)

While appellant's attorney challenged the accuracy of the eyewitness identifications in his opening statement, cross-examinations and closing argument, he failed to call an expert on eyewitness identifications. He

also failed to mention the lack of prior contacts between the witnesses and appellant. In his closing argument, the prosecutor did not acknowledge any difficulty with the eyewitness identifications made by Mendez and Fraduie. Rather, he argued that there was no connection between the surviving victims and the defendant, and that because there was no prior contact, the witnesses had no reason to be untruthful. (4RT 634.) Furthermore, the prosecutor repeatedly argued that the jury should use "common sense" to evaluate the eyewitness testimony – often relying upon the very myths about the ability of witnesses to perceive and recall that an expert might have rebutted. (4RT 642-643 [stress would help the witness remember, use "common sense"]; 643-645 [the prosecutor's unsupported speech regarding the difference between "the ability to recognize" and "the ability to describe"]; 637-638, 645, 648 [the certainty expressed by the witnesses as to their identifications of appellant]; 685-686 [use common sense].) The error was not harmless, but permitted the prosecutor to exploit a significant weakness in the defense case – the failure to call an expert. (*People v. Watson* (1956) 46 Cal.2d at p. 836.)

As appellant has previously argued, research has shown that the certainty of a witness is easily manipulated by a variety of factors that have nothing to do with accuracy. (See, e.g., Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olsen, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112 (2002); Gary L. Wells & Amy L. Bradfield, "*Good, You Identified the Suspect*": *Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience,* 83 J. Applied Psychol. 360 (1998).) At the same time, research also shows that fact-finders place a disproportionate weight on the confidence of the witness in their analysis of the witness' reliability. (Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision*

Times in Simultaneous and Sequential Lineups, 78 J. Applied Psychol. 22, 23 (1993); see also Penrod & Cutler, Witness Confidence, *supra*, at 819 [reporting a mock-jury finding that "nearly four out of five mistaken identifications are believed"]; Gary L. Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony, in Eyewitness Testimony*, Psychological Perspectives, 256, 271 (Gary L. Wells, Elizabeth Loftus, eds., 1984).

Because the trial court excised vital portions of the eyewitness identification factors from the instruction, appellant was placed at a disadvantage when it came time for the jury to consider the accuracy and reliability of the eyewitness identifications. Even in the absence of argument by counsel, the jury would have been prompted to consider whether the eyewitnesses were reliable given, among other weakening factors, the witnesses had never seen the perpetrator(s) before, and in at least one case, the eyewitness's ability to observe was significantly compromised by his state of intoxication. In a case where the only evidence supporting the convictions was eyewitness identifications, this was necessarily prejudicial. The version of CALJIC No. 2.92 given in this case violated appellant's rights to due process, to meaningfully present a defense, to the effective assistance of counsel, and to reliable guilt and penalty verdicts, as protected by the federal and California constitutions, where appellant's conviction depended upon uncorroborated eyewitness identifications. (U.S. Const., Fifth, Sixth and Fourteenth Amends.) Appellant's convictions must therefore be reversed.

VI. THE TRIAL COURT'S FAILURE TO MAINTAIN COURTROOM DECORUM BY CONTROLLING WITNESS MENDEZ'S OUTBURSTS WAS PREJUDICIAL ERROR

The prosecution called Carlos Mendez as a witness in both the guilt phase and in the penalty phase retrial. (3RT 459-497; 5RT 1002-1029.) Thirteen times during his guilt phase testimony, and three times during the penalty retrial, Mendez called Mr. Reed "that devil" (3RT 464-465, 470-473, 476, 479; 5RT 1007-1008, 1017.) He added more emotion to his penalty retrial testimony by stating, in reference to the shooting of his wife that "even a dog can't be killed this way."[55] (5RT 1029.)

The court failed to admonish either jury that Mendez's attacks on appellant should have no bearing on their guilt or penalty determinations, failed to admonish the jurors that they should remain fair and impartial, or otherwise to take steps to protect Mr. Reed's right to a fair trial.

A. Standard of Review

Federal due process requires that the accused receive a trial by an impartial jury free from outside influences. (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 362.) One of the duties of the trial court is to maintain the order and dignity of the judicial process, to prevent improper influences from reaching the jury. (*United States v. Young* (1985) 470 U.S. 1, 10.) The trial court has broad power to maintain orderly proceedings. (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) Accordingly, a trial court's responses to outbursts from a witness must be reviewed for abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057.)

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55 Although defense counsel objected once to the use of the word "devil" at the penalty retrial (5RT 1008), he failed to object during the guilt phase.

B. A Criminal Defendant Has a Right to a Fair and Impartial Trial And a Trial Judge Has a Duty to Maintain Proper Decorum and An Appropriate Atmosphere in the Courtroom

The cornerstone of the American judicial system is the right to a fair and impartial process. (United States Const. Sixth and Fourteenth Amendments.) A "trial is a formal proceeding where every litigant is entitled to nothing less than the cold neutrality of an impartial judge charged with the duty to ensure that every grievance is fairly resolved in accordance with the rules of evidence and trial procedure." (*Vaughn v. Progressive Cas. Ins. Co.* (Fla. Dist. Ct. App. 2005) 907 So. 2d 1248, at p. 1252.) The defendant is entitled to solemnity and sobriety in the criminal process, as such elements are essential attributes of a system that subscribes to any notion of fairness and rejects the verdict of a mob. (*Murphy v. Florida* (1975) 421 U.S. 794, 799.)

The preservation of order, dignity, and decorum in the courtroom is one of the duties of the court. (*United States v. Young, supra,* 470 U.S. 1, 10.) Indeed, the paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice. (*Sheppard v. Maxwell, supra,* 384 U.S. 333, 354, fn. 9.) One of the polestar considerations in affording a defendant a fair trial is that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudices, passion, excitement, and tyrannical power." (*Sheppard v. Maxwell, supra*, 384 U.S. at p. 350, quoting *Chambers v. Florida* (1940) 309 U.S. 227, 236-237.)

The court has both the statutory and inherent power and duty to take whatever legitimate steps are necessary to maintain proper decorum and an appropriate atmosphere in the courtroom during a trial. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126-127 (cert. den., 421 U.S. 1012,

95 S.Ct. 2417, 44 L.Ed.2d 680) citing Code Civ. Pro., § 128, subd. 3, *People v. Merkouris* (1956) 46 Cal.2d 540, 556.) "Trial courts possess broad power to control their courtroom and maintain order and security." (*People v. Woodward* (1992) 4 Cal.4th 376, 385; Code Civ. Proc., § 128, subd. (a)(1)-(5).) The court also has the power "to take whatever steps [are] necessary to see that no conduct on the part of any person obstruct[s] the administration of justice." (*People v. Santo* (1954) 43 Cal.2d 319, 331 (cert. den., 348 U.S. 959, 75 S.Ct. 451, 99 L.Ed. 749.)

The trial court has a duty to make sure that "public sentiment" toward a defendant not be expressed in the courtroom in such a manner so as to influence the jury. (*People v. Slocum* (1975) 52 Cal.App.3d 867, 883.) Where, for example, the misconduct of a spectator is "so reprehensible as necessarily to result in influencing the jury," a mistrial must be declared. (*Ibid.*) The trial court's steps to reduce the possible prejudicial effect of the misconduct upon the jury will be considered. (*Ibid.*) In this case, the misconduct was displayed by a witness who was the center of the jury's attention; the impact of the witness' overly emotional, pejorative comments on the jury is beyond question.

C. Mr. Reed Was Deprived of His Right to a Fair Trial by Mendez's Outbursts

Mr. Reed's case closely resembles *Rodriguez v. State* (Fla.App. 1983) 433 So.2d 1273.) In that case, the victim's wife, her daughter, and her daughter's husband were following the victim from a shopping center in another car when they saw two men emerge from a yellow Cadillac, shoot the victim several times and drive away. The victim died at the hospital a short time later. By tracing the license plate on the Cadillac, the police learned that defendant owned the automobile. Some witnesses identified the defendant as

the murderer after examining photographs and observing a line-up, but the victim's widow was unable to make an identification. Even so, at trial the victim's widow – like Mr. Mendez in this case – shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility toward the defendant. Reversing a judgment of conviction for first-degree murder and for display of a firearm during the commission of a felony, the *Rodriguez* court said that the improper conduct of the widow of the victim while testifying engendered sympathy for her plight and antagonism for the defendant, depriving him of a fair trial. The court held that these outbursts, while understandable, were extremely prejudicial. (*Rodriguez v. State, supra*, 433 So.2d at 1276.) A similar display of emotion, hostility, impassioned statements and shouted epithets occurred here: Mr. Mendez angrily and repeatedly called Mr. Reed "that devil" and garnered sympathy for his dead wife by emoting, "even a dog can't be killed this way." (3RT 464-465, 470-473, 476, 479; 5RT 1007-1008, 1017; 1029.)

Similarly, in *Fuselier v State* (Miss. 1985) 468 So 2d 45, a prosecution for capital murder, the victim's daughter was the first prosecution witness. She was seated at counsel's table, openly displaying emotion during the proceedings. The Court found that this arrangement presented the jury with an image of the prosecution acting on the daughter's behalf and reversed the defendant's conviction, finding her conduct could all too easily lead to a verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to facts. (*Fuselier v State, supra*, 468 So 2d 45, 52-53.) Citing *Sheppard and Chambers, supra*, in reversing the conviction, the court noted:

> There can be no graver proceeding than when a human being is put on trial for his or her life. The right to a fair trial includes the right to a verdict based on the evidence and not extraneous prejudicial happenings in and around the courtroom. [Citations

> omitted.] In numerous contexts this Court has held that a verdict based on anything other than the evidence of the crime is tainted and where it is the result of bias, passion or prejudice it cannot be allowed to stand.

(*Fuselier v State, supra*, 468 So 2d at 53.)

The same principle applies here; Mr. Reed was on trial for his life, and Mendez's emotional outbursts and identification of Mr. Reed as "that devil" could only taint a trial where the sole issue was whether Mr. Reed was the person who shot Mendez and killed his wife. The unfair and prejudicial emotional emphasis served to overshadow the facts. (See also, *State v. Stewart* (1982) 278 S.C. 296 [295 S.E.2d 627, 629-631], certiorari denied 459 U.S. 828, 74 L.Ed.2d 65, 103 S.Ct. 64 [trial court failed to explore the prejudice which may have resulted from the conduct of a spectator who continually glared at the jury and who made opinionated remarks regarding defendant's guilt which were overheard by several jurors; an overcrowded and noisy courtroom also resulted in several outbursts requiring admonitions]; *Price v. State* (1979) 149 Ga.App. 397 [254 S.E.2d 512, 513-514] [victim's mother repeatedly disrupted the proceedings with emotional outbursts and other interruptions]; *Walker v. State* (1974) 32 Ga.App. 476, 208 S.E.2d 350 [abuse of discretion when the trial court allowed the mother of the victim to sit at the prosecution table throughout the trial over defendant's objection]; *State v. Gevrez* (1944) 61 Ariz. 296, 148 P.2d 829, 832-833 [mother of the deceased victim sat within three to four feet of the jury, repeatedly interrupted the trial with emotional outbursts, and wept bitterly throughout the trial]; and *Glenn v. State* (1949) 205 Ga. 32, 52 S.E.2d 319, 321-322 [widow of the victim wept visibly and audibly during final argument after the prosecutor had asked her to be present to "let the jury know she was interested"].)

D. Mendez's Outbursts Were Prejudicial

Where a Sixth Amendment right to a fair trial and a Fourteenth Amendment due process violation is charged, this court must apply the *Chapman* standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, to affirm, this Court must be able to declare a belief that the error was harmless beyond a reasonable doubt. (*Ibid.*) To do so, the court must find that "'the error complained of did not contribute to the verdict obtained'" – because it was "unimportant in relation to everything else the jury considered on the issue in question." (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) As the United States Supreme Court held in *Sullivan v. Louisiana* (1993) 508 U.S. 275, "Harmless-error review looks . . . to the basis on which 'the jury actually rested its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Id.* at p. 279, original italics.)

The court's failure to control Mr. Mendez's outbursts and its failure to admonish the jury cannot be found harmless beyond a reasonable doubt. The jurors were left to experience the unmitigated impact of Mr. Mendez's attack on Mr. Reed. They were uncertain over Mr. Reed's involvement in the killing of Vasquez and the shooting of Mendez, as evidenced by their question and request for further instruction during deliberations. (RT Vol 6, 1317-1320, see Arg. VII, *infra.*) The eyewitness testimony that Mr. Reed was the shooter was conflicting and inconclusive, and the jury apparently found doubt in the charges because of Mr. Galindo's unequivocal testimony, for the first time in any proceeding, that a much larger man than Mr. Reed did the shooting. (6RT 1129-1131.) It thus cannot be said

beyond a reasonable doubt that Mendez's outbursts did not tip the scales in favor of the prosecution. In *People v. Lucero* (1988) 44 Cal.3d 1006, 1021-1022, a spectator called out to the jury that an argument tendered by the defense was erroneous. The reviewing court held that this isolated incident, followed by the trial court's immediate admonishment to disregard the spectator's comment, was not so egregious as to have influenced the jury's verdict. (*Id.* at p. 1024.) However, the court did point out that the trial court should have told the jury that they should not be influenced by the emotional display. (*Id.* at fn. 11.) Mr. Mendez, from the witness stand, made repeated references to Mr. Reed as "that devil," heard by both the jury that decided Mr. Reed's guilt and the jury that ultimately voted to impose the death penalty.

Furthermore, as noted in previous sections, this was a close case. The jury was exposed to epithets which demonstrated Mendez's impassioned belief in Mr. Reed's guilt. This could only have clouded the fact that Mendez's various descriptions of the shooter, both in his statements to the police and his testimony on the witness stand, were highly contradictory and – when boiled down to their essence – indicated that Mendez saw only a gun pointed at him by a Black man.[56] An event which minimizes the weaknesses in an eyewitness's identification of a defendant is very likely to affect the verdict reached in the case. The court refused to instruct the jury on lingering doubt. (See Argument VII, *infra*.) During deliberations the jury expressed doubt that Mr. Reed was the person who shot Mr. Mendez's wife, and asked the court whether that doubt could be considered. The court gave an erroneous answer

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See detailed discussion of this point in Argument II, *supra*, on the insufficiency of the evidence to support Mr. Reed's conviction on the Mendez and Vasquez charges.

to the jury's question during deliberations as to whether they could consider their doubt on the issue of identity, which amounted to a directed verdict.[57] Therefore the conduct in the instant case should be considered to have prejudiced both Mr. Reed's guilt trial and penalty phase retrial, and the judgments should be reversed.

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[57]See detailed discussion of this point in Argument VII, *infra*.

VII. THE PENALTY PHASE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE A LINGERING DOUBT INSTRUCTION, FAILED TO RESPOND ADEQUATELY TO THE JURY'S QUESTION INDICATING IT HAD A LINGERING DOUBT AS TO THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE, AND BECAUSE THE COURT'S INSTRUCTION IN RESPONSE TO THE JURY'S QUESTION DIRECTED A VERDICT OF DEATH, IN VIOLATION OF STATE LAW AND THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

Only one special circumstance was alleged in this case: the special circumstance of multiple murder (§190.2, subd. (a)(3)). (2CT 451-452.) As discussed in greater detail in Arguments II, and III, *supra*, the state's guilt phase evidence in this case consisted entirely of the uncorroborated eyewitness identifications of appellant by two strangers who were surviving victims of the two separate crimes. One of those strangers, Carlos Mendez, observed, very briefly, the approach of a man with a gun in the dark before Mendez was shot in the face. Mr. Mendez picked Mr. Reed's photograph out of a suggestive six-pack photo display four months after the shooting. The other identifying witness, Mr. Fraduie, heard gunshots in the dark and ran away, never seeing who was doing the shooting. Mr. Fraduie did not come forward for five months. In his first contact with police regarding this case, Mr. Fraduie was unable to give a description of the man he had seen with a gun, but when he was later shown the photo display previously shown to Mr. Mendez, he picked out Mr. Reed. Both witnesses subsequently picked Mr. Reed out of a live lineup, saying that they picked the man they had seen in the prior photographic lineup. While the guilt phase jurors determined beyond a reasonable doubt that appellant was the perpetrator of both murders, the first

jury failed to reach a verdict at the penalty phase, hanging up seven to five for LWOP. (2CT 595; 4RT 791-792.) It is highly likely that lingering doubt about the reliability of the eyewitness identifications played a part in the jury's inability to reach a penalty verdict.

At the second penalty trial, before a new jury, the defense was able to present for the first time a crucial eyewitness, Joe Galindo, who had been the subject of an unsuccessful motion to continue the guilt phase of the trial. (6RT 1126-1137; see Argument I, *supra*, regarding the unreasonableness of the trial court's denial.) Joe Galindo testified emphatically that appellant was not the person who wounded Mr. Mendez and shot and killed Amarilis Vasquez. Galindo's testimony corroborated defense witness Foster Slaughter's testimony that the man who shot Vasquez was much taller and heavier than appellant.[58] (6RT 1130-1131.) The penalty retrial jury was not informed that the previous jury had not heard Galindo's testimony before reaching its guilt verdicts.

At the second penalty phase trial, counsel requested special defense instructions informing the jurors that they could consider lingering doubts that appellant committed the crimes in determining whether to vote to execute Mr. Reed or spare his life. (10CT 2881, 2883; 6RT 1241, 1243-1244.) Defense special instruction A, derived from *People v. Morris* (1991) 53 Cal.3d 152, 218-219, read:

> The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that some time in the future, facts may come to light that have not yet been discovered.

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[58]See detailed discussion in Argument I, at pages 65-70, *supra*.

(10CT 2881; 6RT 1241.) Defense special instruction C, derived from *People v. Thompson* (1988) 45 Cal.3d 86, 134, stated:

> Each of you may consider as a mitigating factor any lingering or residual doubt that you may have as to the guilt of the defendant. Lingering or residual doubt is defined as doubt concerning proof that remains after you have been convinced beyond a reasonable doubt.

(10CT 2883; 6RT 1243-1244.)

The prosecutor generally objected to the instructions. (6RT 1236.) Prior to ruling on the requests, the court remarked: "I have not found any cases that deal with that, this lingering doubt business. . . .It just seems to me – Well, I'll keep my opinions to myself about having separate juries hear the case and then talk to them about lingering doubt that they don't know anything about because they didn't decide the defendant's innocence or guilt, but the law says that's what you are allowed to do. And that ought to confuse everybody, I think." (6RT 1238-1239.) Following a discussion of the two proposed instructions, the court refused them. (6RT 1241-1244.)

More specifically, the prosecutor's objection to the *Morris* instruction was that "[i]n a number of cases since then, the court has found that the defense is not entitled to a specific instruction concerning lingering doubt." (6RT 1241.) The prosecutor cited *People v. Ochoa* (1998) 19 Cal.4th 353, 478, and *People v. Mayfield* (1997) 14 Cal.4th 668, 807, and the cases cited therein. (6RT 1241-1242.) The court remarked, "I think, yeah, what *Mayfield* stands for is the proposition that since we have 8.85 of the jury instructions which gives the broad definition of factor (K), that there isn't any need to give pinpoint instructions on the definition of lingering doubt." (6RT 1242.) Mr. Schmocker argued:

> Your honor, I found 174 cases talking about lingering

> doubt, and they were all over the place. As Mr. Knowles [the prosecutor] has pointed out, there are cases that go both ways.
>
> It struck me that because this is a second jury, I would think that an understanding of that lingering doubt would be more clear to a guilt phase – to a jury that had considered the guilt of the defendant; and that when we have the second jury, I think it might be more important to give such an instruction there.
>
> There is a case called *People v. Arias* [(1996) 13 Cal.4th 92, 183]. . . . and my thought is – the only language I was looking at there is where it was talking about, as I understood it, in some circumstances they thought that a lingering doubt instruction should be given. And it struck me that this is that kind of case.

(6RT 1242.) Without further elaboration, the court declined to give defense instructions "A" and "C." (6RT 1243-1244.) The instructions were refused despite the facts that 1) there were significant weaknesses in the identifications of the perpetrator[59]; 2) the original jury was unable to reach a penalty verdict, splitting 7-5 for life; 3) the penalty retrial jury was hearing the case anew; and 4) the penalty retrial jury heard a new defense identification witness whose testimony was not heard by the first jury. Nothing in the instructions given informed the jury that it could consider lingering doubt, as was evidenced by the jury's question: "If the jury agrees that one of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" (10CT 2887; 6RT 1316.)

Defense counsel argued on closing that the jury could consider residual or lingering doubt on the basis of the problems with the eyewitness

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[59]See detailed discussion in Arguments II and III, *supra*.

identifications. (6RT 1285-1293.)

The retrial jury was then instructed that the guilty verdicts had been determined by the first jury.[60]

On August 3, 1999, at 1:55 p.m., the jury retired to deliberate. (10CT 2847-2848; 6RT 1313.) The jury deliberated until 4 p.m., and then was excused for the day. (6RT 1315.)

