**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| **PEOPLE OF THE STATE OF CALIFORNIA,** | **)** | |
| | **)** | **Supreme Court** |
| **Plaintiff and Respondent,** | **)** | **Crim. S040703** |
| | **)** | |
| **v.** | **)** | **Los Angeles County** |
| | **)** | **Superior Court No.** |
| **JAMES ROBINSON, JR.,** | **)** | **PA007095** |
| | **)** | |
| **Defendant and Appellant.** | **)** | |

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**APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES**

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# APPELLANT'S OPENING BRIEF

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## STATEMENT OF THE CASE

This is an automatic appeal from a judgment of death entered by the Los Angeles Superior Court on June 17, 1994. (RT 2903; CT 688-693.)

On July 11, 1991, a felony complaint was filed charging appellant, James Robinson, Jr., in count 1 with the murder of James White, and in count 2 with the murder of Brian Berry. (Pen. Code § 187.)[1] (CT 152-155.)

The complaint alleged two special circumstances in connection with the murder counts. The murders were alleged to have been committed while appellant was committing a robbery. (§ 190.2(a)(17); CT 152-155.) In count 3, appellant was charged with second degree robbery. (§ 211.) The complaint further alleged that appellant personally used a firearm in the commission of all of the offenses (§§ 1203.06(a)(1); 12022.5), causing the offenses to become serious felonies. (§1192.7(c)(8).) (CT 152-155.)

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[1] All statutory references are to the California Penal Code unless otherwise noted.

Appellant was held to answer for the charges following a preliminary hearing held on January 14, 1992. (CT 156.) The same charges were filed in an information on January 28, 1992. (CT 148-151.)

On March 30, 1993, a jury trial began before the Honorable Ronald S. Coen. (CT 199.) Jury selection concluded on April 6, 1993. (CT 257.)

On April 12, 1993, the prosecution began presenting evidence in the guilt phase of trial. (CT 279.) The presentation of evidence and the arguments of counsel concluded on April 27, 1993. (CT 297.) The jury began deliberations on April 27, 1993. (*Ibid*.) On April 29, 1993, the jury announced that they had agreed upon the verdicts. (CT 299.)

The jury verdicts were announced on May 3, 1993. (CT 310.) The jury found appellant, James Robinson, Jr., guilty of both counts of first degree murder as charged in the information. (CT 310.) The jury further found that appellant had personally used a firearm in commission of the offenses, and found "true" the robbery special circumstances. (CT 310-311.) Appellant was also found guilty of the second degree robbery count charged in count III of the information. (CT 311.)

The penalty phase began on May 4, 1993. (CT 395.) The presentation of evidence and the arguments of counsel concluded on May 5, 1993. (CT 396.) The jury began deliberations on May 5, 1993. (*Ibid*.) On May 10, 1993, after slightly more than two days of deliberations, the jury announced that they were hopelessly deadlocked. (CT 518.) After questioning the jurors, the trial court declared a mistrial. (*Ibid.*)

On June 11, 1993, a conflicts hearing was held concerning attorney Bruce Hill's representation of appellant. (CT 524.) On June 28, 1993, the trial court relieved attorney Hill of the representation. (CT 577.) On July 6,

1993, the trial court appointed attorney Richard Leonard to represent appellant in the penalty retrial. (CT 579.)

On April 20, 1994, a new jury panel was assembled. Jury selection began with the distribution of the juror questionnaire form and hardship voir dire. (CT 618.) Jury selection continued on April 25, 1994, and was completed that same day. (CT 619.) The presentation of evidence began on May 2, 1994. (CT 620.) The evidence and arguments of counsel concluded on May 18, 1994. (CT 629.) On May 19, 1994, the jury returned verdicts of death for both count I and count II of the information. (CT 680-681.)

On June 17, 1994, the trial court denied appellant's motion to modify the verdict of death pursuant to Penal Code § 190.4(e). (CT 682.) The trial court imposed the death penalty for each of the two murder counts. (*Ibid*.) The trial court sentenced appellant to the mid-term of three years for the robbery count charged in count III of the information, plus an additional four years for the weapons enhancement. (CT 682.)

## STATEMENT OF THE FACTS

### I. APPELLANT, JAMES ROBINSON, JR.

A. James Robinson's Family Background.

Appellant, James Robinson, Jr., was born on December 28, 1968, in Indianapolis, Indiana. (RT 2639.) James was the youngest child in the family. He has two older sisters, Tehanna Robinson Beebee and Rheema Robinson. (RT 2639.) By the time James was three months old his parents were divorced. (RT 1493-1494.) His father was never a part of James' life. (RT 1493.) James' mother, Vesta Robinson, raised her three children as a single parent. (RT 1494.) Mrs. Robinson has never remarried. (RT 2655.) She and the children moved to California in August of 1972, when James was almost four years old. (RT 2639-2640.)

B. James Meets Tai Williams And Tommy Aldridge.

James met Tai Williams when they were both in the seventh grade at Paul Revere Junior High School. (RT 877.) James' best friend since the second grade, James Holland, introduced him to Tai and to some other people at Paul Revere. (RT 877.) While at Revere, he and Tai met Tommy Aldridge. (RT 965.) James never liked Tommy very much, and did not consider him a close friend. (RT 877; 965.) He was close to Tai, and kept up the friendship in spite of his mother's disapproval. (RT 1171-72.)

Mrs. Robinson did not like Tai and she disapproved of her son's friendship with him. (RT 1171-72; 2647.) She knew Tommy Aldridge, and believed that he had gone to high school with James. She did not consider him a friend of James'. Tommy was merely an "associate." (RT 2648.) Mrs. Robinson was a strict mother to all three of her children. (RT 2650.) She knew that James was able to make his own decisions once he went

away to college. However, Mrs. Robinson still considered herself a "protective" mother. (RT 2650.)

C. High School And The Marines.

James attended Palisades High School where he was an average student. He played on the school's football team, and graduated in 1987. (RT 2645-2647.) In December of his senior year in high school James decided to pre-enlist in the United States Marines. He had not yet heard from some of the colleges he had applied to and was getting nervous about what he would do in the Fall. (RT 2348.) He enjoyed some of his training experience, but did not like the Marines' over-all philosophy. (RT 2347-48.) After a couple of months, he was given a general discharge and returned home. (RT 2647.)

D. College.

After leaving the Marines, James enrolled in West Los Angeles College and then transferred to California State University, Northridge ("Northridge" or "CSUN"), in January of 1990. (RT 2349; 2649.) While James was at Northridge, Mrs. Robinson visited often – sometimes two to three times a week. (RT 2649.) She brought groceries and laundry soap. If James was working late at night, she would pick him up and give him a ride home. She went to check up on him and to be with him. (RT 2649.) Once he was away at Northridge, James did not consult with his mother before making every decision. (RT 2651.)

## II. THE EVENTS LEADING UP TO JUNE 1991.

A. James Robinson's Circumstances In 1990.

In January of 1990, James was 22 years old, and a full-time student at Northridge. (RT 2639; 2666.) He lived in the Northridge dormitories, and had a part-time job on campus. (*Id*.) In August of that year, James took

on another part-time job working for a nearby Subway sandwich shop. He worked at the Subway for approximately five months. (RT 405; 409.) The store owner, Stuart Schlosser, testified that James was a good employee, and was courteous and cooperative with customers and other staff members. (RT 430-431.) James described the job as "okay," but it was just a college job for him. (RT 2351.) He left Subway because he needed more hours than they were able to give him and he had a better job offer at the Honey Baked Ham store. (RT 878 -879.) Another reason James left was a situation which had arisen at the same time concerning some missing money. (RT 878-79.) Schlosser had discovered some money missing from the store. (RT 409.) He suspected that either James or one other employee had the opportunity to take the money. He told James and the other man that both of them would be terminated if the money was not returned. (RT 409-410.) According to Schlosser, both employees felt that they were treated fairly. [2] (RT 409-410) James told Schlosser that he had a better job offer, and they agreed that it was probably best for everyone if he took the other job. (RT 878-879.)

James never displayed any hostility or expressed any anger or resentment about leaving Subway. (RT 435.) He frequently returned to the Subway sandwich shop to visit and to buy food. He and Schlosser had pleasant conversations on these occasions. (RT 412.)

B. January of 1991.

In January of 1991, James had to withdraw temporarily from classes at Northridge. (RT 2354.) James had obtained a grant of $1,500 which he was to use to pay for his dorm room. Instead, he spent the money on other

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[2] Schlosser testified that both men were let go when the money was not returned. (RT 409-10; 434.)

things. James' mother, Mrs. Vesta Robinson, ended up reimbursing the school for $800. (RT 2652.) She insisted that James pay Northridge the remaining $700. (RT 2652.) The Dean told James that he could return to school as soon as the money was paid. (RT 2652.)[3] When they left the Dean's office, James told his mother that he would take a semester off from school and work full-time to repay the money. (RT 2661.)

C. James' Employment And His Finances In 1991.

In January of 1991, James took a job at Ralph's Market, and stayed there for around three months. (RT 879-80; 2356.) Von's Market hired him in May of 1991. (RT 2357.) He worked as a meat wrapper at the supermarkets, working anywhere from 25 to 30 hours per week. (RT 879-880.) Around one month before he was arrested, James went to work for Lucky Market. (RT 2357.) He changed jobs because Lucky's offered him full-time work. (RT 880.)

James had no financial problems in the Spring of 1991. (RT 966.) He cashed his paychecks at his job, which provided enough of an income for him to live on. (*Id*.) He was, however, having trouble with his bank accounts. (RT 967.) James had a checking account and a savings account with the Matador Federal Credit Union. (RT 684.)[4] During this time,

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[3] The court would not allow Mrs. Robinson to describe a statement she had from Northridge dated August 26, 1993, asking James to return to register for classes. (RT 2653; 2661.)

[4] The checking account was opened on May 21, 1990, and closed by the Credit Union on June 7, 1991, due to overdrawn checks. (RT 686; 691) This type of account will be closed if an account holder exceeds three overdrawn checks in a six-month period. (RT 686.) When the checking account was closed on June 7, 1991, it had a balance of $22.30. This balance was transferred to the savings account. (RT 691.) As of June 10,

(continued...)

Matador was taken over by Security Pacific National Bank. (RT 698.) Checks written on Matador checks would have been returned with the notation "account closed." (RT 698-699.) James was confused about the status on his accounts during the bank takeover. He had some problems with his checking account and had trouble straightening them out. Several checks were returned "NSF." (RT 890.) During this time, he cashed his checks at the market where he worked and kept most of his money in cash. (RT 891-892.) The credit union was only open for limited hours and with his work schedule he had trouble getting there on the buses during business hours. (RT 891.) James also stopped making deposits when the account became so confused because he thought that he should keep the cash to repay people holding the bad checks. It took him some time, but he was eventually able to pay everyone holding one of the returned checks. (RT 891.)

D. James Moves In With Tai Williams And Donna Morgan.

During most of 1991, James and several roommates had been sharing a condominium near the Northridge campus. (RT 882.) The roommates decided to give up their lease and James had to move at the end of May. (RT 883-884.) James was staying in the dorms on an interim basis and looking for an apartment to share with his friend, George Jackson. (RT 884-885.) George, however, decided to move back home. (RT 885.)

James' friend Tai Williams was living in the Northridge area. Tai shared an apartment with his girlfriend Donna Morgan, and their baby daughter. (RT 882; 886-887.) When Tai heard that James needed a place

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[4](...continued)
1991, there was no money in the checking account. (RT 691.) A $50.00 deposit to the savings account was made on July 8, 1991, leaving a balance in that account of $97.30. (RT 692.)

to stay, he encouraged him to stay with them. (*Id*.) James moved into Tai and Donna's apartment in late May or early June of 1991. He never intended to stay with Tai and Donna for more than a month. (RT 886-887.) He agreed to pay them $100 a month for rent, which was to include his share of the utilities. (RT 887.) James called his mother on Friday, June 14, 1991, and told her that he was staying at Tai Williams' apartment. Mrs. Robinson was angry. (RT 2654.) She did not like Tai and did not trust him. (*Id*.) Mrs. Robinson told James to come home, but he refused. (RT 2658.)

E. Purchasing The Gun.

Tai owned a gun, and he took James with him when he went to a nearby shooting range for target practice. (RT 466.) Their mutual acquaintance, Tommy Aldridge, also had a gun. James also became interested in target shooting. On June 3,1991, he went to National Gun Sales and bought an AMT .380 automatic weapon. (RT 892; 713.) Tai went with him and drove him to the store. (RT 892.) James only bought the gun because it was cheaper than renting one when he went to the firing range. (RT 892.) He enjoyed going to the firing range and never intended to use the gun to rob or hurt people. (RT 893-894.) He completed the necessary paperwork and returned to pick up the gun after the waiting period on June 18, 1991. (RT 707.)

F. Tai And Donna's Domestic Problems.

Tai and Donna were not getting along well during the time that James stayed with them. (RT 894-895.) They argued constantly and often put James in the middle of their fights by asking for his opinion. This was an uncomfortable situation for him because he was friendly with both of them. (RT 895-896.) Tai and Donna often fought about money. On one

occasion, Tai did not return from work Thursday evening and was gone until Saturday. Donna was angry because she needed money for something. James was upset too because he had written a check for the cable television bill and had expected Tai to reimburse him. (RT 900-901.) James encouraged Tai to spend more time with Donna and their baby. (RT 895.) He tried to get Tai a job at Lucky Market because they had medical benefits which Tai could use for the baby. (RT 897.)

On one occasion when Tai was at work, Donna made sexual advances toward James. (RT 897.) James felt very embarrassed and uncomfortable about this. (RT 896.) He was also aware that Tai was not faithful to Donna. Tai became involved with one of James' female friends from the dorms, and several other women. (RT 898.) James talked to Tai about this and told him that he felt uncomfortable and "caught in the middle" between Tai and Donna. (RT 898.) On the Wednesday before the crime, James walked in on Tai with another girl. He did not tell anyone about what he had seen. (RT 898-899.)

## III. THE EVENTS SURROUNDING THE HOMICIDES.

### A. Tai's Plans To Rob The Subway Sandwich Shop.

Tai knew that James had worked at the Subway Sandwich Shop near the intersection of Zelzah and Devonshire in the late Summer and early Fall of 1990. (RT 881.) When James was working at the Subway, Tai had come in once or twice to pick him up at the end of his shift. (Id.) On one occasion, Tai remarked that the place did not appear to be making money. James contradicted Tai, and showed him the hourly logs reflecting how much money the business took in throughout the course of the day. (RT 881-882.)

One evening between June 1st and June 10th of 1991, Tai brought up the idea of robbing the Subway. (RT 901-903.) James had returned home after work to find Tai and Donna sitting in the living room watching television with some other friends. (RT 901-902.) The television program was a crime show, along the lines of "America's Most Wanted" or "Unsolved Mysteries." (RT 901-902.) The program was describing how the criminal had escaped through the back door after the robbery. Tai was sitting on the floor playing with the baby. He looked at James and said, "Hey, if you rob the Subway, you can go out the back door, can't you?" (RT 902.) James replied, "Dude, there is no way you can go out the back door of the Subway. They keep the gate locked. There is one way in there. If you go in there, somebody is going to see you." There was no further discussion of the Subway that evening. (RT 902.)

Tai brought up the idea of robbing Subway again the week before June 29, 1991, the day of the homicides. On either the Monday or Tuesday of that week, James and Tai were together to the firing range. (RT 903.) Tai asked him, "If you shoot people in the Subway, can't you kill them in the refrigerator?" He just looked at Tai and replied, "If you shoot anybody in a place like this, you'll lose your hearing." (RT 904.) Tai said, "Oh, yeah, that's true." James was not yet worried about Tai's remarks, but he thought that it was strange for Tai to bring up the subject of robbing Subway again. (RT 904.) These two incidents were the only times that subject ever came up between them. (RT 904.)

B. Saturday, June 29, 1991.

James worked a full day on Saturday, June 29, 1991. (RT 910-911.) He took the bus to and from Lucky's as usual, arriving back at Tai and Donna's apartment around 10:00 p.m. (RT 913-914.) Tai and Donna were

there when he arrived. (RT 914.) They immediately called him into the bedroom, telling him that they needed to speak to him. (RT 914.) Tai and Donna accused James of gossiping about them. Tommy Aldridge had reported to Tai and Donna that James had been saying things about them that were not true. (RT 915-916.) James denied spreading any gossip, and suggested that the three of them confront Tommy. (RT 915.) Tai did not want to do that. He and Donna asked James to leave. (RT 915-916.)

James felt that there was nothing he could do to change their minds. He went into the living room and picked up his Walkman. He placed three $20 bills on the counter to cover his share of the telephone bill and left the apartment. (RT 916-917.) He got as far as the apartment complex's swimming pool when he turned around and went back to the apartment. (*Id.*) He stood by the door and called for Tai to come outside so they could talk. (RT 917)

Tai was not dressed and it was dark outside. He did not want to have a long talk. (RT 918.) James was confused by Tai's attitude. He thought that it was Donna and not Tai who wanted him out of the apartment. James remained calm while speaking to Tai.[5] Moving out was "not a big deal." He was, however, concerned that Tommy had lied and he wanted to straighten things out with Tai. (RT 919-920.) Tai told James that they could talk later. He told James to meet him at the Subway at 1:00 a.m. (RT 918; 923.)

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[5] Tai testified that James had been crying and extremely emotional during their conversation. (*See*, RT 471.) James testified that he did not get upset or cry. (RT 919.) At the preliminary hearing, Tai also stated that James gave him a handwritten note during their conversation. (*See*, RT 516.) James denied having done so. (RT 920.)

After his talk with Tai, James went to get his bicycle from the Kentucky Fried Chicken ("KFC"). The KFC had a place for him to chain the bike and he often left it there. (RT 920) He rode the bike up Reseda Boulevard to the Ralph's Market where a friend of his worked. (RT 920.) This friend had co-signed for him to move into non-campus residency and he wanted to pick up the application and finalize those arrangements so he could move out of Tai and Donna's as soon as possible. (RT 920-921.)

James' friend was not at work that night. (RT 921.) While he was at the market, appellant met a Japanese exchange student named Etsuko. (RT 921) Etsuko invited him to visit her later that evening at her dorm room. James agreed to stop by the see her at 12:00 midnight. (RT 922.)

James left the Ralph's Market at around 11:25 p.m. and began making his way to the CSUN campus. (RT 922.) He visited with Etsuko for a while and left her dorm at around 1:30 a.m. (RT 922.) By the time he left Etsuko's, James had decided not to meet Tai at the Subway sandwich shop. (RT 922-923.) He had figured that he did not need to hear anything more that Tai had to say. (RT 922-923.) Then James changed his mind and decided to go to Subway as he had agreed. (RT 925.) He felt that if he did not show up, Tai and Donna would say that he was flaky and unreliable. (RT 925.)

C. James' Discovery Of The Crime Scene.

The walk from the dorms to the Subway sandwich shop is approximately one-half mile. (RT 926.) As he approached the Subway, James noticed a red car parked in front of the store. (RT 927.) The sandwich shop was well lit inside. (RT 928.) When he entered the store, he saw a male sitting on the floor between the stools with his back against the wall. The stools were located immediately to the right of the front door.

The individual was sitting about four feet away from the door. His legs were straight out in front of him. He was facing the counter area. (RT 935.) The person's face was bloody. (RT 929.)

Everything happened very fast. (RT 929) At the same time he saw the person sitting on the floor, he heard the 2x4 which was used as a deadbolt on the back door fall to the ground. (RT 930; 931.) He heard footsteps "tapping" or "dancing" in the back of the store. (RT 930) One set of footsteps made a "chirping" sound like tennis shoes would do on that flooring. The other set of footsteps sounded as though they were made by a heavier shoe. (RT 931.) James figured that there was a robbery in progress, and a fight was going on in the back of the store. (RT 930; 934.)

James went toward the back of the store. (RT 934.) As he turned the corner around the end of the service counter, he saw the back door closing slowly, as if someone had pushed it open and it was closing on its own. (RT 934, 935.) There was another guy lying on the floor behind the counter area near the register. (RT 934; 936.) James hopped over him and ran toward the back door. (RT 934.)

James ran out through the back door, and headed toward the back gate into the alley. He wanted to see if he could get a license plate number of those responsible. (RT 940-942.) He could see through to the alley from the rear door of the shop. (RT 939-940.) As he went out the backdoor and ran past the dumpster, James noticed a Subway plastic sandwich bag on the ground. (RT 941.) As James neared the gate to the alley, he heard a car door shut. (RT 942.) When James saw the car's tail lights come on, he recognized them. He was positive that the tail lights were from a 1990 Ford Mustang. (RT 942.) He realized it was Tai's car because Tai's tail lights were broken. (RT 944-945.)

James was in shock. (RT 944.) He remembered looking at the Subway sandwich bag and thinking that he should take it to show Tai that he had been there and that he knew what Tai had done. (RT 942.) James reached for the bag and then something told him that he should not touch anything there. (RT 942.) He lightly touched the plastic bag, but let it go before actually lifting the bag off of the ground. (RT 947-948.) James ran down the alley, heading West to the spot where Tai's car had been. (RT 948.) He thought about running to the police station, but he did not. (*Id.*) James then began to think that, by asking to meet him at the Subway, Tai was trying to set him up. It occurred to him that maybe Tai wanted to kill him too. (RT 948-949.)

D. Leaving Tai's and Donna's Apartment.

James eventually returned to Tai's and Donna's apartment. (RT 949.) He tried to stay awake because he was afraid of Tai. But James was exhausted and ended up falling asleep in front of the television. He left early, around 6:00 a.m. on Sunday morning, which was as early as the buses would be running. (RT 949.) James went to a nearby motel, the Day's Inn at the corner of Winnetka and Roscoe Boulevard. (RT 950.) He called his mother and told her that he was staying at the Day's Inn and gave her the telephone number there. (RT 2662.) From the Day's Inn he made arrangements to look at some apartments. (RT 950.)

James met with apartment manager Donna Lopez on Sunday, June 30, 1991, to look at an apartment she had advertised in the newspaper. (RT 950-951; 663-665.) He told Lopez that he wanted to rent the apartment and filled out a rental application. (RT 664-665; People's Exh. #59.) James tried to give Ms. Lopez cash as a deposit and for the first month's rent. He opened up a "fanny pack" or "front pack" type of wallet. Inside

the front pack was a black pouch containing cash. (RT 676.) James was carrying cash because he had cashed his paychecks and had approximately $687 in cash. (RT 952.) Lopez testified that James counted out the money on her kitchen table and that the bills were mostly tens and twenties. (RT 677-678.) [6] Lopez told James that she could not take his money until the credit check was completed. (RT 666.) She also told him that she could not accept cash and that he should bring money orders made out to Northridge House Apartments. James returned later that day with the money orders. (RT 666-668; 952-54.)

Ms. Lopez allowed James to move in the next day, July 1, 1991, when the credit check was satisfactorily completed. She also agreed to work out a payment schedule for him so that he could gradually pay off the $350 security deposit. (RT 669.)

E. Tommy Aldridge's Visit To James' Apartment.

James spoke to Tommy Aldridge on Thursday or Friday of that week. Tommy had been paging him all week and he finally returned the call because the constant pages at work were annoying. (RT 954-955.) Tommy denied telling Tai or Donna that appellant had been gossiping about them. (RT 955.) James agreed to let Tommy come to see his new apartment. (RT 955-956.) He wanted to see if Tommy would say anything about Tai or the Subway robbery. (*Id*.) James told Tommy to go to a nearby intersection and page him. He also told Tommy to get there before 7:00 p.m. because he knew Tommy liked to keep late hours and he had to go to work the next day and did not want to be up late with Tommy. (RT

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[6] James testified that he did not count out any money for Ms. Lopez as she described, but he did open his pouch and his wallet which contained a large amount of cash. (RT 951.)

956.) Tommy paged him at 12:00 midnight. James was annoyed about the late hour, but he responded because he felt bad that Tommy had driven all the way from Los Angeles. Their mutual friends, Raquel Rose and Wendell Jones, were with Tommy. (RT 957.)

F. James' Arrest And Police Interview.

James was arrested on Tuesday, July 9, 1991. (RT 1088; CT 791.) He waived his rights and agreed to speak to police. (CT 791.) Detective Terry Richardson spoke to James at the Devonshire Station within one-half hour of the arrest.

James was frightened when he spoke to the police. He assumed they had arrested him because he is Black and because he was a former Subway employee. (RT 960.) Because he was afraid, he told the police several things that were not true. (RT 1140.) In the interview, James told the police that he was never at the Subway sandwich shop. (RT 960-961.) He was nervous and embarrassed during his police interview because he knew who had done the crimes. (RT 960-961.) He wanted to talk about what he had seen, but he knew that he would be pressured to turn in the people who were responsible. (RT 959.)

## IV. THE PROSECUTION'S WITNESSES.

A. Eyewitness Rebecca James' View Of The Subway Sandwich Shop.

On June 30, 1991, at approximately 1:30 a.m., Rebecca James was returning from a date. (RT 263.) She and her companion, Jack Ferra, had left their car in the parking lot of the outdoor mall at the corner of Zelzah and Devonshire Streets in Northridge, California. (RT 264; 273.)
Ms. James and Ferra chatted together as they walked by the shops in the outdoor mall on their way back to the car. (RT 275-276.) As they passed

the Subway sandwich shop, she noticed that it was still open at that late hour. (RT 265-266.)

Ms. James glanced inside the Subway two times, for an aggregate of approximately two minutes, as she and Ferra passed by. (RT 266; 286-289.) She did not recall if there had been advertising in the windows. She could not describe the layout of the sandwich shop. (RT 276-277.) The first time Ms. James looked inside she saw three people standing inside the Subway. (RT 266; 286.) One person, who appeared to be an employee, was standing behind the counter. (RT 266.) Another person, who appeared to be a customer, was in front of the counter. (*Id*.) Ms. James' view of the customer was primarily of his head and torso. (RT 279-280.) A third person was standing toward the side of the far wall, on the customer's side of the store. (RT 266; 286.) The customer appeared to be holding a gray or black metal pan. Ms. James thought that it might have been a bread pan. (RT 267.) Ms. James did not detect any problems or animosity between the people in the Subway. (RT 268.) The customer was a Black man, and the other two people were White. (*Id*.)

Ms. James glanced inside the Subway sandwich shop for a second time a few moments later when she heard a startling noise. It sounded like a "bang," as if the metal bread pan had been dropped on the floor. (RT 289.) Glancing into the shop as she kept walking, Ms. James saw the customer either run around the counter or jump over the counter. At the preliminary hearing, Ms. James stated, "I thought I saw him get taller like he jumped." (CT 22.) Ms. James was not alarmed by what she observed at the Subway. She thought that the people were roughhousing or playing. (RT 268.) Ms. James continued to walk to the car and saw nothing else. (RT 269.)

B. Rebecca James' Discovery Of The Reward Money And Her Subsequent Identification Of James Robinson.

Police later contacted Rebecca James, and she described what she had seen that morning. (RT 269.) Ms. James heard about the crime in the news media, and discussed what she had seen with her family. (RT 298-299.) At some point an "official" person told her that a reward was being offered. (RT 299.) Ms. James contacted a private attorney for assistance in obtaining the reward money. (RT 300-301.) At trial, Ms. James could not recall whether she had known about the reward money when she assisted the police artist in preparing the composite sketch. (RT 299-300.) However, Ms. James was certain that she had known about the reward money when she testified at the preliminary hearing and identified James Robinson. (RT 300.)

Although her recollection of the person she saw inside the Subway had been clearer closer to the events than it was at trial, Ms. James was unable to identify James Robinson from a photo "Six Pack" that the police showed her shortly after the crime. (RT 297-299; 301.) At trial, she described the customer at the Subway sandwich shop as being approximately 5'10" tall and identified James as the person she had seen. (RT 269.) However, Ms. James also agreed that there were a number of dissimilarities between James and the man she had seen in the Subway. (*See*, RT 294-296.) Ms. James did not recall the suspect wearing glasses. (RT 302.) The man she saw appeared to be somewhat rounder in his build and had a rounder face. Ms. James noted that James had a more slender and angular face than the man she had seen. (RT 295.) She described the suspect as having full lips, being "broad where the eyes are" and having short hair. (RT 271.) She also remembered telling the police that the male Black she saw was not very dark-skinned. (RT 294.)

James Robinson got his first pair of glasses in the second grade. (RT 2644.) He cannot function in his daily activities without his glasses. If he removes them, his vision is so poor that he is unable to make out objects even a few feet away. (RT 906.)

C. The Evidence Obtained From The Crime Scene.

Several LAPD homicide detectives searched the Subway sandwich shop and the surrounding area for evidence connected to the crime. (*See*, RT 335; 372.) The floor safe was found sitting on the floor in the hallway area behind the counter. (RT 348-349.) The safe was open and had no money inside it. A bank deposit bag found inside the safe was empty. (RT 349-350.) Normally, this bag would have contained 65 or 70 one dollar bills for use in case the store ran short of change in the register. (RT 395.) The cash register was open as well. The compartments had been removed and set on the left side of the register. (RT 374-375.) There was no paper money left in the register. (RT 375.) An audit of the register tape records revealed that the register contained approximately $580. (RT 395; 397-398.)

The last entry on the register tape was made at 1:32 a.m. on June 30, 1991. (RT 399.) The order was for a six-inch turkey and bacon sub, a six-inch seafood and crab sub, and two large tuna salads. The total was $17.26. (RT 399.) The register journal tape indicated that this was the last order of the day, and also revealed that it was not paid for. (RT 399-400.) The officers searched the alleyway behind the Subway sandwich shop. (RT 352-353.) They discovered a Subway sandwich lying on the ground. (RT 353.) The sandwich was wrapped in a plastic bag according to Subway procedure for a "to go" order. (RT 402-404.) Detective Brandt removed

the sandwich from the wrapper and determined that it was a turkey and bacon sandwich. (RT 380-381.)

The plastic bag was analyzed for fingerprints. (RT 766-767.) There were a number of smudged prints on the bag which could not be identified. Two identifiable prints were obtained from the plastic bag and matched to James Robinson's left thumb and left index finger. (RT 769-770.) The LAPD latent print expert testified that there is no way to determine how long prints have been on an object. (RT 773.) Both identifiable prints were located on the bottom left-hand corner of the bag. (RT 774) The expert also tested several other areas of the Subway sandwich shop for latent prints. Fingerprints were obtained from the cash register but none of them matched James Robinson. (RT 779-780.) Latent prints were also found on a bag of potato chips, but none were matched to James Robinson. (RT 780-781.) One identifiable fingerprint was obtained from the floor safe, and this was matched to victim White. (RT 875.) Detectives did not find any remains of tuna salad or a mixed seafood salad. (RT 382.) The cash register tape revealed that these were the last items ordered. (*Id.*)

Three bullet casings were found inside the Subway sandwich shop. (RT 356.) A slug was found embedded in the ceiling above the chip rack. (RT 613.) A firearms expert conducted test firings of James' gun and compared the results to the slugs recovered from the victims' bodies and the shell casings found in the shop. (RT 848-849.) In his opinion, the bullets were all fired from James' gun. (RT 858.)

A shoe print was obtained from atop the counter at the Subway sandwich shop. (RT 756.) During the search of James' apartment at the time of his arrest, the officers seized shoes to attempt to match that print. No match could be made to any of James Robinson's shoes. (RT 757.)

D. Prosecution Witnesses Tai Williams And Tommy Aldridge.

Tai Williams testified at trial as a prosecution witness. (RT 455-480.) Williams and James Robinson had been close friends since they met in the seventh grade. (RT 458, 466.) According to Williams' testimony, James spoke about robbing the Subway sandwich shop on several occasions. (RT 459.) He could not, however, recall the times and dates of these alleged conversations. (RT 469.) Williams stated that he did not take James seriously, because he had always been a "talker." (RT 467.) Williams knew James to be a peaceful and "mellow" person who was never violent. (RT 482.)

Tommy Aldridge also testified as a prosecution witness. (RT 547.) Aldridge claimed to have spoken to James on Monday, several days before the Subway robbery. (RT 549.) According to Aldridge, James said that he knew Tai would evict him soon and he needed to get money to move out. (RT 549-550.) James allegedly told Aldridge that he had a gun and that he was planning to rob someone. (RT 550-551.) Two days later, on Wednesday, Aldridge spent the evening at Tai and Donna's apartment. (RT 551-552.) James was also present. Aldridge claimed that James spoke about his plan to rob the Subway sandwich shop where he used to work. (RT 552.)

Aldridge testified that he spoke to James again the following day. (RT 553.) Tai and Donna were also present. James supposedly told them that he had planned out exactly how he would go through with it. He said that he was looking for a driver to take him there, but he couldn't find anyone. (RT 554.) James also said that he planned to do it this weekend. (RT 555.) According to Aldridge, James said that he knew one of the

people working at the Subway sandwich shop, and that he planned to kill anyone present so he could not be identified. (*Id*.)

Aldridge testified that James called him on Sunday, June 30th, at Aldridge's parents' home. James was very "hyper" and said repeatedly that he had a surprise. When Aldridge asked him if he had "done the Subway," James just giggled. He would not give Aldridge a "yes or no" answer. (RT 557.) Aldridge spoke to James again on the telephone on Monday. (RT 559.) When asked about the Subway sandwich shop, James giggled nervously and refused to answer any questions. (RT 559.) James wanted to *See* Aldridge immediately, and gave him an address where they were to meet. (RT 559-560.)

Aldridge went to the arranged meeting place. His friend, Raquel Rose, was driving and another friend, Wendell Jones, had come with them. (RT 561.) They met James and he directed them to the apartment. (RT 561-562; 565.) Aldridge and the others went inside the apartment with James Robinson. (RT 563.) Later, he and James walked outside by themselves leaving the others in the apartment. When they were alone, Aldridge asked him again if he had done the murders. (RT 563.) According to Aldridge, James described how he committed the crimes and admitted shooting the two victims. (RT 564-565.)

Aldridge, Rose and Jones spent the night in James' apartment. (RT 571.) The next morning, Aldridge gave James a ride to his job at the supermarket and then went straight home. (RT 573.) He then called Tai Williams. (RT 573; 577.) Aldridge testified that he had been reluctant to turn James in to police and, therefore, he asked Tai to do it instead. (RT 573.) At this point in his testimony, Tommy Aldridge stated: "I didn't want

to turn ***Tai*** in." (*Id*.) He later corrected himself, stating that he meant to say "James." (RT 575.)

Tai and Donna called Northridge Police from the payphone across the street from their apartment. Tai could not recall the date when he placed the call. (RT 525.) On July 10, 1991, Aldridge went to the police station with Tai and Donna Morgan to meet with detectives investigating the Subway crimes. (*See*, CT 795.) They were there for a few hours. (RT 576.) Aldridge's meeting with Detective Richardson on that occasion lasted between thirty minutes and one hour. (RT 576-577.) He met with Detective Richardson again, but he did not recall how many times they met. (RT 582.)

Aldridge owns a Davis .380, the same caliber gun as the one James purchased. (RT 604)

E. Testimony Of Dennis Ostrander.

Dennis Ostrander was the night manager of Lucky Market's meat department in June and July of 1991, during the time James worked there. (RT 783.) Ostrander has Post-traumatic Stress Disorder ("PTSD") or "Battle Fatigue" resulting from his combat service with the Marines in Vietnam. (RT 799; 803.) The PTSD causes him to have problems with his memory. He recalled being interviewed by the police around July 12 or July 14, 1991, but did not recall whether that interview was tape recorded. (RT 800.)

One evening during the first week of July 1991, Ostrander and James were working together. (RT 787-788.) Ostrander testified that James insisted on speaking to him, and asked if Ostrander had heard about the Subway shop killings. Ostrander had not yet heard about the Subway sandwich shop robbery. (RT 787) James then said, "Well there was

killings at the Subway shop." He continued to say, "I popped those two kids." (RT 788.) Ostrander said, "Yeah, right." He did not believe James. (RT 787.) Later, James supposedly showed Ostrander a small caliber handgun with a stainless steel barrel. (RT 788-789.) According to Ostrander, James described how he had planned and carried out the robbery and how he had killed the two victims. (RT 792-795.) James allegedly told Ostrander he got "a couple hundred bucks" in the robbery. (RT 796.)

Ostrander's girlfriend mentioned the Subway robbery/homicides when he returned home later that evening. Ostrander told the police that she had mentioned it on June 30, 1991, before James allegedly spoke to him about the Subway sandwich shop. He claimed that he had not been listening to her and therefore did not put it together until later. (RT 801-802.)

F. Ostrander's Attempts To Obtain Money From Lucky's And The Alleged Threats.

According to Ostrander, James Robinson was supposed to be at work on Sunday, June 30, 1991. (RT 823.) Ostrander claimed that he had to work a double shift that day because James called in sick. (RT 823-824.) Ostrander was unable to finish all of his work because he was short-handed without James there. Lucky's gave him a reprimand as a result. (RT 823-824.)

After James was arrested, Lucky's night manager confronted Ostrander and asked him if he had any information about James Robinson's involvement in the crimes. (RT 814-815.) Ostrander said that he knew nothing about the Subway sandwich shop robbery/homicides. (RT 815-816)

Ostrander left Lucky's later that night and went to his car. He testified that two Black males in a red Toyota truck with no license plates

pulled up alongside him. The men in the truck rolled down the window and told him to, "Keep my fucking mouth shut." (RT 818-819.) Ostrander understood this as a threat. The next day Ostrander came to work around 12:30 and parked his car across the street. The same two men were waiting for him in the Lucky's parking lot. (RT 819) They were wearing sunglasses so Ostrander could not identify them. The two men stared at him for about 30 seconds and left. (RT 819.) Ostrander then began to fear for his safety. He then told Lucky management what had occurred. (RT 819.)

Ostrander usually carries a switchblade knife for protection. He feels this is a common practice for Vietnam veterans. (RT 820) At one point, he told the police that if this case went to trial, he would not remember anything. He did that because he was in fear of his life if he testified. (RT 820.) Ostrander described other threats to his life. He testified that he has been run off the road. According to Ostrander, Lucky's still received threatening calls even after moving him around to three different stores. The caller would describe Ostrander and then asked if "Dennis" is working there. (RT 821-822.) Ostrander claimed that while he testified at the preliminary hearing on January 14, 1992, two individuals had been waiting for him at the Lucky's meat department. They wore sunglasses and stood by the meat department for around 20 minutes. They did not respond to greetings from other Lucky's employees. (RT 832-833; 834.) Ostrander never filed police reports following these alleged incidents. (RT 833.)

Ostrander denied having any problems with Lucky's prior to the threats. He had received some "write ups," but stated that he was basically happy with Lucky's management. (RT 836-837.)

At trial, Ostrander denied trying to pressure police into helping him extract a large monetary settlement from Lucky's in exchange for his testimony. (RT 836.) Ostrander met with the police detectives to discuss his testimony in James Robinson's case. A transcript was made of the meeting. (RT 836-837; 838-839.) During that meeting, Ostrander stated: "I just want to be truthful. I will go to the court for you, but that's my terms and I want to do it. And if I have to ask the police department to help me out with Lucky's with a lawyer stating, okay, this man, we are going to need him. This is the terms. You are going to give him a settlement and it is not going to be no $50,000 or something because he cannot live. I want to get something going for myself." (RT 839-840.)

## V. JAMES' RESPONSE TO THE PROSECUTION WITNESSES' TESTIMONY.

James Robinson testified that he did not kill James White and Brian Berry. (RT 876.) James and Tai never had ten or twelve conversations about robbing Subway. They never discussed the Subway sandwich shop's layout or its equipment. Tai's testimony in this regard was all a lie. (RT 904-905.) Tommy Aldridge's testimony that James spoke about the Subway robbery the week before the crime was also false. (RT 905.)

Tommy paged James constantly after the Subway sandwich shop crimes were reported in the news. He invited himself over to see James' new apartment. (RT 2360.) James never confessed the Subway killings to Tommy. (RT 2362.) Tommy lied in court. (RT 2429.)

James testified that he worked with Dennis Ostrander occasionally on the evening shifts at Lucky Market. (RT 907-908.) On a personal level, James and Ostrander did not have a close relationship. James thought Ostrander was a "weirdo" and tried to stay out of his way. (RT 908-909.)

Ostrander's testimony was all lies. (RT 2429.) James never discussed the Subway Sandwich Shop with Dennis Ostrander. (RT 959.)

## VI. SIGNIFICANT LEGAL EVENTS AT TRIAL.

### A. The Trial Court's Standardized Form Questionnaire.

The trial court advised both counsel that it intended to use a juror questionnaire in connection with voir dire. (RT 11; 31.) The jury questionnaire form used in this case was extensive. The questionnaire was 24 pages long and contained 56 questions in major areas. (CT 232-255.) Of these 56 question areas, most contained multiple sub-parts so that the actual number of responses required was approximately 96. Prospective jurors were asked to reflect on complex issues such as their attitudes on the death penalty. (*Id.*)

A panel of approximately 100 prospective jurors was assembled for jury selection in the guilt phase. The prospective jurors were sworn in at about 10:47 a.m. on March 30, 1993. (CT 199; RT 40.) They received the questionnaire form at around 11:00 a.m. (RT 74.) The trial judge announced that the courtroom would be closed for lunch at 12:00 noon and would not re-open until after 1:30 p.m. (RT 39.) The court told the prospective jurors that they were free to leave after handing in their completed questionnaire, and stated that they could complete it before 12:00 p.m. or wait and hand it in after 1:30 p.m. that same day. (RT 39-42.) The panel was expressly told that they were ***not*** to take the form home and return with it on the next court date. (*Ibid.*)

Most prospective jurors returned the questionnaire before the noon recess at 12:00 p.m. (RT 74.) They had, therefore, approximately 45 minutes to complete a form which required detailed explanations and no less than 96 separate responses. As defense counsel later observed, this

allowed the jurors to spend an average of only 28 seconds per response. (RT 74; CT 214.)

In the penalty retrial, the prospective jurors did not receive the form until well past 11:00 a.m. (RT 1729; 1734.)[7] These jurors had even less time to complete the same standardized form. Three times the trial judge stated on the record that the form was to be turned in by 12:00 noon. (*See*, RT 1729; 171732; 1734.) The court's final word to the prospective jurors about the questionnaire was, "turn it in before noon or 11:30." (RT 1734.) It was well past 11:00 a.m. when the court made this statement.[8]

B. The Defense Motion For Additional Voir Dire**.**

Prior to jury selection, defense counsel filed a motion concerning the voir dire. (CT 200-215.) Counsel was seeking attorney-conducted voir dire for both the general questioning and the death qualification questions. Counsel also requested that the death qualification voir dire be sequestered.[9] (*See*, CT 200; RT 72.) The prosecutor did not oppose any aspect of the defense motion. (*See*, RT 79.)