On August 4, 1999, the jury resumed deliberations at 8:30 a.m. (20CT 5638; 6RT 1316.) At 9:30 a.m., the jury submitted the question: "If the jury agrees that 1 of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding [sic] death?" (10CT 2887; 20 CT 5638; 6RT 1316.) Defense counsel asked the court to answer the question: "No." (6RT 1317.) Defense counsel explained:

> The jury, I think, has expressed a question that suggests that they have a lingering doubt in regards to one of the special circumstances. And since the reason that we are here is because of a finding of the special circumstances, I think that what they are expressing is a lingering doubt as to that special circumstance; and therefore I think they should be advised that the answer is "No," and that they should consider lingering doubt as a – as a circumstance in mitigation.

(6RT 1317.) The prosecutor responded:

> I think that we should tell them that they can consider all the evidence that they have and that they have had, in light of the law; and on balance, if they think the death penalty is warranted, they can return a verdict of death. But more

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60 The instruction was: "The defendant has been found guilty of murder in the first degree. The allegation that the murder was committed under a special circumstance has been specifically [sic] found to be true." (6RT 1303.)

specifically than that, I don't think we can answer.

(6RT 1317.) Defense counsel responded:

> That sounds like a reasonable response to their question, also.
>
> I just don't think we can tell them just a short "yes." I think that's – I think we would be making a mistake in doing that. This is really their decision, and I think on balance they have to weigh this mitigation.

(6RT 1317.) The following discussion ensued:

> THE COURT: Well, I think we have to start from the position that the guilt phase jury has already found the special circumstance to be true; that the second jury, in this case, the penalty phase jury, is not charged with the duty of re-determining the issue as to whether or not the special circumstance is true or not. In other words, they don't get to re-decide the special circumstance.
>
> And it would appear to me that since this jury, the penalty phase jury, then doesn't re-decide the special circumstance allegation, which was previously found to be true by the penalty phase jury, that even though this jury may have some lingering or residual doubt as to perhaps one of the two murders, it would appear from their note that – that they feel that the circumstances of at least one of the two murders, the Factor (A) circumstances, would substantially outweigh the mitigating factors and in their opinion the death penalty would be appropriate in this case.
>
> Those are the thoughts that I've had on this issue, which would end up answering their question in the affirmative, yes, that they could still render the penalty.
>
> But if you two feel that that's too abrupt an answer, the word "Yes," and you would like me to try to reword it some way, I'd be happy to listen to your thoughts in that regard.

. . . .

MR. KNOWLES: I think legally the answer to the question is yes they can, but telling them yes they can, I fear what – that that will be telling them how they should vote.

And that's why I made the suggestion that we tell them, "All things considered, including whatever doubt you may have on one of the murders, all things considered, you can choose one or the other."

THE COURT: And I think you agreed with that?

MR. MARTIN: I did.

THE COURT: Well, let's bring them out.

(6RT 1318-1319.) At 10:25 a.m., the jury was brought into the courtroom, and the court addressed the jury:

THE COURT: Your question is as follows:

"If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?"

I have met with the lawyers, and the answer as best we can give you is as follows:

That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case.

The answer is yes.

Does that answer your question?

THE FOREPERSON: I believe so.

THE COURT: All right. Thank you.

(20CT 5638; 6RT 1319-1320 [emphasis added].)

The jury resumed deliberations at 10:30 a.m., and at 10:35 a.m. returned with a verdict of death. (20 CT 5638; 6RT 1320-1321.) However, when the jury was polled, Juror number 1 said this was not her verdict. (20CT 5639; 6RT 1322.) The court announced that the verdict was not unanimous and told the jurors to go back into deliberations. (20CT 5639; 6RT 1322.) At 10:55 a.m., the jury resumed deliberations. (20CT 5639.) At 11:30 a.m., the jury requested readback of Slaughter's testimony, and continued to work until 11:55 a.m. (10CT 2885; 20CT 5639; 6RT 1323.) Following the lunch break, the jury began deliberating again at 1:40 p.m., at which point it announced it no longer needed the readback. (10CT 2886; 20CT 5639; 6RT 1324.) At 1:50 p.m., the court went on the record and stated that, just before the noon hour, the foreperson had submitted a note requesting Foster Slaughter's testimony, but before the testimony could be read back, the court received another note stating, "We don't need the transcript re-read." (10CT 2886; 6RT 1324.) The court offered to bring the jury out to explore the issue, but counsel declined. (6RT 1324-1325.) At 1:55 p.m., the jury informed the court that it had reached a verdict. (20CT 5639.) At 2:10 p.m., the jury returned to the courtroom with its verdict. (20CT 5639.) The unanimous verdict was death. (20CT 5639; 6RT 1325-1327.)

The heart of the prosecution's penalty phase case was to condemn appellant for being "a predator killer, who kills for the enjoyment, for the excitement of it." (6RT 1251-1252, 1278-1279.) The prosecutor argued that another jury had already found beyond a reasonable doubt that appellant had committed both murders. (6RT 1255.) The prosecutor argued:

> . . . there were two witnesses who testified in this area of residual doubt. The first witness was a man named Galindo, Joe Galindo. And he was across the street and down the block slightly when he saw – well, he heard a shooting,[61] and then he saw a black male apparently run by. And his description of the black male is different from how you would generally describe the defendant.

(6RT 1255-1256.) Nobody ever informed the penalty retrial jury that the guilt phase jury never heard Galindo's testimony.

Given the record as a whole, it is reasonably likely that the jurors did not consider or give effect to their lingering doubts that appellant was responsible for both murders, in violation of state law and the Fifth, Eighth and Fourteenth Amendments. Finally, given the enormous importance of the question and the closeness of the penalty phase case, the penalty judgment must be reversed.

B. The Trial Court Erred In Denying Appellant's Lingering Doubt Instruction

This Court has long held that doubts as to a capital defendant's guilt may be considered as mitigation in fixing the penalty. (*People v. Terry* (1964) 61 Cal.2d 137, 145-147, cert den. (1964) 379 U.S. 866, 13 L.Ed.2d 68, 85 S.Ct. 132.)[62] In *People v. Cox* (1991) 53 Cal.3d 618, this Court, relying on

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Here the prosecutor misstated Galindo's testimony. Galindo testified that he *did* see the shooting, in that he saw a man with his arm raised and a muzzle flash. (6RT 1127-1129.)

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"Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting the defendant opportunity to present his claim of innocence. The jury's task, like the historian's, must be to discover and evaluate events that have faded into the past, and no human mind can perform that function with certainty. Judges and juries must time and again reach

Franklin v. Lynaugh (1988) 487 U.S. 164, 174, held that although a capital defendant is entitled to present evidence and argue residual doubt under California law, neither the Eighth Amendment nor the California Constitution requires a residual doubt instruction. However, the Court noted that, as a matter of statutory mandate under Penal Code section 1093, subdivision (f), a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox, supra*, at p. 678, fn. 20; see also *People v. Thompson, supra*, 45 Cal.3d 86, 124, cert. den. (1988) 488 U.S. 960, 102 L.Ed.2d 392, 109 S.Ct. 404 [recognizing propriety of appropriately phrased instruction to consider lingering doubt regarding a defendant's intent to kill in deciding penalty]; *People v. Kaurish* (1990) 52 Cal.3d 648, 705-706 [rejecting claim that court should have given defense instruction where court's instruction that jurors "could consider lingering doubt of defendant's guilt to be a factor in mitigation" was sufficient].) Appellant's instruction presented such a case.

The evidence warranted the residual doubt instruction. The identity of the person (or persons) who killed Vasquez and Moreland and attempted to kill Mendez and Fraduie was the only contested question at the guilt phase. As Mr. Reed argued at trial, and continues to argue on appeal, the evidence was insufficient to prove that he was the gunman in either case. The possibility of lingering doubt was a circumstance of the capital crimes that could be considered by the jury under both Penal Code section 190.3,

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decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*People v. Terry, supra*, 61 Cal.2d at pp. 145-147.)

subdivisions (a) and (k). While the penalty jury did not decide Mr. Reed's guilt, it was presented with evidence concerning the facts and circumstances of the murders. As this Court has indicated, a jury determining penalty only, if given the pertinent information regarding the homicide, may weigh any residual doubt about the convictions in its penalty deliberations. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1234-1236.) Moreover, a lingering doubt instruction is appropriate at such a penalty trial. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1239, cert. den. (1993) 508 U.S. 917, 124 L.Ed.2d 268, 113 S.Ct. 2361 [residual doubt instruction proper in penalty retrial].)

In this case, the prosecution's own penalty phase evidence provided a basis for residual doubt as to appellant's guilt. The only evidence linking Mr. Reed to the shootings was the significantly flawed eyewitness identifications by Mr. Mendez and Mr. Fraudie, both of whom were strangers to Mr. Reed, and neither of whom had much opportunity to observe the shooter under circumstances that militated against accurate identification. Both shootings occurred after dark, and were completely unexpected and out of context. Mr. Fraduie was intoxicated at the time of the event. Mr. Mendez was in shock at having been shot in the face and leg, and upon learning that his wife had been killed. Significant time passed between the crimes and the witnesses being presented with the initial, suggestive, photo lineup.[63]

Further undermining the prosecution case was the testimony of defense witnesses Slaughter and Galindo, both of whom testified to a much taller and heavier man who shot Mr. Mendez and his wife. After observing Mr. Reed standing up in court, Mr. Galindo emphatically stated that Mr. Reed

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[63]See detailed discussion in Arguments II and III, *supra*.

was not the shooter.[64]

Lingering doubt was the centerpiece of appellant's penalty defense. His attorney urged the jury to consider such doubt as mitigation. (6RT 1285-1293.) The instructions requested by the defense were appropriately drafted to address overall lingering doubt as to appellant's guilt. (Contrast *People v. Cox, supra,* 53 Cal.3d at pp. 675-677 [requested instruction erroneously directed that the jury consider lingering doubt regarding the nature of his participation rather than his guilt].)[65] Nothing in the instructions informed the jury that it was permitted to consider residual doubt, and the jurors' question – "If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death? – indicates that the jury did not understand that residual doubt could be weighed in mitigation. Trial counsel's argument on lingering doubt was insufficient to overcome the trial court's error in refusing to instruct the jury on lingering doubt. (See *Boyde v. California* (1990) 494 U.S. 370, 383-384; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397-399.) As the United States Supreme Court noted in *Boyde, supra*, instructions, not argument by counsel, guide jury deliberations:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually

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The jury was not informed that Mr. Galindo had not testified at the guilt phase.

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In requesting the instructions, defense counsel cited three cases: *People v. Morris, supra*, 53 Cal.3d 152, 218-219; *People v. Thompson, supra*, 45 Cal.3d 86, 134; and *People v. Arias, supra,* 13 Cal.4th 92, 183. (10CT 2881, 2883; 6RT 1241-1242.) These references provided adequate and accurate authority for appellant's request.

> billed in advance to the jury as matters of argument, not evidence [citation] and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

(*Boyde v. California, supra*, 494 U.S. at 384 [addressing prosecutorial misstatements of the law].) In short, a residual doubt instruction was necessary in this case, and the trial court erred in denying appellant's instruction.

The trial court's refusal to give the lingering doubt instruction was not only an error under state law, but it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial, and a reliable and non-arbitrary penalty determination under the Sixth, Eighth and Fourteenth Amendments. A liberty interest created by state law is protected against arbitrary deprivation under the Fourteenth Amendment. (*Hewitt v. Helms* (1983) 459 U.S. 460, 466, 74 L.Ed.2d 675, 103 S.Ct. 864; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant has state-created right that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion].) California law mandates that lingering doubt be considered, when offered, as mitigation. (*People v. Terry, supra*, 61 Cal.2d at pp. 145-147) and that appropriately written instructions on lingering doubt be given. (*People v. Cox, supra*, at p. 678, fn. 20; *People v. Thompson, supra*, 45 Cal.3d at p. 134.) The refusal of the trial court to give appellant's lingering doubt instruction deprived him of his state-created liberty interest not to be sentenced to death by a jury that did not consider lingering doubt as a basis for a lesser sentence. The arbitrary failure of the trial court to abide by state law constituted a denial of due process under the federal constitution. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [failure of judge to follow state capital sentencing procedures for weighing aggravating and

mitigating circumstances was a denial of due process under Fourteenth Amendment].) Moreover, the denial to appellant of a state-created right granted to other capital defendants violated the equal protection clause of the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425, cert. den. (1991) 498 U.S. 879, 112 L.Ed.2d 172, 11 S.Ct. 202 [state court's retroactive application of jury selection rule to one defendant but not to another violated the federal equal protection clause].) The rejection of appellant's lingering doubt instruction was erroneous under both state and federal law and requires reversal of his death sentence.

C. The Trial Court's Instruction to the Jury Following Its Inquiry Deprived Reed of His Right to Have the Jury Consider and Give Full Effect to Its Doubt as to One Count

1. The Court Was Required to Give a Lingering Doubt Instruction Under the Circumstances of this Case, Because, During Deliberations, The Jurors Requested Instruction on their Doubt as to Whether Appellant Committed One of the Murders

Prior to the commencement of deliberations, the jury was instructed, as to factor (k) mitigating circumstances, that it could consider: "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (10CT 2866; 6RT 1305-1306; CALJIC No. 8.85.) Although a lingering doubt that appellant was not the shooter in the Tacos el Unico crimes was relevant mitigation, and was the primary focus of appellant's penalty phase case (*People v. Jones* (2003) 30 Cal.4th 1084, 1125), the court

refused both of appellant's proposed lingering doubt instructions. (10CT 2881, 2883; 6RT 1241-1244 [The text of the instructions is on pages 171-172, *supra*].) Moreover, the eyewitness who testified that Mr. Reed shot Fraduie was not especially reliable, and admitted that he was running away when the fatal shots were fired. (3RT 377-378.) Therefore, lingering doubt as to either murder was relevant mitigation.

To be sure, a trial court is not required to give instructions that are argumentative or contain incorrect statements of law. (See *People v. Sanders* (1995) 11 Cal.4th 475, 560.) However, neither the prosecutor nor the court suggested that the instructions requested by the defense were argumentative or legally incorrect, and the court acknowledged that the jury, even though not the jury that decided guilt, could consider lingering doubt [". . . I'll keep my opinions to myself about having separate juries hear the case and then talk to them about lingering doubt that they don't know anything about because they didn't decide the defendant's innocence or guilt, but the law says that's what you are allowed to do." (6RT 1238-1239.) While the first requested instruction may have been argumentative, the second requested instruction was not objectionable and should have been given in this case. The United States Supreme Court has made clear that mitigation is not limited to enumerated factors in section 190.3, but includes any mitigating information that may convince the jury to vote for a sentence less than death. (See, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308.) Furthermore, "[t]he jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." (*People v. Brown*, 40 Cal.3d at p. 540.) Indeed, the jury may reject the death penalty even in the complete absence of mitigating evidence. (See, e.g., *People v. Duncan* (1991) 53 Cal.3d 955, 978-979; *People v. Nicolaus* (1991)

54 Cal.3d 551, 590-591.) The only objection raised by the prosecutor to the two proposed lingering doubt instructions was that "[i]n a number of cases since [*Morris* was decided], the court has found that the defense is not entitled to a specific instruction concerning lingering doubt." (6RT 1241.)

Even if initially the court was not obligated to give the jury an instruction on lingering doubt, the obligation undeniably arose when the jurors asked the court, "If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" (10CT 2887; 6RT 1316.) If a jury seeks information on any point of law arising in the case after it has retired to deliberate, the court must give the required information. (Pen.Code § 1138.) "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Penal Code section 1138 obligates the court to clear up any instructional confusion expressed by the jury. (*People v. Gonzalez, supra*, 51 Cal.3d 1179, 1212, superseded by statute on other grounds in *In re Steele* (2004) 32 Cal.4th 682, 691.)

The jury's request could not have been a clearer indication that the jury had a lingering doubt about one of the murders,[66] as defense counsel noted in requesting that the jury should be advised that the answer to their question was "no" and that they should be instructed to consider lingering doubt as a circumstance in mitigation. (6RT 1317.) The prosecutor suggested an instruction that was more death-oriented. (6RT 1317.) Both counsel agreed

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The jury's doubt became even clearer with its next note to the Court, requesting a re-reading of Foster Slaughter's testimony (10CT 2885; 6RT 1324), even though the jury later retracted that request.

that "yes" would not be an appropriate response. (6RT 1317-1319 [The prosecutor: "I think legally the answer to the question is yes they can, but telling them yes they can, I fear what – that that will be telling them how they should vote. [¶] And that's why I made the suggestion that we tell them, "All things considered, *including whatever doubt you may have on one of the murders*, all things considered, you can choose one or the other." *Emphasis added.*]) The court's analysis of the juror's question made less sense:

> THE COURT: Well, I think we have to start from the position that the guilt phase jury has already found the special circumstance to be true; that the second jury, in this case, the penalty phase jury, is not charged with the duty of re-determining the issue as to whether or not the special circumstance is true or not. In other words, they don't get to re-decide the special circumstance.
>
> And it would appear to me that since this jury, the penalty phase jury, then doesn't re-decide the special circumstance allegation, which was previously found to be true by the penalty phase jury, that *even though this jury may have some lingering or residual doubt as to perhaps one of the two murders*, it would appear from their note that – that they feel that the circumstances of at least one of the two murders, the Factor (A) circumstances, would substantially outweigh the mitigating factors and in their opinion the death penalty would be appropriate in this case.
>
> Those are the thoughts that I've had on this issue, which would end up answering their question in the affirmative, yes, that they could still render the penalty.

(6RT 1318-1319 [emphasis added].) There was nothing about the jurors' note that suggested, as the court stated, that the jurors believed the circumstances of one of the two murders would substantially outweigh the mitigating factors, or that "in their opinion the death penalty would be appropriate." On its face,

the court's interpretation of the jurors' note was unreasonable.

Counsel agreed that the instruction that should be given was:

> All things considered, *including whatever doubt you may have on one of the murders*, all things considered, you can choose one or the other."

(6RT 1319 [emphasis added].) After counsel had agreed upon an instruction that did not include the word "yes," the jury was brought into the courtroom, and the court instructed the jury:

> THE COURT: Your question is as follows:
>
> "If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?"
>
> I have met with the lawyers, and the answer as best we can give you is as follows:
>
> That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case.
>
> *The answer is yes.*

(6RT 1319-1320 [emphasis added].) The court omitted the crucial words counsel had agreed upon, "whatever doubt you may have on one of the murders," and added the word "yes" despite the agreement of both the prosecutor and defense counsel that it was improper to tell the jury "yes."

The court's comments to the jury in answer to their question was misleading and directed the verdict of death. Unfortunately, the other instructions did nothing to correct or nullify the misleading nature of this instruction. It is true that the jury was instructed on factors (a), (j), and (k) with CALJIC No. 8.85 and that this Court has held that such instructions

generally allow consideration of lingering doubt as a mitigating factor, notwithstanding their failure to specifically address lingering doubt. (10CT 2865-2866; 6RT 1304-1306; see, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 567-568.) On the other hand, the trial court also instructed the jury as follows: "The defendant has been found guilty of murder in the first degree. The allegation that the murder was committed under a special circumstance has been specifically [sic] found to be true," (6RT 1303) as well as a long list of factors to consider when evaluating the reliability of eyewitness identification testimony. (6RT 1302-1303.)

At the very least, the instructions as a whole were potentially ambiguous and misleading. Of course even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances." (*People v. Brown* (1988) 45 Cal.3d 1247, at p. 1256.) When considered in conjunction with the prosecutor's arguments, the failure to inform the retrial jury of the fact that Joe Galindo did not testify at the guilt phase trial, and that this jury did not decide the guilt issues, there is a reasonable likelihood that the jurors understood that it would be improper for them to consider their lingering doubts as to appellant's guilt for one of the murders in determining whether to execute him. (See, e.g., *People v. Claire* (1992) 2 Cal.4th 629, 663; *People v. Brown, supra*, 45 Cal.3d at p. 1255; *People v. Lucero, supra*, 44 Cal.3d at p. 1031; *Hitchcock v. Dugger, supra,* 481 U.S. at pp. 397-398 [from instruction and prosecution arguments, jurors likely understood that its consideration of mitigating factors was limited to those listed in instruction and no others].) The jury's request for a readback of Foster Slaughter's testimony, its hasty withdrawal of that request, and the verdict being returned shortly thereafter, also suggest that lingering doubts were cut off soon after the trial court's erroneous instruction in response to the

jury's question.

A duty to instruct arose when the jury sought guidance during deliberations. (Pen. Code, §1138 [when jurors express a "desire to be informed on any point of law arising in the case, ... the information required must be given...."].) When such a request is made, the trial court is under "a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.]" (*People v. Beardslee, supra,* 53 Cal.3d 68, 97.) If, in response to a question during deliberations, the court undertakes to give an instruction respecting the jury's right to consider certain evidence, the instruction as given must not be confusing or misleading. (*People v. Rubalcaldo* (1922) 56 Cal.App. 440, 444.)