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[7] The record indicates that the panel entered the courtroom at 10:58 a.m. (RT 1729.) The prospective jurors were sworn, and the court addressed them for at least ten to fifteen minutes before they were excused. The record does not state when the panel of prospective jurors left the courtroom. (*See*, RT 1734.)

[8] The panel was told to turn in the questionnaire by 1:30 p.m. at the latest. However, they were also informed that the courtroom would be locked from 12:00 noon to 1:30 p.m., and that they were free to leave after turning in the form. (RT 1732.)

[9] At the motion's hearing, defense counsel modified the request seeking sequestered voir dire for all areas of questioning, not only the ***Hovey***, or "death qualification," inquiries. (RT 78.)

Two alternative legal grounds supported the defense motion. First, James Robinson challenged the constitutionality of several provisions of California's Code of Civil Procedure section 223 ("section 223"). Alternatively, the defense asked the trial court to exercise its discretion under section 223 to modify voir dire procedures. Specifically, defense counsel asked the trial court to allow: 1) supplemental general voir dire to follow-up on the prospective jurors' written responses to the inquiries contained in a standardized form questionnaire the trial court used; 2) individually sequestered examination of each prospective juror; and 3) the attorneys to conduct some or all of the questioning. (*Id*.)

Counsel argued that additional voir dire was necessary to supplement the prospective jurors' responses to the questionnaire. (RT 72-75.) Two topical areas were singled out as deserving special attention. The first concern was the problem of prejudicial, pre-trial publicity. Counsel noted that the case had generated substantial pretrial publicity in the immediate area from which the jury pool was drawn. As counsel pointed out, responses to the questionnaires showed that 39% of the jurors had heard about the case in the media. (RT 76.) Attached to the defense motion were eleven print articles alone about this case. (CT 216-231.) The second area of concern was race. The racial aspects of this case (involving an African-American defendant accused of killing two White teenagers) were especially sensitive in the atmosphere of racial tension existing in the Los Angeles area at the time of James Robinson's trial. Specifically, the federal trial in the Rodney King case was then underway and also the trial of three men accused of assaulting truck driver Reginald Denny during the 1992 riots. (*See*, CT 200-215; RT 78-79.)

Defense counsel next argued that supplemental voir dire was vital in this case because the questionnaires had not yielded sufficient information upon which to base challenges for cause. (CT 200-215; RT 72-79.) Counsel noted that the time allotted for the prospective jurors to complete the questionnaire had been insufficient for them to reflect and to provide accurate and truthful answers:

> The prospective jurors in this case were sworn at 10:47 a.m., on March 30, 1993. Most [with the exception of those who claimed hardship] were given a questionnaire at that time and told that it must be completed and returned not later than 1:30 p.m. Many returned the questionnaire before the noon recess at 12:00. Of those, the best had approximately 45 minutes to complete a form which required detailed explanation and no less than 96 separate responses. That is an average of 28 seconds per response, and it should be noted that many of the responses required detailed thoughts regarding the death penalty. (CT 214.)

Counsel explained the need for attorney-conducted questioning. Defense counsel argued that the lawyers would be better able than the trial court to probe the jurors' responses to discover unknown or unrevealed biases attributable to pre-trial publicity and/or racial attitudes because they had superior knowledge of the facts of the case. (*See*, CT 202-208.) Counsel further noted that both he and the prosecutor were experienced trial lawyers and therefore would be able to conduct the requested supplemental questioning quickly and efficiently. (*Id*.)

In support of the request for individualized voir dire, counsel noted substantial authority establishing that group questioning about attitudes toward the death penalty results in inaccurate responses. (CT 208-215.) Moreover, counsel cited authority establishing that the impartiality of the

jury is compromised by group questioning in this area. Jurors become increasingly "death prone," and are more inclined to return a death verdict after being exposed to group questioning concerning death qualification. (CT 210-215.)

The trial court denied the defense request for supplemental, general voir dire. The court held that the questionnaire's inquiries concerning racial bias were sufficient under then existing case law and that the limitations on voir dire imposed by section 223 did not violate federal constitutional guarantees of due process, equal protection or the defendant's Sixth Amendment right to an impartial jury. (*See*, RT 79-82.) With respect to prejudicial pretrial publicity, the trial court found that the completed juror questionnaires revealed that these prospective jurors had little knowledge of the case. The trial court further found that the questionnaire had been administered properly and that the prospective jurors had provided sufficient information for counsel to exercise challenges for cause and peremptory challenges. (RT 83-84.) The trial court also denied the defense request for sequestered voir dire. (RT 84.) The court never addressed the argument that sequestered voir dire was necessary to ensure juror candor in the larger social and historical context of this case.

C. The Trial Court's Voir Dire.

The trial court handled voir dire without counsel's participation. Questioning was conducted in front of the entire panel of approximately 84 prospective jurors. Before starting the voir dire, the trial judge had the court clerk call 18 names, and those prospective jurors were seated in the jury box. (*See*, RT 86.) The court then gave a brief description of the case, introduced the parties and both counsel, and had the prosecutor read a list of the people's witnesses. (*See*, RT 87-89.)

The court's voir dire was very brief in most cases. The first jury was selected in just over one court day.[10] Only 199 minutes of court time was spent to complete the voir dire of 61 prospective jurors. The average length of questioning, therefore, was approximately 3 minutes for each juror. The actual time spent on juror questioning was probably much less, as the figure of 199 minutes of court time includes time spent on other matters such as the court and counsel's discussions concerning challenges for cause and objections. (*See*, RT 86-243; CT 256-257.)

Counsel renewed the motion before the start of the penalty phase re-trial, and the motion was again denied. (RT 1720; 1727.) Voir dire for the penalty phase proceeded even more quickly than it had in the guilt phase trial. In the penalty retrial, jury selection was completed within a matter of a few hours, in less than one court day. (CT 619.) The jurors and the alternates were sworn and excused by 3:32 p.m. of the same day that they arrived in court to begin voir dire. (CT 619; RT 1937.) Only 167 minutes of court time was spent on jury selection for the penalty retrial. (*See*, RT 1804 -1937.)

D. Evidence Of Tai Williams And Tommy Aldridge's Culpability.

The trial court excluded two items of evidence offered by the defense which indicated that Tai Williams and Tommy Aldridge were responsible for the crimes. LAPD Detective Peggy Mosley was the homicide detective who showed the photographic line-up to eyewitness Rebecca James on July 3, 1991. (RT 1181.) Detective Mosley was responsible for compiling the "Murder Book," containing all of the various

[10] Counsel exercised several peremptory challenges, and the 12 jurors and six alternates were chosen in the first few minutes of the next court day. (*See* RT 231-244.)

investigative reports connected with the case, even anonymous tips or leads. (RT 1184.) The Murder Book she prepared in this case was over 1,200 pages long. (RT 1185-86.) The trial court sustained the prosecutor's objection and did not allow Mosley to testify concerning information that a grey Mustang, the type of car driven by Tai Williams, was seen by civilian witness Ralph Dudley in the alley behind Subway that evening. (RT 1186.) The defense also wanted to introduce evidence concerning Tai's and Tommy's activities around the time of the Subway crimes. Ten days after James Robinson's arrest in this case, Tai and Tommy were stopped at 1:30 a.m. (the approximate time of the robbery/ homicides at Subway) while driving around together in Beverly Hills. They were both subsequently charged with misdemeanors for unlawfully possessing loaded guns. (RT 442.)

The prosecutor requested a hearing before calling Tai Williams and Tommy Aldridge to testify. (RT 440.) He sought to prevent defense counsel from impeaching either of them with their misdemeanor convictions for gun possession. The prosecutor wanted to preclude on relevancy grounds any and all defense questions about the underlying facts and circumstances surrounding the arrests. (RT 441.) Defense counsel argued that the weapons possession arrest was relevant for two purposes: to undermine Tai and Tommy's credibility; and as substantive evidence supporting the defense claim that they, and not James Robinson, had committed the crimes. Counsel pointed out that Tommy owned the same type of gun that James had purchased, at Tai Williams' urging, shortly before the crime. Tommy's gun was also the same caliber as the murder weapon. (RT 442.) Defense counsel described in some detail the discrepancies in the expected testimony of these witnesses, and explained

for the court the importance of impeaching their credibility. (*See*, RT 444-445.)

The trial court held that defense counsel had not made a sufficient showing to elicit this testimony as evidence of third party culpability. (*See*, RT 443.) The court further ruled that the evidence was not relevant and thus not admissible as impeachment. (RT 446.) Finally, the court concluded that any slight relevance this evidence had was outweighed by the potential for confusion of the issues before the jury. (RT 446; 539.)

The trial court issued the same ruling in the retried penalty phase, precluding all use of the evidence of Tai's and Tommy's gun possession arrests. (RT 2237.)

The trial court also prevented defense counsel from questioning Detective Mosley about Ralph Dudley's sighting of the grey Mustang in the alley behind the Subway. (RT 1186.) This area of inquiry was again foreclosed in the penalty phase. (RT 2239-2241.) In his closing argument in the penalty retrial, the prosecutor emphasized the absence of any lingering doubts as to James Robinson's guilt. (*See* RT 2771-2810.)

E. The Testimony Of Doctor Rogers.

Deputy Medical Examiner Christopher Rogers testified concerning the victims' autopsies. (RT 628.) Dr. Rogers described the locations of the bullet wounds and the paths or trajectories the bullets followed. (RT 628-629; 642.) Next, the prosecutor sought to have the coroner testify concerning the probable positions of the victims and the shooter(s). Defense counsel objected to this portion of the coroner's testimony on several grounds, including relevancy, undue speculation, Evidence Code section 352, and lack of foundation because the prosecutor presented no evidence that the doctor was trained in crime scene reconstruction or

criminal investigation methods. (*See,* RT 618-619; 647.) The trial court overruled the defense objections and permitted the coroner to testify in this area. (RT 648.)

The coroner agreed that the victims and the attacker(s) could have been in many different positions consistent with the evidence. (RT 653) However, in his opinion, the most likely scenario was that the victims were kneeling when they were shot. (RT 652.) The coroner gave the same testimony in the re-tried penalty phase. There, the prosecutor actually knelt down and then lay down on the floor to demonstrate the possible positions of the victims during the coroner's testimony. (RT 2024-2026.)

F. The Jury's Request For A Read Back Of Testimony.

On the second day of deliberations in the guilt phase, the jury sent the court a note requesting that three areas of testimony be re-read. The jury requested "testimony of Barbara Phillips regarding the position of fingerprints on the bag. Also, the number of prints and whether put on the bag at the same time." (RT 1392; CT 308.) In addition, the jury requested "testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning." (*Id.*) Finally, the jury wanted read back testimony concerning "whether James had the gun Sunday morning after he returned home." (RT 1393; CT 308.) The court and counsel agreed that there had been no testimony concerning the second item requested, i.e., whether Tai had been home when James returned to the apartment early Sunday, June 30th. (RT 1392.)

After meeting with counsel and James Robinson, the court had the jury brought into the courtroom. The judge explained to the jurors that one item did not exist and that the other two areas of testimony would be provided. (RT 1395.) The court then directed the reporter to select the

passages to be read to the jury in response to the request. (RT 1396.) The reporter read a lengthy excerpt of James' testimony which was highly prejudicial and was not responsive to the question asked. (RT 1396.)

**VII. THE FIRST PENALTY PHASE.**

The first penalty phase began on May 4, 1993. (RT 1406.) Evidence was presented in one day. (RT 1406-1555.) The jury heard arguments of counsel, received instructions and began deliberations on May 5, 1993. (RT 1648.) On May 10, 1993, the court found that the hopelessly deadlocked and declared a mistrial. (RT 1665-1656.) On June 25, 1993, defense attorney Hill was relieved due to a conflict. (RT 1691.) Replacement counsel, attorney Richard Leonard, was appointed on July 6, 1993. (RT 1693.)

**VIII. THE SECOND PENALTY PHASE.**

The second penalty trial began on April 20, 1994. (CT 618.) Defense counsel renewed the request for attorney conducted voir dire and for individual, sequestered voir dire and the trial court again denied the motion. (RT 1720; 1727.) The new jury was selected in less than one court day. (CT 619.)

The jury for the penalty retrial heard virtually all of the evidence from the prosecution's guilt phase case. (CT 620-623.) In addition, the prosecutor introduced extensive and cumulative victim impact testimony. The parents of both victims and the sister of one victim testified at length and in a narrative fashion on many subjects, including: the victims' unique characteristics; the families' emotional reactions to the crimes; and their feelings about the killer and the way in which their loved ones allegedly died. (*See* RT 2247-2285; CT 624.)

James Robinson testified about the events surrounding the crimes as he had done in the guilt phase. He did not shoot and kill either James White or Brian Berry. (RT 959-960.) James clearly stated that he did not fire his gun, and had not been carrying it late Saturday evening, June 29th, or early Sunday morning, June 30th. (*Id*.)

The defense presented the testimony of numerous witnesses who had known James at various times in his life and had seen him in different settings. One of these witnesses was James' childhood friend, James Holland. James Holland and James Robinson grew up together, having been close friends since childhood. (RT 2448.) Holland testified that James Robinson was "nice, soft hearted and loyal." (RT 2447-2448.)

Several older adults testified about their experiences with James Robinson in various settings. Music producer H.B. Barnum described meeting James and his family through the Life Choir, a choral group founded by Barnum and others in 1981. (RT 2700-2701.) He stated that James Robinson was a responsible young man who could be depended upon to help out by supervising the younger children. (RT 2701-2702.) Another founding member of Life Choir, Lenona Walton, knew James and his family socially, as well as through the Choir. (RT 2705.) She described James Robinson as a "very loving individual" who was studious and reliable. (RT 2706.) Bernard Walton testified that he had known James Robinson for 12 or 13 years, and felt that James was like one of his own sons. (RT 2710-2711.) Family friend Gregory Jones expressed similar feelings. Mr. Jones had known James Robinson since James was around seven or eight years old. (RT 2689.) He considered James a good role model for his children. James Robinson was well-mannered and bright, and Jones had never known him to be violent. (RT 2690-2691.) Other

members of Life Choir testified in similar terms about James Robinson. (*See*, testimony of Billie Crotty [RT 2610-2615]; testimony of Judith Gilbert [RT 2615-2620]; testimony of Judith Long-Steele [RT 2621-2624].)

Several of James Robinson's friends from Northridge testified in the penalty retrial. Kevin Forester had known James Robinson for four or five years. They met in the dorms at Northridge. (RT 2666.) Forester described James as "easygoing and compassionate." He could not believe that James Robinson was capable of robbing or shooting anyone. (RT 2667.) Another friend from Northridge, Barry Turbow, had also known James Robinson for four or five years. (RT 2675-2676.) He described James as a good friend with an "easy-going" personality. (RT 2677.) He too found it inconceivable that James could have committed the crimes. (RT 2676-2677.) Two female friends gave similar descriptions of James Robinson. They also expressed disbelief about James' responsibility for the Subway Sandwich Shop crimes. (*See*, testimony of Terri Lyn Zinser, [RT 2625-2631]; testimony of Kristi Marie Skinner [RT 2631-2638].)

James' mother, Mrs. Vesta Robinson, also testified in the penalty phase. (RT 2638-2665.) Mrs. Robinson described her family, the activities they shared and the values she used to raise the children. Mrs. Robinson started her children singing at an early age, both in and out of church. (RT 2641-2642.) She was one of the founding members of Life Choir, an inter-faith choral group started by people in the entertainment industry. (*Id*.) The Life Choir performed at the 1984 Los Angeles Olympics, and at an event commemorating the Statue of Liberty. (RT 2642.) James and his two sisters sang in Life Choir, and their names are listed on the group's album. (RT 2643.) James served as a sergeant of arms for the youth committee of Life Choir. (RT 2643.)

The Robinson family was involved in several other community activities when James was growing up. Mrs. Robinson and James' two sisters were active members of the Order of the Eastern Star, and James was a Junior Mason. (RT 2644.) Mrs. Robinson enrolled the children in the Young Marine Corp. Each year the children would spend a week on a military base in San Diego for youth leadership training. (RT 2645.)

Mrs. Robinson finds it "totally impossible" that her son could have robbed the Subway and killed the two victims. She has never seen him be violent or aggressive. He has never struck her or his sisters. She described him as a "meek, loving, soft-hearted type person." (RT 2655.)

## ARGUMENT

**I.** RESPONDENT FAILS TO REFUTE JAMES ROBINSON'S CLAIMS THAT THE TRIAL COURT'S EXCLUSION OF PROFFERED DEFENSE EVIDENCE VIOLATED MULTIPLE GUARANTEES UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS AND WAS CONTRARY TO CALIFORNIA LAW.

### A. Background and overview of claims.

In the Appellant's Opening Brief ("AOB"), James Robinson raises several related claims based on the trial court's refusal to allow the defense to introduce two items of evidence challenging the testimony and credibility of the prosecution's two star witnesses, Tai Williams and Tommy Aldridge. (See AOB, Arg. I, pp. 40-89.) The legal and the factual bases for those claims are reviewed briefly in the subsections which follow. The review is followed by the discussion of each of respondent's contentions concerning these claims.

#### 1. The evidence at issue and the proceedings in the trial court.

Through discovery, defense counsel obtained a police report stating that in July of 1991, only ten days after James' arrest in this case, Beverly Hills Police arrested Williams and Aldridge. Williams, Aldridge and another male were stopped by police while driving around Beverly Hills at 1:30 a.m., the same time of night that the Subway sandwich shop robbery/murders were committed. Williams was carrying a .9 millimeter. Aldridge had a .380, the same type of gun James owned and the same caliber gun used in the murders in this case. (*See*, RT 442; 2239.) Both Tai Williams and Tommy Aldridge sustained misdemeanor convictions for unlawfully carrying a concealed weapon while driving. (*Id*.) The defense's second piece of evidence directly linked Tai Williams to the

Subway **THE TRIAL COURT EXCLUDED SUBSTANTIVE EVIDENCE INDICATING THAT TWO KEY PROSECUTION WITNESSES COMMITTED THE CRIMES AND ALSO REFUSED TO PERMIT DEFENSE IMPEACHMENT WITH THIS EVIDENCE, CONTRARY TO STATE LAW AND IN VIOLATION OF JAMES ROBINSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.**

A. Factual Background And Proceedings In The Trial Court.

1. *Tai Williams and Tommy Aldridge were critical witnesses for both the defense and the prosecution in this case*.

James Robinson's childhood friends Tai Williams and Tommy Aldridge were the prosecution's star witnesses in this case. Tai and Tommy's testimony, and their credibility, was also central to James Robinson's defense. These witnesses were highly significant to both sides for several reasons. First, Tai and Tommy were certain to merit special attention from the jury because of their close relationship to the defendant, James Robinson. Tai Williams, Tommy Aldridge and James Robinson had been close friends since the seventh grade. (RT 458; 547) The three went all through high school together and remained in touch after graduating. (RT 2208-2209.) [11]

[11] James testified that he felt closer to Tai and considered Tommy Aldridge merely an acquaintance. (RT 877; 965.)

Second, it was undisputed that Tai and Tommy were in close contact with James around the time of the crimes. James was living with Tai Williams and his girlfriend, Donna Morgan, in their Northridge apartment for about a month before the Subway sandwich shop crimes. (RT 886-887.) He and Tai spent time together when they were off work. Tai encouraged James to buy a gun and took him to go to practice target shooting at the gun range. (RT 892.) Tai and Tommy also socialized often, and Tommy was a frequent visitor to Tai and Donna's apartment. (RT 900; 902.)

James Robinson testified that Tai Williams brought up the idea of robbing the Subway Sandwich Shop on two occasions in June of 1991. (RT 901-904.) Tai, however, testified that it was James Robinson's idea, and that he often discussed robbing the Subway in the weeks preceding June 30, 1991. (RT 459.) Tommy provided similar testimony about James Robinson's planning of the crime. (RT 554-555.) He also claimed that James had contacted him a few days after the Subway killings and subsequently confessed the entire incident to him. (RT 557; 564-565.) These witnesses were undeniably in a position to hear and to observe James Robinson at the relevant times, and their alleged friendship with him enhanced the credibility of their testimony at trial.

Tai and Tommy were crucial witnesses for the additional reason that they were solely responsible for James Robinson's arrest. Tommy Aldridge testified that he spoke to Tai Williams the morning after he learned that James was responsible for the Subway crimes. (RT 2227.) According to Tommy, they agreed that Tai and Donna would contact the police. (*Id*.) By that time, the Subway Sandwich Shop robbery and the homicides had been widely reported in the news media. Substantial rewards for information

leading to an arrest had been offered and widely publicized. (*See* CT 223-224; 227.)

Tai, Donna, and Tommy knew that James Robinson had been arrested on July 9, 1991. (RT 2227.) The next day the three of them went together to the Northridge Office of the Los Angeles Police Department. (RT 2227.) In their interview with LAPD detectives, Tai, Donna and Tommy claimed to have information establishing that James Robinson had committed the crimes. (*Id.*) All three of them testified at the preliminary hearing. (CT 55-100; 118-139.) Tai and Tommy returned to testify in the guilt phase of trial (*See* RT 457-537; 547-607), and Tommy testified a third time in the retried penalty phase. (RT 2207-2242; CT 623.) Tommy Aldridge received $7,000 as his share of the reward money. (RT 2228.)