Here, in response to the jury's question regarding lingering doubt, the court failed to give the instruction agreed upon by counsel that the jurors could consider whatever doubt they might have on one of the murders, and instead instructed them that yes, they could impose the death sentence despite their doubt as to Mr. Reed's culpability for one of the two murders. This was clearly error.

2. The Error Was Prejudicial

The error deprived appellant of due process, his right to present a defense, and his right to assistance of counsel.

Where, as here, error of federal constitutional dimension has occurred, reversal is required unless the Court determines that it was harmless beyond a reasonable doubt. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *Yates v. Evatt, supra*, 500 U.S. at p. 404; *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Lucero, supra*, 44 Cal.3d 1006, 1032.) For state law violations in the penalty phase of a capital trial, reversal is required if there is any "reasonable possibility" that the verdict would have been different in the

absence of the error. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) Reversal is required under this standard if there is a reasonable possibility that even a single juror might have reached a different decision absent the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"].) Given that the jurors' penalty determination is an individualized, normative one, and the need for heightened reliability in capital cases, the "reasonable possibility" standard is "more exacting" than the *Watson* standard for reversal applied to guilt phase errors. (*People v. Brown, supra*, 46 Cal.3d at p. 447; see also *People v. Ashmus, supra,* 54 Cal.3d at p. 965 [equating reasonable possibility standard under *Brown* with the federal harmless beyond a reasonable doubt standard].) Under either standard, it is clear that the penalty judgment must be reversed.

The defense focus at the penalty phase was lingering doubt that Mr. Reed was the shooter in the Tacos el Unico incident because two eyewitnesses testified that the shooter was a much larger man than Mr. Reed, and the surviving victim, Mr. Mendez, was mistaken in identifying Mr. Reed. (5RT 1122; 6RT 1283, 1285-1289, 1292-1293; 6RT 1265 [prosecutor on closing: "There were two murders here. The defense talked about this residual or lingering doubt in their opening statement. They only put on evidence concerning the murder of Amarilis Vasquez"].)[67] Whether due to trial counsel's presentation, or the weakness of Mr. Fraduie's identification, the jury lacked confidence in the first jury's guilt findings as to one of the murders, and requested guidance beyond that of the instructions they were given. "Where

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It is worth noting that doubt as to only one of the murders was also doubt as to the only special circumstance alleged and found, multiple murder.

original instructions are inadequate, and the jury asks questions indicating their confusion and need for further explanation, failure to give proper additional instructions is usually reversible error." (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227.) Here the court's failure to give instruction on lingering doubt once the jury asked for further explanation impeded the jury's consideration of the mitigating evidence presented at the penalty phase, an error of constitutional dimension. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-9, 106 S.Ct. 1669, 90 L.Ed.2d 1.) The jury's questions demonstrate that it was giving the question of the identity of the shooter in one of the murders careful consideration. Quite soon after the trial court gave an additional instruction that did not address doubt, instead telling the jury, "The answer is yes," the jury returned a death verdict. Under these circumstances, it appears "reasonably likely" that the error "may have affected the jury's decision to impose the death sentence." (*Skipper v. South Carolina, supra*, 476 U.S.1, at p. 8, 106 S.Ct. at p. 1673.)

There can be no dispute that the identity of the shooter was the heart of Mr. Reed's penalty phase defense. Although the trial court did not preclude Mr. Reed from advancing this defense, the jury instructions surely derailed it. Moreover, nobody informed the penalty retrial jury that the guilt phase jury had not heard Galindo's testimony. Had the penalty retrial jury been aware of that fact, that jury's doubt that Mr. Reed was properly found by the guilt phase jury to be the shooter in the Tacos el Unicos case would have been strengthened considerably. The court's error in failing to give a lingering doubt instruction initially was compounded by the trial court's botched answer to the jury's question, omitting the key agreed-upon language "including whatever doubt you may have on one of the murders" and adding the word "yes" following the jury's inquiry. (See 6RT 1319-1320.) The omitted

language again deprived the jury of permission to fully consider lingering doubt that Mr. Reed was the shooter. In addition to refusing to instruct the jury at the close of evidence that it was appropriate for a juror to consider in mitigation any lingering doubt he or she may have concerning Mr. Reed's guilt, and failing to define or even mention lingering doubt for the jury when the jury asked for instruction about it, the court, by adding the word "yes" at the end of its answer to the jury's question gave an instruction that effectively directed a verdict for death. Even the prosecutor recognized that telling the jury "yes" was the equivalent of a directed verdict, stating:

> I think legally the answer is yes they can, but telling them yes they can, I fear what – that will be telling them how they should vote.

(6RT 1319.) The prosecutor was right. When the judge instructed the jury, saying "The answer is yes," despite the rest of what he said, the judge essentially told the jury how to vote.

The language of CALJIC No. 8.85 does not cure the error. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322.) Nor does anything in the record suggest that the jury understood how to weigh the evidence that Mr. Slaughter and Mr. Galindo saw a larger and taller man that Mr. Reed doing the shooting at Tacos el Unico – their question indicates they did not, and the court's instruction failed to address lingering doubt. The prosecutor in closing argument repeatedly relied on CALJIC No. 8.85, referring to it as "the one jury instruction which focuses your attention on certain factors which you should look to," and stated that he was going to "apply the evidence that you've heard in this case to those factors." (6RT 1251-1252.)

The prosecutor then attacked the lingering doubt theory at length, going over all of the details of the descriptions given by Mr. Galindo and Mr. Slaughter, urging the jurors to make a distinction between "describing something and recognizing it." (6RT 1255-1260.) The prosecutor compared those descriptions with the descriptions given by Carlos Mendez and the circumstances under which Mendez made his observations and later made his identifications of Mr. Reed as the shooter, glossing over the gross inconsistencies in the descriptions given by Mendez by arguing that the identifications were the result of "recognition," not "description." (6RT 1260-1263.) The prosecutor was also permitted, without objection by the defense, to argue "facts" not in evidence by urging that "Carlos Mendez was paying particular attention to the man who was approaching him with a gun" because he had "an overwhelmingly good reason to pay attention," and that "if Carlos had ever paid attention to anything in his life, he was paying attention then." (6RT 1261.) The prosecutor also argued that "the fact that he was hit, the fact that his wife was killed, etched this event in his memory. This was not an event easily forgotten," and drew the conclusion that because of these "facts," Mendez recognized Mr. Reed and selected his photograph. (6RT 1261.) The prosecutor argued that Mendez independently "recognized" Mr. Reed in a live lineup and subsequent court proceedings. (6RT 1261-1262.) None of these arguments was countered by appropriate expert testimony on the manner in which memory works vis a vis eyewitness identification.[68]

For the above reasons, the sentence of death must be vacated.

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[68]See Arguments II and III regarding insufficient evidence, *supra*.)

D. The Penalty Phase Judgment Must Be Reversed Because The Court's Instruction That the Jury Was "Not Here to Determine [Appellant's] Guilt Or Innocence" And The Court's Response to The Jury's Lingering Doubt Question Directed a Verdict of Death, In Violation of State Law and the Fifth, Sixth, Eighth, and Fourteenth Amendments

1. Introduction

Even before the penalty retrial jury began hearing evidence, and even though this jury would hear testimony from a defense eyewitness not presented to the guilt jury, the trial court instructed the jury that Mr. Reed's guilt was "conclusively presumed." (5RT 943.) At the end of the trial, before deliberations began, the jury was again instructed that Mr. Reed's guilt was "conclusively proven." (6RT 1232.) And when the jurors asked a question revealing that some or all in fact had lingering doubt, the trial court's answer further closed the door to the jury's consideration of lingering doubt as mitigation. (6RT 1319-1320.) The trial court's instructions to the penalty retrial jury, taken together, effectively directed a verdict of death for appellant. In so doing, the trial court committed fundamental constitutional error by invading the province of the jury as arbiter of penalty in a capital case. The jury was foreclosed from considering appellant's primary penalty defense, lingering doubt. The error requires reversal.

2. Facts

After the first jury could not reach a penalty verdict, the court declared a mistrial, and a penalty retrial was had with a new jury. At this time, the defense was able to present for the first time a crucial eyewitness, Joe Galindo, whose unavailability (due to his National Guard service) had been the

subject of an unsuccessful motion to continue the guilt phase of the trial.[69] (6RT 1126-1137.) Joe Galindo emphatically testified that appellant was not the person who shot and killed Amarilis Vasquez, corroborating and expanding Foster Slaughter's testimony that the man who shot Vasquez was much taller and heavier than appellant.[70] (6RT 1130-1131.)

Before the jurors at the penalty retrial heard any evidence regarding the circumstances of the crimes, and again at the conclusion of the case, the issue of lingering doubt was removed from their consideration. At the outset of the penalty phase retrial, the court informed the jury:

> There has already been a guilt phase jury trial. In that trial, the defendant was convicted of two counts of murder in the first degree and two counts of willful, deliberate, and premeditated attempted murder. ...
>
> The jury in the guilt phase trial also found to be true the allegation of what is called a special circumstance, that is, that the defendant was convicted of two first degree murders in that proceeding.
>
> Having been found guilty of those offenses and the special circumstance having been found to be true, there is a second trial, the penalty phase trial. *In this penalty phase trial, the defendant's guilt is to be conclusively presumed as a matter of law.*

(5RT 943 [Emphasis added].) A few minutes later the court gave the same instruction, adding: "*You are not here to determine his guilt or innocence.*"

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See Argument I, *supra*, regarding the trial court's error in refusing to grant a continuance to obtain Mr. Galindo's testimony for the guilt phase of trial.

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See detailed discussion of the crucial nature of Mr. Galindo's testimony in Argument I, *supra*, pp. 65-70.

(5RT 969 [Emphasis added].)

At the close of the case, the court refused proposed defense instructions which would have informed the jury that it could consider lingering doubt of Mr. Reed's guilt and the special circumstance findings as a mitigating factor. (10CT 2881, 2883; 6RT 1241, 1243-1244; 6RT 1241-1244.)

At the close of evidence, the court instructed the jury:

> Remember when we started off, I advised you of the fact that the defendant has been convicted of the two counts of attempted murder, two counts of murder in the first degree, that the use of a firearm was found to have been true already by another jury, and that the infliction of great bodily injury was found to be true. *As a matter of law, you are to treat those convictions as conclusively proven.*

(6RT 1232 [Emphasis added].) The jury also was instructed, "The defendant has been found guilty of murder in the first degree. The allegation that the murder was committed under a special circumstance has been specifically [sic] found to be true." (6RT 1303.)

Immediately after receiving these instructions, on August 3, 1999, at 1:55 p.m., the jury retired to deliberate. (10CT 2847-2848; 6RT 1313.) The jury deliberated until 4 p.m., and then was excused for the day. (6RT 1315.)

On August 4, 1999, the jury resumed deliberations at 8:30 a.m. (20CT 5638; 6RT 1316.) At 9:30 a.m., the jury submitted the following question: "If the jury agrees that one of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" (10CT 2887; 20 CT 5638; 6RT 1316.) Defense counsel asked the court to answer the question: "No." (6RT 1317.) The prosecutor urged: "I think that we should tell them that they

can consider all the evidence that they have and that they have had, in light of the law; and on balance, if they think the death penalty is warranted, they can return a verdict of death. But more specifically than that, I don't think we can answer." (6RT 1317.) After some discussion, the court and counsel agreed that the answer should not be simply "yes" as the judge suggested, but should include mention of lingering doubt: "All things considered, including whatever doubt you may have on one of the murders, all things considered, you can choose one or the other." (6RT 1318-1319.)

The agreed-upon instruction was not, however, the instruction given by the judge, who left out the language about doubt, but added "yes," as follows: "That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case. ¶ *The answer is yes.*" (6RT 1319-1320 [emphasis added].)

The jury resumed deliberations at 10:30 a.m., and – 5 minutes later, at 10:35 a.m. – returned with a verdict of death. (20CT 5638; 6RT 1320-1321.) However, when the jury was polled, Juror number 1 said this was not her verdict. (20CT 5638; 6RT 1322.) The court announced that the verdict was not unanimous and told the jurors to go back into deliberations. (20CT 5639; 6RT 1322.) At 10:55 a.m., the jury resumed deliberations. (20CT 5639.) At 11:30 a.m., the jury requested readback of Foster Slaughter's testimony, and continued to work until 11:55 a.m. (10CT 2885; 20CT 5639; 6RT 1323.) Following the lunch break, the jury began deliberating again at 1:40 p.m., at which point it announced it no longer needed the readback. (10CT 2886; 20CT 5639; 6RT 1324.) At 1:50 p.m., the court went on the record and stated that, just before the noon hour, the foreperson had submitted a note requesting Foster Slaughter's testimony, but before the testimony could be read back, the court received another note stating, "We don't need the

transcript re-read." (10CT 2886; 6RT 1324.) The court offered to bring the jury out to explore the issue, but counsel declined. (6RT 1324-1325.) At 1:55 p.m., the jury informed the court that it had reached a verdict. (20CT 5639.) At 2:10 p.m., the jury returned to the courtroom with its verdict. (20CT 5639.) The unanimous verdict was death. (20CT 5639; 6RT 1325-1327.)

3. The Trial Court Erroneously Directed a Verdict in Favor of Death

The trial court directed a verdict for death. The court's instructions left no room for the jury to consider potentially mitigating facts – specifically, residual doubt that Mr. Reed was the shooter in one of the incidents. Consideration of lingering doubt was decisively removed from the case, and the evidence supporting that doubt was characterized as irrelevant to the jury's sentencing decision. The jury was told that (1) a critical aspect of the penalty phase defense – lingering doubt – was entirely foreclosed to appellant by the decision of the prior jury and could not be considered; and (2) the jury could impose a sentence of death despite its belief that one of the cases "containe[d] some doubt."

The penalty judgment must be reversed because the instructions violated state law as well as appellant's right to a fair sentencing hearing and a reliable penalty phase determination, as guaranteed by the Fifth, Eighth and Fourteenth Amendments. Because respondent cannot prove the error harmless beyond a reasonable doubt, the penalty judgment must be reversed.

It is "virtually axiomatic" that a court's duty is to give instructions that are correct statements of the law. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) The instructions given in this case, however, regarding the prior jury's guilt verdict, were not correct: The first jury was directed to determine whether appellant was guilty beyond a reasonable doubt

of each of two murders. Once that jury reached guilty verdicts as to each, it was virtually assured that the only special circumstance alleged, multiple murder, would be found true. The instructions did not require that the guilt phase jury find appellant's guilt to be conclusively proven or beyond all doubt.

Instead of instructing the retrial jury that the initial jury's guilt finding was "beyond a *reasonable* doubt," the new jury was informed that the question of guilt, and hence the question of the special circumstance of multiple murder, was *conclusively proven*. The instructions given at the guilt phase did not require an acquittal if Mr. Reed's guilt had not been *conclusively* proven or was proven beyond all doubt.

The trial judge further emphasized his point by telling the jury that "[y]ou are not here to determine [Mr. Reed's] guilt or innocence," effectively telling the jury that it must accept the first jury's verdict as having been proved, suggesting an indisputable factual determination.

The impact of the court's instructions was to leave the jury with the following scenario: (1) Mr. Reed was guilty of the crimes of murder and attempted murder as alleged in the four counts; (2) the jury could not reconsider his guilt, but could only decide his sentence; (3) even if the jury doubted Mr. Reed's guilt on one of the murders, the jury could impose the death penalty. By instructing the jury that it was "not here to determine [appellant's] guilt or innocence" and then answering the jury's question: if "one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" with "yes" – and failing to tell the jury it could consider lingering doubt (as requested by both the prosecutor and defense counsel) – the court left no room for considering its lingering doubt about one of the murders.

Under similar circumstances, in *People v. Gay* (2008) 42 Cal.4th

1195, this Court found erroneous an instruction which told the jury at the penalty retrial that it had been "conclusively proven" by the prior jury's verdict that the defendant had shot and killed the victim, which was in conflict with the trial court's later instruction permitting the jury to consider lingering doubt. (*People v. Gay, supra*, 42 Cal.4th at p. 1224.) The error is even more egregious here, in that no instruction told the jury that it was appropriate to consider lingering doubt at all.[71] As in *Gay*, nothing in the record suggests that the jury understood how to weigh the evidence that was admitted. (*Id.* at p. 1225.)

Instead, the record suggests quite plainly that the jury was confused: The jurors interrupted deliberations to request clarification from the trial court, but could not ask for clarification on lingering doubt as did the jurors in *Gay*; the jury considering Mr. Reed's penalty had not heard that instruction. Even so, the jury's question clearly indicated that there was doubt as to one crime. (10CT 2887; 20 CT 5638; 6RT 1316.)

The trial court's response to this jury's question was less adequate than the response by the judge in *Gay*, who simply re-read the lingering doubt instruction and told the jury it was clear enough, despite evidence to the contrary from the jury. (*Id.* at p. 1226; see generally *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613, 66 S.Ct. 402, 90 L.Ed. 350 ["When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy"].) In Mr. Reed's case, the trial court sought the views of counsel, but then largely disregarded the agreed-upon language, particularly

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Trial counsel argued lingering doubt (6RT 1285-1293), but the jury was also instructed in the language of CALJIC No. 1.02 that the arguments of counsel are not evidence, and are overridden by the court's instructions. (10CT 2852; 6RT 1297.)

the crucial word, "doubt." The prosecutor acknowledged that telling the jury "yes" in response to its question would be tantamount to a directed verdict. (6RT 1318-1319.) The trial court's instruction had the very effect that so concerned the prosecutor. The error is clear.

4. Because the Erroneous Instructions and Refusal to Give the Defense Instructions Prevented the Jury From Considering Relevant Mitigating Evidence, The Remedy is to Reverse the Verdict of Death

Under the Eighth and Fourteenth Amendments to the United States Constitution, the defendant in a capital case is guaranteed the right to have relevant mitigating evidence considered by the penalty jury. (*Skipper v. South Carolina, supra*, 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) This right may be violated even if the defendant's related right to introduce relevant mitigating evidence is not. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) Not only are capital sentencing schemes required to "permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen.'" (*Sumner v. Shuman* (1987) 483 U.S. 66, 76, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115, fn. 10.)

In *Eddings, supra*, 455 U.S. at p. 114, the Supreme Court disapproved the sentencing judge's failure to consider evidence of the defendant's troubled background and commented that, "[i]n this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence *Eddings* proffered on his behalf." In this case, the trial court *did* instruct the jury to disregard the evidence of residual doubt by telling it that it was "not here to determine [appellant's] guilt or innocence" and then answering the jury's question: if "one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" with "yes."

Any barrier that precludes a jury, or any of its members, from considering relevant mitigating evidence constitutes federal constitutional error. (*Mills v. Maryland* (1988) 486 U.S. 367, 375; *People v. Mickey* (1991) 54 Cal.3d 612, 693.) The erroneous instructions given in this case erected an insurmountable barrier to the jury's consideration of appellant's mitigating evidence of lingering doubt and thereby violated appellant's constitutional rights.

The court's pretrial comments, delivery of the erroneous instructions, and refusal to give the defense instructions also violated appellant's state and federal constitutional right to trial by jury (U.S. Const., Amends. 6 and 14; Cal.Const. Art. I, § 16), and the state statute which governs the respective functions of judge and jury. An essential feature of trial by jury is that the jurors shall be "under the superintendence of a judge having power to instruct them as to the law." (*Patton v. United States* (1931) 281 U.S. 276, overruled on other grounds in *Williams v. Florida* (1970) 399 U.S. 78, 92.) Implicit in the requirement that the judge instruct the jury is the requirement that the judge instruct correctly. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, at p. 302; accord, *Bollenbach v. United States, supra*, 326 U.S. at p. 612; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836.) Delivery of the erroneous instructions and comments by the court challenged here, which misstated the law to appellant's detriment, violated this essential element of appellant's right to trial by jury.

Moreover, just as the judge has the duty to instruct the jury correctly as to the law, the judge has the duty to refrain from instructing the jury as to the facts. "In a trial for any offense, questions of law are to be decided by the court, and questions of fact by the jury." (§ 1125.) The court's

instructions should indicate "no opinion of the court as to any fact in issue. [Citation.]" (*People v. Wright, supra*, 45 Cal.3d at p. 1135.) "The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." (*United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, at p. 573.)

Therefore, even a judge's comments on the evidence, which carry less potential for prejudice because, unlike instructions, they are not binding on the jury, "must be accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) The comments should not mislead the jury and especially "should not be one-sided." (*Querica v. United States* (1932) 289 U.S. 466, 470.) The trial court may not "withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 766.)

In this case, the court's pretrial comments and erroneous instructions were inaccurate, misleading and unfair. In effect, they withdrew material mitigating evidence from the jury's consideration, expressly directed a verdict against appellant on the issue of lingering doubt, and prohibited the jury from exercising its ultimate fact-finding power to find that appellant's guilt had been satisfactorily or unsatisfactorily found. The court refused defense instructions that would have correctly informed the jury that it could consider lingering doubt in mitigation. For all of these reasons, the instructions given – in the absence of the requested defense instructions – violated appellant's right to trial by jury, to a fundamentally fair trial, and to an individualized, reliable and non-arbitrary sentencing determination and directed a verdict of death. The death verdict returned by such an impaired jury cannot stand.

Appellant was prejudiced by the court's comments and instructions, and its failure to provide the jury with the defense instructions. This was a close case, evidenced by the mistrial at the first penalty trial and the temporary deadlock at the retrial. As argued elsewhere,[72] the eyewitness identifications were far from substantial and reliable; however, the penalty phase jury was not given any legal vehicle through which to take those weaknesses in the prosecution case into account. Furthermore, the penalty jury clearly expressed a doubt that one of the murders warranted the death penalty when it requested instruction on lingering doubt. (10CT 2887.) This Court found prejudice in the combination of evidentiary and instructional error in *Gay*, even though the jury at least heard the lingering doubt instruction, and even though the combined errors only affected evidence bearing on whether the defendant was the actual shooter rather than merely an accomplice to murder. (*People v. Gay, supra*, 42 Cal.4th at p. 1227.) Here, doubt went to whether Mr. Reed was the perpetrator or the crime was committed by someone else entirely.

The trial court expressed to counsel its opinion that a penalty retrial jury should not be allowed to consider lingering doubt, remarking: "I have not found any cases that deal with that, this lingering doubt business. . . .It just seems to me – Well, I'll keep my opinions to myself about having separate juries hear the case and then talk to them about lingering doubt that they don't know anything about because they didn't decide the defendant's innocence or guilt, but the law says that's what you are allowed to do. And that ought to confuse everybody, I think." (6RT 1238-1239.) The trial court clearly was of the opinion that lingering doubt was irrelevant because the first

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[72]See Arguments II and III, *supra*.

jury had found Mr. Reed guilty. The trial court was wrong that lingering doubt was irrelevant, and its instruction to the jury that it could impose the death penalty on Mr. Reed even if it believed one of the crimes did not support it – that fatal "yes" – cannot be deemed harmless under any standard of review. Even the prosecutor recognized that advising the jury "yes" in answer to its questions would be error, and would effectively tell the jury how to vote.[73] (6RT 1318-1319.) The jury heeded the judge's instruction and returned a verdict of death. The death sentence must be vacated.

E. The Trial Court Erred in Failing to Inform the Retrial Penalty Jury that Galindo Had Not Testified Before the Original Jury, Which Found Reed Guilty of Both Murders but Failed to Reach A Penalty, Voting 7-5 in Favor of Life

1. Introduction

The second penalty phase jury was not informed that the key defense witness, Joseph Galindo, did not testify at the guilt phase or first penalty phase trial, or that the first jury was deadlocked 7 to 5 in favor of life. These facts were relevant to the second penalty phase jury's consideration of lingering doubt, Mr. Reed's strongest defense against the death penalty. Because of these failures, Mr. Reed was denied his Fifth, Eighth and Fourteenth Amendment rights under the United States Constitution, and analogous rights under the California Constitution, including, but not limited to, his right to due process of law, to a fair trial, and to equal protection of the laws. Mr. Reed was prejudiced because if the second penalty phase jury had

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In spite of his concession outside the jury's presence, the prosecutor argued on closing that another "jury had already found beyond a reasonable doubt that he committed these two murders and some other findings which the judge has already told you about." (6RT 1255.)

been allowed to consider this information, that jury would likely have acted on the lingering doubt expressed in its question to the trial court and would have returned a more favorable penalty verdict. This compounded the trial court's error in refusing to grant Mr. Reed a continuance or otherwise make accommodations to enable Mr. Galindo to testify in the guilt phase. Separately or in conjunction with the trial court's refusal to grant a continuance, Mr. Reed was denied his right to present a defense, his right to due process of the law, and to a fair trial.

2. Factual Background

At the first penalty phase trial, the jury considered the evidence introduced at the guilt phase in determining the appropriate penalty, because it was required to do so by section 190.4, subdivision (d). That jury had not heard the testimony of eyewitness Joseph Galindo, who at the second penalty phase trial described the shooter as a much larger man that Mr. Reed. (See Arguments I and II, *supra*.) Despite not hearing Galindo's testimony, the first penalty phase jury hung 7 to 5 in favor of life without possibility of parole, and the trial court declared a mistrial. (2CT 595; 4RT 792, 795-796.)

Mr. Reed was denied his due process rights under the United States Constitution because the second penalty phase jury did not consider all of the circumstances surrounding the offenses, because the jury was not told that Joseph Galindo had not testified at the guilt or first penalty phase trial, and because the jury was not informed that seven jurors on the first penalty phase jury voted for a sentence of life without possibility of parole. While the second penalty phase jury heard Joseph Galindo's testimony – corroborating Foster Slaughter's testimony – that Mr. Reed was not the shooter, the impact of that evidence was diluted by the failure to tell the second penalty phase jury that the first penalty phase jury did not hear Galindo's testimony, but still voted

7 to 5 for life.

3. Standard of Review

The state standard of review for error at the penalty phase, which is a more "exacting standard" than that employed for state-law errors at the guilt phase, is as follows: "'[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, at p. 917, citing *People v. Brown, supra,* 46 Cal.3d 432, 447-448.) "When evidence has been erroneously received at the penalty phase, this court should reverse the death sentence if it is 'the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die.' [Citation.]" (*Ibid.*, citing *People v. Danielson* (1992) 3 Cal.4th 691, 738.) The federal standard of review for constitutional error is set forth in *Chapman v. California, supra*, 386 U.S. 18, 24: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." "*Brown*'s 'reasonable possibility' standard and *Chapman*'s 'reasonable doubt' test ... are the same in substance and effect." (*People v. Prince* (2007) 40 Cal.4th 1179, 1299.) Under either standard, relief is warranted.

4. The Fact of the First Jury's Deadlock, The Numerical Vote of the First Jury and the Fact that Joseph Galindo Did Not Testify at the Guilt Trial or the First Penalty Trial Were Relevant to the Issue of Lingering Doubt, and Should Have Been Placed in Evidence as Mitigating Facts

A due process violation of the United States Constitution may

occur whenever the procedures by which a state determines whether the death penalty should be imposed on a defendant results in an unfair hearing, or unfair proceedings. (*People v. Crovedi* (1966) 65 Cal.2d 199, 205.) Sentencing procedures should not create "a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner." (*Gregg v. Georgia* (1976) 428 U.S. 153, at p. 188, 96 S.Ct. 2909, at p. 2932, 49 L.Ed.2d 913.) The Eighth and Fourteenth Amendments require that the jury not be precluded from considering any mitigating factors offered to show a basis for a sentence less than death. (*Lockett v. Ohio, supra*, 438 U.S. 586, 604.)

This Court has held that the fact that a first jury deadlocked, or the numerical vote of the first jury, is irrelevant to the issues before the jury on a penalty retrial. (*People v. Hawkins* (1995) 10 Cal.4th 920, 968; *People v. Thompson* (1990) 50 Cal.3d 134, 178.) This Court set out its reasoning in *Hawkins* as follows:

> As we have elsewhere declared, the fact of a first jury's deadlock, or its numerical vote, is irrelevant to the issues before the jury on a penalty retrial. (*People v. Thompson* (1990) 50 Cal.3d 134, 178 [266 Cal.Rptr. 309, 785 P.2d 857].) Although, as discussed above, guilt phase evidence may be relevant to the matter of residual doubt, which in turn may be considered by the jury in mitigation, the fact of the jury's deadlock is not pertinent to this or any other mitigating circumstance. All that can reasonably be inferred from the first jury's failure to agree on a penalty is that the jurors differed as to defendant's moral culpability for any number of reasons. The evidence of deadlock does not go to defendant's " 'character,' 'record,' or a 'circumstance of the offense,' " relevant to the individualized determination of the penalty in capital cases. (*Franklin v. Lynaugh, supra*, 487 U.S. at p. 174 [101 L.Ed.2d at pp. 165-166], quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869].) The fact of the first deadlocked jury was therefore immaterial to the second penalty phase jury's task, and the trial court did not err in excluding reference to it.

(*People v. Hawkins, supra*, 10 Cal.4th 920, at p. 968.)

"Mitigating factors" are those relating to the capital defendant's "character, or record and any circumstance of the offense." (*Lockett v. Ohio, supra*, 438 U.S. 586, at p. 604.) *Lockett* established the constitutional doctrine in capital sentencing of "individualized consideration," which "mandates that the sentencer be allowed to consider all evidence concerning the offender and the offense that might argue for a sentence less than death." (Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L.REV. 1147, 1148 (1991) [discussing the tension between certain constitutional capital sentencing doctrines].)

Mr. Reed respectfully submits that this Court's holding in *Hawkins* that a first jury's deadlock or its numerical vote is irrelevant in a penalty retrial does not apply in the context of the individualized consideration of Mr. Reed's case, because the new jury was asked to determine penalty based on the prior jury's guilt determinations, and was doing so with new defense evidence as to the weakest portion of the prosecution's case – i.e., identification of the perpetrator. This Court has held that lingering doubt regarding a defendant's guilt properly may be considered by a penalty jury as a mitigating factor. (*People v. Gay, supra,* 42 Cal.4th 1195, 1218.) The defendant is entitled to adduce evidence to show his possible innocence of the crimes of which he has been convicted (*People v. Terry, supra*, 61 Cal.2d 137, 145) and argue his possible innocence to the jury as a factor in mitigation. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1252.) In *Franklin v. Lynaugh, supra*, 487 U.S. 164, the United States Supreme Court held that "lingering doubts are not over any aspect of petitioner's "'character,' 'record,' or a 'circumstance of the offense." (*Franklin v. Lynaugh, supra*, 487 U.S. 164, at

p. 174.) Justice O'Connor concurred that "'[r]esidual doubt' is not a fact about the defendant or the circumstances of the crime." (*Franklin v. Lynaugh, supra,* 487 U.S. 164, at p. 188.) At the same time, the United States Supreme Court has held that a capital defendant cannot be restricted to proof of statutory mitigating factors. (*Hitchcock v. Dugger, supra*, 481 U.S. 393, 398-399, 107 S.Ct. 1821, 95 L.Ed.2d 347.) This Court has recognized that, while a capital defendant has no federal constitutional right to have the jury consider lingering doubt as to guilt in choosing the appropriate penalty, he has a statutory right to have a jury consider it. (*People v. Gay, supra*, 42 Cal.4th 1195, 1220.)

Residual doubt is any remaining or lingering doubt a jury has concerning the defendant's guilt despite having been satisfied "beyond a reasonable doubt." (See *Smith v Balkcom* (5th Cir.1981) 600 F.2d 573, 580, cert. denied, 459 U.S. 882 (1982). In *Balkcom* the Fifth Circuit stated:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt – doubt based on reason -- and yet some genuine doubt exists. It may reflect a mere possibility; it may be the whimsy of one juror or several. Yet this whimsical doubt – this absence of absolute certainty – can be real.

(*Ibid.*)

In California the jury may consider residual doubt as a non-statutory mitigating factor. (*People v. Gay, supra*, 42 Cal.4th 1195, 1218.) Indeed, any limitation by the state as to what mitigating circumstances can be argued is constitutionally prohibited. "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for

a sentence less than death." (*Lockett v. Ohio, supra*, 438 U.S. 586, 604-605 [striking down Ohio's statutory list of mitigating factors, which was limited to only three specific factors, as incompatible with the Eighth and Fourteenth Amendments]; see also *Penry v. Lynaugh, supra,* 492 U.S. 302 [holding unconstitutional a statutory barrier to consideration of mental retardation]; *Eddings v. Oklahoma, supra*, 455 U.S. 104 [holding unconstitutional a judicial barrier to considerations of youth and family background].) Accordingly, California Penal Code section 190.3 provides in pertinent part: "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

This Court holds that lingering doubt regarding a defendant's guilt is a mitigating factor. (*People v. Gay, supra*, 42 Cal.4th 1195, 1218.) The fact that Mr. Galindo did not testify before, and that jury still could not come to a verdict on penalty, is relevant on the issue of lingering doubt. The *Thompson* case, upon which *Hawkins* was premised, did not address employing the fact that a previous jury was divided in favor of life as a factor in mitigation in the form of a basis for lingering doubt. (*People v. Thompson, supra,* 50 Cal.3d 134, 178.) *Thompson* merely held that "[a]ll that can reasonably be inferred from the first jury's failure to agree on a penalty is that the jurors differed as to defendant's moral culpability for any number of

reasons. The evidence of deadlock does not go to defendant's " 'character,' 'record,' or a 'circumstance of the offense,' " relevant to the individualized determination of the penalty in capital cases." (*Ibid.*) Here, however, the state of the record differs considerably between the first and second penalty trials, due to the appearance of Mr. Galindo at the second trial. The first jury's deadlock becomes relevant to a lingering doubt determination by the second jury by reason of the fact that Mr. Galindo did not testify before, and that jury still could not come to a verdict on penalty. The inferences to be drawn by the second jury were based upon a quantitatively different record and a different circumstance of the offense than was presented to the first jury – a witness who had a clear view of the shooter, and who emphatically testified that Mr. Reed was not that man.

Compounding the error, the court did not inform the penalty retrial jury that Mr. Galindo had not testified at the guilt phase trial or the first penalty phase trial; therefore, Mr. Reed was deprived of the benefit of that crucial fact in the retrial jury's consideration of lingering doubt as to whether Mr. Reed was the shooter in the Tacos El Unicos case. Galindo's testimony substantially weakened an already weak prosecution case as to the Tacos El Unicos charges because his testimony corroborated Foster Slaughter's testimony that Mr. Reed was not the shooter, and highlighted the victim's inconsistent descriptions of the shooter. The court told the jury that it must not concern itself with the findings of the jury at the guilt trial; rather, the jury was directed to accept Mr. Reed's guilt as a foregone conclusion: "The defendant has been found guilty of murder in the first degree. The allegation that the murder was committed under a special circumstance has been specifically [sic] found to be true." (6RT 1303.) The court also refused to instruct the jury that it could consider its lingering doubts as to Mr. Reed's guilt

of those charges. Still, the penalty retrial jury struggled over the penalty decision.

Just as evidence suggesting Mr. Reed was not the shooter was relevant and admissible at his penalty retrial as relevant to mitigation and sentence (Pen.Code, § 190.3; *People v. Gay, supra*, 42 Cal.4th 1195, 1218), the fact that the guilt phase jury did not hear that evidence in finding Mr. Reed guilty was relevant to the retrial jury's consideration of lingering doubt, because it constituted relevant evidence that the finding of guilt may have been decided beyond a reasonable doubt by the prior jury, but that the same jury remained unsettled. Because the penalty of death is qualitatively different from any other sentence, a greater degree of reliability is required in imposing it. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305.) Mr. Reed submits that it is irrational to exclude from a penalty retrial jury's consideration evidence of a defect in a prior proceeding that precluded the prior jury's consideration of evidence of possible innocence, and that to do so violates the rule of *Lockett v. Ohio* that no mitigating evidence may be excluded, and the Eight and Fourteenth Amendments of the United States Constitution. (*Lockett v. Ohio, supra*, 438 U.S. 586, 604-605.)

Commentators have recognized the problems inherent in placing the penalty issue before a jury divorced from the guilt determinations: "Jurors who decided reluctantly and only after much urging by others that a defendant was guilty of capital murder would no longer be present to render a reasoned moral response that incorporates considerations of lingering doubt in the decision of punishment."[74] (William J. Bowers, Marla Sandys, and Benjamin

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See Argument XII, *infra*, pp. 232-236, for a detailed discussion of the Constitutional violations resulting from compelling Mr. Reed to be retried on

D. Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998), at p. 1544.)

Finally, the fact that the first jury could not return a death verdict, and actually hung at 7 to 5, indicated that they had a lingering doubt as to whether Mr. Reed committed one of the murders.[75] This was a mitigating circumstance, since it showed that seven of the jurors who knew the facts – even without Galindo's testimony – did not believe Mr. Reed deserved the death penalty. However, the penalty retrial jury did not learn of this fact, which was clear error under federal law. (*Lockett v. Ohio, supra*, 438 U.S.586, 604.)

Therefore, Mr. Reed was denied due process at the penalty phase, and the death verdict must be reversed.

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the issue of penalty.

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It is *unlikely* the jury was swayed toward sympathy by the defense presentation at penalty other than lingering doubt. In this case there was no expert testimony, and no carefully researched social history – in short, there was very little of the kind of evidence normally considered important in a capital penalty phase trial. (See 6RT 1280-1293.)

VIII. THE COURT COERCED A VERDICT AT THE PENALTY PHASE RETRIAL WHEN IT RECEIVED A VERDICT, DISCOVERED DURING THE POLLING OF THE JURY THAT THE VERDICT WAS NOT UNANIMOUS, AND SENT THE JURORS BACK TO DELIBERATE WITHOUT PROPER INSTRUCTIONS AND ADMONITIONS

The court coerced a verdict at the penalty phase retrial when it received the jury's verdict for death and discovered in polling the jury that the verdict was not unanimous, and then sent the jury back for more deliberations. (20CT 5638; 6RT 1321-1322.) When asked, Juror No. 1 stated the verdict was not hers. The next five jurors stated that death was their verdict. At that point the court stopped polling the jury and sent the jurors back for more deliberations. (6RT 1322.) The court's sole comment was: "It appears we do not have a unanimous verdict. I'm going to return the verdict form to you and ask that the jurors go back into deliberations, please. Thank you." (6RT 1322.)

While the court did not explore the issue with the jury, polling the jurors revealed that they were unable to reach a verdict, with a strong indication that Juror No. 1 was (perhaps waveringly so) the lone holdout. (6RT 1321-1322.) Confronted with the possibility of a second hung jury, the determination whether there was a reasonable probability of agreement rested in the sound discretion of the trial court. (*People v. Rodriguez, supra*, 42 Cal. 3d 730, 775.) However, the court was required to exercise its power without coercion, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." (*Ibid.*)

Directing further deliberations is proper where the trial court reasonably concludes that "such direction would be perceived as a means of enabling the jurors to enhance their understanding of the case rather than as

mere pressure to reach a verdict on the basis of matters already discussed and considered." (*People v. Proctor* (1994) 4 Cal.4th 499, 539, judgment aff'd, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 .) But the trial court has a duty to properly instruct the jury; in this case, the court's failure to do so before sending the jurors back to resume deliberations was reversible error, especially given the likelihood there was just one juror who was holding out against the majority.

The court should have cautioned the jury that no juror should surrender his or her individual judgment and conscience, even if this meant no unanimous decision could be reached. (See *People v. Keenan* (1988) 46 Cal.3d 478, 534, and *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268 ["It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party"].) The court failed to caution the jury in this case. The court should also have informed the jurors that there was no necessity that they reach *any* verdict [76] (*People v. Gainer* (1977) 19 Cal. 3d 835, 852; *People v. Wattier* (1996) 51 Cal. App. 4th 948, 956), but failed to do so.

Instead of exploring the issue whether the jurors believed further deliberations would be helpful, or giving the necessary instructions to avoid pressure on the holdout juror or jurors, the court simply sent the jurors back without comment, clearly implying that a verdict *must* be reached. In *People v. Wattier, supra*, 51 Cal.App.4th 948, the Court of Appeal held a trial court properly instructed the jury to return to deliberations after it had provided a

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The standard pattern instruction echoes this imperative by informing the jury to "consider the evidence for the purpose of reaching a verdict if you can do so." (CALJIC No. 17.40)

guilty verdict, where one juror during polling stated that he voted for guilt but that he felt pressured to do so. (*Id.* at p. 955-956.) The Court of Appeal noted that a trial court must determine whether a jury reached a unanimous agreement before it discharges the panel. (Pen. Code, §§ 1140, 1163-1164.) If during the polling any juror answers that the verdict is not his or her verdict, the jury must be returned to the jury room for further deliberations (Pen. Code, § 1163.) In *Wattier*, the juror conceded that he voted for guilt but said he felt constrained to do so, but the Court of Appeal rejected the defendant's claim that by sending the jury back into deliberations, the court improperly coerced the verdict that was returned after another thirty minutes of deliberation. The Court of Appeal found the trial court's instructions to the jury entirely proper: Among other admonitions, the trial court specifically directed the juror who had disclaimed the verdict not to acquiesce to the majority, but to make his own decision. (*Id* at p. 956.) The panel as a whole was instructed "that the People and the Defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so." (*Id.*)

Here, however, no such cautionary instructions were given. The judge merely stated that the verdict must be unanimous, then returned the used verdict forms to the jury and told it to continue its deliberations. The apparent holdout juror went back to the jury room under pressure to acquiesce to the jurors who had chosen death. (See *People v. Gregory* (1989) 184 Ill.App.3d 676, 682 [Jury coercion found where, after a perfunctory sidebar with both counsel, the judge reminded the jury his previous instructions were that its verdict upon any charge "must be unanimous," then returned the used verdict forms to the jury and asked it to continue its deliberations].)