Tai's and Tommy's testimony, where they described James' alleged planning of the crimes and his subsequent confession, was obviously highly damaging. The impact of their testimony was enhanced by the way in which they portrayed themselves before the jury. Both Tai and Tommy claimed to be shocked that James was capable of murder. They described him as a peaceful individual who might be a "talker" but who was never violent or aggressive. (*See*, RT 467; 554; 585.) Tommy went out of his way to portray himself as the loyal friend, telling the jury how he had been reluctant to turn James in to police and how he instead asked Tai to do it instead. (RT 573.)[12]

The prosecutor took advantage of James' longstanding friendship with Tai in his closing argument in the guilt phase. Trying to discredit

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[12] At this point in his testimony, Tommy Aldridge stated: "I didn't want to turn ***Tai*** in." (RT 573.) He later corrected himself, stating that he had meant to say "James." (RT 575.)

James' testimony, the prosecutor portrayed James as someone who would turn on his best friend. In the course of arguing that James had a weak alibi, the prosecutor stated, referring to James: " . . . but I am going to blame it on somebody. I am going to blame it on the one person who doesn't say I did it. Tai Williams wasn't there. Never told you he did it. He has got to blame somebody, so who does he blame? The person who allows him to move into his house and then starts crying for you." (RT 1253.)

In the penalty phase closing argument, the prosecutor bolstered Tommy Aldridge's credibility by reminding the jury that Tommy "has known the defendant since the seventh grade." (RT 2780-2781.) Later in the argument the prosecutor again sought to enhance Aldridge's credibility by making him appear to be James Robinson's loyal friend:

> How can anybody believe that this person who you know has done such an atrocious, horrendous act. Nobody can believe that. None of his friends could believe it from school. None of the people from the choir could believe that. Even Tommy Aldridge told you he couldn't believe that and didn't believe that.

(RT 2786.)

Elsewhere in his penalty phase closing argument the prosecutor contrasted James Robinson's alleged disloyalty and willingness to turn on his friends:

> The defendant is willing to blame others to cover up his own acts. He lays it all off on Tai, the person who takes him in at his time of need, allows him to stay at his house and let's put the blame on him.

(RT 2806-2807.)

2. *In addition to James Robinson's testimony, the defense had other evidence which not only contradicted Tai Williams' and Tommy Aldridge's stories, but connected them to the Subway robbery and homicides.*

James Robinson's testimony was the only evidence the trial court allowed the defense to present to refute Tai's and Tommy's story. James denied ever having planned to rob the Subway. (RT 876; 1179-1180.) He described two conversations in which ***Tai*** had brought up the idea of robbing the Subway, and had asked for advice on exactly how to commit the robbery and kill the employees to keep from being identified. (RT 901-902; 903-904.) James flatly denied making any statements or confessions to Tommy Aldridge. (RT 905; 958.) His testimony, however, was largely uncorroborated. Defense counsel wanted to introduce evidence which not only undermined Tai's and Tommy's credibility but indicated that they had committed the Subway crimes and framed James Robinson to take the blame.

Two substantial pieces of evidence which supported the defense case were excluded from both phases of James Robinson's capital trial. In July of 1991, only ten days after James' arrest in this case, Tai and Tommy were arrested by Beverly Hills Police on weapons charges. They were stopped by police while driving around Beverly Hills at 1:30 a.m., the same time of night that the Subway sandwich shop robbery/murders were committed. Tai was carrying a .9 millimeter. Tommy had a .380, the same type of gun James owned and the same caliber gun used in the murders in this case. (*See*, RT 442; 2239.) Both Tai and Tommy sustained misdemeanor convictions for unlawfully carrying a concealed weapon while driving. (*Id*.)

The defense's second piece of evidence directly linked Tai Williams to the Subway Sandwich Shop robbery/homicides. A civilian witness, Ralph Dudley, reported to LAPD Detective Peggy Mosley that he had seen a grey Mustang, the same color, make and model as Tai's car, in the alley behind the Subway sandwich shop at the time of the crimes. (RT 1186.) James testified that he too had seen the grey Mustang, and he recognized it as Tai's car because of the broken rear tail lights. (RT 944-945.)

The testimony of the prosecution's only eyewitness was consistent with James Robinson's testimony and with Mr. Dudley's observation. Eyewitness Rebecca James saw a Black male inside the Subway Sandwich Shop around the time of the robbery. Although she identified James Robinson at trial, she had been unable to identify him from a photographic lineup shown to her shortly after the crime. (RT 271; 273.) During her cross-examination at trial, Ms. James agreed that the man she had seen was different from James Robinson in a number of significant features. Ms. James recalled that the Black male she had seen inside the Subway had a broader face and nose, fuller, thicker lips and lighter skin than James Robinson. (RT 271; 295.)

3. *The trial court's rulings prevented the jury from learning of Tai and Tommy's arrests and Ralph Dudley's sighting of the grey Mustang, which matched Tai's car, at the crime scene.*

The prosecutor requested a hearing before calling Tai Williams and Tommy Aldridge to testify.[13] (RT 440.) He sought to prevent defense counsel from impeaching either of them with their misdemeanor

[13] The prosecutor stated that he requested this hearing "in the nature of a ***Castro*** motion," in reference to ***People v. Castro*** (1985) 38 Cal.3d 301 (RT 440).

convictions for gun possession. The prosecutor also sought to preclude any and all defense questions about the underlying facts and circumstances surrounding the arrests. (RT 441.) Defense counsel argued that the weapons possession arrest was relevant for two purposes: to undermine Tai and Tommy's credibility; and as substantive evidence supporting the defense claim that they, and not James Robinson, had committed the crimes.[14] Counsel pointed out that Tommy owned the same type of gun that James had purchased, at Tai Williams' urging, shortly before the crime. Tommy's gun was also the same caliber as the murder weapon. (RT 442.) Defense counsel described in some detail the discrepancies in the expected testimony of these witnesses, and explained for the court the importance of impeaching their credibility.[15]

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[14] "It would have a dual purpose, judge. We expect quite candidly – I might as well be open about it. We expect Mr. Williams to testify, among other things, that he, together with Mr. Robinson and another gentleman by the name of Aldridge, who is a likely witness in this case, purchased weapons at about the same period of time. Mr. Robinson was the last of them to buy a weapon. I believe that he [Williams] would testify the purpose he had in purchasing a weapon was to use it for hobby related purposes. I believe that would be inconsistent with the notion that he and the same people were driving around Beverly Hills with concealed weapons in the car." (RT 442.)

[15] "There has been prior testimony of Mr. Williams that perhaps on 10 or 12 separate occasions the subject matter of robbing the Subway came up. On those occasions he was present, Mr. Williams was present, and on some of the occasions another person, Donna Morgan, apparently is his girlfriend, was present. With respect to the facts of this evening, there would be testimony about an argument, about Mr. Williams telling Mr. Robinson that he had to find another abode or different residence. That Mr. Robinson then came back after that. There was a subsequent discussion. With respect to the testimony of Mr. Williams I would differ respectfully from Mr. Barshop [the prosecutor]. Mr. Williams, contrary to the testimony

(continued...)

The trial court held that defense counsel had not made a sufficient showing to elicit this testimony as evidence of third party culpability. (*See*, RT 443.) The court further ruled that the evidence was not relevant, and thus not admissible as impeachment under ***People v. Wheeler*** (1992) 4 Cal.4th 284, and Cal. Const. Art. 1, § 28(d). (RT 446.) Finally, the court concluded that any slight relevance this evidence had was outweighed by the potential for confusion of the issues before the jury. (*Id*.)[16] The trial court issued the same ruling in the retried penalty phase, prohibiting any defense questioning concerning Tai's and Tommy's gun possession arrests. (RT 2237.)

The trial court also prevented defense counsel from questioning Detective Mosley about Ralph Dudley's sighting of the grey Mustang in the alley behind the Subway. (RT 1186.) This area of inquiry was again foreclosed in the penalty phase (RT 2239), where counsel argued lingering doubt as to James' responsibility for the crimes in mitigation of the death penalty. (RT 2811-2812.)

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[15](...continued)
of Donna Morgan, has not testified, and I don't believe he would testify, that he knew whether the gun was present or not in the living room. He did testify that he heard a clip, which you would associate with a clip going into a weapon. Donna Morgan has testified that Mr. Williams in fact went into the living room, checked the gun box and found the weapon to be missing on the last occasion Mr. Robinson left the apartment. Mr. Williams testified differently, and I could give a recitation and citation as to page indicating that he remained in the bedroom, had conversation with Donna Morgan and never checked the gun case whatsoever." (RT 444-445.)

[16] The trial court made the same ruling the following day immediately before prosecution witness Tommy Aldridge began his testimony. (RT 539.)

4. *The trial court's rulings to exclude the defense evidence not only unfairly prejudiced the defense but allowed the prosecutor to mislead the jury concerning the facts of the case.*

The trial court's erroneous rulings excluding the proffered defense evidence not only eviscerated the defense case, but unfairly benefitted the prosecution by allowing inferences about Tai's and Tommy's credibility which were plainly false. In his closing argument, the prosecutor freely enhanced Tai's and Tommy's credibility while simultaneously painting a negative picture of James Robinson. Describing what he claimed were James Robinson's thought processes, the prosecutor stated:

> Let's put the blame on Tai Williams. I saw his car driving away. And I saw, maybe – I heard another voice. I heard some other shoes. Maybe its Tommy Aldridge, so let's put the blame on Tommy Aldridge, ***but there is no evidence on that***. No idea. But let's put the blame somewhere else because me, it can't be me."

(RT 2799-2800 [emphasis added].)

Later in the argument, the prosecutor returned to Tai Williams and Tommy Aldridge, and again emphasized the lack of evidence connecting them to the crimes.

> Then he [James Robinson] says, well, Tommy Aldridge must be the other person involved. ***Of course there is no evidence of that***. He doesn't see him. He doesn't hear him. He doesn't know if there is more than one person, two people, four eight, ten. He has no idea. Because, if you remember, what he told you, he saw the car driving away and all he knew was that it was Tai Williams' car, if we believe him. But we'll put the blame on Tommy Aldridge. It must be Tommy. Who else could it be?"

(RT 2806-2807 [emphasis added].)

Here again, the prosecutor took advantage of the court's ruling precluding the defense evidence connecting Tai and Tommy to the Subway crimes to mislead the jury by implying that no such evidence existed. At the same time, the prosecutor discredited James Robinson by creating the false impression that there was no support whatsoever for James' testimony about Tai's involvement in the crimes. Through this argument the prosecutor also implies that James Robinson is a liar who will unfairly shift the blame to others.

B. Overview Of Legal Arguments.

The trial court's erroneous exclusion of evidence concerning Tai's and Tommy's connection to the crimes denied James Robinson fundamental rights guaranteed by several provisions of the federal constitution and the state constitution. Exclusion of this evidence violated James Robinson's federal constitutional rights to present a defense and to confront and cross-examine witnesses as guaranteed by the Sixth and Fourteenth Amendments. (***Crane v. Kentucky*** (1986) 476 U.S. 683, 690-91; ***Washington v. Texas*** (1967) 388 U.S. 14, 22-23; ***Chambers v. Mississippi*** (1973) 410 U.S. 284, 302.) Further, because this evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense (***Beck v. Alabama*** (1980) 447 U.S. 625, 637-38), and deprived him of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (***Zant v. Stephens*** (1983) 462 U.S. 862, 879; ***Woodson v. North Carolina*** (1976) 428 U.S. 280, 304; ***Johnson v. Mississippi***, (1988) 486 U.S. 578, 584-85.)

The trial court's evidentiary rulings were erroneous on several grounds under this state's laws of evidence. First, the trial court's assessment of this evidence as having only "slight" probative value is contradicted by California law holding that evidence of third party culpability is highly relevant, as is evidence bearing on the witnesses' motives. (*See* ***People v. Hall*** (1986) 41 Cal.3d 826; ***People v. Garceau*** (1993) 6 Cal.4th 140, 177; ***People v. Alvarez*** (1996) 49 Cal.App.4th 679, 688, and cases discussed in section D, *infra*.) Second, the evidence was relevant and admissible to impeach Williams' and Aldridge's credibility. (*See* Evid. Code § 788; ***People v. Wheeler***, *supra*, 4 Cal.4th 284, and cases discussed in section D, *infra*.) Third, the trial court abused its discretion by excluding this evidence under Evidence Code section 352 on the grounds that its probative value was outweighed by the potential for jury confusion. (*See* ***People v. Clair*** (1992) 2 Cal.4th 629, and cases discussed in section D, *infra*.)

Because the trial court erroneously excluded this evidence in contravention of established state law, the court's action deprived James Robinson of a state-created liberty interest and denied him due process of law as required by the Fifth and Fourteenth Amendments to the federal constitution. For all of these reasons, the trial court's erroneous ruling requires reversal of James Robinson's conviction and sentence of death. (***Hicks v. Oklahoma*** (1980) 447 U.S. 343, 346; ***Lambright v. Stewart*** (9th Cir.1999) 167 F.3d 477.)

C. Standard Of Review.

This Court typically reviews a trial court's evidentiary rulings for abuse of discretion. (*See* ***People v. Burgener*** (1986) 41 Cal.3d 505; Evid. Code §§ 350, 352.) However, James Robinson contends that heightened

scrutiny is appropriate and necessary because this claim involves error of constitutional magnitude in the context of a capital case. This evidence was essential to the defense, and its exclusion deprived James Robinson of his constitutional rights to due process of law, to present a defense, to confront and cross-examine witnesses, and to a fair trial and a reliable determination of guilt and the penalty. (U.S. Const. Amends. V, VI, VIII and XVI; Cal.Const., Art. I, §§ 7, 15 and 17.) Admission of the third party culpability evidence was also mandated by the decisional law of this state (see, e.g., ***People v. Hall***, *supra*, 41 Cal.3d 826), and California's statutes (see, Evid. Code §§ 350, 352).

The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is [] different." (***Gardner v. Florida*** (1977) 430 U.S. 349, 357-58. *See also*, *e.g.*, ***Lockett v. Ohio*** (1978) 438 U.S. 586; ***Godfrey v. Georgia*** (1980) 446 U.S. 420.) As the Ninth Circuit Court of Appeal has noted, this increased concern with accuracy in capital cases has led the Supreme Court to "set strict guidelines for the type of evidence which may be admitted, must be admitted, and may not be admitted." (***Lambright v. Stewart***, *supra*,167 F.3d 477, citing ***Skipper v. South Carolina*** (1986) 476 U.S. 1; ***Booth v. Maryland*** (1987) 482 U.S. 496.) According to the reasoning of these cases, this Court should independently examine the record and determine that the trial court's erroneous exclusion of this evidence was not harmless beyond a reasonable doubt. (***Chapman v. California*** (1967) 386 U.S. 18, 24.)

D. Exclusion Of The Proffered Third Party Culpability Evidence Violated Several Of James Robinson's Fundamental Rights As Guaranteed By The Fifth, Sixth, Eighth And Fourteenth Amendments To The Federal Constitution.

1. *The erroneous exclusion of the third party culpability evidence denied James Robinson his rights to present a defense and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the federal constitution.*

The Ninth Circuit recently reversed a state court murder conviction where a similar restriction on cross-examination had undermined the defendant's ability to present evidence of third party culpability. In ***Thomas v. Hubbard***, 273 F.3d 1164, (9th Cir. 2001), the Ninth Circuit remarked: "[e]vidence that someone other than the defendant may have committed the crime is critical exculpatory evidence that the defendant is entitled to adduce." (*Id.* at 1177.) The Court particularly emphasized the importance and relevance of evidence casting suspicion on a prosecution witness:

> Fundamental standards of relevancy require the admission of testimony which *tends to prove* that a person other than the defendant committed the crime that is charged. ***This is particularly true in a case in which the evidence suggests that the prosecution's main witness may be the perpetrator***.

(***Thomas v. Hubbard***, at 1177 [emphasis supplied], quoting ***United States v. Crosby***, 75 F.3d 1343, 1347 (9th Cir. 1996).)

In ***Thomas v. Hubbard***, the Ninth Circuit made clear that the defense does **not** need to make a threshold showing that its third party culpability defense is plausible before being entitled to present the evidence or conduct cross-examination in support of the theory.

> Even if the defense theory is purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: '[I]f the evidence [that someone else committed the crime] is in truth

> calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt."

(***Thomas v. Hubbard***, supra, at 1177, quoting ***United States v. Vallejo***, 237 F.3d 1008, 1023 (9th Cir. 2001) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law, § 139 (Tillers rev. ed. 1983, alterations in original).)

The Ninth Circuit's reasoning clearly applies to the present case. James Robinson maintained that he was innocent throughout the guilt phase of trial and during both sentencing trials. As in ***Thomas v. Hubbard***, the only defense offered to the jury was that the prosecution witness(es) was the actual killer. In both this case and in ***Hubbard***, the defense lacked support other than the defendant's own un-corroborated testimony. By restricting defense cross-examinations of Tai Williams, Tommy Aldridge, and Detective Mosley, the trial court here committed the same error, i.e., depriving the defense of the only objective, verifiable evidence that another person(s) had committed the crime. The trial court's ruling, therefore, effectively denied James Robinson his rights to a fair trial and to present a defense guaranteed by the Fifth, Sixth and Fourteenth Amendments. (***Chambers v. Mississippi,*** *supra*, 410 U.S. 284; ***Washington v. Texas,*** *supra,* 388 U.S. 14.)

2. *James Robinson's Fourteenth Amendment right to due process of law and his Sixth Amendment right to confront and cross-examine witnesses was infringed by the trial court's erroneous restriction of defense cross-examination*.

The United States Supreme Court has repeatedly affirmed the criminal defendant's right to confront and cross-examine adverse witnesses.

In doing so, the Court has relied on several constitutional bases. In ***Chambers v. Mississippi***, *supra*, 410 U.S. 284, 295, the Supreme Court used a due process rationale, holding:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." [Citations.] It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." [Citation.] Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [Citation.] But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. [Citation.]

(*Id.* at 295.)

The Supreme Court has also upheld the criminal defendant's right to confront and cross-examine adverse witnesses under the Sixth Amendment. In ***Davis v. Alaska*** (1974) 415 U.S. 308, the Court commented extensively on the significance of the accused's Sixth Amendment confrontation rights, emphasizing that these rights can best be effectuated through vigorous cross-examination.

> Cross-examination is the principal means by which the believability of a witness and the credibility of his testimony are tested.
>
> * * *
>
> A more particular attack on the witness' credibility is effected by cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as

> they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." [Citation] We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citation].

(*Id.* at p. 316.)

The Supreme Court has been suspicious of trial court limitations on defense cross-examination, especially where the proposed questioning might have exposed bias or interest on the part of a prosecution witness. (***Delaware v. Van Arsdall*** (1986) 475 U.S. 673, 676 ["exposure of a witness' motivation in testifying is a proper and important function of a constitutionally protected right of cross-examination."].) In ***Thomas v. Hubbard***, *supra*, 273 F.3d 1164 , the Ninth Circuit re-affirmed the constitutional necessity of permitting a defendant to attack the credibility of his accuser. "Where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution." (***Thomas v. Hubbard***, *supra*, at 1178, quoting, ***De Petris v. Kuykendall***, 239 F.3d 1057, 1062 (9th Cir. 2001).

As in ***Thomas v. Hubbard***, Tai Williams and Tommy Aldridge were crucial witnesses for the prosecution. Without cross-examining them about their arrests for gun possession, defense counsel could not reasonably expect to persuade the jury that they, and not James Robinson, had been the actual killers. The defense was also unable to cast any significant doubt on Tai's and Tommy's credibility because impeachment with this incident was

not allowed. The defense was also precluded from questioning Detective Mosley about the grey Mustang seen near the Subway near the same time of the robbery and shootings. As in the ***Thomas*** case, the jury may have doubted their truthfulness and their motivations if counsel had been allowed to elicit the evidence from Detective Mosley and had been able to cross-examine Tai and Tommy them about the circumstances surrounding their arrests for illegal gun possession.

3. *The conviction and sentence here were not sufficiently reliable under the Eighth and Fourteenth Amendments due to the erroneous exclusion of the third party culpability evidence*.

A "heightened standard of reliability" must be met in order to sustain any capital conviction or sentence of death. (***Beck v. Alabama,*** *supra*, 447 U.S. 625, 637-638.) The trial court's rulings excluding the evidence of Tai Williams' and Tommy Aldridge's weapons possession arrests and preventing all cross-examination on in this area, as well as excluding evidence of the grey Mustang, prevented the jury from considering relevant information which was capable of raising a reasonable concerning James Robinson's culpability in the guilt phase of trial. Because the excluded evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense. (*Id.*)

In capital sentencing, the Eighth and Fourteenth Amendments also require an "individualized consideration of the penalty," including the circumstances of the offense. (***Woodson v. North Carolina,*** *supra,* 428 U.S. 280, 304; ***Zant v. Stephens,*** *supra,* 462 U.S. 862, 879; ***Johnson v. Mississippi***, *supra*, 486 U.S. 578, 584-85.) The United States Supreme Court has found that the prejudice caused by the exclusion of relevant

testimony may be "devastating" because the error raises the possibility that the verdict was based on "caprice and emotion." (***Gardner v. Florida,*** *supra,* 430 U.S. 349, 357-358.) Moreover, the Supreme Court has long held that the sentencer must be permitted to consider "[a]s a mitigating factor, any aspect of a defendant's character or record or 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; see also ***Hitchcock v. Dugger*** (1987) 481 U.S. 393, 394; ***Eddings v. Oklahoma*** (1982) 455 U.S. 104, 110.)