Because the court in this case failed to give the jury *any*

instructions whatsoever upon learning that they had reached a deadlock, the holdout juror could only surmise that she would eventually have to submit to the pressure of the majority to reach a verdict of death. This jury had already been directed to return a verdict of death without considering their doubts about the validity of one of the convictions. The error was compounded in that the court instructed the jury in the language of CALJIC 17.41.1, which pointedly tells each juror that he or she is not guaranteed privacy or secrecy.[77] That instruction assured the holdout juror that her words might be used against her and that candor in the jury room could be punished, further inhibiting speech and free discourse in a forum where "free and uninhibited discourse" was most needed. (*Attridge v. Cencorp* (2nd Cir. 1987) 836 F.2d 113, 116.) Given the requirement of heightened reliability in capital cases, appellant's sentence must be reversed.

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[77]See Argument XI., *infra*.

IX. THE TRIAL COURT ERRED BY REFUSING APPELLANT'S PINPOINT INSTRUCTION THAT THE LAW DOES NOT HAVE A PREFERENCE FOR THE PUNISHMENT OF DEATH

Defense counsel requested that the jury be instructed in the following language:

> The law does not have a preference for the punishment of death, but rather leaves it entirely up to you based upon the instructions I have given you, to determine which penalty is appropriate.

(10CT 2882.) In rejecting this instruction, the court remarked: "It seems to me that that is covered in the instructions that I've outlined, specifically 8.84, which explains to them that it's their decision to make as to which of the two punishments which are available should be imposed. (6RT 1243.) The court erred by refusing the instruction.

A. Appellant Was Entitled to His Appropriately-Worded Instruction

A criminal defendant is entitled upon request to instructions which pinpoint his theory of defense. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Adrian* (1982) 135 Cal.App.3d 335, 338; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; *People v. Sears* (1970) 2 Cal.3d 180, 190; see also Pen. Code § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party. . . ."].) The right to such instructions applies at both the guilt and penalty phases of a capital trial. (See, e.g., *People v. Benson* (1990) 52 Cal.3d 754, 806; *People v. Davenport* (1985) 41 Cal.3d 247, 281-283.) "[I]n considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." (Cal. Stds. Of Jud. Admin., § 5.)

The trial court may reject a proffered instruction if it is argumentative or focuses on disputed *evidence* rather than the defense *theory* (*People v. Wright, supra*, 45 Cal.3d at p. 1137); if it is duplicative or legally incorrect (*People v. Mickey, supra,* 54 Cal.3d 612, 697); or if it is lengthy or confusing (*People v. Falsetta* (1999) 21 Cal.4th 903, 923). If a proffered instruction meets the *Sears* guidelines discussed above, the trial court has no discretion to refuse to so charge the jury. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

The trial court's rejection of the instruction because it was "covered in the instructions" the court had already outlined was not justified. Although a court is not required to accept duplicative instructions, it may not refuse an instruction to which the defense is otherwise entitled. Unlike instructions which misstate the law or are argumentative, instructions which are duplicative, at least in part, with other instructions need not be refused by the trial court. Pattern instructions assume that restatement and amplification may occur within the jury instructions. For example, CALJIC No. 1.01 states in part, "If any rule, direction or idea is repeated or stated in different ways in these instructions, no emphasis is intended... ." See also CALJIC No. 17.31, which informs the jury the instructions may be redundant because they do not apply.

The court instructed the jury pursuant to CALJIC No. 8.84 (penalty trial - introductory). (10CT 2864.) Amplification of the instruction did not render the defense request improper. Typically, instructions rejected as duplicative also suffer from some more serious infirmity, such as containing incorrect statements of the law (see *People v. Staten* (2000) 24 Cal.4th 434, 465 fn. 10) or being argumentative (see *People v. Anderson* (2001) 25 Cal.4th 543, 599). But where the defense is otherwise entitled to an amplifying

instruction and it would not cause confusion or undue consumption of time, refusal of an instruction constitutes an abuse of discretion.

As previously stated, defendants have a right to special instructions which pinpoint the defense theory of the case. (*People v. Sears, supra,* 2 Cal.3d 180, 189-190; *People v. Wright, supra*, 45 Cal.3d 1126, 1137.) Appellant sought to have a concise, clearly-worded statement added to the instructions to pinpoint the concept that the law does not have a preference for the death penalty. It was undisputed that the special instruction requested by appellant was a correct statement of the law. It was not argumentative. It did not highlight any particular evidence supporting the defense theory. It was not worded in a confusing manner. The proposed language served the purpose of highlighting the jury's freedom to choose life. Thus, the added language would have dispelled any confusion regarding the primacy of one penalty over the other.

The trial court abused its discretion in not allowing this proper pinpoint instruction. Unlike cases where denial of pinpoint instructions as duplicative were deemed harmless (see, e.g., *People v. Brown*, *supra*, 31 Cal.4th 518, 559-560 [refusal of accomplice corroboration instruction harmless where record showed accomplice was fully corroborated as matter of law]; *People v. Gurule* (2002) 28 Cal.4th 557, 660 [denial of accomplice supplement harmless where judge instructed witness was accomplice by law]), in appellant's case, the critical issue was the jury's power to choose between the two penalties, especially in light of the issue of lingering doubt. Because the issue was so critical, the court's refusal to instruct under the proposed language constituted an abuse of discretion.

B. The Error Was Prejudicial

When a trial court fails or refuses to instruct on the defense theory of an offense, the error, insofar as it is merely one of state law, is evaluated under the standard of reversal found in *People v. Watson*, *supra*, 46 Cal.2d 818, 836. (See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 164-178 [prejudicial error in failing *sua sponte* to instruct fully on lesser included offenses and theories supported by evidence evaluated in noncapital case under state standard].) Under this standard, the conviction will be reversed if, after an examination of the entire case, including the evidence, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Id.* at p. 78.)

Unlike cases where denial of pinpoint instructions as duplicative were deemed harmless (see, e.g., *People v. Brown, supra*, 31 Cal.4th 518, 559-560 [refusal of accomplice corroboration instruction harmless where record showed accomplice was fully corroborated as matter of law]; *People v. Gurule, supra,* 28 Cal.4th 557, 660 [denial of accomplice supplement harmless where judge instructed witness was accomplice by law]), in appellant's case, the critical issue was the jury's power to choose between the two penalties, especially in light of the issue of lingering doubt. Because the issue was so critical, it is reasonably probable that the jury would have rejected the death penalty had the instruction been given.

Given the requirement of heightened reliability in capital cases, appellant's sentence must be reversed.

X. THE TRIAL COURT ERRED BY REFUSING APPELLANT'S PINPOINT INSTRUCTION THAT THE JURY COULD NOT CONSIDER THE DETERRENT OR NONDETERRENT EFFECT OF THE DEATH PENALTY OR THE MONETARY COSTS TO THE STATE

A. The Trial Court Erred by Refusing The Instruction

Defense counsel requested that the jury be instructed in the following language:

> In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or nondeterrent effect of the death penalty or the monetary cost to the state of execution or maintaining a prisoner for life without the possibility of parole.

(10CT 2884; 6RT 1244-1245.) The court stated: "It seems to me that what this is telling the jury is things that they are not to consider. And there's a whole list of the cases of things that they are not to consider in the penalty phase. And it would seem to me that this is an instruction that should not be given." (6RT 1244.)

As previously stated, a criminal defendant is entitled upon request to instructions which pinpoint his theory of defense. (See, e.g., *People v. Kraft, supra,* 23 Cal.4th 978, 1068; *People v. Adrian, supra,* 135 Cal.App.3d 335, 338; *People v. Rincon-Pineda, supra,* 14 Cal.3d 864, 865; *People v. Sears, supra,* 2 Cal.3d 180, 190; see also Pen. Code § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party. . . ."].) The right to such instructions applies at both the guilt and penalty phases of a capital trial. (See, e.g., *People v. Benson, supra,* 52 Cal.3d 754, 806; *People v. Davenport, supra,* 41 Cal.3d 247, 281-283.) "[I]n considering instructions to the jury [the judge] shall give no less consideration

to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." (Cal. Stds. Of Jud. Admin., § 5.)

This instruction has been approved by this court as a proper penalty phase instruction. (*People v. Ray* (1996) 13 Cal. 4th 313, 354, fn. 22.) Such an instruction enables the jury to understand that it is entitled to disregard only those "consequences" not constitutionally relevant to its sentencing decision, and that it bears the ultimate responsibility for choosing between death and life imprisonment with parole based on the particular circumstances of the case. The failure to give this instruction minimizes the gravity of the penalty decision in violation of the Eighth Amendment. (See *Caldwell v. Mississippi* (1985) 472 U.S. at p. 328-330; *People v. Mayfield* (1993) 5 Cal.4th 142, 183; *People v. Jennings* (1988) 46 Cal.3d 963, 991.)

The trial court abused its discretion in not allowing this proper pinpoint instruction. Unlike cases where denial of pinpoint instructions as duplicative were deemed harmless (see, e.g., *People v. Brown, supra,* 31 Cal.4th 518, 559-560 ; *People v. Gurule, supra*, 28 Cal.4th 557, 660), here, the critical issue was the jury's power to choose between the two penalties, especially in light of the issue of lingering doubt. Because the issue was so critical, the court's refusal to instruct under the proposed language constituted an abuse of discretion.

B. <u>The Error Was Prejudicial</u>

When a trial court fails or refuses to instruct on the defense theory of an offense, the error, insofar as it is merely one of state law, is evaluated under the standard of reversal found in *People v. Watson, supra,* 46 Cal.2d 818, 836. (See, e.g., *People v. Breverman, supra*, 19 Cal.4th 142, 164-178 [prejudicial error in failing sua sponte to instruct fully on lesser

included offenses and theories supported by evidence evaluated in noncapital case under state standard].) Under this standard, the conviction will be reversed if, after an examination of the entire case, including the evidence, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Id.* at p. 78.)

Unlike cases where denials of pinpoint instructions as duplicative were deemed harmless (see, e.g., *People v. Brown, supra*, 31 Cal.4th 518, 559-560 [refusal of accomplice corroboration instruction harmless where record showed accomplice was fully corroborated as matter of law]; *People v. Gurule, supra*, 28 Cal.4th 557, 660 [denial of accomplice supplement harmless where judge instructed witness was accomplice by law]), in appellant's case, the critical issue was the jury's power to choose between the two penalties, especially in light of the issue of lingering doubt. Because the issue was so critical, it is reasonably probable that the jury would have rejected the death penalty had the instruction been given.

Given the requirement of heightened reliability in capital cases, appellant's sentence must be reversed.

XI. THE PROVISION OF CALJIC 17.41.1 VIOLATED MR. REED'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL

The guilt and penalty retrial juries were instructed with CALJIC 17.41.1 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.

(2CT 556; 10CT 2876; 4RT 694; 6RT 1311.)

In *People v. Engelman* (2002) 28 Cal.4th 436, this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate the federal constitution. Mr. Reed 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 the 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 17.41.1 pointedly tells each juror that he or she is not guaranteed privacy or secrecy. At any time, the deliberations may be interrupted and a fellow juror may report another juror's words to the judge and allege some impropriety, real or imagined, which the juror believed occurred in the jury room. The instruction, in short, informs 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*, *supra*, 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*, 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 [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 should bar CALJIC 17.41.1 so that it may not be allowed to chill free exchange and discourse during deliberations.

The right to trial by jury, pursuant to the Sixth Amendment and California Constitution, Article I, section 16, is a right to the verdict by a unanimous jury. (*Apodaca v. Oregon* (1972) 406 U.S. 404.) That right is abridged by CALJIC 17.41.1 because it may coerce 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 who would be more likely to hold fast to an unpopular decision if he knew that he could not be hauled before the court to account for it 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.) We do know, however, that at the penalty retrial, one juror announced her disagreement with the death verdict upon polling, after the jury had indicated a unanimous verdict had been reached. (20CT 5639; 6RT 1322.) The possibility is significant that this juror felt unable to state her minority position

in the jury room. 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* (1993) 5 Cal.4th 478, 502.)

But even if the error is not treated as structural, in Mr. Reed's case it was clearly prejudicial. The second penalty phase jury struggled to reach a verdict, asking for instruction on lingering doubt and receiving none. (10CT 2887; 6RT 1316, 1319-1320.) That jury came back with a purported verdict, only to reveal when polled that one of the jurors did not agree with it. (6RT 1320-1322.) The court announced that the verdict was not unanimous and told the jurors to go back into deliberations, where they worked for more than an hour before reaching a unanimous verdict – in the meantime, asking for Foster Slaughter's testimony and then retracting the request. (6RT 1322-1327.) No doubt during the final hour or so of deliberations, Juror No. 1 felt tremendous pressure to change her vote in favor of death. There is simply too much danger that the chilling effect of CALJIC No. 17.41.1 may have caused her to relinquish her hold on her vote for life, fearing her fellow jurors would report her to the judge.

Accordingly, the penalty must be vacated.

XII. APPELLANT'S RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A PENALTY VERDICT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR JURY TRIAL, RELIABLE PENALTY DETERMINATIONS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A. Introduction

After a little more than a day of penalty phase deliberations, the trial court dismissed the original jury in this case upon finding that the jury could not unanimously agree on a penalty verdict. (4RT 791-792.) The jury indicated that the final vote had been 7-5 for LWOP. (4RT 792.) In the penalty retrial, after being instructed that guilt verdicts were "conclusively presumed" (5RT 943, 6RT 1232), a second jury returned a verdict of death. (6RT 1320-1321.)

Allowing the penalty retrial under these circumstances constituted federal constitutional error. An overwhelming majority of the jurisdictions that allow the death penalty to be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to the penalty. As one of the few remaining jurisdictions that permits a penalty retrial following a hung jury, California's death penalty scheme is an anomaly and is contrary to the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The penalty retrial following the hung jury violated appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as state constitutional protections in article I,

sections 1, 7, 15, 16, and 17 of the California Constitution.[78]

B. Standard of Review

Analysis of a claim that a death penalty scheme violates the cruel and unusual punishment prohibition of the Eighth Amendment involves two inquiries: (1) "Objective indicia that reflect the public attitude toward a given sanction" (*Gregg v. Georgia, supra*, 428 U.S. at p. 173), including the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" (*Enmund v. Florida* (1982) 458 U.S. 782, 788); and (2) "informed by [these] objective factors to the maximum possible extent" (*Coker v. Georgia* (1977) 433 U.S. 584, 592), the Court "bring[s] its own judgment to bear on the matter" (*Enmund v. Florida, supra*, 458 U.S. at pp. 788-789) to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment." (*Gregg v. Georgia, supra*, 428 U.S. at p. 182.)

C. Analysis

The death penalty is barred altogether currently in 15 states[79] and

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Despite the lack of objection at trial on this ground, this Court has consistently considered "as applied" challenges, such as this one, to California's death penalty scheme on their merits without requiring objection below. (*People v. Hernandez* (2003) 30 Cal.4th 835, 863; *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau* (1993) 6 Cal.4th 140, 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323; *People v. Yeoman* (2003) 31 Cal.4th 93, 118; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Wade v. Taggart* (1959) 51 Cal.2d 736, 742.)

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The death penalty is prohibited in the following jurisdictions: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. (See Death Penalty Information Center website at http://www.deathpenaltyinfo.org/state_by_state)

in the District of Columbia and Puerto Rico. The death penalty is authorized under federal law and in 35 state jurisdictions currently. However, in the vast majority of these jurisdictions, 25 of the 35 states where the death penalty is an available punishment, if the jury is unable to agree unanimously on a penalty phase verdict, there is **no penalty retrial** and the defendant is instead sentenced to life imprisonment or life imprisonment without possibility of parole (LWOP).[80] A penalty retrial following a hung jury is also prohibited under federal law.[81] Delaware has a procedure which requires a unanimous jury finding of at least one aggravating circumstance; without such a finding, a life sentence results,[82] although the judge makes the ultimate penalty determination otherwise. Similarly, Florida utilizes a procedure where the jury makes only a recommendation on sentencing and the judge actually decides

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Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); *Id.* Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720 § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp 1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7); (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995; Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (20010; Pa. Stat. Ann. tit. 42, § 9711(c)(1)(v) (Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990);Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

[81]18 USCA § 3593(e) (West Supp. 1995).

[82]11 Del. Code § 4209(d)(1).

between life and death.[83] Montana also employs a procedure where the judge determines the penalty upon a jury finding of at least one aggravating factor.[84]

California, under the 1977 death penalty statute, followed the more enlightened trend and prohibited a penalty retrial following a hung jury. (See *People v. Kimble* (1988) 44 Cal.3d 480, 511.) However, under the harsher 1978 death penalty statute, California reverted into the minority ranks and now permits such penalty retrials. (Pen. Code, §190.4, subd. (b).) This position is followed in only a few other jurisdictions.[85] Statutes in Connecticut and Kentucky are silent about the consequences of a hung jury in the penalty phase of a capital case, but case law suggests that penalty retrials are permissible. (*State v. Daniels* (Conn. 1988) 542 A.2d 306; *State v. Ross* (Conn. 2004) 849 A.2d 648, 726, fn. 68; *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672; *Dillard v. Commonwealth* (Ky. 1999) 995 S.W.2d 366, 374.)

Thus, of those jurisdictions that rely on jury determinations of penalty in a capital case, California stands with only a handful of other states that permit penalty retrials following a hung jury. This demonstrates an emerging national consensus prohibiting penalty retrials following a hung jury.

This consensus is borne out of recognition that concern for fundamental fairness and human dignity require that a capital defendant should only be "forced to run the gauntlet once" on death. *(Green v. United States* (1957) 355 U.S. 184, at p. 190.) Normally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," (*Richardson v. United States*

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[83]Fla. Stat. Ann. § 921.141(2).

[84]Mont. Code Ann. § 46-18-305 (2003).

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Ala. Code § 13-A-5-46(g) (2002) Ariz. Crim. Code § 13-703.01L (2002); Ind. Code § 35-50-2-9(f) (2002); Nev. Rev. Stat. 175.556 (2003).

(1984) 486 U.S. 317, 324) and this general rule has been held applicable to capital case penalty proceedings. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108-109.) But most states allowing the death penalty have recognized that one penalty trial is enough. Even if double jeopardy does not apply, it is still indisputable that death is a penalty different from all others. (*Gregg v. Georgia, supra*, 428 U.S. at p. 188 (joint opinion of Stewart, Powell and Stephens, JJ.).) No capital defendant should be subject to repeated attempts by the State to sentence him to death "thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity." (*United States v. Scott* (1978) 437 U.S. 82, 95.) Such penalty retrials also take a tremendous toll on the other trial participants – the second set of jurors, the families and friends of the victims who are called upon to speak of their deep loss, the prosecutors, the trial judge, court personnel, the defendant, the defense legal team, and the defendant's family and friends.

Compelling a capital defendant to endure the ordeal of a second full blown trial over life or death is constitutionally inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 101.) Because Mr. Reed was submitted to the punishment of a penalty retrial, even though the initial jury could not reach a unanimous penalty decision, voting seven to five for a life sentence, appellant's death penalty should be reversed.

XIII. THE PROVISION OF CALJIC NO. 8.85, WHICH INCLUDED INAPPLICABLE FACTORS AND FAILED TO SPECIFY WHICH FACTORS COULD BE MITIGATING ONLY, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT

The jury was instructed with CALJIC No. 8.85, the standard instruction regarding the factors in aggravation and mitigation which may be considered in determining whether a sentence of death or life without the possibility of parole should be imposed. (2CT 568-569; 6RT 1304-1306.) Appellant respectfully submits that CALJIC No. 8.85 violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution. Appellant recognizes that this Court previously has rejected similar contentions (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064 *People v. Benson, supra,* 52 Cal.3d 754, 802), but he requests reconsideration for the reasons given below. In addition, he raises the issue to preserve it for federal review.

Several of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case (see Penal Code § 190.3, subds. (b)-(j)), yet the trial court did not delete those inapplicable factors from the instruction. (2CT 568-569.) Moreover, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the evidence. Including inapplicable statutory sentencing factors, and failing to specify which factors were aggravating and which factors were mitigating, was harmful in a number of ways.

First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See, e.g., *People v. Gurule, supra,* 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) The factors introduced by a

prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – were relevant solely as possible mitigators. (See, e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against Mr. Reed. In other words, without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent and/or irrational aggravating factors, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Stringer v. Black* (1992) 503 U.S. 222, 235; *Mills v. Maryland* (1988) 486 U.S. 367, 373-375; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Indeed, the need for such instructions in this case was particularly acute, and their omission particularly prejudicial, because the prosecutor improperly argued at the outset that factors "(D) through (J) – well, actually, (D) through (K) can be thought of either as *neutral* or as defendant oriented factors, *sometimes mitigating* factors." (6RT 1252 [emphasis added].)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra*, 447 U.S. 343; *Fetterly v. Paskett, supra,* 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating

and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. At the beginning of his argument, the prosecutor told the jury he was "going to talk about the one jury instruction which focuses your attention on certain factors which you should look to," and then he was "going to apply the evidence that you've heard in this case to those factors." (6RT 1251.) The prosecutor then announced his "theme in the case," which was "that the defendant in this case is a predator killer, who kills for the enjoyment, for the excitement of it." (6RT 1251.) The prosecutor prefaced his remarks about the individual factors with the comment: "But if you're going to return a verdict of death, then the aggravating factors need to substantially outweigh the mitigating factors." (6RT 1253.) He then stepped over to his diagrams and stated:

> I'm going to start with the ones in the middle. That would be factors (D) through (J).
>
> The first one, (D) extreme mental or emotional disturbance.
>
> Not in this case.
>
> The victim participation. You may read about things in the papers where somebody gets killed, but they had something to do with causing, you know, the thing to happen.