For all of the reasons previously discussed, the proffered third party culpability evidence was not only relevant but was capable of creating a reasonable doubt as to James Robinson's guilt. This evidence was plainly relevant to the circumstances of the offense. It was also relevant to James' character because, if accepted, this evidence undermined Tai's and Tommy's credibility and called into question their depiction of James as a remorseless killer. Because the jury was prevented from considering this relevant evidence in both phases of the capital trial, the convictions and sentence of death lack the reliability required by the Eighth and Fourteenth Amendments to the federal constitution and must be reversed.

4. *Conclusion*.

For all of these reasons, the trial court's holding precluding questioning concerning Tai's and Tommy's arrests denied James Robinson his Fifth and Fourteenth Amendment rights to due process and to a fair trial. (*See*, ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.) The court's ruling also deprived him of his rights to present a defense and to confront and cross-examine witnesses under the Sixth and Fourteenth Amendments. (*See*, ***Thomas v. Hubbard***, *supra*, 273

F.3d 1164; *see also*, ***Chambers v. Mississippi***, *supra*, 410 U.S. 284; ***Washington v. Texas***, *supra*, 388 U.S. 14. Finally, reversal is required because the trial court's erroneous rulings prevented the convictions and sentence from meeting the heightened standard of reliability necessary to sustain a capital conviction and a sentence of death under the Eighth and Fourteenth Amendments. (***Beck v. Alabama,*** *supra*, 447 U.S. 625, 637-638; ***Woodson v. North Carolina,*** *supra*, 428 U.S. 280, 304; ***Zant v. Stephens,*** *supra,* 462 U.S. 862, 879; ***Johnson v. Mississippi***, *supra*, 486 U.S. 578, 584-85.)

E. Williams And Aldridge's Arrests Were Relevant And Admissible Evidence Which Should Have Been Admitted Under Several Provisions Of California Law.

1. *The excluded evidence raised a reasonable doubt about James Robinson's guilt and therefore satisfied California's standard for the admission of third party culpability evidence.*

In ***People v. Hall***, *supra*, 41 Cal.3d 826, the California Supreme Court established the standard for admitting defense evidence of third party culpability: "To be admissible, the third-party evidence need ***not*** show 'substantial proof of a probability' that the third person committed the act; ***it need only be capable of raising a reasonable doubt of defendant's guilt.***" (*Id.*, at 833-834.) In defining "reasonable doubt" in this context, the ***Hall*** court stated: "Evidence of mere motive or opportunity to commit the crime in another person, ***without more***, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime . . . ." (*Id.*, at 833 [emphasis added].)

In the ***Hall*** decision, the Supreme Court not only announced a new standard for the admission of third party culpability evidence, but also gave trial courts substantial guidance as to how that standard should be applied. Trial courts must analyze third-party culpability evidence just as they would any other proffered evidence; i.e., by evaluating the evidence for relevance (Evidence Code section 350), and then for the risks of undue prejudice, jury confusion or undue consumption of time (Evidence Code section 352). Trial courts were expressly cautioned in ***Hall*** not to be unduly restrictive in assessing the relevance of third-party culpability evidence offered by the defense: "[Trial courts] should avoid a hasty conclusion * * * that evidence of [defendant's] guilt was incredible. Such determination is properly the province of the jury." (***People v. Hall***, *supra*, 41 Cal.3d 826, 834.) In other words, the defendant's proffered evidence must be considered truthful by the trial court while assessing its admissibility.

This Court further advised that when assessing the competing risks of undue prejudice, jury confusion or consumption of time (Evidence Code section 352), trial courts should resolve any doubts in favor of the defense.

> Furthermore, ***courts must focus on the actual degree of risk*** that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed: 'If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, ***the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt***. (1A Wigmore, Evidence (Tillers rev. Ed. 1980) § 139, p. 1724.).'

(***People v. Hall***, *supra*, 41 Cal.3d at pp. 834 [emphasis added].)

2. *The proffered defense evidence of third party culpability ought to have been admitted because specific subjects (Tai and/or Tommy) were identified and because the evidence was not speculative but, rather, established a direct connection between the alternate suspects and the crime.*

Following the decision in ***People v. Hall***, this Court has upheld several trial court decisions excluding third party culpability evidence. The trial court here relied upon two of these cases, ***People v. Sandoval*** (1992) 4 Cal.4th 155, and ***People v. Alcala*** (1992) 4 Cal.4th 742, to exclude the proffered defense evidence. The trial court's reliance, however, was misplaced as those cases are factually distinguishable from the present case and those distinctions dictate a different result.

It is proper to exclude third party culpability evidence where the defense cannot identify a specific suspect or suspects for the crime. (***People v. Sandoval***, *supra,* 4 Cal.4th 155.) In ***Sandoval***, this Court upheld the trial court's decision to preclude defense cross-examination of police detective for purposes of showing that victim was probably involved in criminal activity and might have been killed by ***any number of*** accomplices or rivals. (*Id.*, at 176.) (See *also*, ***People v. Bradford*** (1997) 15 Cal.4th 1299, 1325 [evidence that victim's statement that she had previously been in fear of "a man" insufficient without more]; ***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1017-18 [defense prevented from introducing evidence that other suspects existed due to victim's association with "Hells Angel-type people" and drug dealers].)

To introduce third party culpability evidence the defense must show something more than speculation about another person's involvement. In ***People v. Alcala***, *supra*, 4 Cal.4th 742, the defense identified an alternate suspect, but the proffered evidence consisted of nothing more than the

suspect's mere presence in the area on the day after the crime. This Court noted that the "[d]efendant's offer of proof failed to include ***any*** evidence, direct or circumstantial, linking [the third party] to [the] murder." (*Id.* at 793 [emphasis added].) (*See also*, ***People v. Kaurish*** (1990) 52 Cal.3d 648, 685 [third party culpability evidence properly excluded where it merely showed that another person had a reason to be angry with the victim].)

James Robinson's case is readily distinguishable on two bases. First, the defense had clearly identified the suspects as Tai Williams and Tommy Aldridge. Second, the defense here offered more than speculation about possible third party involvement. Substantial evidence linked these two suspects to the capital crime and suggested that Tai and Tommy conspired to rob the Subway sandwich shop and to fix the blame on James.

Tai and Tommy had been friends since the seventh grade. James was living with Tai Williams and his girlfriend (Donna Morgan) at the time of the murders. Tai and Tommy socialized together frequently and "hung out" together at the apartment. According to James' testimony, Tai discussed robbery plans on two separate occasions, once when Tommy was also present. (RT 901-902; 903-904.) It is also not disputed that Tai Williams took James to buy a gun (a .380, the same gun Tommy carried) and encouraged him in the hobby of target shooting. (RT 442.)

In addition, the defense had evidence from an independent source that a grey Ford Mustang, the make, model, and color of Tai Williams' car, had been seen in the alley behind the Subway around the time of the killings; not after the crime as in ***People v. Alcala***. (RT 1186.) The only eyewitness testified that the Black male she saw in the Subway had different features and darker skin than James Robinson. (RT 271; 295.) Finally, Tommy Aldridge carried a .380, the same caliber gun that James

owned and the same type of gun which was used to commit the murders, and he and Tai were arrested driving in Beverly Hills with their guns loaded at 1:30 a.m., the same time of night as the Subway crimes. (RT 442.) Considering the presence of these supporting circumstances, the defense ought to have been permitted to present evidence of third party culpability under California law.

3. *The proffered defense evidence was highly relevant to establishing Tai's and Tommy's motives for testifying falsely against James, and also corroborated James' own testimony in this area.*

The trial court's decision to exclude the defense evidence on relevance grounds makes no logical sense given the facts of this case. The success of the defense case here depended upon convincing the jury that the prosecution's key witnesses, Tai Williams and Tommy Aldridge, had fabricated their testimony. James Robinson's testimony, if believed, established that Tai had robbed the Subway and turned James in to the police to claim the reward and to avoid prosecution. Evidence corroborating James' testimony about Tai's and Tommy's motives for testifying against him was, under these circumstances, not only relevant but essential for the defense case.

The trial court's ruling is contrary to the applicable statutes and California case law, both of which favor broad inclusion of evidence bearing on witness' credibility and motive for testifying. This Court has found evidence of motive to be highly relevant in the context of another capital murder case. In ***People v. Garceau***, *supra*, 6 Cal.4th 140, 177, this Court remarked:

> Relevant evidence is defined in Evidence Code § 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact

> that is of consequence to the determination of the action,' The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or ***motive***.' [Citations].

(*Id.*, at 177 [emphasis added].)

The ***Garceau*** Court found that motive was a material issue. (***People v. Garceau***, *supra*, at pp. 178-179; *see also*, ***People v. Alvarez***, *supra*, 49 Cal. App.4th 679, 688 ["As a general rule, motive for testifying may be relevant and probative in a given case."].)

The strength of the evidence is immaterial in the determination of relevance. Where the evidence tends to prove a disputed issue, either directly or by reasonable inference, it should be admitted. (***People v. Jaspal*** (1991) 234 Cal.App.3d 1446, 1462 [evidence is relevant whenever "it tends logically, naturally, and by reasonable inference to prove or disprove a material issue."]; ***People v. Kronemyer*** (1987) 189 Cal.App.3d 314, 347.)

Other sections of the California Evidence Code reflect the desire to admit a wide variety of evidence bearing on witness' motive and credibility. Evidence Code section 780 provides, in pertinent part:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of the witness ***any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony*** at the hearing, including but not limited to any of the following:
>
> * * *
>
> (f) The existence or nonexistence of a ***bias, interest or other motive***.

As defense counsel explained at the hearing preceding the trial court's ruling, the witnesses' arrests for gun possession immediately

following the capital crimes was highly relevant evidence supporting the defense case. Based on this evidence, the jury could reasonably have concluded that Tai and Tommy were lying when they testified that James planned and carried out the Subway crimes and that they were probably responsible. With this evidence, counsel could have argued and the jury could have reasonably inferred that Tai and Tommy were carrying their guns in Beverly Hills at 1:30 a.m. because they planned to carry out another robbery. The evidence of Ralph Dudley's sighting of Tai's car at the crime scene, which was also excluded, further corroborated James' testimony. The jury ought to have had the benefit of this relevant evidence when assessing the prosecution witnesses' motives and their credibility.

4. *The evidence of Tai and Tommy's gun possession was relevant to impeach their credibility and California case law disfavors exclusion of this type of evidence under Evidence Code section 352.*

California law expressly allows a witness in a criminal case to be impeached with any felony conviction or misdemeanor conduct involving moral turpitude. (*See*, Cal. Const., Art.1, § 28(d); Evidence Code section 788; ***People v. Wheeler*** (1992) 4 Cal.4th 284.) The trial court acknowledged that Tai and Tommy's misdemeanor convictions for illegal weapons possession constituted crimes of moral turpitude. (RT 446.) The court concluded, however, that the evidence had only "slight relevance" which was outweighed by the potential for confusion of the issues. (*Id*.) This ruling was clearly contrary to the case law of this state and to the policies of California evidentiary law as expressed in the California Constitution.

For at least the past 20 years, California has favored broad inclusion of any and all evidence bearing upon the credibility of a witness in a

criminal proceeding. In 1982, voters passed Proposition 8, which contained the "Truth-in-Evidence" amendment to the California Constitution. (Cal. Const., Art. 1, § 28(d).) section 28(d) greatly expanded the range of evidence admissible to impeach the credibility of a witness in a criminal case. section 28(d) provides:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

In ***People v. Wheeler,*** *supra,* 4 Cal.4th 284, this Court was called upon to decide whether, and to what extent, misdemeanors were relevant for impeachment under section 28(d).[17] This Court held that, following the constitutional amendment, a witness in a criminal case may be impeached with misdemeanor conduct where that conduct involves moral turpitude. The ***Wheeler*** opinion indicates an expansive view of relevance in keeping with the legislative intent to significantly expand the area of relevant evidence in criminal cases. There, this Court stated: "We therefore conclude that if past criminal conduct amounting to a misdemeanor has

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[17] The constitutional amendments adopted in Article 1, section 28, changed prior case law to the extent that relevant misdemeanor conduct is now admissible for impeachment purposes in a criminal case. Previously, Evidence Code section 788 limited impeachment with evidence of past misconduct to felony convictions.

some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as 'relevant' evidence under section 28(d)." (***Wheeler*** at p. 295.) Citing the general standard for relevance set forth in Evidence Code section 210, the ***Wheeler*** Court continued to explain why impeachment with past misdemeanor conduct is relevant in a criminal case:

> Not all past misconduct has a 'tendency in reason to prove or disprove' a witness's honesty and veracity. However, as we explained in ***Castro***, *supra*, 'it is undeniable that a witness' moral depravity of any kind has 'some tendency in reason' [citation] to shake one's confidence in his honesty . . . [*] There is . . . some basis . . . for inferring that a person who has committed a crime which involves moral turpitude [even if dishonesty is not a necessary element] . . . is more likely to be dishonest than a witness about whom no such thing is known. Certainly the inference is not so irrational that it is beyond the power of the people to decree that in a proper case the jury must be permitted to draw it . . . .

(***Wheeler***, *supra*, at 295, quoting ***People v. Castro***, *supra*, 38 Cal.3d at 315.)

Under section 28(d), the trial court retains its discretion under Evidence Code section 352 to limit evidence including past misdemeanor conduct offered for impeachment. In ***Wheeler***, this Court remarked: "When exercising its discretion under Evidence Code section 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area." (*See*, ***People v. Beagle*** (1972) 6 Cal.3d 441, 453-454; ***People v. Castro***, *supra*, 38 Cal.3d 301, 309.) In subsequent cases, this Court and other California courts have given additional guidance to trial courts in the exercise of their discretion to limit this type of evidence under

Evidence Code section 352. In ***People v. Clair***, *supra*, 2 Cal.4th 629, this Court remarked that trial courts exercising their discretion under Evidence Code section 352 "should continue to be guided – but not bound – by the factors set forth in ***People v. Beagle***, *supra*, 6 Cal.3d 441, and its progeny."[18] This court further noted that: "When the witness subject to impeachment is not the defendant, those factors prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (***People v. Clair***, *supra*, 2 Cal.4th 629, 654, citing, ***People v. Woodard*** (1979) 23 Cal.3d 329, 335-337.)

Applying these two factors from ***People v. Clair*** to the present case, it is clear that the trial court abused its discretion by excluding the gun possession arrests. Tai Williams and Tommy Aldridge were arrested for carrying the guns in Beverly Hills approximately 10 days after James Robinson's arrest in this case. (RT 442.) Remoteness, therefore, was not an impediment to admitting this evidence. (*See*, ***People v. Halsey*** (1993) 21 Cal. App. 4th 325, 327 (1993) [the prior must have occurred before the trial but is not required to have preceded the offense date].)[19] On the contrary,

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[18] In ***People v. Beagle***, *supra*, 6 Cal.3d 441, trial courts were directed to consider four factors in connection with decisions to admit priors for impeachment purposes: 1) does the prior reflect adversely on the witness' honesty or veracity?; 2) is the prior near or remote in time?; 3) is the prior for conduct substantially similar to that for which the defendant is standing trial?; and, 4) will the prospect of impeachment influence the defendant's decision to testify? (*Id.* at 453-54) In ***People v. Clair***, *supra*, 2 Cal.4th 629, the California Supreme Court indicated which factors from ***Beagle*** should be considered following the adoption of Article 28, and where the proposed impeachment concerns a witness and not the defendant on trial.

[19] It is not clear from the record whether the trial court recognized (continued...)

the close timing of this incident to the capital crimes is a factor supporting admission in this case. In ***People v. Phillips***, 41 Cal.3d 29, 54 (1985), this Court held that prior convictions for three essentially contemporaneous burglaries in different counties was "suggestive of an ambitious premeditated dishonesty." Here, the jury could reasonably conclude (consistent with the defense case) that Tai and Tommy were together and carrying guns in Beverly Hills because they had embarked upon a robbery spree contemporaneous with the Subway robbery and shootings.

The remaining consideration, whether the conduct reflects dishonesty, also supported inclusion of this evidence. Tai's and Tommy's gun possession corroborated James' testimony about how his two former friends conspired to frame him to take the blame for their crimes. The evidence of their gun possession was thus highly probative of their credibility because it supported the inference that Tai and Tommy had lied in court. (*See*, ***People v. Kwolek*** (1995) 40 Cal.App.4th 1521, 1533, [where a defendant who was on trial for the attempted murder of his wife testified and denied asking his wife to buy marijuana for him he could be impeached with a prior conviction for possession for sale of marijuana because the prior offense supported the inference that the defendant's testimony on this point was false].)

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[19](...continued)
that these misdemeanor offense were not time barred for use in this case. (*See*, RT 446.) To the extent that this was a partial basis for the trial court's ruling, this too was erroneous. While this Court has held that, in the context of a capital case the prior must have occurred before the date of the capital offense, that holding was limited to priors sustained by the ***defendant***. (*See*, ***People v. Balderas*** (1985) 41 Cal.3d 144, 201.) It was, therefore, irrelevant that Tai's and Tommy's gun possession arrests took place after the crimes underlying the capital charges here.

In ***People v. Beagle***, *supra*, 6 Cal.3d 441, this Court affirmed "the general rule that felony convictions bearing on veracity are admissible." (*Id.* at 453-454.) The Court made plain that this general rule applied equally to all witnesses in criminal cases, remarking, "no witness, including a defendant who chooses to testify, is entitled to a false aura of veracity." (*Ibid*.) This basic policy rationale strongly supports inclusion of this evidence to impeach Tai Williams and Tommy Aldrige. Tai and Tommy were vital prosecution witnesses whose testimony was in direct opposition to the defense evidence. James' testimony in combination with other evidence established that these two witnesses conspired to commit the crimes and then lied in court to avoid responsibility. Their veracity was thus critical to the outcome of this case. Under these circumstances, evidence casting doubt on Tai's and Tommy's credibility was clearly relevant and material. Because the defense was prevented from meaningfully challenging their testimony, Tai Williams and Tommy Aldridge were accorded the "false aura of veracity" this Court warned against in ***People v. Beagle***.

5. *The trial court's exclusion of this relevant defense evidence was an abuse of its discretion under Evidence Code section 352 and was contrary to the policies concerning the admission of evidence in criminal cases expressed in California law.*

As demonstrated above, the evidence of Tai Williams' and Tommy Aldridge's weapons possession was highly relevant and was admissible on multiple legal grounds. The trial court's balancing of the competing interests to be considered under Evidence Code section 352 was flawed because the court failed to assign the proper weight to the defendant's interests in presenting a defense. This misjudgment caused the trial court to so underestimate the probative value of the evidence that it was able to

conclude that the slight potential for jury confusion was a stronger concern. As a result, the trial court abused its discretion by excluding relevant and admissible evidence which was vital to the defense case.

This Court recently commented on the proper exercise of trial court discretion to exclude evidence in a criminal case, stating: "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to present all relevant evidence of significant probative value to his or her defense." (***People v. Cunningham*** (2001) 25 Cal.4th 926, 998. *Accord*, ***People v. Babbitt*** (1988) 45 Cal.3d 660, 684; ***People v. Reeder*** (1978) 82 Cal.App.3d 543, 552.) Other California courts are in agreement, and these cases indicate that the balance under section 352 is heavily weighted toward inclusion of defense evidence in criminal cases. In ***People v. Reeder***, *supra*, 82 Cal.App.3d 543, the court of appeal found:

> In light of the more fundamental principle that a defendant's due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution.

(*Id.*, at 552.)

Similarly, in ***People v. De Larco*** (1983) 142 Cal.App.3d 294, the court of appeals stated:

> Inclusion of relevant evidence is tantamount to a fair trial . . . . Indeed, discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.' (***People v. Lavergne*** (1971) 4 Cal.3d 735, 744; ***People v. Murphy*** (1963) 59 Cal.2d 818, 829).

(*Id.* at 305-306.)

To overcome a section 352 objection, "evidence of a third party's culpability 'need only be capable of raising a reasonable doubt of [the] defendant's guilt.'" (***People v. Cudjo*** (1993) 6 Cal.4th 585, 609, quoting ***People v. Hall***, *supra*, 41 Cal.3d 826, 833.) In ***Hall***, this Court held that the defendant did ***not*** need to show "substantial proof of a probability" that the third party committed the act to defeat a section 352 objection. (***People v. Hall***, *supra*, at p. 833.)

The evidence in question here not only met but exceeded the legal requirements for overcoming an objection based on Evidence Code section 352. As the trial court itself recognized, the judge had the ability to give the jury a limiting instruction to prevent any improper use of this evidence. ( RT 648.) The potential for confusing this jury was, therefore, very slight and was certainly insignificant compared to the defense's need for the evidence. The trial court was incorrect in its assignment of values to the competing interests to be weighed under Evidence Code section 352. The importance of this evidence to James Robinson's case was grossly undervalued, while the interests in avoiding jury confusion was greatly overstated. The trial court thus abused its discretion by excluding this evidence.