Not here.[86]

(6RT 1253.) The prosecutor continued:

> (F) Did the defendant have a reasonable belief that his actions were morally justified.
>
> There's no basis in this case for any of that.
>
> (G) Up here on the board, I just put the one word 'duress,' but the language of the factors is a little bit longer. Basically it means did somebody force him to do it.
>
> Not in this case.
>
> (H) Is there any mental disease, mental defect, or intoxication which somehow kind of makes it less bad what he did.
>
> Not in this case.

(6RT 1253-1254.) The prosecutor's comments on factor (I) – appellant's age – were that he was "old enough to know better," that he was "old enough to conform his conduct to something which approximates living with other people," and "old enough to be responsible for his actions." (6RT 1254.) As to factor (J) – did the defendant play a minor role – the prosecutor remarked, "No. He was the only actor. He was the actual killer in both of them." (6RT 1254.)

The point of the prosecutor's argument about the purportedly

86

Here the prosecutor inserted a disclaimer, stating: "And I'm going to come back to that in the aggravating factors, but it's important to note here that the absence of a mitigating factor, meaning that it just doesn't apply, that doesn't mean that it's an aggravating factor. For right now, I'm just talking about the absence of a mitigating factor." (6RT 1253.)

mitigating factors was to emphasize the aggravated nature of the shootings – that no evidence had been presented of any mental problems that might have made the shooting of perfect strangers understandable, that the victims were completely innocent of any wrongdoing, that there was no moral justification for the shootings, that appellant was "old enough to know better" and fully responsible for his actions, and that nobody else was responsible for the shootings. It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black, supra*, 503 U.S. 222, 235.)

The prosecutor twisted the mitigating circumstances around to support his theory that Mr. Reed was "a predator killer, who kills for the enjoyment, for the excitement of it." (6RT 1251-1252, 1278-1279.) Although the prosecutor clothed the argument in terms of aggravating factors (a) through (c), he emphasized the randomness, lack of participation and helplessness of the victims to support this "predator" theory. (See, e.g., 6RT 1268-1269 ["Ms. Vasquez. Innocent. She had nothing to do with him. They had never seen each other that we know of. They had never spoken. And he didn't even ask her for her property and give her a chance to refuse."]; 6RT 1269 ["The defendant poured bullets through that one window. And the people inside that window had done nothing to him. And he did this ignoring the physical gestures of Carlos Mendez of nonresistance."]; 6RT 1269 ["Only the center portion of the window is broken out. He didn't shoot at the truck. He didn't

shoot near the truck. He didn't shoot to frighten them or to cause them to give over the truck or the money. He fired into the center window from just outside of it to kill them."]; 6RT 1274 ["The man was defenseless. The man had not done anything to provoke the attack. And apparently he died while begging for his life."].)

Although this Court has held that no reasonable juror would misconstrue these factors as aggravating (see, e.g., *People v. Benson, supra*, 52 Cal.3d at p. 802), that assumption has been severely undermined by subsequent empirical research showing how these factors are actually understood. In a study of jurors who sat on capital trials in California, it was found that jurors actually believed, despite instruction to the contrary, that the absence of mitigation evidence supported a sentence of death. (See Haney, Sontag, & Costanzo, *Deciding to Take A Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 Journal of Social Issues 149, 169; see also C. Haney and M. Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law and Human Behavior 411 [in study involving upper-level college students, large percentage were unable to accurately identify factors listed in CALJIC No. 8.85 as aggravating or mitigating].) In the face of such evidence, this Court can no longer so blithely assume that jurors in fact understood what is commonly – but erroneously – believed to be the "plain" meaning of the instruction's language. (See, e.g., *People v. Benson, supra*, 52 Cal.3d at p. 802.) In any event, the only logical conclusion is that jurors would consider the absence of mitigation to be aggravating, since the instruction expressly tells the jurors to "consider" if any of these factors is "not" present. Once again, jurors are presumed to follow instructions. (See, e.g., *Francis v. Franklin, supra*, 471 U.S. at p. 324, n. 9; *People v. Holt* (1997)

15 Cal.4th 619, 662.)

Moreover, permitting – indeed, mandating – the penalty jurors to be instructed on irrelevant matters makes it likely that their focus will be diluted and their attention distracted from the difficult task at hand. These dangers were heightened by the trial court's failure to clearly explain which factors were aggravating and which were mitigating.

Furthermore, failing to delete factors for which there was no evidence at all not only served to artificially inflate the case for aggravation, but also tended to diminish the mitigating evidence that was presented. The jury was effectively invited to sentence Mr. Reed to death because there was evidence in mitigation for "only" one or two factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest. In so doing, the instruction undermined the right to heightened reliability in the penalty determination, all in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama* (1980) 447 U.S. 625, 637.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting from *Gregg v. Georgia, supra*, 428 U.S. at p. 189) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.)

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has stated that trial courts have a duty to screen out factually-unsupported theories, "either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131; see also *People v. Michaels* (2002) 28 Cal.4th 486, 531 ["Instructions should not be unnecessarily complicated by telling the jury that a defense unclaimed by the defendant and excluded by the other instructions is inapplicable."].) Unlike other instructions which are required to be modified or edited to delete potentially misleading or confusing language (see, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 389-390 [penalty-phase jury instruction to consider all of the evidence at all phases of trial should have been tailored to exclude evidence relating to charges of which defendant was acquitted]), or deleted altogether if unsupported by the evidence (see *People v. Guiton, supra*, 4 Cal.4th at p. 1131), CALJIC No. 8.85 is treated differently – to a capital defendant's considerable disadvantage. In a situation where the law requires heightened, not lessened, scrutiny (see *Ford v. Wainwright, supra,* 477 U.S. at pp. 411, 414), this Court has incongruously

sanctioned irrelevant or inappropriate instructional language in violation of Appellant's Eighth and Fourteenth Amendment rights to equal protection and a reliable penalty determination (see *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [a death judgment cannot be predicated on factors that are totally irrelevant to the sentencing process].)

For all of these reasons, the instruction violated Mr. Reed's rights to an individualized sentencing determination based on permissible factors relating to him and the crime, to a fair trial by jury, to due process, and to a reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. Given the closeness of the case and the magnitude of the error, reversal is required regardless of the standard of prejudice applied. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-590; *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at p. 448.) At the very least, it is clear that the cumulative effect of this and the other errors that occurred throughout Mr. Reed's trial violated his state and federal constitutional rights to a fair trial and a reliable penalty judgment. (See, e.g., *Chambers v. Mississippi, supra*, 410 U.S. 284; *People v. Hill* (1998) 17 Cal.4th 800, 844-847; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883, 893; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-625.) The death judgment must be reversed.

XIV. THE PROVISION OF CALJIC NO. 8.88 DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION, VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT

The trial court's concluding instruction in this case, CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all 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 the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the

> aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(10CT 2870-2871; 6RT 1307-1309.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., Amend. XIV), to a fair trial by jury (U.S. Const., Amends. VI, XIV), and to a reliable penalty determination (U.S. Const., Amends. VI, VIII, XIV), and require reversal of his sentence. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.) Appellant recognizes that the Court has rejected similar challenges to CALJIC No. 8.88 (see, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 124), but nevertheless raises the issue here in order for the Court to reconsider those decisions and to preserve it for federal review.

A. The Instruction 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 Mr. Reed hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (10CT 2870-2871.) "So substantial," however, is an impermissibly vague phrase which bestowed intolerably broad discretion on the sentencing jury.

To pass constitutional muster, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death penalty sentencing scheme must adequately inform the jurors of "what they have to find in order to impose the death penalty ...." (*Id.* at pp. 361-362.) A death penalty scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth and Fourteenth Amendments. (*Ibid.*)

The phrase "so substantial" violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. 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* ...." (*Maynard v. Cartwright, supra,* 486 U.S. 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.) In that case, the Court 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. 862, 867, n. 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.

(*Arnold v. State, supra,* 224 S.E.2d at p. 392.)

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, n. 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. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, but 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 v. State, supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "substantial history of serious assaultive criminal convictions" (*Ibid.*), 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 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* (1980) 446 U.S. 420, 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. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII, XIV), the death judgment must be reversed.

B. The Instruction Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment

Of course, 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; *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 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 far different 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.

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, supra*, 494 U.S. at p. 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* (1993) 6 Cal.4th 457, 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.

CALJIC No. 8.88, as provided in appellant's case, is also defective because it implied that death was the only available sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances...." However, it is clear under California law that a penalty jury may always return a verdict of life without possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown, supra*, 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed mitigation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.) The failure to properly instruct the jury on this crucial point deprived appellant of his right to have the jury given proper information concerning its sentencing discretion (*People v. Easley* (1983) 34 Cal.3d 858, 884), deprived appellant of an important procedural protection that California law affords capital defendants in violation of due process, and made the resulting verdict unreliable in violation of the Eighth and Fourteenth Amendments.

In sum, 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. amend. VIII, XIV) and denies due process (U.S. Const. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346), and must be reversed.

C. The Instruction 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 § 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." (Cal. Penal Code § 190.3.) 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. 370, 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 § 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.

In addition, the instruction improperly reduced the prosecution's

burden of proof below that was required by Penal Code § 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.)

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* (1895) 157 U.S. 301, 310.)

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, the 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.

(*People v. Moore, supra,* at pp. 526-527.) In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it was a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See, e.g., *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739; *Bashor v. Risley* (C.A.Mont. 1984) 730 F.2d 1228, 1240; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 871-876.) 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 573 F.2d 1027, 1028 (8th Cir. 1978); 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. Given the closeness of the case discussed in detail in the preceding arguments and the critical errors in the instruction, respondent cannot prove the errors harmless beyond a reasonable doubt. At the very least, it is clear that the cumulative effect of this and the other errors that occurred throughout appellant's trial violated his state and federal constitutional rights to a fair trial and a reliable penalty judgment. (See, e.g., *Chambers v. Mississippi, supra,* 410 U.S. 284; *People v. Hill, supra*, 17 Cal.4th at pp. 844-847; *Alcala v. Woodford , supra*, 334 F.3d 862, 883, 893; *Mak v. Blodgett, supra*, 970 F.2d 614, 622-625.) Reversal of appellant's death sentence is required.

XV. THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT

The only special circumstance alleged and found true was under Penal Code section 190.2, subdivision (a)(3), the so-called "multiple murder" special circumstance. (CT 486-749.) For the reasons explained below, this special circumstance violates the Eighth Amendment. While appellant recognizes that the Court has rejected similar challenges to the multiple murder special circumstance (see, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 286-287; *People v. Coddington* (2000) 23 Cal.4th 529, 656 [overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1058-1059]), he raises the issue here in order for the Court to reconsider its previous decisions and in order to preserve the claim for federal review.

In order to satisfy the Eighth Amendment, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244, quoting *Zant v. Stephens, supra*, 462 U.S. 862 at p. 877), and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313, conc. opn. of White, J.) It must do so, furthermore, "in an objective, evenhanded, and substantially rational way...." (*Zant v. Stephens, supra*, 462 U.S. 862, at p. 879.)

Under the California scheme – in which the special circumstances set forth in Penal Code § 190.2(a) are supposed to satisfy the foregoing demands (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1023; *People*

v. Bacigalupo, supra, 6 Cal.4th at pp. 467-468) – "each special circumstance" – not just all of the special circumstances considered in the aggregate – must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (*People v. Green* (1980) 27 Cal.3d 1, 61.)

The special-circumstance at issue in this case -- multiple murder, Pen. Code § 190.2(a)(3) -- fails to distinguish "in an objective, evenhanded, and substantially rational way" (*Zant v. Stephens, supra*, 462 U.S. 862, at p. 879), between those deserving of death and those who are not.

"Narrowing is not an end in itself, and not just any narrowing will suffice." (*United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1445.) To narrow in "an evenhanded ... and substantially rational way," the special circumstance must define a sub-class of persons of comparable culpability. "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." (*Ibid.*)

At issue in *Cheely* were federal statutes dealing with mail bombs. (18 U.S.C. §§ 844, subd. (d), 1716, subd. (a).) The statutes declared that anyone who, with the intent to injure property or life, causes a death by knowingly placing in the mail an explosive device, is eligible for the death penalty. The Ninth Circuit held the statutes were unconstitutional: "[T]hey create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants...." (*United States v. Cheely, supra*, 36 F.3d at p. 1444.)

Under the statutes, the court observed, one jury could sentence to death a person who accidentally killed while intending to damage property,

while a second jury could vote to spare a mail-bomber who deliberately assassinated an NAACP official. "The narrowing" principle on which the statutes rest thus fails to "foreclose ... the prospect of ... 'wanton or freakish' imposition of the death penalty." (*United States v. Cheely, supra*, 36 F.3d at p. 1445.)

This is equally true of the multiple murder special circumstance in the California statute. Thus the multiple murder special circumstance applies to the white racist who deliberately kills several black children in separate incidents. It also applies to the black man who, in the course of a robbery, accidentally kills one white woman and her 9-week old fetus, which the defendant did not know the woman was carrying. (See, e.g., *People v. Davis* (1994) 7 Cal.4th 797, 810 [person responsible for death of 8-week old fetus may be convicted of murder]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 [intent to kill not required for multiple murder special circumstance]. Under the statutory scheme, one jury could sentence the black defendant to death while another could spare the life of the white killer. "The prospect of such 'wanton and freakish' death sentencing is intolerable under Furman and the cases following it." (*United States v. Cheely, supra*, 36 F.3d at p. 1444.) In short, the multiple-murder special circumstance establishes unconstitutionally overbroad criteria for death-eligibility.

As noted above, appellant recognizes that the Court has rejected this challenge to the multiple murder special circumstance. (See, e.g., *People v. Sapp, supra*, 31 Cal.4th at pp. 286-287; *People v. Coddington, supra*, 23 Cal.4th at p. 656.) In *Sapp*, the Court distinguished *Cheely* on the ground that the mail-bomb statute permitted individuals to be sentenced to death even if no "serious bodily harm or death were intended" and the defendants did not have the "mens rea of murderers." (*People v. Sapp, supra*, 31 Cal.4th at

p.287.) The flaw in the Court's analysis is that it overlooks the example given above, the man who accidentally kills during the course of a robbery did not harbor malice -- the mens rea of a murderer – and did not intend either "serious bodily harm or death." He is guilty of first-degree murder only because of the felony-murder rule. The mail-bomb statute at issue in *Cheely* likewise created a category of felony murder and allowed anyone who fell within it to be sentenced to death. Both it and Penal Code § 190.2, subdivision (a)(3) create "a broad class, composed of persons of many different levels of culpability." Allowing juries "to decide who among them deserves death" is what creates "the possibility of aberrational decisions as to life or death" and violates the Eighth Amendment. (*United States v. Cheely, supra*, 36 F.3d at p. 1445.)

In *Coddington*, the Court noted that the United States Supreme Court in *Lowenfield v. Phelps, supra*, 484 U.S. 231, held that multiple murder is a constitutionally proper narrowing category. (*People v. Coddington, supra*, 23 Cal.4th at p. 656.) Not so. In *Lowenfield*, the question presented was whether, in a non-weighing state, an aggravating circumstance on which death may be imposed may duplicate an element of a capital crime or, put another way, a special circumstance creating death eligibility (there, intentional murder with intent to kill more than one person). The Supreme Court held that such duplication was constitutionally permissible because, while the capital murder element, or special circumstance finding, accomplished the narrowing required by the Eighth Amendment, the question in the penalty phase was whether mitigation outweighed aggravation. (*Id.* at pp. 241-246.) The Court was simply not presented with the question whether the multiple-murder special circumstance adequately narrowed the class of persons eligible for the death penalty. That issue was neither raised by the defendant nor discussed by the Court.

For all of these reasons, appellant respectfully requests that the Court revisit the merits of this argument. If it does, the special circumstance finding must be stricken, which shall render the judgment of death void. (See *Godfrey v. Georgia, supra*, 446 U.S. at pp. 422-33 [death sentence vacated where Supreme Court finds sole eligibility factor unconstitutionally broad]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322 [invalidation of sole special circumstance requires *per se* reversal].)

XVI. CALIFORNIA'S CRIMINAL JUSTICE SYSTEM IS TOO UNRELIABLE TO ALLOW THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED

Even if this Court finds that the evidence is sufficient to support the jury's finding that appellant was guilty of the murders of Amarilis Vasquez and Paul Moreland, it cannot reasonably say Mr. Reed committed these crimes beyond all doubt. Experience over the past 15 years tells us there is a significant possibility that the eyewitness identification procedures led to unreliable, overly definite identifications by victim witnesses who were under significant stress and subjected to other circumstances that undermine the reliability of their identifications. Furthermore, the identification procedures did not incorporate known safeguards against false eyewitness identifications. In light of our evolving recognition of this reality, the Eighth Amendment to the United States Constitution must now prohibit affirmation of a death sentence unless guilt is proven beyond *all* doubt.

A. The Constitution Forbids Imposition of Death When Police Practices Generate an Unacceptably High Number of Wrongful Convictions

Reliability of criminal convictions is a bedrock constitutional requirement, and the goal of the numerous procedural protections guaranteed by the state and federal constitution. The need is greatest in death penalty cases: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305 [opinion of Stewart, Powell, and Stevens, JJ.].) The need for reliability is no less great in the

determination of guilt. (*Beck v. Alabama*, *supra*, 447 U.S. 625, 637.)

Although the possibility of wrongful convictions has been a part of the debate on the death penalty for centuries,[87] the possibility has remained abstract, and the proportions assumed to be minute. Twenty-three years ago, a painstaking effort to identify wrongful convictions asserted that from 1900 through 1985, at least 139 innocent persons were sentenced to death and at least 23 innocent persons were executed.[88] This study sparked considerable controversy in the years following its appearance,[89] but we now know that wrongful convictions occur at a frequency far greater than even the boldest examiners dared suggest fifteen years ago.[90]

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See generally, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L.Rev. 21, 22 (1987). "In the mid-1770s, the British scholar Jeremy Bentham argued that capital punishment differs from all other punishments because `[f]or death, there is no remedy.' Jeremy Bentham, *The Rationale of Punishment* 186 (Robert Heward ed., 1830) (circa 1775). Bentham recognized that there could be no "system of penal procedure which could insure the Judge from being misled by false evidence or the fallibility of his own judgment," *id.* at 187, and he argued that execution prevents "the oppressed [from meeting] with some fortunate event by which his innocence may be proved. [citation omitted]." *United States v. Quinones* (2d Cir., 2002) 313 F.3d 49, 63.

88Bedau & Radelet, *supra*.

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See, e.g., Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L.Rev. 121 (1988).

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Huff, Rattner, and Sagarin, authors of the 1995 book *Convicted but Innocent*, spent more than a decade studying the persistence of wrongful convictions, gathering evidence and assessments from police administrators, sheriffs, prosecutors, public defenders, and judges. The three scholars concluded that about 0.5 percent of persons convicted of felonies are estimated to be innocent.

A 1996 Department of Justice Report noted that every year since 1989, *in about 25% of the sexual assault cases referred to the FBI where results could be obtained (primarily by State and local law enforcement), the primary suspect has been excluded by forensic DNA testing*. Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have excluded the primary suspect, and about 6,000 have "matched" or included the primary suspect.[91] The National Institute of Justice's informal survey of private laboratories reveals a strikingly similar 26% rate. As noted by Peter Neufeld and Barry Scheck, "the consistency of these numbers strongly suggests that postarrest and postconviction DNA exonerations are tied to some strong, underlying systemic problems that generate erroneous accusations and convictions."[92]

The rate of mistakes in rape cases is stunning – and there is every reason to believe that the rate is even higher in robbery cases. Both rape and robbery are crimes of violence in which the perpetrator is often a stranger to the victim. They are both susceptible to the well-documented[93] dangers of

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See Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, U.S. Dept. of Justice (June 1996), at 0-3.

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Research Report, n. 5, pp. xxviii-xxix. In *Actual Innocence*, Scheck, Neufeld and Jim Dwyer suggest that the true rate of wrongful convictions may be closer to ten percent than to one-half of one percent.

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See generally, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 278 (2002).(reviewing the literature over thirty years). Studies continue to be published regarding this issue. See, e.g., Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Annu. Rev. Psychol. 277 (2003); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification*

eyewitness misidentification, the leading cause of wrongful convictions – a phenomenon restricted to crimes committed by strangers. Such is the case in about three-quarters of robberies, but only a third of rapes. (See, Bureau of Justice Statistics, *Criminal Victimization in the United States 2002*, Table 29, cited in Samuel Gross, et al., *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 530 (Winter 2005).) The nature of the crime of rape means that the victim must spend time with the perpetrator, while robberies are usually quick, and generally involve less immediate physical contact.

As of April, 2004, Gross reports 120 exonerations in rape cases; 88% of them involved mistaken eyewitness identification. (*Id.*.at pp. 530-531.) There were only three robbery exonerations, all of which include eyewitness misidentifications. Before DNA, the results were dramatically different. A study of all known cases of eyewitness identification in the United States from 1900 through 1983 found that misidentifications in robberies accounted for more than half of all misidentifications, and outnumbered rape cases by more than 2 to 1. (Samuel Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, J16 Journal of Legal Studies 395, 413 (1987).) The difference in the number of recent exonerations is solely due to the availability of DNA testing in rape cases. (Gross, *Exonerations in the United States*, *supra*, at pp. 530-531.) If we had a technique for detecting false convictions in robberies comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations.

DNA testing has thus revealed that error of the gravest kind is

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Accuracy, 87 J. Appl. Psychol. 112 (2002).

institutionalized in criminal prosecutions. And capital cases are more, not less, vulnerable to mistake than rapes or robberies. Murder cases generate the most intense community pressure, which often leads to "confirmatory bias," or tunnel vision, by law enforcement officials who feel the heat. The victims of murder cases are by definition unavailable. The incentives for jailhouse informants are high, and incentives could not be higher for real killers, who frame innocent fall guys or less guilty accomplices when facing the possibility of execution.[94]

Since 1973 and the reimposition of the death penalty after *Gregg v. Georgia, supra,* 428 U.S. 153, 139, dozens of people have been freed from death row after being cleared of their charges. These prisoners cumulatively spent over 1,000 years awaiting their freedom.[95] As the United States Supreme Court noted in June of 2002, "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." (*Atkins v. Virginia* (2002) 536 U.S. 304, 321, n. 25; see also *Ring v. Arizona* (2002) 122 S.Ct. 2428, 2447 (Breyer, J. concurring), noting the release of the 100th exonerated death row inmate since executions resumed in 1977.)

Prior to the revelations of DNA testing, the consensus was best expressed by Justice Learned Hand: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." (*United*

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See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital cases*, 61 Law and Contemporary Problems 123, 129-133 (Autumn 1998); James Liebman, *The Overproduction of Death*, 100 Columbia Law Review 2030 (2000).

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Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (2004) Death Penalty Information Center (<http://deathpenaltyinfo.org/) (Last visited June 8, 2010).

States v. Garsson (S.D.N.Y.1923) 291 F. 646, 649.) Justice Hand's formulation was recognized by Illinois Governor George Ryan, who was confronted with thirteen cases of innocent men condemned to death – so many that he finally said, "Our capital system is haunted by the demon of error – error in determining guilt, and error in determining who among the guilty deserves to die." (See Bradley R. Hall, *From William Henry Furman to Anthony Porter: The Changing Face of the Death Penalty Debate*, The Journal of Criminal Law and Criminology, Vol. 95, No. 2, at p. 371 (2005).)

The profound shift in our understanding of the error level in serious criminal convictions led to a sweeping rejection of the Federal Death Penalty Act (FDPA) in *United States v. Quinones* (S.D.N.Y. 2002) 205 F. Supp. 2d 256. The court held the FDPA unconstitutional because "it not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive process." (*Id.*, 205 F. Supp. 2d at 257.) This holding was based on the following grounds: (1) In recent years, an extraordinary number of death row inmates have been exonerated, in some cases, after they came within days of execution. These exonerations, especially those based on DNA evidence, have opened a window on the workings of our system of determining guilt in capital cases, and have shown that the risk of wrongful executions is far higher than anyone used to believe; and (2) nothing about the procedural structure of federal capital litigation affords any special protection against that risk. (*Id.* at 266-268.)

On appeal, the district court's decision was reversed. (*United States v. Quinones*, *supra*, 313 F.3d 49.) The Second Circuit found that the likelihood of an innocent person being executed had long been a part of the debate over the death penalty's propriety in both Europe and the United States:

"[T]he argument that innocent people may be executed – in small or large numbers – is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment, and binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent." (*Id.*, 313 F.3d at 62; see in general, 313 F.3d at 63-66.) It further found that no lower court could hold that the death penalty was unconstitutional, in light of three specific references to the death penalty in the U.S. Constitution, and the United States Supreme Court's decisions in *Gregg v. Georgia, supra*, 428 U.S. 153, and *Herrera v. Collins* (1993) 506 U.S. 390; the court interpreted *Gregg* as foreclosing a challenge to the death penalty as constitutional *per se*, and *Herrera* as foreclosing any challenge to a death penalty scheme on grounds that it led to the execution of too many people. (313 F.3d at 61-62, 67-70.)

The Court's claim that fear of executing an innocent person is no different now than at any time in our country's history is unpersuasive. It simply picked statements from philosophers and death penalty opponents over the past 230 years warning of the irrevocable nature of death as a penalty and the danger of convicting innocent people, and did not acknowledge, let alone refute or minimize, what moved the district court: the fact that the abstract possibility of error has been made concrete; error has occurred, and is occurring, at a massively greater rate than anyone believed possible.

Furthermore, the district court did not hold that "capital punishment" was unconstitutional; it held the FDPA was unconstitutional because it had no provisions that would minimize the error rate demonstrated in state court death penalty schemes. And the Second Circuit's reading of the *Herrera* decision is simply wrong. In her concurring opinion in *Herrera*,

Justice O'Connor, joined by Justice Kennedy, wrote: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed...*the execution of a legally and factually innocent person would be a constitutionally intolerable event.*" (506 U.S. at 419 [emphasis added].) Given the tenor of the dissent on this issue (506 U.S. at 430 (dissent by Blackmun, J, in which Stevens and Souter, JJ, join), Justice O'Connor spoke for a majority of the Court.

Herrera had claimed that he was factually innocent, and could prove it with evidence that had only become available after trial. He had argued that the execution of an individual who is known to be innocent violates the Constitution. On his *factual* claim, the Court's reaction is best summarized in Justice O'Connor's pivotal concurring opinion: "Petitioner is not innocent, in any sense of the word." (506 U.S. at 419.) In *Herrera*, the Court was not asked to pass on the constitutionality of a system that repeatedly executes innocent people, and it had no record of such a systemic problem before it. As a result, the *Herrera* opinions deal solely with the rights of an individual defendant who had claimed (unpersuasively) to be able to prove that he was innocent after he had exhausted all ordinary remedies for direct and collateral review. The Court's discussion of the issues points in the opposite direction from the Second Circuit's description: the high court says that the execution of innocent defendants *is* a matter of critical constitutional importance.

In *Gregg* and its companion cases, the United States Supreme Court held (1) that the death penalty is not intrinsically unconstitutional, 428 U.S. at 187, and (2) that three of the five death penalty statutes before the Court contained adequate procedural safeguards to avoid the arbitrary

imposition of death sentences that had been condemned in *Furman v. Georgia* (1972) 408 U.S. 238. (*Gregg, supra*, 428 U.S. at 207; *Proffitt v. Florida* (1976) 428 U.S. 242, 259- 60; *Jurek v. Texas* (1976) 428 U.S. 262, 276.) Neither of those issues is raised here. But there is another holding in *Gregg* (and in *Furman*) that is pertinent: (3) that the constitutionality of the death penalty must be examined and re-examined in light of "the evolving standards of decency that mark the progress of a maturing society." (*Gregg, supra*, 428 U.S. at 173, quoting *Trop v. Dulles, supra,* 356 U.S. 86, 101.)

Gregg itself has not been revisited, but the Court repeatedly has relied on that third holding to declare unconstitutional specific applications of the death penalty and procedures used to administer it.[96] In many of these cases following *Gregg*, the Court has applied new information and new arguments to old procedures, and has found them wanting. For example, in *Roper v. Simmons* (2005) 543 U.S. 551, the Court reversed its decision in *Stanford v. Kentucky* (1989) 492 U.S. 361), and held that the execution of juveniles under the age of 18 is unconstitutional. (*Id.* at pp. 565-579.)

The precise issue here - the constitutionality of the use of the death penalty in the face of mounting new evidence that under current procedures it leads to the executions of a substantial number of innocent defendants - has never been addressed by the United States Supreme Court. The issue in this case was not decided in *Herrera*, and it has not been

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See, e.g., *Woodson v. North Carolina, supra*, 428 U.S. 280; *Coker v. Georgia* (1977) 433 U.S. 584; *Gardner v. Florida* (1977) 430 U.S. 349; *Lockett v. Ohio, supra*, 438 U.S. 586; *Godfrey v. Georgia, supra*, 446 U.S. 420; *Enmund v. Florida, supra*, 458 U.S. 782; *Ford v. Wainwright, supra,* 477 U.S. 399; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Thompson v. Oklahoma* (1988) 487 U.S. 815; *Atkins v. Virginia, supra*, 536 U.S. 304.

addressed in *Gregg* or in any other post-*Gregg* case. The issue did not ripen until recently. It remains undecided to this day. This Court's authority to consider it, within the framework created by *Gregg* and subsequent cases, is beyond dispute.

B. California's Death Penalty Scheme Is Afflicted with All the Factors Identified as Leading Causes of False Convictions

The high number of wrongful convictions have made it possible for causal factors to be identified. They are: (1) mistaken eyewitness identifications; (2) false "incentivized" testimony from accomplices and jailhouse informants; (3) false confessions; (4) wrong science; and (5) official misconduct.[97] One of the most thorough reviews of the sources of wrongful

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Errors of Justice : Nature, Sources and Remedies (Cambridge Studies in Criminology) by Brian Forst, Alfred Blumstein (Series Editor), David Farrington (Series Editor) Cambridge University Press (2003); Kreimer and Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA* (Dec. 2002) 151 U. Penn. L. Rev. 547[describing several examples of wrongful convictions in Pennsylvania, some based on testimony of jailhouse informants]; Liebman, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030 [noting several cases in which jailhouse snitches were used to secure faulty convictions]; Garvey, (Ed.), *Beyond Repair? America's Death Penalty* (Duke Univ. Press, 2003); Findleuy, *Learning from Our Mistakes: a Criminal Justice Commission to Study Wrongful Convictions* (Spring 2002) 39 Cal. Western L. Rev. 333; Blume, *Twenty-five Years of Death: a Report of the Cornell Death Penalty Project on the 'Modern' Era of Capital Punishment in South Carolina (*2002) 54 S.C. L. Rev. 285; American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: a Guide for Examining the Administration of the Death Penalty in the United States* (2002) Ohio St. L. Journal, *Symposium: Addressing Capital Punishment through Statutory Reform; Scheck et al., Actual Innocence* (2000) [out of 62 cases in which DNA has exonerated an innocent defendant, 13 cases, or 21 percent, relied to some extent on the testimony of informers]; Keith Findley, *Learning from Our Mistakes: a Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. Western L. Rev. 333 (2002); Stanley Cohen, *The Wrong*

convictions was done in Illinois. Governor Ryan appointed a Governor's Commission to study how and why so many innocent individuals could have been sentenced to death, and to "submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate." The commission included judges, prosecutors and defense lawyers from across the political spectrum, all of whom were familiar with Illinois' death penalty system.[98] On April 15, 2002, after two years of study, the Illinois Governor's

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Men: America's Epidemic of Wrongful Death Row Convictions, Carroll & Graf Publishers (2003); Warden, *The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row,* Research Report, Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern University School of Law (2002). False testimony by incentivised witnesses is the second most prevalent factor in wrongful convictions in U.S. capital cases, exceeded only by incorrect or perjured eyewitness testimony, found in 53.5% of cases. Of the 38 defendants wrongfully sentenced to death, 16 were convicted in whole or part on the testimony of jailhouse informants, all but two of whom appear to have simply fabricated confessions, often with the help of officials.

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Former federal prosecutor and First Assistant Illinois Attorney General, Judge Frank McGarr served as the Commission's Chairman. Illinois Commission Report, *supra*, note 5, at 1. Judge McGarr spent eighteen years on the federal bench and served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986. (*Ibid.*) A former member of the Illinois General Assembly and the United States Congress, Senator Paul Simon served as Co-Chair. (*Ibid.*) Since he retired from the United States Senate in 1997, Senator Simon has been a professor at Southern Illinois University and Director of its Public Policy Institute. (*Ibid.*) Thomas P. Sullivan also served as Co-Chair. Formerly a United States Attorney for the Northern District of Illinois from 1977 to 1981, Mr. Sullivan is now in private practice at Jenner & Block. (*Ibid.*) The Commission included six former prosecutors, four current or former defense lawyers, and two current or former

Commission issued its Report. (See Report of the Commission on Capital Punishment, Governor's Commission on Capital Punishment (Apr. 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (last visited March 15, 2005 [hereinafter Illinois Commission Report].

The Commission found that the primary problem, from which many others flow, is the intense community pressure on law enforcement authorities to resolve horrific cases. This pressure leads to tunnel vision,[99] or "confirmatory bias," the premature closing off of investigative leads, directive interviews of suspect and witnesses, provision of irresistible favors to informants and accomplices, and misuse of science. Community pressure can make officials desperate enough for resolution to commit misconduct; which is present in a high percentage of wrongful convictions. The Commission's recommendations were designed to combat the influence of confirmatory bias by training and by particular procedures to eliminate the effect of various forms of witness direction. In essence, these recommendations are designed to combat the high pressure of the most serious cases, and bring police

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judges: Judge McGarr and Judge William H. Webster. (*Ibid.*) Refer to the "Commission Members" section of the Illinois Commission Report for more information. Commission Members, Illinois Commission on Capital Punishment, at http://www.idoc.state.il.us/ccp/ccp/member_info.html (last visited Aug. 1, 2003).

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The Illinois Commission suggests that tunnel vision occurs "where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty." (*Id.* at p. 20.) Officers become so convinced that they have arrested the correct person that they often ignore information pointing in another direction. (*Id.* at pp. 20-21.) Illinois Commission Report, *supra* note 5, at 20-21; see also, Stanley Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L. Rev. 1379 (2000).

practices up to minimum requirements in order to avoid false confessions, misrecollected and misinterpreted events, false identifications, and contaminated testimony. The first nineteen recommendations are concerned with police and pre-trial procedures, and with accuracy in catching the real perpetrator. An additional six recommendations relate to informant and accomplice testimony. The recommendations also require police to receive training on issues that have caused wrongful convictions.[100] As we will see, none of these recommendations are in effect now in California.[101]

C. Mistaken Eyewitness Testimony

The commonest source of wrongful convictions is mistaken or perjured eyewitness testimony. Specific weaknesses in the eyewitness identifications central to the prosecution's case against Mr. Reed have been discussed in detail previously. (See Args. I, II, & III, *supra*.) More generally, police and prosecution procedures followed in California have not incorporated recognized protections against mistaken eyewitness identification. Seven of the Illinois recommendations are designed to

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See, e.g., Recommendation #16: All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare manuals on these topics: (1) The risks of false testimony by in-custody informants ("jailhouse snitches"). (2) The risks of false testimony by accomplice witnesses. (3) The dangers of tunnel vision or confirmatory bias. (4) The risks of wrongful convictions in homicide cases. (5) Police investigative and interrogation methods. (6) Police investigating and reporting of exculpatory evidence. (7) Forensic evidence. (8) The risks of false confessions.

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Robert Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101.

eliminate suggestion from the process of eyewitness identification, thereby drastically reducing misidentifications.[102] None of these recommendations is

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Recommendation 10: "When practicable, police departments should insure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect."

Recommendation 11:

(a) Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and therefore they should not feel they must make an identification;

(b) Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.

Recommendation 12:

If the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photo.

Recommendation 13: Suspects should not stand out in the lineup or photo spread as being different from the distractors, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

Recommendation 14: A clear written statement should be made of any statements made by the eyewitness at the time of the identification procedure as to his or her confidence that the identified person is or is not the actual culprit. This statement should be recorded prior to any feedback by law enforcement personnel.

Recommendation 15: When practicable, the police should videotape lineup procedures, including the witness' confidence statement.

required, or practiced, in California. Thus, although impermissibly suggestive eyewitness identification procedures are banned in principle,[103] the daily practice by law enforcement authorities continues to tolerate a high risk of wrongful identifications being made and delivered to factfinders by witnesses with complete, albeit thoroughly misplaced, confidence.[104] California law allows procedures that permit law enforcement to guide witnesses towards a particular suspect believed by the officer to be the perpetrator, and allows the witness to develop a misleading confidence in what initially may have been a tentative identification. The results of these procedures are a "constitutionally intolerable" number of wrongful convictions.

D. Conclusion

In *United States v Quinones, supra,* 313 F.3d 49, the district court wrote, "[t]he best evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed, and that, on the other hand, convincing proof of their innocence often does not emerge until long after their conviction." (*Id.* at p. 55.) As of September 20, 2010, California's system has condemned over 700 people to its death row. Most have never had their cases thoroughly reviewed by the courts, and many do not even have lawyers to initiate a review. It is

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People v. Blair (1979) 25 Cal.3d 640, 659; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.

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Tom Perrotta, *Hynes Endorses Double-Blind Police Lineups*, N.Y. L.J., Dec. 13, 2002, at page 1, col. 3; U.S. Dep't of Justice, National Institute of Justice, Technical Working Group for Eyewitness Evidence, *Eyewitness Evidence: A Guide of Law Enforcement*, (Oct. 1999) at 2-3, available at http:// www.ncjrs.org/pdffiles1/nij/178240

highly likely that dozens of those now on California's death row are innocent of the crimes for which they were convicted, or of the aggravating circumstances that led to their punishment.[105] All aspects of criminal investigation and prosecution that have been identified as productive of wrongful prosecutions are inherent parts of California's criminal justice system. There is no reason to believe they are not having the same effect in California. For the forgoing reasons, appellant asks that his death sentence be overturned.

105

The irrevocable nature of the death penalty means that no remedy is now available for Thomas Thompson, despite the exposure of key witness and jailhouse informant Edward Fink as a liar in the Thomas Goldstein case; the use by the prosecutor of completely inconsistent theories in two separate trials; and the courts' refusal to consider evidence completely undermining the prosecutor's theory of the case because it was introduced too late. "Without question if Thompson's claims were being litigated today he would be granted a new trial." (Andrew Love, *Too Late for Justice,* Los Angeles Daily Journal, March 14, 2005.)

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

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

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6[106]; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional

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

muster without such review].)

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

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

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

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

A. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad

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

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

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

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-one special circumstances[107] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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107 The number of special circumstances is now twenty-two.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. *(People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

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

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[108] (See Section E. of this Argument, *post.*)

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In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily

B. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.3(a) as Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[109] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

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death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

109

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

weeks after the crime,[110] or having had a "hatred of religion,"[111] or threatened witnesses after his arrest,[112] or disposed of the victim's body in a manner that precluded its recovery.[113] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings. (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783.)

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

Prosecutors throughout California have argued that the jury

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

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People v. Nicolaus, supra, 54 Cal.3d 551, 581-582, cert. den., 112 S. Ct. 3040 (1992).

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

113

People v. Bittaker, supra, 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990).

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

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra*, 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments to The United States Constitution

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§

190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

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

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

doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

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

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

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

of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

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

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

established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra*, 543 U.S. at 244.)

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.* at p. 282.)

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

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th 1223, 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 finally made. As a prerequisite to the imposition of the death penalty, § 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.[114] 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 (6RT 1308), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88 [emphasis added].) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[115] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[116]

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

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

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This Court has held that despite the "shall impose" language of § 190.3, even

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

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

The United States Supreme Court explicitly rejected this reasoning in *Cunningham*.[117] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to

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if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (*Brown I*) (1985) 40 Cal.3d 512, 541.)

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Cunningham cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi*, *Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, *supra*, 35 Cal.4th at 1253; *Cunningham, supra*, 549 U.S. at p. 289.)

be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Cunningham, supra*, 549 U.S. at pp. 276-279.) That was the end of the matter: *Black*'s interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Id.* at pp. 290-291.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. 293.)

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

(*Cunningham, supra*, 549 U.S. at pp. 291.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty*

can be imposed.

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

This holding is simply wrong. As § 190, subd. (a)[118] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing

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

options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

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

(*Ring*, 536 U.S. at 604.)

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

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (§ 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (§ 190.3; CALJIC No. 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all

(punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at p. 328 [emphasis in original].) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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

A California jury must first decide whether any aggravating circumstances, as defined by § 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring*, 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State, supra,* 59 P.3d 450.)[119]

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See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring*

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"].)[120] As the high court stated in *Ring, supra,* 536 U.S. at p. 609:

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

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

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as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

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In its *Monge* opinion, the United States Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 [emphasis added], quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 (1981), and *Addington v. Texas* (1979) 441 U.S. 418, 423-424.)

penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution.

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

(a) Factual Determinations

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra*, 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond

a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

(b) Imposition of Life or Death

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

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

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

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding

> erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

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

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

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

In *Monge*, the United States Supreme Court expressly applied the Santosky rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]*n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 [emphasis added], quoting *Bullington v. Missouri, supra*, 451 U.S. 430, 441, and *Addington v.*

Texas (1979) 441 U.S. 418, 423-424.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1255), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is

required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[121] The same analysis applies to the far graver decision to put someone to death.