6. *The trial court's erroneous ruling denied James Robinson his federal constitutional rights to due process of law, fundamental fairness and a reliable determination of guilt and of the penalty.*

The trial court's erroneous exclusion of the proffered third party culpability evidence was more than an abuse of its discretion under California's statutory laws of evidence. By excluding evidence which, as discussed above, ought to have been admitted under state law because it

clearly exceeded the requirements for overcoming an objection under Evidence Code section 352, the trial court deprived James Robinson of a state created liberty interest and denied him his federal constitutional right to due process of law. (*See* ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346.) The United States Supreme Court and the federal circuits have been particularly vigilant where claims concern states' applications of their own statutory rules in the context of capital litigation. (*See, e.g.*, ***Ford v. Wainwright*** (1986) 477 U.S. 399, 414; ***Beck v. Alabama***, *supra*, 447 U.S. 625.) The state may create a liberty interest in the correct application of its own statutes:

> Where a defendant is deprived of a state statutory right, such deprivation may implicate the federal Due Process Clause. States may create 'liberty interests' that are protected by the Fourteenth Amendment. [Citation.] As this court has held on more than one occasion, 'the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.' (***Lambright v. Stewart***, *supra*, 167 F.3d 477, 486-487, quoting ***Fetterly v. Paskett*** (9th Cir. 1993) 997 F.2d 1295, 1300, citing ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Ballard v. Estelle*** (9th Cir. 1991) 937 F.2d 453, 456.)

Moreover, a state court's erroneous admission or exclusion of evidence may violate the federal constitution by causing fundamental unfairness to the criminal defendant. (*See* ***Kealohapauole v. Shimoda***, 800 F.2d 1463, 1466 (9th Cir. 1986); ***Batchelor v. Cupp***, 693 F.2d 859, 865 (9th Cir. 1982) *cert. denied*, 463 U.S. 1212 (1983).)

The trial court's erroneous exclusion of the third party culpability evidence was thus contrary to state law, and denied James Robinson his federal constitutional rights to due process of law and a fundamentally fair

trial. In addition, the court's ruling also deprived him of a fair and reliable determination of the sentence in violation of the Eighth Amendment. (*See* ***Sullivan v. Louisiana*** (1993) 508 U.S. 275; ***Beck v. Alabama***, *supra*, 447 U.S. 625, 637.) For all of these reasons, this Court must reverse James Robinson's convictions and sentence of death.

F. The Trial Court's Exclusion Of The Defense Evidence Pertaining To Third Party Culpability Was Highly Prejudicial Error Requiring Reversal Of James Robinson's Convictions Applying Either The ***Chapman*** Standard Of Reversal Or The Less Stringent Standard Of ***People v. Watson***.

1. *This Court should apply the "harmless error" standard of reversal of* ***Chapman v. California*** *because the trial court's erroneous rulings affected James Robinson's federal constitutional rights.*

As discussed above, the trial court denied James Robinson several fundamental constitutional rights by excluding defense evidence pertaining to third party culpability; in particular the evidence concerning Tai Williams' and Tommy Aldridge's arrests for weapons possession. Because the trial court's rulings impacted these fundamental rights, the proper standard of reversal is the " harmless-error" analysis of ***Chapman v. California***, *supra*, 386 U.S. 18, 24. (*See* ***Delaware v. Van Arsdall***, *supra*, 475 U.S. 673, 680.) Under the ***Chapman*** standard, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Id*.)

In ***Delaware v. Van Arsdall***, *supra*, 475 U.S. 673, the United States Supreme Court applied the ***Chapman*** standard to a case where the trial court erroneously limited defense cross-examination of a prosecution witness. The Supreme Court stated: "***The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully***

***realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.***" (*Id.*, at 684 [emphasis added].) The Supreme Court in ***Van Arsdall*** provided specific guidance to reviewing courts applying the ***Chapman*** standard to a case where defense cross-examination had been improperly curtailed:

> Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. [Citations].

***Delaware v. Van Arsdall***, *supra*, 475 U.S. at p. 684.)

Reversal of James Robinson's convictions in the guilt phase is clearly indicated when the Supreme Court's analysis in ***Van Arsdall*** is applied to assess the prejudice resulting from the trial court's rulings excluding this evidence in both phases of this capital trial.

2. *The state cannot show that the trial court's rulings excluding the third party culpability evidence was harmless error because this evidence undermined the testimony and the credibility of the prosecution's chief witnesses and its admission would have raised a reasonable doubt concerning James Robinson's guilt.*

a. <u>The testimony excluded here was essential to the state's case in the guilt phase of trial</u>.

Tai Williams' and Tommy Aldridge's testimony was not merely important but essential for the state to prove that James Robinson committed the Subway sandwich shop robbery and homicides. Tai's and

Tommy's testimony provided information about how James allegedly planned the crimes. (*See*, RT 459; 551-555.) Tommy testified that James not only admitted having "done the Subway," but also confessed to him that he killed the victims a few days after news of the Subway robbery/murders was announced in the media. (*See* RT 564-565.) As previously noted, Tai and Tommy broke the case by contacting the Northridge police with their story implicating James Robinson. (RT 525; 576.)

Tai and Tommy were vital prosecution witnesses not only because of the information they provided about James' alleged planning of the crimes and his subsequent admissions, but because of their relationship with James. As close friends of James Robinson since childhood, these witnesses could reasonably be expected to know what James was like as a person. Tai and Tommy were very credible with the jury for this reason and the way in which they portrayed James Robinson was, therefore, quite significant. Through their testimony, Tai and Tommy created a picture of James Robinson as a cold, calculating killer without sympathy or respect for other people. According to them, James displayed a callous attitude toward the victims all along and was fully prepared to kill people to get the money he wanted. (RT 555; 586.) Tommy testified that when James confessed to the crimes he showed no remorse for what he had done and had no sympathy for the victims. (RT 565.) Their testimony was vital if the prosecution was to succeed in convincing the jury that James Robinson, with no prior felony convictions, was the type of person who could actually commit these crimes. Furthermore, at sentencing, Tommy's testimony was equally persuasive in convincing the jury that death was the appropriate penalty.

b. Although Tai and Tommy corroborated one another in their testimony, the only other piece of corroborating evidence was highly questionable and their stories were contradicted by James Robinson's testimony and by the excluded defense evidence.

Tai's and Tommy's stories about how James allegedly planned the Subway robbery were corroborated only by one another. James' own testimony is directly contrary. James denied ever having planned to rob the Subway or to commit any other robbery. (RT 904-905.) He testified that it was Tai who brought up the idea of robbing Subway. (RT 901-902; 903-904.)

There is some corroboration for Tommy's testimony concerning James' alleged admission of responsibility after the crimes. However, there are several reasons to distrust this corroborating testimony. Dennis Ostrander testified that James told him about committing the Subway robbery and homicides in the week following the crime. (RT 792-795.) Yet Ostrander's testimony is suspect for several reasons. At trial, Ostrander admitted that he learned of the crimes several days before he supposedly had this conversation with James. (RT 801-802.) However, when his manager at Lucky's questioned him shortly after James' arrest on July 9, 1991, Ostrander denied any awareness of James Robinson's involvement. (RT 814-816.) Ostrander contacted Northridge police ***after*** James had been arrested and the news media had announced a substantial reward for information concerning the crimes. (*See* CT 795.) When Ostrander did go to the police, he was clearly interested in obtaining money in exchange for his testimony. (*See* RT 839-840.) Testifying against James Robinson was, for Ostrander, a convenient vehicle not only to cash in on the reward money but to extract a large disability settlement from Lucky's market for stress

disability. (*Id.*) Because of his obvious self interest, Ostrander's testimony would have been worthless if not corroborated by Tommy's story of James' alleged confession. If counsel had been allowed to undercut Tommy's credibility, both his story and Dennis Ostrander's testimony would have been discounted as self-serving fabrications.

Apart from these three highly questionable witnesses, the prosecution's case against James Robinson was almost non-existent. There was no physical evidence linking James to the crime. Two fingerprints of his were matched to a plastic bag found outside the Subway. (RT 769-770.) However, there were also a number of smudged prints on the plastic bag which could not be identified. (*Id.*) Numerous prints taken from a variety of places inside the Subway Sandwich Shop were ***not*** matched to James Robinson. (*See*, RT 779-780; 780-781; 875.) The shoe print found atop the counter inside the Subway sandwich shop did not match for any of James Robinson's shoes. (RT 756-757.) Further, the only eyewitness to the crime failed to identify James in a photographic line-up. (RT 297-299; 301) Even while testifying against him at trial, Rebecca James acknowledged a number of significant physical differences between James Robinson and Black male she saw that night in the Subway Sandwich Shop. (RT 271; 294.)

c. <u>The trial court's refusal to allow other defense evidence which contradicted Tai's and Tommy's story and corroborated James' testimony exacerbated the prejudice</u>.

The corroboration for James' testimony was more substantial than the slight corroboration for Tommy Aldridge's testimony about James' alleged confession. In contrast to Ostrander's suspect testimony, there was no reason to doubt the truth of the evidence substantiating James' version of the events that night at the Subway. LAPD Detective Peggy Mosley had

information of Tai's involvement from Ralph Dudley, a civilian with no connection to this case. Dudley saw a grey Mustang, the same make, model and color as Tai's car, in the alley behind the Subway sandwich shop at the time when Tai would have been there according to James Robinson's testimony. (RT 1186.) If this evidence had not been excluded by the trial court it would have provided substantial corroboration for James' testimony about events at the Subway. Similarly, the excluded evidence of Tai's and Tommy's driving around Beverly Hills with their guns at 1:30 a.m., the same time of night as the Subway robbery/murders and only ten days after James' arrest in this case, substantiated James' testimony that it was Tai who had expressed an interest in armed robbery. (RT 442.) The jury could have reasonably inferred that Tai and Tommy were driving around Beverly Hills illegally carrying loaded guns for that purpose.

d. The evidence of Tai's and Tommy's gun possession arrests was the only information the defense had to discredit these witnesses on cross-examination.

The extent of cross-examination otherwise permitted by the trial court is a factor in evaluating the prejudice where evidence is erroneously excluded. (***Delaware v. Van Arsdall***, *supra*, 475 U.S. 673, 684.) The trial court in this case made two significant rulings limiting the defense cross-examination. The court's rulings to preclude defense use of the gun possession arrests and its decision to prohibit the introduction of evidence concerning Ralph Dudley's sighting of Tai's car near the Subway virtually determined the outcome. Through these two rulings to exclude subjects from defense cross-examination, the trial court removed the only evidence the defense had connecting Tai to the crime and undermining Tai's and Tommy's testimony. In this case, the trial court's rulings to exclude this

evidence effectively denied the defense any meaningful cross-examination of Tai Williams or Tommy Aldridge.

e. The prosecution's case was not overwhelming and the excluded evidence of third party culpability could have raised a reasonable doubt as to guilt.

It is almost always prejudicial error to exclude evidence of third party culpability, even where that evidence is circumstantial or subject to another interpretation. (*See, e.g.*, ***Jones v. Wood*** (9th Cir. 2000) 207 F.3d 557, [*habeas* petitioner established prejudice where trial counsel failed to present circumstantial evidence supporting theory that a particular suspect with a known dislike of the victim had been in the area at the time of the murder].) The exclusion of third party culpability evidence in this case was even more prejudicial because the excluded evidence not only assisted the defense but undercut the prosecution's chief witnesses.

The prosecution's case against James Robinson was not unassailable. As discussed above, Dennis Ostrander's testimony was suspect because of his admitted financial interest in the outcome. (*See* RT 839-840.) The state's eyewitness, Rebecca James, failed to identify James Robinson shortly after the crime. Her positive identification came only after she had consulted an attorney about collecting the reward money in exchange for her assistance. (RT 299.) As previously discussed, Tai Williams and Tommy Aldridge were the critical prosecution witnesses. The fact that their truthfulness went unchallenged before the jury was, under the circumstances of this case, probably outcome determinative. The prosecution's success in the guilt phase depended upon maintaining Tai's and Tommy's credibility. The prosecution had a clear advantage at the outset because of these witnesses' position. Both Tai and Tommy were

highly credible because both were viewed as close friends of James' around the time of the crimes. Tommy Aldridge enhanced this false image of himself as James' close and knowledgeable childhood friend in his testimony where he claimed to have been reluctant to turn James in to the police. (*See*, RT 573.) Tai also portrayed himself as the kindhearted friend who helped James by giving him a place to live. (*See* RT 466-467.) The prosecutor used this theme in closing argument, suggesting that Tai and Tommy were merely trusting childhood friends who had been conned by James Robinson. (*See* RT 1253.)

The defense's ability to create a reasonable doubt as to James' guilt was equally dependent on these witnesses. For the defense, the task was to provide the jury with reasons to doubt Tai's and Tommy's story and their motives. The defense could not effectively counter the mis-impression of Tai and Tommy as loyal friends of James without using the evidence of their arrests for gun possession. Evidence of Tai's and Tommy's arrests on gun charges would have, combined with other defense evidence, testimony and cross-examination, undermined Tai's and Tommy's credibility and raised a reasonable doubt as to James Robinson's guilt. The gun possession arrests were the best available means the defense had to attack these witnesses' motives. Without this evidence, or the evidence police obtained from Ralph Dudley, the defense was left with no objective and verifiable information with which to create a reasonable doubt as to James' guilt.

3. *The exclusion of third party culpability evidence was so highly prejudicial that reversal is required applying the standard of* ***People v. Watson.***

This Court has applied the standard of ***People v. Watson*** (1956) 46 Cal.2d 818, 836, to determine whether the erroneous exclusion of evidence was sufficiently prejudicial to require reversal. (*See*, ***People v. Kidd*** (1961)

56 Cal.2d 759, 767.) Under the ***Watson*** standard, reversal is required where it is "reasonably probable" that a more favorable result would have been obtained absent the error. (***People v. Watson***, *supra*, 46 Cal.2d 818, 836.) Reversal of James Robinson's convictions and sentence is similarly required under the ***Watson*** standard because it is at least reasonably probable that the inclusion of this evidence would have raised a reasonable doubt about his guilt.

Exclusion of impeachment evidence which deprives a criminal defendant of a defense is "clearly prejudicial." (***People v. Vogel*** (1956) 46 Cal.2d 798, 805.) As discussed previously, the trial court's ruling eliminated the strongest piece of independent evidence supporting James Robinson's third party culpability defense. The excluded evidence of the gun possession arrests and Ralph Dudley's sighting of Tai's car at the crime scene strongly indicated that Tai and/or Tommy were involved in the Subway crimes. Obviously, covering up their own involvement would be a powerful incentive for them to lie when testifying against James. As Justice Mosk once noted, this type of evidence "discloses that the witness had a specific incentive to lie: the jury could well conclude that a witness who had been promised valuable sentencing benefits if he testified for the prosecution would be more likely to color or even fabricate his testimony in an effort to please the prosecutor and 'earn' the benefits." (***In re Jackson*** (1992) 3 Cal.4th 578, 637 [dis. op. of Mosk, J.].)

Excluding the gun possession arrest from Tai's and Tommy's cross-examinations also prevented the jury from considering strong evidence bearing on their credibility. Because the defense was prevented from using the evidence of the gun possession arrests to impeach Tai and Tommy, they were able to portray themselves as a law abiding people and James'

Robinson's closest friends. As a result, their testimony carried an undeserved aura of reliability which the defense was unable to challenge. Under these circumstances, it is at least reasonably probable that the defense evidence which the trial court erroneously excluded would have created a reasonable doubt as to James Robinson's guilt.

G. Reversal Of James Robinson's Sentence Of Death Is Required Because The Trial Court's Evidentiary Rulings Prevented The Jury's Consideration Of Relevant Evidence, Thus Precluding The Reliability Necessary Under The Eighth And Fourteenth Amendments.

1. *The trial court's exclusion of the third party culpability evidence was especially prejudicial under the circumstances of this case.*

As previously discussed, Tommy Aldridge's testimony was highly prejudicial for several reasons. The trial court's rulings restricting Tommy's cross-examination in the penalty phase was especially harmful to the defense in this case because this was a retrial before a new jury. The prosecutor re-litigated the guilt phase of trial before the new jurors. In the penalty retrial, the prosecutor admitted that he was seeking the death penalty solely due to the circumstances of the alleged crimes. (*See* RT 2778-2781.) Tommy Aldridge's testimony, concerning James' alleged planning of the crimes and his subsequent lack of remorse, was specifically noted as a factor in aggravation. (*See* RT 2781-2784.)

Several aspects of the state's case were refocused in the second penalty phase as part of a concerted effort to convince the new jury of two things. First, the jury had to be persuaded to accept the prosecution's version of what had happened at the Subway Sandwich Shop, i.e., that James Robinson was guilty beyond a reasonable doubt of the murders of Brian Berry and James White. Second, to recommend a death sentence, the

jury had to be persuaded to adopt the prosecution's version of how these crimes had been carried out.

The prosecutor adjusted the presentations of his witnesses to attain these ends. His direct examination of the coroner, Dr. Rogers, was refocused to place greater emphasis on this witness' allegedly expert determination of where the victims' and the shooter had been positioned. In the guilt phase the coroner's testimony about the relative positions of victims to shooter encompasses only three transcript pages. (RT 649-652.) The witness stated his opinion, i.e., that the victims were probably shot while in a kneeling position, only one time. (RT 652.) In the penalty retrial, Dr. Rogers' testimony in this area expanded to cover thirteen pages of trial transcript. (*See* RT 2016-2029.) The prosecutor had the coroner review every possible scenario for the parties' relative positions in detail. (*Id.*) The prosecutor went so far as to demonstrate the possible positions while Dr. Rogers was testifying. The calculated effect was to elevate the prosecution's likely scenario, in which the victims are kneeling with their backs to their killer, to the level of an established scientific fact in the minds of the jurors. (*See* Argument III, *infra*.) Convincing the jury of the truth of this possible scenario for the crime scene made it easier for the prosecutor to persuade the jury that anyone who could kill in such a calculated manner deserved a death sentence.

The victims' family members reinforced this version of events by changing their testimony in the penalty retrial. The family members added remarks about imagining the victims' terror and suffering at the time of their deaths. (RT 2254; 2283.) They described how the killer shot the victims "execution style" and then left them there to die. (*Id.*) The parents

of both victims stated that they could not imagine anyone being so heartless and unfeeling. (*Ibid.*)

In addition to viewing the crime as a cold-blooded and deliberate execution in furtherance of a robbery, the jury also had to be convinced that James Robinson was a heartless and remorseless killer, i.e., a person capable of committing this crime according to the prosecution's theory. In the second penalty phase, the prosecution made even more effective use of Tommy Aldridge's testimony to accomplish this second purpose. The prosecutor again called Tommy to testify, and elicited the same information Tommy had testified to in the guilt phase of trial. (RT 2207-2242.) As previously discussed Tommy's unchallenged testimony was especially prejudicial for several reasons, including: the length of his friendship with James; his feigned understanding of James' personality and his disbelief that James could commit murder; and, his asserted reluctance to turn James in to police. In his direct examination of Tommy Aldridge in the penalty retrial, the prosecutor emphasized this witness' testimony about James' alleged callousness in the planning of the crimes and his subsequent lack of remorse. (*See*, RT 2213; 2215-2216; 2218-2219; 2223; 2224-2225; 2226.)

With the defense unable to challenge his veracity or cast any doubt on his credibility, Tommy Aldridge appeared to be a loyal friend of James Robinson's and a reluctant witness for the prosecution. Tommy's credibility was thus unassailable without the evidence of his gun possession arrest and the resulting prejudice was enormous. Combined with the additions to Dr. Rogers' testimony and the victim impact witnesses' testimony, and the prosecutor's emphasis on the alleged circumstances of the crime in closing argument in the penalty retrial, the prejudice was impossible to overcome.

2. *James Robinson had a federal constitutional right to present evidence of third party culpability in the*

*penalty phase of his capital trial and the state cannot show that exclusion of this evidence was harmless beyond a reasonable doubt.*

James Robinson was constitutionally entitled to present evidence of third party culpability in the penalty phase of trial. In capital sentencing generally, the sentencer may not be precluded from considering ***any*** mitigating factor. (***Lockett v. Ohio***, *supra*, 438 U.S. 586; ***Eddings v. Oklahoma***, *supra*, 455 U.S. 104; ***Penry v. Lynaugh*** (1989) 492 U.S. 302.) Even evidence which is not relevant under state rules of evidence may be relevant to capital sentencing. (***Skipper v. South Carolina***, *supra*, 476 U.S. 1, fn. 2.) Evidence of third party culpability is highly relevant in the penalty phase of a capital trial, both as mitigation under Penal Code section 190.3, factor (k) and as a circumstance of the offense under factor (a). In ***Mak v. Blodgett*** (9th Cir. 1992) 970 F.2d 614, *cert. denied*, (1993) 507 U.S. 951, the Ninth Circuit held that exclusion of such evidence was constitutional error, since it was relevant mitigating evidence relating to the circumstances of the offense and to the defendant's character.

As previously discussed, the prosecution sought the death penalty here based on the circumstances of the crime. As the Ninth Circuit found in ***Mak v. Blodgett***, the third party culpability evidence ought to have been considered by the penalty phase jury because it concerned the facts of the offense. For all of the reasons discussed below in sub-section 3, the state cannot prove beyond a reasonable doubt that the jury would have reached the same result absent the error.

3. *Reversal is required under the state law standard of* ***People v. Brown*** *because there is at least a reasonable possibility that the jury would have reached a different verdict if the error had not occurred.*

In ***People v. Brown*** (1988) 46 Cal.3d 432, this Court reaffirmed the "reasonable possibility" test as the appropriate standard for assessing the effect of state law error in the penalty phase of a capital trial:

> [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.

(***Brown***, *supra*, at 448.)

In ***People v. Ashmus*** (1991) 54 Cal.3d 932, 983-984, this Court again invoked ***Brown***, explaining that to apply the standard required the reviewing court to reverse based on even the possibility that a hypothetical juror ***might*** have reached a different decision absent the error: "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id* at p. 983-984.)

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in ***People v. Watson***, *supra*, 46 Cal. 2d 818, 836. The Court in ***Brown*** stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (***People v. Brown***, *supra,* 46 Cal.3d at 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The ***Brown*** Court stated:

> A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also – and most important – to render an individualized, normative determination

> about the penalty appropriate for the particular defendant – i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the ***Watson*** standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 [emphasis in original], *quoting* ***Woodsen v. North Carolina***, *supra,* 448 U.S. at 305. *See also*, ***People v. Ashmus***, *supra,* 54 Cal.3d at 965 [equating the reasonable possibility standard of ***Brown*** with the federal harmless beyond a reasonable doubt standard].)

In James Robinson's case, it is at least reasonably possible that the jury would have returned a verdict of life without the possibility of parole ("LWOP") if the trial court had not excluded the evidence of third party culpability. As discussed above, the trial court's erroneous exclusion of the third party culpability evidence (including Ralph Dudley's sighting of a grey Mustang like Tai's at the crime scene, and Tai's and Tommy's arrests for weapons possession under suspicious circumstances indicating they had planned to commit a robbery) prevented the jury from considering evidence raising a reasonable doubt as to James Robinson's guilt. If admitted, this evidence would have corroborated other elements of the defense case in the penalty phase. James Robinson testified in the retrial and again denied any involvement in the Subway sandwich shop crimes. (RT 1179-1180.) Defense counsel argued reasonable/lingering doubt as to James' guilt as a factor in mitigation in the penalty phase closing argument. (RT 2811-2812.) Added to all of these circumstances, the excluded evidence may well have swayed the jury to vote for a life sentence rather than returning a death verdict.

The third party culpability evidence of Tai's and Tommy's arrests was also relevant to their credibility. As previously discussed, the prosecutor argued for the death penalty based on the circumstances of the crime, emphasizing the callousness of homicides in this case. (RT 2778-2810.) Through his testimony, Tommy gave the jury the impression that James was a remorseless killer. (*See*, RT 2213; 2215-2216; 2218-2219; 2223; 2224-2225; 2226.) As a longtime friend of James, he was very credible in regards to his knowledge of James' personality. Evidence casting doubt on Tommy's judgment and undermining his credibility with the jury was, therefore, highly relevant to the defense as they tried to present a different image of James Robinson which would incline the jury to choose a life sentence.

For all of these reasons, the defense evidence of third party culpability was highly relevant in the penalty phase of James Robinson's capital trial. As Justice Traynor correctly observed, "errors at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment." (Traynor, The Riddle of Harmless Error (1970)] at p. 68.) In the present case, it is at least reasonably possible that a life sentence would have resulted had the jury had heard the excluded evidence in the retried penalty phase. Reversal of James Robinson's sentence of death is thus required.

## II. THE TRIAL COURT'S HANDLING OF THE JURY VOIR DIRE IN BOTH PHASES OF THIS CAPITAL CASE VIOLATED CALIFORNIA LAW AND DENIED JAMES ROBINSON HIS CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW, DUE PROCESS OF LAW, A FAIR TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE

**DETERMINATION OF GUILT AND OF THE PENALTY.**

A. Introduction And Summary Of Claims On Appeal.

In this appeal, James Robinson raises several claims concerning the jury selection in both phases of this capital trial. The claims are complex, both factually and legally, and are interrelated. This introduction is designed to provide an overview of all of the claims concerning the jury selection in both phases of trial.

James Robinson's first contention is that this state's statute governing jury selection, Code of Civil Procedure section 223 ("section 223"), unconstitutionally limits voir dire in criminal cases. The disparate treatment of criminal and civil litigants in jury selection denies criminal defendants equal protection and the right to a fair trial before an impartial jury. (U.S. Constit. Amends. 6, 14.) The statute's elimination of sequestered, individual voir dire concerning jurors' views on capital punishment also results in a conviction prone jury in violation of the defendant's Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury. (*Id.*) Moreover, through exposure to group questioning on their ability to personally impose a death sentence, the jurors become de-sensitized to the idea of voting for the ultimate penalty and thus are more prone to do so. This effectively denies capital defendants their Sixth and Fourteenth Amendment rights to an impartial jury at the sentencing phase, and violates the Eighth and Fourteenth Amendments' guarantees of a fair and reliable sentencing (***Beck v. Alabama***, *supra*, 447 U.S. 625, 637-38), and an individualized determination of the penalty (***Zant v. Stephens***, *supra*, 462 U.S. 862, 879; ***Woodson v. North Carolina***, *supra*, 428 U.S. 280, 304; ***Johnson v. Mississippi***, *supra*, 486 U.S. 578, 584-85.)

Even if this Court upholds the constitutionality of the statute, James Robinson raises a series of interrelated claims based on the trial court's application of section 223 in this case. The trial court's handling of voir dire does not constitute merely an abuse of its statutory discretion. Rather, the court abdicated its responsibility to ensure James Robinson's constitutional rights to due process of law, a fair trial before an impartial jury and a reliable determination of the convictions and the sentence in his capital trial.

The court's voir dire methods were ineffective because they failed to gather enough information for the court and/or counsel to meaningfully determine challenges for cause. The initial difficulty in obtaining accurate information resulted from this court's hurried approach to jury selection. The court distributed a lengthy and confusing juror questionnaire to the panel. The prospective jurors, however, did not have enough time to formulate accurate and considered responses. They were ordered by the court to complete the questionnaire as soon as possible and were strongly encouraged to return it within one hour. (*See*, Sub§§ B(1)(f) and B(2)(e), *infra*.) The result was large numbers of blank responses, inaccuracies and confusing responses. Although many responses on the questionnaires were incomplete or contradictory, the trial judge also failed to take the time to clarify the prospective jurors' responses. (*See*, Sub§§ E(2) and (3), *infra*.) ***The court allowed only a few hours, less than one court day, for the entire voir dire and jury selection.***

The inadequate time taken in voir dire was exacerbated by the court's style of questioning and its exclusion of both counsel from the process. The trial judge refused to allow either the prosecutor or defense counsel to question prospective jurors. Voir dire was conducted exclusively

by the trial court, and the judge's questioning was cursory and superficial. (*See*, Sub§§ B(1)(d) and (e); B(2)(b) and (e); E(4) and E(6), *infra*.) Furthermore, the trial court mistakenly concluded that it lacked the discretion to use open-ended questions in voir dire. (*See*, Sub§ B(1)(d), *infra*.)

The trial judge refused to undertake further questioning even in those instances where prospective jurors' responses on the questionnaires indicated possible prejudice. (*See*, Sub§ B(1)(g), *infra*.) In several instances, the court actively "rehabilitated" jurors whose responses indicated that they were not impartial and should be excused for cause or questioned more extensively. (*See*, Sub§§ B(1)(c), B1(f), B1(g), B(2)(b) and B(2)(f), *infra*.) Contrary to the defense's express requests, the trial judge made no attempt to ferret out racial biases or prejudices through voir dire. The trial court similarly ignored defense requests for further voir dire concerning substantial adverse publicity. (*See*, Sub§ B(1)(c) and (d), and Sub§ I, *infra*.)

The difficulty in gathering information about the panel was compounded by the court's denial of the defense requests for sequestered voir dire of the jurors. (*See*, Sub§§ B(1)(c), *infra*.) By conducting voir dire in the presence of the entire panel of prospective jurors, the court encouraged jurors to conform their views to those expressed by others which had been endorsed by the judge. (*See*, Sub§§ E(5),(6), and (7), *infra*.) The trial court's refusal to hold sequestered voir dire for death qualification actually created prejudice in the entire panel of prospective jurors. Listening to repeated questioning about the penalty encouraged the guilt phase jurors to believe that James Robinson was guilty. (*Id.*) In the

second jury's selection, the group voir dire desensitized these prospective jurors to the idea of imposing the ultimate penalty. (*Ibid*.)

In addition to the claims stated above concerning the voir dire procedures, James Robinson raises other claims challenging trial court's specific rulings in jury selection. The trial court erroneously excused several jurors for cause at the prosecutor's request where they merely showed scruples about imposing the death penalty. (*See*, Sub§§ B(1)(h) and B(2)(g), *infra*.) In several cases the trial court denied defense challenges for cause, even though prospective jurors had indicated that they were biased for one or more reasons. (*See*, Sub§§ B(1)(g) and B(2)(f), *infra*.) Finally, James Robinson contends that the prosecutor's use of peremptory challenges to remove all prospective jurors who were not firmly in favor of the death penalty violated his right to an impartial jury drawn from a representative cross-section of the community. (*See*, Sub§ K, *infra*.)

For all of these reasons, the trial court's handling of the voir dire in this case was inconsistent with its duty to ensure that impartial jurors were selected to hear this capital case. The court's conduct amounted to a total abdication of its responsibilities concerning voir dire and thus does not constitute a valid exercise of its discretion under section 223 to adapt voir dire procedures to meet the needs of particular cases. Alternatively, should this Court find that the trial court exercised its statutory discretion, James Robinson contends that the court abused its discretion to manage voir dire requiring reversal of both phases of his capital trial.

B. Factual And Procedural Background.

1. *Voir dire and jury selection for the first jury, which determined the guilt phase and penalty phase mistrial*.

a. The trial court's juror questionnaire.

Before the start of the guilt phase, the court advised both counsel that it intended to use a juror questionnaire in connection with voir dire. (RT 11, 31.) The jury questionnaire form used in this case was extensive. The questionnaire was twenty four (24) pages long and contained 56 questions in major areas. Of these 56 question areas, most contained multiple sub-parts so that the actual number of responses required was approximately ninety-six (96). The difficulty of the form lay not just in the number of responses required but in the types of questions asked. Prospective jurors were asked to reflect on complex issues such as their attitudes on the death penalty. (CT 232-255.)

b. The administration of the questionnaire.

The panel of approximately 100 prospective jurors was sworn in at about 10:47 a.m. on March 30, 1993, in preparation for selecting the first jury. (CT 199; RT 40.) The prospective jurors received the questionnaire form (CT 232) at around 11:00 a.m.[20] (RT 46.) They were told that the courtroom would be closed for lunch at 12 noon and would not re-open until after 1:30 p.m. (RT 43.) The court told the prospective jurors that they were free to leave after handing in their completed questionnaire, and stated that they could complete it before 12:00 p.m. or wait and hand it in after 1:30 p.m. that same day. (RT 39-42.) The panel was expressly told that they were ***not*** to take the form home and return with it on the next court date. (*Ibid*.)

Most prospective jurors returned the questionnaire before the noon recess at 12:00 p.m. (RT 74.) They had, therefore, approximately 45

[20] Hereinafter, the jury selection for the guilt phase and the mis-tried penalty phase will be referred to as the "first jury," and the jury selection for the penalty phase will be referred to as the "second jury."

minutes to complete a form which required detailed explanations and no less than 96 separate responses. As defense counsel later observed, this allowed the jurors to spend an average of only 28 seconds per response. (CT 214; RT 74-75.)

c. The defense motion for supplemental voir dire and sequestered voir dire conducted by counsel.

On April 1, 1993, the day after the panel for the first jury was given the questionnaire, defense counsel filed a motion pertaining to the juror selection process. The motion was heard on April 5, 1993, the next scheduled court day. (CT 200; RT 72.) Through the motion, counsel was seeking attorney-conducted voir dire for both the general questioning and the death qualification questions. Counsel also requested that the death qualification voir dire be sequestered.[21] (*See*, CT 200-214.) The prosecutor did not oppose any aspect of the defense motion.

Two alternative legal grounds supported the defense motion. James Robinson challenged the constitutionality of several provisions of section 223, specifically the denial of equal protection inherent in the statute's restriction of voir dire in criminal and not civil cases. Alternatively, acting on the presumption that the trial court would follow section 223, the defense asked the trial court to exercise its discretion under section 223 to modify voir dire procedures. Specifically, defense counsel asked the trial court to allow: 1) supplemental general voir dire to follow-up on written responses in the questionnaires; 2) individually sequestered examination of each prospective juror; and 3) the attorneys to conduct some or all of the questioning. (*Id*.)

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[21] At the motion's hearing, defense counsel modified the request seeking sequestered voir dire for all areas of questioning, not only the ***Hovey***, or "death qualification," inquiries. (RT 74.)

James Robinson's counsel advanced several arguments in support of the request for supplemental, general voir dire. Counsel argued that additional voir dire was necessary to supplement the prospective jurors' responses to the questionnaire. Two specific areas were singled out as deserving special attention. The first concern was the problem of prejudicial, pre-trial publicity. Counsel noted that the case had generated substantial pretrial publicity in the immediate area from which the jury pool was drawn. As counsel pointed out, responses to the questionnaires showed that 39% of the jurors had heard about the case in the media. (RT 76.) Attached to the defense motion were eleven print articles alone about this case. (CT 216-231.) The second area of concern was race. Counsel noted that the racial aspects of this case (involving an African-American defendant accused of killing two White teenagers) were especially sensitive in the atmosphere of racial tension existing in the Los Angeles area at the time of James Robinson's trial. Specifically, the federal trial in the Rodney King case was then underway and also the trial of three men accused of assaulting truck driver Reginald Denny during the 1992 riots. (CT 200-215.) The possibility of race riots similar to those seen only a year earlier after the verdict acquitting the police officers in the first King trial was a genuine concern which is reflected throughout James Robinson's trial. The trial court here often commented to the jury about the progress of the King case in federal court, and had plans to recess early when the verdict in that case was to be announced. (*See*, RT 624-626.)

Defense counsel next argued that supplemental voir dire was vital in this case because the questionnaires had not yielded sufficient information upon which to base challenges for cause. (CT 200-215; RT 75-76.) Counsel noted that the time allotted for the prospective jurors to complete

the questionnaire had been insufficient for them to reflect and to provide accurate and truthful answers:

> The prospective jurors in this case were sworn at 10:47 a.m., on March 30, 1993. Most [with the exception of those who claimed hardship] were given a questionnaire at that time and told that it must be completed and returned not later than 1:30 p.m. Many returned the questionnaire before the noon recess at 12:00. Of those, the best had approximately 45 minutes to complete a form which required detailed explanation and no less than 96 separate responses. That is an average of 28 seconds per response, and it should be noted that many of the responses required detailed thoughts regarding the death penalty.

(CT 214.)

With respect to the request for attorney-conducted questioning, defense counsel addressed the concerns of judicial economy and efficient administration of criminal cases reflected in the enactment of section 223. Defense counsel argued that the lawyers would be better able than the trial court to probe the jurors' responses to discover unknown or unrevealed biases attributable to pre-trial publicity and/or racial attitudes because they had superior knowledge of the facts of the case. (*See*, CT 202-208.) Counsel further noted that both he and the prosecutor were experienced trial lawyers and therefore would be able to conduct the requested supplemental questioning quickly and efficiently. (CT 202-208.)

Trial counsel next made several arguments in favor of individualized voir dire. (CT 208-215.) Counsel noted substantial authority establishing that group questioning about attitudes toward the death penalty results in inaccurate responses. Moreover, counsel cited authority establishing that

the impartiality of the jury is compromised by group questioning in this area. Jurors become increasingly "death prone," and are more inclined to return a death verdict after being exposed to group questioning concerning death qualification. (*See*, CT 210-215.)

d. The trial court's rulings on the defense motion for sequestered, attorney conducted voir dire.

The trial court denied the defense request for supplemental, general voir dire. The court held that the questionnaire's inquiries concerning racial bias were sufficient under then existing case law and that the limitations on voir dire imposed by section 223 did not violate federal constitutional guarantees of due process, equal protection or the defendant's Sixth Amendment right to an impartial jury. (*See*, RT 79-82.)

With respect to prejudicial pretrial publicity, the trial court found that the completed juror questionnaires revealed that these prospective jurors had little knowledge of the case. The trial court further found that the questionnaire had been administered properly and that the prospective jurors had provided sufficient information for counsel to exercise challenges for cause and peremptory challenges. (RT 83-84.) In explaining its rulings, the trial court stated that, pursuant to it's reading of the California Court of Appeal's decision in ***People v. Taylor*** (1992) 5 Cal.App.4th 1299, the judge was not permitted to ask the prospective jurors open-ended questions during voir dire. (RT 82.)

The trial court also denied the defense request for sequestered voir dire. In the court's view, counsel had effectively had a sequestered voir dire concerning death qualifications because each juror responded in writing (via the questionnaire) to questions about their attitudes concerning the death penalty. (RT 83-84.) The trial court rejected the defense contention that the jury would become more "death prone" if the ***Hovey***

voir dire was not sequestered. (RT 84.) The court never addressed the argument that sequestered voir dire was necessary to ensure juror candor in the larger social and historical context of this case.

e. The trial court's voir dire of the jury selected to try the guilt phase.

The trial court in James Robinson's case handled voir dire without counsel's participation. Questioning was conducted in front of the entire panel of approximately 100 prospective jurors. Before starting the voir dire, the trial judge had the court clerk call 18 names, and those prospective jurors were seated in the jury box. (*See*, RT 86.) The court then gave a brief description of the case, introduced the parties and both counsel, and had the prosecutor read a list of the people's witnesses. (*See*, RT 87-89.)

The court's voir dire was very brief in most cases. At the outset, the judge asked each juror was asked if they wanted to make any changes to their responses on the questionnaire. (*See*, RT 90.) If the juror had no changes to make, and the court had identified nothing in their questionnaire which appeared to disqualify them from jury service in this case, the court asked no questions apart from the four "death qualifying" inquiries. All jurors were asked the same four questions concerning the death penalty:

> The Court: Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid the death penalty issue?
>
> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to

> any special circumstance alleged merely to avoid the death penalty issue?
>
> Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of what the evidence is in this case you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for the death penalty?
>
> Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of what the evidence is in this case, you would always vote for death and never vote for life imprisonment without the possibility of parole? (RT 91-92.)

Sixty prospective jurors were placed in the jury box for voir dire. Five prospective jurors were excused for financial hardship. (RT 169, 216, 232, 235, 236.) Eight others were excused by stipulation of counsel for reasons ranging from pre-paid vacation plans to personal problems to the prospective juror's stated inability to determine a capital case. (*See*, RT 98, 177, 183-184, 185,186, 203, 207.) The remaining pool of prospective jurors was thus reduced to 47. Of these, 24 prospective jurors (over half of the remaining jury pool) underwent no questioning at all apart from the four death qualifying inquiries. (*See*, RT 90, 96, 106, 107, 109, 122, 128, 132, 144, 150, 167, 170, 180, 183, 200, 207, 210, 213, 214, 215, 225, 236, 238, 240, 242.) Another eight of these jurors answered only one or two

superficial questions which were largely irrelevant to their qualifications to hear this case. (*See*, RT 112, 146, 163, 171, 181, 187, 190, 236.) The practical result was that from a total pool of 47, 32 prospective jurors had answered no significant follow-up questions on voir dire. Of the 18 jurors actually selected to hear the case, 16 had undergone absolutely no questioning in court, and the other two answered only minimal background inquiries. (*See*, CT 257.) The trial court, therefore, effectively determined whether jurors were qualified solely on the basis of its written questionnaire.

The trial court asked additional questions in only a few circumstances. Further inquiry was made where a prospective juror's responses to the questions indicated that they had feelings against the death penalty. (*See*, RT 93, 101, 115, 203, 205, 218.)[22] The court questioned the jurors further if any areas on the questionnaire were left blank (*See*, RT 123, 159, 171.) In some cases, the court questioned jurors further where they had admitted favoring the prosecution merely because charges had been filed, or where their responses stated a similarly clear bias toward the State. (*See*, RT 98, 134,178, 194, 197, 222, 232.)

f. The time allowed for jury voir dire.

The first jury was selected in just over one court day.[23] Only 199 minutes of court time was spent to complete the voir dire of 61 prospective

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[22] In some cases, the court asked additional questions where the prospective juror's questionnaire revealed an obvious concern such as acquaintance with a witness, counsel or the court. (*See*, RT 146, 186, 227.)

[23] Counsel exercised several peremptory challenges, and the 12 jurors and six alternates were chosen in the first few minutes of the next court day. (*See* RT 231-244; CT 257.)

jurors. The average length of questioning, therefore, was approximately three minutes for each juror. The actual time spent on juror questioning was probably much less, as the figure of 199 minutes of court time includes time spent on other matters such as the court and counsel's discussions concerning challenges for cause and objections. (*See*, RT 86-244; CT 256.)

g. Defense challenges for cause in the guilt phase.

The defense made three challenges for cause in the guilt phase. Two of these challenges were due to pro-death penalty bias. All defense challenges for cause were denied.

> Mr. Hill: With respect to juror number 8, Mark Veltre.
>
> * * *
>
> The juror has indicated in response to question number 53 that he favors the death penalty. And if the defendant is given a completely fair, unhurried trial, and is found guilty, that would be an appropriate penalty. I believe this shows an inability or impairment on the part of the juror to evaluate such matters as mitigation evidence. It shows a disposition on the part of this juror.
>
> The Court: As to that, he stated that he would follow the law. He would consider each penalty, in and of itself, and passed the ***Wainwright v. Witt*** criteria. Challenge for cause is overruled. (RT 153.)

Later, the defense made another challenge for cause.

> Mr. Hill: With regard to the alternate juror who is seated in the "D" position, Mr. Frank Grdanc. The challenge would be to this juror because of the fact that he appears to be of a particular crime threshold.
>
> In answer to question number 53 in particular, he indicated that the

death penalty is the cost or penalty to be imposed in cases of extreme violence.

Counsel has not had the opportunity to question this juror. It may very well be that he would be predisposed in this case to vote in favor of death given his feelings, as evidenced by the questionnaire, without deference to other factors such as mitigation.