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

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v.*

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

Demetrulias, supra, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under § 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism

for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. 37, 51 [emphasis added], the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

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

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. (See Section C.4 of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*, 548 U.S. at pp. 177-178), this absence renders that scheme

unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under § 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United States Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made

beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See 6RT 1305; *Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

Appellant's penalty retrial jury was instructed in the language of 8.85, entitled "Penalty Trial – Factors for Consideration." (10CT 2865-2866; 6RT 1304-1305.)

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton, supra,* 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or

not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

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

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

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

(*People v. Morrison* (2004) 34 Cal.4th 698, 730 [emphasis added].)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed

that § 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel, supra*, 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[122]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra*, 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett, supra,* 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett, supra*, 997 F.2d 512, 522 [same analysis applied to state of Washington].)[123]

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See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State – as represented by the trial court [through the giving of CALJIC No. 8.85] – had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

[123]See detailed analysis of this issue in Argument XIII, *supra*, pp. 235-243.

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC No. 8.85 pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

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

D. The California Sentencing Scheme Violates The Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants

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

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States

Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

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

In *Prieto*,[124] as in *Snow*,[125] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced

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

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"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra,* 30 Cal.4th at p. 126, fn. 3; emphasis added.)

to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., §§ 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons ... must be stated orally on the record." (California Rules of Court, rule 4.42(e).) The pre-2008 version of Rule 4.42(e) also required the court to give "a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[126] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to

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

capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short Of International Norms of Humanity And Decency And Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky, supra,* 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

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

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

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

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty

for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.")[127] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra,* 477 U.S. 399; *Atkins v. Virginia, supra*, 536 U.S. 304.)

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

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

XVIII. THE METHOD OF EXECUTION EMPLOYED IN CALIFORNIA VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF PROCEDURAL DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION UPON CRUEL AND UNUSUAL PUNISHMENTS

A. Introduction

California Code of Regulations title 15, sections 3349 et seq. (2010) sets out the lethal-injection protocol now in effect in California. Currently pending in the United States District Court in Case Number 5-6-cv-219-JF-HRL is the question whether the current protocol is deficient in a way similar to San Quentin Operational Procedure 0-770, or O.P. 770, the earlier lethal injection protocol found constitutionally deficient, applying the "demonstrated risk" standard articulated in *Baze v. Rees* (2008) 553 U.S. 35.

California's execution procedures violate the federal constitution in two respects. First, the State has failed to comply with the statutory requirement that standards for lethal injection be established by the Department of Corrections. (Pen. Code § 3604, subd. (a).) Second, both of the statutory methods of execution constitute cruel and unusual punishment in violation of Appellant's rights under the Eighth Amendment. While appellant recognizes that this Court has rejected similar Eighth Amendment challenges to the California's execution procedures (see, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 863), he respectfully requests reconsideration and also raises the issue here to preserve it for federal review.

B. The Department Of Corrections' Failure To Adopt The Regulations Mandated By Penal Code Section 3604 Violates Appellant's Right To Procedural Due Process

The Fourteenth Amendment guarantees that no person will be

deprived of life, liberty, or property without due process of law. (U.S. Const., Amend. XIV.) To establish a violation of the right to procedural due process, the complaining party must show: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. (*Bank of Jackson County v. Cherry* (11th Cir. 1993) 980 F.2d 1362, 1366.) A capital appellant facing execution has a constitutionally protected interest in life that is not extinguished by his judgment and sentence. (*Ohio Adult Parole Authority v. Woodward* (1998) 523 U.S. 272, 281; see also, *id.* at p. 288, conc. opn, of O'Connor, J.) The State of California is plainly attempting to deprive Mr. Reed of life and must accordingly do so in accordance with procedures which accord with the requirements of due process. As the following discussion demonstrates, the procedures adopted by the state were and are constitutionally inadequate.

When a statute requires a regulatory agency to adopt standards to guide the performance of specified actions, the agency's failure to adopt such standards or to comply with the procedures required for adoption of standards prior to taking those actions violates the guarantee of procedural due process. (See, e.g., *Marshall v. Union Oil* (9th Cir. 1980) 616 F.2d 1113, 1116.) In California, all regulations and other standards of general application employed by a governmental agency must be adopted pursuant to the procedures set forth in the state Administrative Procedures Act (hereinafter "the Act." (Gov't Code § 11342, subd. (g).) The Act mandates that rigorous procedures be observed prior to the adoption of regulations, including public notice and hearings, legal review, and a public comment period, followed by filing of the regulation with the Secretary of State. (See, e.g., Gov't Code §11346.4, et seq.) Rules adopted without complying with the Act are invalid

and may not be enforced. (Gov't Code §11340.5.)

To counsel's knowledge, the Department of Corrections has not complied with the mandate of section 3604, subdivision (a), to establish standards for the administration of lethal injections or with the provisions of the Administrative Procedures Act. The only regulation in the California Code of Regulations which even mentions the words "lethal injection" is 15 C.C.R. §3349. This section merely sets forth the procedures and departmental forms required for a Death Row inmate's request for either lethal injection or lethal gas and therefore does not comply with the requirements of section 3604, subdivision (a). The only other information dealing with the subject which is available from the Department of Corrections is a document dated May 15, 2007, which provides a description in PDF format of the Department's lethal injection procedures. (California Department of Corrections, http://www.cdcr.ca.gov/News/2007_Press_Releases/docs/RevisedProtocol.pdf.)

The foregoing document also fails to establish coherent standards for administering lethal injections. The new regulations largely are O.P. 770 by another name, particularly with respect to the selection and training of the execution team and important aspects of the method for delivery of the three drugs involved. As with O.P. 770, the document does not define a set of procedures that will ensure that a condemned prisoner will be free from unnecessary suffering. The document's failure to prescribe even a minimal level of training for the personnel involved in administering the lethal injection raises a substantial and unnecessary risk that the subject will undergo extreme pain and suffering before and during his execution. If inadequately trained personnel improperly insert the catheter, the chemicals may be inserted into appellant's muscle or other tissue rather than directly into his bloodstream,

causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly, and the intended effects will not occur. Improper insertion of the catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose. There also is the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

The document does not mandate that a physician or other trained medical expert be present to render treatment or assistance to a prisoner in the event of an emergency; instead, the document mandates only that a physician be present to declare death. In fact, medical doctors are prohibited from participating in executions pursuant to the ethical principles set forth in the Hippocratic Oath. The American Nurses Association also forbids members from participating in executions. This increases the chances of improper administration which could result in pain, an air embolism, the clotting of the catheter which would prevent injection, and heart failure. Furthermore, the document sets out specific dosages of three drugs to be administered to all subjects, but different dosages affect different people in different ways, depending upon individual body weight, metabolism, and other medical conditions. Accordingly, there is a risk that the listed dosages may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

The document also does not outline the proper guidelines for the storage or the handling of the chemicals involved. Improperly stored and/or handled chemicals may cause unnecessary suffering. Sodium pentothal wears

off quickly; and if not enough is given, it may paralyze the muscles of the prisoner and render him incapable of breathing while still conscious, causing panic and an excruciatingly arduous death.

Plainly, the procedures were not properly adopted as required by the statute and the Administrative Procedures Act. They are constitutionally inadequate under the Fourteenth Amendment as a violation of appellant's right to procedural due process and also may not be enforced under state law. (Gov't Code §11340.5.)

C. California's Lethal Injection Procedure Violates The Eighth Amendment Prohibition Against Cruel And Unusual Punishments

California's lethal injection procedures also violate the Eighth Amendment ban on cruel and unusual punishments. The Eighth Amendment proscribes punishment that would inflict torture or a lingering death or involve the wanton infliction of pain. (*In re Kemmler* (1890) 136 U.S. 436, 447; *Gregg v. Georgia, supra,* 428 U.S. at p. 173; *Hudson v. McMillian* (1992) 503 U.S. 1.) The Amendment embodies concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures. (*Estelle v. Gamble* (1976) 429 U.S. 97.) It prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 101.) To discern the "evolving standards of decency," courts look to objective evidence of how society views a punishment today. (*Coker v. Georgia, supra,* 433 U.S. at pp. 593-597; *Enmund v. Florida, supra*, 458 U.S. at p. 788-796.) In essence, "no court would approve any method of implementation of the death sentence found to involve cruelty in light of presently available alternatives." (*Furman v. Georgia, supra*, 408 U.S. at p. 430.)

Death by lethal gas has been ruled cruel and unusual punishment. (*Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp.1387, aff'd, 77 F.3d 301, 309, vacated & remanded 519 U.S. 918 (1996).) On October 15, 1996, the judgment of the Ninth Circuit was vacated in light of amendments to section 3604. (*Gomez v. Fierro* (1996) 519 U.S. 918.) In 1996, section 3604 was again amended, to provide that in default of an election by the inmate, the execution would be by lethal injection. However, lethal injection also results in precisely the kind of painful, agonizing, and lingering death which the Eighth Amendment prohibits.

In examining whether a method of execution is "unconstitutionally cruel," the court must examine the "degree of risk" involved in its administration. (*Fierro v. Gomez, supra*, 865 F.Supp. at p. 1411, discussing *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662.) Factors to be considered in this assessment include the amount of pain involved and the immediacy of unconsciousness. (*Id.* at pp. 1410-1411 [interpreting the authorities cited in *Campbell*].) The *Fierro* court interpreted *Campbell* to suggest that "the persistence of consciousness 'for over a minute' or for 'between a minute and a minute-and-a-half but no longer than two minutes' might be outside constitutional boundaries." (*Id.* at p. 1411.)

There have been many instances where execution by lethal injection has been prolonged, extending the amount of psychological pain inflicted. (See *In re Carpenter*, Petition for Writ of Habeas Corpus, S083246.) In Oklahoma in 1992, for example, Robyn Lee Parks finally died after gasping, coughing and gagging for eleven minutes after the drugs were first administered. One reporter who witnessed Parks' death wrote that the execution looked "painful and ugly and scary." "It was overwhelming, stunning, disturbing -- an intrusion into a moment so personal that reporters,

taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over." ("11-Minute Execution Seemingly Took Forever," Tulsa World, (Mar. 11, 1992) p. A13.) Stephen Peter Morin's execution technicians were forced to probe both of Morin's arms and one of his legs with needles for nearly 45 minutes before they found a suitable vein because of Morin's history of drug abuse. ("Murderer of Three Women is Executed in Texas," N.Y. Times (Mar. 14, 1985) p. 9.) Similarly, after repeated failures in trying to find a suitable vein, Randy Wools, a drug addict, eventually helped the execution technicians find a useable vein. ("Killer Lends a Hand to Find a Vein for Execution," L.A. Times (Aug. 21, 1986) p. 2.) It took nearly an hour to complete the execution of Elliot Rod Johnson due to collapsed veins. ("Addict is Executed in Texas for Slaying of 2 in Robbery," N.Y. Times (June 25, 1987) p. A24.)

In 1988, it took forty minutes after he was strapped to the execution gurney for prison personnel to pronounce Raymond Landry dead. It took twenty-four minutes after the drugs first started flowing into his arms. ("Drawn-out Execution Dismays Texas Inmates," Dallas Morning News (Dec. 15, 1988) p. 29A.) Two minutes after prison personnel administered the drugs, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. ("Landry Executed for '82 Robbery-Slaying," Dallas Morning News (Dec. 13, 1988) p. 29A.) The curtain separating the witnesses from the inmate was then closed, and not reopened for fourteen minutes while the execution team reinserted the catheter into the vein. (*Ibid.*) A spokesman for the Texas Department of Correction, Charles Brown [sic], said, "There was something of a delay in the execution because of what officials called a 'blowout.' The syringe came out of the vein, and the warden ordered the (execution) team to reinsert the catheter into the vein." (*Ibid.*)

Medical staff took more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were kept behind a drawn curtain, but reported hearing Rector utter eight loud moans. During the ordeal Rector helped the medical personnel find a vein. The administrator of State's Department of corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein. The difficulty in finding a suitable vein was later attributed to Rector's bulk and his regular use of anti-psychotic medication. ("Rector, 40, Executed for Officer's Slaying," Ark. Democrat Gazette (Jan. 25, 1992) p. 1; "Rector's Time Came, Painfully Late," Ark. Democrat Gazette (Jan. 26, 1992) p. 1B; Frady, "Death in Arkansas," The New Yorker (Feb. 22, 1993) p. 105.)

Billy Wayne White was pronounced dead some 47 minutes after being strapped to the execution gurney. ("Another U.S. Execution Amid Criticism Abroad," N.Y. Times (April 24, 1992) p. B7.) The delay was caused by difficulty finding a vein; White had a long history of heroin abuse. (*Ibid.*) During the execution, White also attempted to assist the authorities in finding a suitable vein. (*Ibid.*)

The execution of John Wayne Gacy provides a similar example. After the execution began, the lethal chemicals unexpectedly solidified, clogging the IV tube that led into Gacy's arm and prohibiting any further passage. Blinds covering the window through which witnesses observed the execution were drawn, and the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were reopened and the execution process resumed. It took eighteen minutes to complete. Anesthesiologists blamed the problem on the inexperience of prison officials who were conducting the execution, saying that proper procedures taught in "IV 101"

would have prevented the error. ("Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction," Chicago Sun-Times (May 11, 1994) p. 5; "Witnesses Describe Killer's 'Macabre' Final Few Minutes," Chicago Sun-Times (May 11, 1994) p. 5; "Gacy Execution Delay Blamed on Clogged IV Tube," Chicago Tribune (May 11, 1994) p. 1.)

Seven minutes after the lethal chemicals began to flow into Emmitt Foster's arm, the execution was halted when the chemicals stopped circulating. ("Witnesses to a Botched Execution," St. Louis Post-Dispatch (May 8, 1995) p. 6B.) With Foster gasping and convulsing, the blinds were drawn so the witnesses could not view the scene. (*Ibid.*) Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. (*Ibid.*) Because they could not observe the entire execution procedure through the closed blinds, two witnesses later refused to sign the standard affidavit that stated they had witnessed the execution. (*Ibid.*) In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." (*Ibid.*) According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney; it was so tight that the flow of chemicals into the veins was restricted. ("Too-Tight Strap Hampered Execution," St. Louis Post-Dispatch (May 5, 1995) p. B1; "Execution Procedure Questioned," Kansas City Star (May 4, 1995) p. C8.)

Richard Townes, Jr.'s execution was delayed for twenty-two minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. ("Store Clerk's Killer Executed in Virginia," N.Y. Times (Jan. 25, 1996) p. A19.)

It took one hour and nine minutes for Tommie J. Smith to be pronounced dead after the execution team began sticking needles into his body because of unusually small veins. ("Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding Active Role in Execution," Indianapolis Star (July 19, 1996) p. A1.) For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. (*Ibid.*) The physician made two attempts to insert the tube in Smith's neck. (*Ibid.*) When that failed, an angiocatheter was inserted in Smith's foot. (*Ibid.*) Only then were witnesses permitted to view the process. (*Ibid.*) The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. ("Problem with Veins Delays Execution," Indianapolis News (July 18, 1996) p. 1.)

It took nearly an hour to find a suitable vein for the insertion of the catheter into Michael Eugene Elkins. ("Killer Helps Officials Find a Vein at his Execution," Chattanooga Free Press (June 13, 1997) p. A7.) It took nearly an hour to find a suitable vein for the insertion of the catheter. (*Ibid.*) Elkins tried to assist the executioners, asking "Should I lean my head down a little bit?" as they probed for a vein. (*Ibid.*) After numerous failures, a usable vein was finally found in Elkins' neck. (*Ibid.*)

The risk of such prolonged administration of the lethal injection is increased by California's lack of comprehensive standards in defining the procedures. In *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, the Ninth Circuit held that execution by lethal injection under the procedures which had been defined in Montana was constitutional. The Court of Appeals explained that those procedures passed constitutional muster because they were "reasonably calculated to ensure a swift, painless death." (*Id.* at p. 1469) Such

a statement cannot be made about the procedures in California. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to Appellant in a competent, professional manner by someone adequately trained to do so.

Similarly, in *LaGrand v. Lewis* (D. Ariz. 1995) 883 F.Supp. 469, aff'd (9th Cir. 1998) 133 F.3d 1253, the district court upheld the written Internal Management Procedures prescribing standards for the administration of lethal injection because "they clearly indicate that executions are to be conducted under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to be used, and the presence of a physician is required." (*Id.* at 470.) Such procedures are not found in the California Code of Regulations or in the document released by the California Department of Corrections.

California's use of lethal injection in the administration of the death penalty fails to protect condemned prisoners from unnecessary pain and suffering, violating the Eighth Amendment of the Constitution. The risk of inflicting such cruel and unusual pain is enhanced with the lack of established, comprehensive protocols. (But see *People v. Bradford* (1997) 14 Cal.4th 1005, 1059.) Accordingly, appellant's death judgment must be vacated and must not be carried out.

XIX. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE 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* (9th Cir. 1987) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; see *Greer v. Miller* (1987) 483 U.S. 756, 765 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *(United States v. Wallace* (9th Cir. 1988) 848 F.3d 1464, 1476.) 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. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Aside from the insufficiency of the evidence (Arguments II and III), and the *Wheeler/Baston* error (Argument IV), which require *per se* reversal, numerous errors infected the guilt phase. The improper denial of Mr. Reed's motion for a continuance to obtain the presence of witness Joe Martin Galindo doomed his opportunity for a fair trial from the beginning. (Argument

I.) Mr. Reed's right to a fair and impartial trial was violated by the trial court's failure to control witness Mendez's outbursts. (Argument VI.) In addition, the version of CALJIC No. 2.92 given to the jury violated Mr. Reed's right to due process, to meaningfully present his defense, violated his right to the effective assistance of counsel, and resulted in the jury's failure to fully consider the evidence where Mr. Reed's conviction depended upon uncorroborated eyewitness identifications. (Argument V.) The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. 14th amend.; Cal. Const. art. I, §§ 1, 7, 15, 16 & 17; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Appellant's conviction, therefore, must be reversed. (*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 [cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace, supra*, 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) 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, supra*, 46 Cal.3d 432, 465 [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]; see generally *In*

re Marquez (1992) 1 Cal.4th 584, 605 [errors harmless at the guilt phase, but prejudicial at the penalty phase].)

Fundamental errors in this case that carried over into the penalty phase retrial included Judge Cheroske's refusal to grant a reasonable continuance to obtain the presence of Joe Martin Galindo at the guilt phase – a fact unknown to the penalty phase jury. When the trial court denied Mr. Reed's request for a continuance in order to present the testimony of a second eyewitness, a domino effect was set in motion. Because the court unreasonably refused to allow time for Joe Galindo, a crucial defense witness, to return to this country from his tour of military duty and testify at the guilt phase, Mr. Reed was deprived of a corroborating witness and a reasonable doubt that he was the shooter in the Mendez case. The guilt phase jury did not get the whole story because they did not hear this witness. That jury could not reach a verdict as to penalty. At the penalty phase retrial Galindo testified for the first time, and that jury was not sure that Mr. Reed had committed one of the murders. Because multiple murder was the only special circumstance, this lingering doubt was critical to the penalty phase determination. Compounding the error, the court refused to give a lingering doubt instruction, even when the jury requested it.[128] Then, in response to the jurors' question, the judge gave an instruction that directed the verdict for death. Finally, when the jury came back with its verdict for death, the court discovered the verdict was not unanimous when one juror disavowed it during polling. Instead of properly instructing the jury to avoid coercion of the holdout juror or jurors, the court sent the jury back, stating only: "It appears we do not have a unanimous

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The penalty phase instructions exacerbated the errors. (See Arguments XI, XIII and XIV.)

verdict. I'm going to return the verdict form to you and ask that the jurors go back into deliberations, please. Thank you."

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, supra*, 481 U.S. 393, 399; *Skipper v. South Carolina, supra,* 476 U.S. 1, 8; *Caldwell v. Mississippi, supra*, 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

As demonstrated above, Mr. Reed's prosecution was infected by fundamental error. Starting with Judge Cheroske's refusal to grant a reasonable continuance of the trial to obtain the presence of crucial defense witness Joe Martin Galindo, Mr. Reed's prosecution devolved into a Kafkaesque exercise in incompetent evidence presented to a jury largely purged of minority jurors. The prosecution employed hopelessly tainted, uncorroborated and unreliable eyewitness testimony as the only evidence linking Mr. Reed to the two unrelated and apparently random shootings. And then the penalty retrial jury's doubts that Mr. Reed was the shooter in one case were brushed aside, and Judge Cheroske directed a verdict in favor of death.

Mr. Reed's convictions and death penalty must be reversed.

Dated: October 7, 2010

Respectfully submitted,

GAIL HARPER
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CERTIFICATE OF WORD COUNT

I, Gail Harper, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 95,197 words, excluding the tables, this certificate, and any attachments. This document was prepared in WordPerfect X3, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on October 7, 2010.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true copy of the foregoing to the following persons at the following addresses on the 7th day of October, 2010:

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