The Court: Not only did he answer the ***Wainwright v. Witt*** criteria correctly – by "correctly" I meant in a way to withstand challenge for cause – but he also answered the ***Witherspoon v. Illinois*** questions. And the challenge is disallowed. (RT 154-155.)

The defense's third challenge for cause was based on the prospective juror's pro-prosecution bias and his connections to the victims in the case.

Mr. Hill: There is a challenge for cause to the juror who is seated in the first alternate position, number 13 or "A" as designated.

The Court: Mr. Stevens.

Mr. Hill: Mr. Stevens indicated in his questionnaire that his sentiment is with the prosecution. He is also, I believe, impaired [in] that for a fact he spoke to neighbors who apparently were related in some fashion to the victim's parents in this case. I believe that is

sufficient causal basis for excusal in this case.

The Court: Mr. Stevens clarified the response that he made in open court. In fact, that he is familiar with certain people, whether or not, apparently they are not witnesses, but he is familiar with the area and the crime scene is insufficient to uphold a challenge for cause. It is overruled.

(RT 153-154.)

Defense counsel removed all three of these prospective jurors with peremptory challenges. (RT 153, 175.)

h. The trial court's treatment of prospective jurors with reservations concerning the death penalty and the prosecutor's exercise of peremptory challenges to exclude them.

As noted above, the trial court rarely asked prospective jurors for additional information during voir dire apart from the four death qualifying questions. Where, however, prospective jurors expressed scruples about imposing the death penalty, the court became more engaged and posed further inquiries. Only 15 prospective jurors were asked any significant questions at all during voir dire. (*See*, Sub§ B(1)(e), *supra*.) Of these, six were questioned further because they expressed some degree of reservation about capital punishment. (RT 93, 101, 115, 203, 205, 218.)

Prospective Juror James Hawkes underwent the most extensive questioning of any prospective juror participating in this case. Mr. Hawkes was an attorney who had practiced criminal law in another state. (RT 101.) The juror clearly had scruples about the death penalty. Mr. Hawkes stated that it would be difficult for him to impose the death penalty. However, he

responded "correctly" to the court's four questions. Mr. Hawkes stated that he could vote to impose the death penalty "in some situations." (RT 103.) Mr. Hawkes confirmed that he could vote for a death verdict depending upon "[h]ow the crime was carried out." (RT 105.)

The trial court overruled the prosecution's challenge for cause. (RT 106.) After the court's rulings on the defense challenges for cause, defense counsel expressed the following concern about Mr. Hawkes:

> Mr. Hill: Judge, if I can bring up one individual point. It is my understanding that Mr. Barshop [the prosecutor] will be using a peremptory challenge to a particular juror. That is one I would like to be heard at this time.
>
> The Court: As to the peremptory challenge, you can be heard. This is somewhat premature. Normally I would say no. I have a feeling that you are talking about prospective juror number 4, Mr. Hawkes.
>
> Mr. Hill: That's correct.
>
> The Court: You don't have to answer this, Mr. Barshop.
>
> Mr. Barshop: Yes.
>
> The Court: The answer is you intend to peremptorily challenge Mr. Hawkes?
>
> Mr. Hill: With regard to that, I am aware of the decision in California which states both sides can exercise

peremptory challenge based on their viewpoint with a juror's decision. Nevertheless, with respect to this particular juror, it is the feeling of defense counsel that essentially ***Witherspoon v. Illinois*** precluded the wholesale elimination of a juror who might have a predisposition against a death penalty. Essentially, by exercising his peremptory challenge, the prosecution may be attempting to do by indirection what it could not do directly.

For that reason, the defendant would be deprived of a cross-section jury with regard to this case and essentially Mr. Hawkes is being eliminated because of his feelings and inclinations against the death penalty.

The Court: One moment, please. Without citing the last 15 cases, I will just cite the most recent, ***People v. Pinholster***, at 1 Cal.4th 865, that those with scruples about imposing the death penalty are not a cognizable class and does not deny a defendant a cross section of the community for peremptory challenge.

(RT 155-156.)

The prosecutor subsequently removed Mr. Hawkes through a peremptory challenge. (RT 157.)

Prospective juror Ms. Rants received similar treatment. Ms. Rants expressed reservations about capital punishment, but also "correctly"

answered the four death qualifying inquiries. She too was removed through a peremptory challenge. (RT 212.) Two other prospective juror who were even slightly hesitant about the death penalty were removed through peremptory challenges. (RT 157 [Mr. Glass]; 232 [Mr. Lapides].) Other prospective jurors who plainly opposed capital punishment were removed for cause almost immediately by the trial court without counsel having any opportunity to explore their views, the extent of their opposition or to discover whether and under what circumstances they might find the death penalty appropriate. (*See*, RT 115, 203, 205.)

i. The final pool of prospective jurors.

As noted above, 60 prospective jurors were placed in the jury box for voir dire. Eleven of these prospective jurors were excused by stipulation between counsel for a variety of reasons. (*See*, RT 99; 100; 169; 177; 185; 187; 207; 217; 232; 235; 236.) The prosecutor made two challenges for cause, both of which were sustained. (RT 121; 204.) The defense made three challenges for cause, all of which were denied. (*See*, RT 153-155.) There were 47 prospective jurors remaining from which counsel could exercise peremptory challenges to select a jury.

Out of the remaining 47 prospective jurors, 32 answered no substantive questions on voir dire. (*See*, Sub§ B(1)(e), *supra*.) James Robinson contends that 10 of the 47 prospective jurors ought to have been excluded for cause, or at least questioned further, due to various indications of bias. (*See*, RT 112; 123; 137; 142; 178; 181; 194; 199; 223; 227.) He further contends that the trial court's voir dire process did not yield enough information to determine whether these prospective jurors were qualified to hear his capital case. Sixteen of the eighteen jurors chosen to try the case

answered no questions whatsoever apart from the four death qualifying questions.

2. *Jury selection and voir dire in the penalty phase retrial.*

a. Time allowed for the questionnaire.

The panel were given even less time to complete the trial court's questionnaire in the penalty phase re-trial. In selecting the second jury, the prospective jurors did not receive the form until well past 11:00 a.m. (RT 1729; 1734.)[24] The trial court made it clear that the jurors were pressed for time to complete the questionnaire. Three times the trial judge stated on the record that the form was to be turned in by 12:00 noon. (*See*, RT 1729; 1731; 1732; 1734.) The court's final word to the prospective jurors about the questionnaire was "turn it in before noon or 11:30." (RT 1734.) It was well past 11:00 a.m. when the court made this statement.[25]

[24] The record indicates that the panel entered the courtroom at 10:58 a.m. (RT 1729.) The prospective jurors were sworn, and the court addressed them for at least 10 to 15 minutes before they were excused. The record does not state when the panel of prospective jurors left the courtroom. (*See*, RT 1734.)

[25] The panel was told to turn in the questionnaire by 1:30 p.m. at the latest. However, they were also informed that the courtroom would be locked from 12:00 noon to 1:30 p.m., and that they were free to leave after turning in the form. (RT 1732.)

b. Defense counsel renews the motion for attorney conducted voir dire, sequestered voir dire and additional questions in particular areas.

Counsel renewed the defense motion for attorney conducted voir dire and individual, sequestered voir dire before jury selection began in the penalty phase retrial. (RT 1720.) The trial court denied the motion a second time. (RT 1727; CT 618.) The judge again conducted the voir dire without allowing either the prosecutor or defense counsel to follow-up with any questions based on the prospective jurors' questionnaire responses. (See RT 1837-1839.)

The trial court also denied defense counsel's requests for additional questioning in certain areas. Before voir dire began, defense counsel addressed the court with the following requests:

> Mr. Leonard: I'd also like the court to ask that, because I would be asking had I been allowed to do the voir dire, judge, to explain to the jurors – the first question you get when they go back into the deliberating room, the first question that will always come out while they are in deliberations: does life without the possibility of parole mean life without the possibility of parole. In other words, they are always asking can the governor go and pardon somebody. And I'd like the court to tell the prospective jurors that life without the possibility of parole means exactly that. Number 1.
>
> Number 2. I'd like the court to tell the prospective jurors they

> are not supposed to take into account whether the death penalty is a deterrent to crime because it may or may not be, but the are not supposed to consider it.
>
> Three. I'd like the court to take into consideration well, advise the prospective jurors that they are not to take into account the cost. Because all jurors feel if we give a person the death penalty that it is going to be economically more feasible for the public, and we know that not to be true. We know it costs more to kill a person or put a person on death row than it does to put them in jail for the rest of their life. (RT 1800-1801.)

The trial court denied all of these requests by defense counsel. (RT 1801-1802.)

c. The trial court's refusal to conduct voir dire concerning racial attitudes.

As noted above, the trial court refused to conduct any supplemental voir dire and relied almost entirely on the questionnaires. However, at defense counsel's request, the court did agree to inform the panel of the racial difference between James Robinson and the victims during voir dire. (RT 1802.) The trial court did not alter its voir dire to include questioning concerning the prospective jurors' racial attitudes. Before beginning voir dire, the court addressed the entire panel as follows:

> Now, one thing I will mention is the defendant, as you can see, is an African-American. The victims in this case are white. Now race is not

> an issue at a penalty trail and is not to be considered by you.
>
> Is there anyone on the panel before me that would ignore this dictate?
>
> Negative response.

(RT 1807.)[26]

d. Voir dire concerning death qualification.

For the penalty phase retrial, the court posed only two questions concerning the death penalty:

> The Court: Do you have such conscientious objections to the death penalty that regardless of the evidence you would automatically vote for life imprisonment without the possibility of parole and never vote for a verdict of death?
>
> Do you have such conscientious opinions regarding the death penalty that regardless of the evidence at this trial you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

(*See*, e.g., RT 1810-1811.)

e. The time allotted for voir dire and the trial court's questioning of prospective jurors.

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[26] The trial court briefly reminded the jurors not to consider race four times as new groups of prospective jurors were called for questioning. The court did nothing more. (*See*, RT 1845; 1880; 1906; 1910.)

Voir dire for the penalty phase proceeded even more quickly than it had in the guilt phase trial. In the penalty retrial jury selection was completed within a matter of a few hours, in less than one court day. (CT 619.) The jurors and the alternates were sworn and excused by 3:32 p.m. of the same day that they arrived in court to begin voir dire. (CT 619; RT 1804.) Only 167 minutes of court time was spent on jury selection for the penalty retrial. (*See*, RT 1804-1935.)

A total of 70 prospective jurors had their names called and were placed in the jury box. (*See*, RT 1804 - 1935.) Of these, 40 prospective jurors answered ***no*** questions apart from the two death qualifying inquiries. In most cases where prospective jurors were questioned, the court's inquiries were brief and usually served only to clarify minor points. (See, e.g., RT 1827-1829.) Eleven of the twelve jurors who decided the case in the penalty phase underwent no voir dire other than the two death qualifying questions. (*See*, CT 619.) The same was true for five of the six alternate jurors. (*Id.*)

The average time devoted to voir dire was approximately 2.3 minutes per prospective juror. Even this estimate is generous because the figure of 167 minutes includes time not spent on juror questioning, such as discussions between the court and counsel on other matters such as challenges for cause and peremptory challenges. The average voir dire of a prospective juror was, therefore, probably less than two minutes.

f. Defense challenges for cause.

Defense counsel made three challenges for cause in the jury selection for the penalty phase retrial. The challenges were based upon the prospective jurors' responses to the questionnaire which, absent the

opportunity to clarify the responses with further questioning, appeared disqualifying.

> Mr. Leonard: It will be on number 3, Mr. Nguyen. Notwithstanding the fact that he is an engineer, but regarding his answer to question number 53, when you read his answer it appears he would vote death because he feels like most people in California that it costs too much money to leave people in jail. And for that reason only, his answer is that he would save the taxpayers money. I'd submit it.
>
> The Court: All right. Under the standard I have before me as espoused in ***Wainwright v. Witt*** . . . at 469 U.S. 412, and this has been upheld many, many times, most recent of which is ***People v. Wash***, . . . 6 Cal.4th 215, is whether the juror's views would prevent or impair the performance of his duties of a juror in accordance with the instructions and the oath given. I don't see that and the challenge for cause is disallowed.

(RT 1837-1838.)

Another juror, Ms. Carla Torrez, expressed the same views, and was also not excused.

> Mr. Leonard: Again, her answer to question number 53, basically what it

says is that it costs too much to leave criminals in jail and that we are better off giving them death to save the taxpayers money, and I'll submit it.

The Court: Again, that's just a statement of philosophy, not a statement under ***Wainwright*** or ***Witt*** or the other cases I have cited, and the challenge for cause is denied.

(RT 1839.)

Finally, defense counsel argued that another juror, Ms. Karen Lehman, should be excused for cause because she favored death for any premeditated murder.

Mr. Leonard: She answers question number 53 when she says, 'I'm in favor of death in premeditated murder cases.'

I don't think the jurors understand that – they know he has been convicted – I don't think they understand that this is a premeditated murder. It's been thought out. It was intentional. And I think when they explain that to jurors that the person went into the Subway shop, he robbed the place, he intentionally executed two people, shot them both in the head. If they know those facts, and know that alone, most of them would say, 'I don't care anything about the defendant. I am going to automatically vote for death.' I think that that's what she is saying when she is saying,

> 'I'm in favor of death in premeditated murder cases.' And that's what we have here, and I'll submit it.
>
> The Court: When that answer is read in light of all the other answers in, for lack of a better term, death qualification questions, the standard under ***Wainwright v. Witt*** has not been met and the challenge for cause is disallowed.

(RT 1838-1839.)

Defense counsel exercised peremptory challenges to remove all three of these jurors. (RT 1844, 1879.)

g. The trial court's treatment of prospective jurors with scruples concerning the death penalty and the prosecutor's exercise of peremptory challenges.

As in the guilt phase, the trial court singled out prospective jurors expressing any reservations about capital punishment for more intense scrutiny. Any juror stating moral opposition to the death penalty was excused for cause, usually without probing questioning to determine if there were any circumstances under which they could impose the penalty. Those jurors expressing some reluctance short of a firm moral viewpoint were questioned further by the court. (See, RT 1807-1810 [Mr. Brochu]; 1815-1817 [Ms. Hyman]; 1848-1852 [Mr. Bradley]; 1856 [Ms. Powell]; 1897-1898, 1903 [Ms. Goldstein].) In all but one case, the prosecutor exercised peremptory challenges to remove these prospective jurors. (RT 1843, 1845, 1864, 1907.)

h. The final jury pool in the penalty phase.

While 70 prospective jurors underwent voir dire, the jury pool was relatively small. Six jurors were excused by stipulation between counsel for a variety of reasons including financial hardship, pre-paid vacation plans, and trouble understanding the English language. (*See*, RT 1818, 1855, 1894, 1912, 1929, 1930.) The prosecutor challenged seven prospective jurors for cause, and the trial court sustained all of these challenges. (RT 1835, 1846, 1855, 1870, 1895, 1896, 1916.) Defense counsel made six challenges for cause, only three of which were sustained. (RT 1837-1841; 1847, 1872, 1906.) The result was a jury pool of 54 prospective jurors from which counsel could select the jury using their peremptory challenges. As in the guilt phase, James Robinson contends that the trial court did not have enough information to determine challenges for cause. He also argues that an additional 9 of the remaining 54 prospective jurors ought to have been excluded for cause due to various indications of bias which the trial judge did not follow-up on through voir dire. (*See*, section D, *infra*.)

C. Code of Civil Procedure Section 223 Denies Criminal Defendants Their State and Federal Constitutional Rights to Equal Protection, Due Process of Law and a Fair Trial by Inhibiting the Effective Voir Dire of Jurors Necessary to Determining Challenges for Cause.

1. *Background And Overview Of Legal Arguments*.

In June of 1990, California voters approved Proposition 115, known as "The Crime Victim's Justice Reform Act." (*See*, ***Raven v. Deukmejian*** (1990) 52 Cal.3d 336, 340.) The result was the enactment of section 223, a statute establishing restrictive procedures for jury voir dire in criminal cases. Pursuant to section 223, the parties have no right to voir dire the jurors, even in a capital case. Voir dire is handled by the trial court which may, at its discretion, permit some attorney questioning. In addition to

altering the previous system of attorney-conducted voir dire, the statute establishes that any voir dire be limited to that necessary to exercise challenges for cause. Section 223 provides, in relevant part:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice as specified in section 13 of Article VI of the California Constitution.

Jury selection in ***civil*** cases is governed by CCP § 225.5 which provides each party's counsel the right to examine prospective jurors so that they may "intelligently exercise peremptory challenges and challenges for cause." The statute governing jury selection in the context of a ***criminal*** trial, section 223, is thus far more restrictive of the parties' rights.

James Robinson submits that section 223 violates the equal protection clauses of both the state and the federal constitutions by allowing civil litigants far greater access to voir dire of potential jurors than is

afforded to the defendant in a criminal case. Moreover, the statute's limitations on voir dire in criminal trials undermines defendants' rights to due process of law pursuant to the Fifth and Fourteenth Amendments, a fair trial before an impartial jury as required by the Sixth and Fourteenth Amendments, and the reliable determination of guilt and of the penalty which the Eighth and the Fourteenth Amendments require in a capital case.

2. *CCP § 223's differential treatment of civil and criminal litigants cannot withstand the strict scrutiny required for infringement upon the fundamental rights to due process of law, a fair trial and an impartial jury*.

The Equal Protection Clause to the Fourteenth Amendment to the United States Constitution commands that no state shall "'deny to any person within its jurisdiction the equal protection of the laws' which is essentially a directive that all persons similarly situated should be treated alike." (***People v. Boulerice*** (1992) 5 Cal.App.4th 463, 471, quoting ***Cleburne v. Cleburne Living Center, Inc.*** (1985) 473 U.S. 432, 439.) It is axiomatic that the Fourteenth Amendment prevents states from legislating "that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the object of that statute." ( ***Eisenstadt v. Baird*** (1972) 495 U.S. 438, 446-447; ***Reed v. Reed*** (1971) 404 U.S. 71, 75-76.) The California Constitution contains a similar equal protection clause which may in some instances provide even broader protection than its federal counterpart. (***People v. Leung*** (1992) 5 Cal.App. 4th 482, 494.)

To challenge a statute on equal protection grounds, a party must first show that the statutory classification results in the disparate treatment of two similarly situated groups. (***People v. Leung***, *supra,* 5 Cal.App.4th at 494; ***McLean v. Crabtree*** (9th Cir. 1999) 173 F.3d 1176, 1185; ***United***

***States v. Lopez-Flores*** (9th Cir. 1995) 63 F.3d 1468, 1472.) In the present case, the groups are criminal and civil litigants. As noted above, California's two statutes governing jury selection treat criminal litigants vastly differently from parties in civil litigation. This disparate treatment of civil and criminal litigants cannot withstand constitutional scrutiny.

After determining the groups to be compared, the equal protection analysis proceeds to a determination of what level of scrutiny is appropriate. (***People v. Leung***, *supra*, 5 Cal.App.4th at 494.) The level of scrutiny is determined by examining the interests affected. As stated by one court, this assessment depends upon the "classification involved in, and the interests affected by, the challenged law." (***People v. Leng*** (1999) 71 Cal.App.4th 1, 11.) The private interests affected by the statute are obvious. All litigants have an interest in receiving a fair trial before qualified jurors. For the criminal defendant, however, the interest is somewhat greater. A criminal defendant's right to a fair trial before an impartial jury is a fundamental personal right. (***Irwin v. Dowd*** (1961) 366 U.S. 717, 722; ***United States v. Sarkisian*** (9th Cir. 1999) 197 F.3d 966, 980; ***In re Lance W.*** (1985) 37 Cal.3d 873, 891.) Any appreciable impact or significant interference with this fundamental constitutional right is subject to strict scrutiny analysis. (***Nordlinger v. Hahn*** (1992) 505 U.S. 1, 10; ***Rodriguez v. Cook*** (9th Cir. 1999) 169 F.3d 1176, 1178; ***People v. Boulerice***, *supra* at 471.) The state interest reflected in section 223 is less clear. The state interests underlying Proposition 115, and the subsequent enactment of section 223, have been described as the interests in "reduc[ing] the unnecessary costs of criminal cases and creat[ing] a system in which justice is swift and fair . . ." (***People v. Boulerice***, *supra*, 5 Cal.App. 4th at 474, quoting Prop. 115 § 1(b) and (c).) Although not stated in the Proposition, the courts of appeal in

***Boulerice*** and ***Leung*** speculated that one of the statutory purposes was ending purported voir dire abuses which unduly prolong the trial process. (***Leung***, 5 Cal.App.4th at 496; ***Boulerice***, 5 Cal.App.4th at 480.)

Under a strict scrutiny standard, the state must show that the challenged statutory classification: (1) bears a close relationship to the promotion of a compelling state interest; (2) is required to achieve the government's goal; and (3) is narrowly drawn to achieve the goal by the least restrictive means necessary. (***Craig v. Boren*** (1976) 429 U.S. 190; ***People v. Leng***, *supra,* 71 Cal.App. 4th at 11.) The state bears the burden of proving that the statutory classification meets all three prongs of the aforementioned test. (***Craig v. Boren***, *supra*, 429 U.S. 190.) Section 223 cannot satisfy even a single prong of this constitutional standard.

In the present case, the State made no showing whatsoever regarding the statute's relationship to the interests it supposedly promotes, i.e., judicial economy and the efficient administration of the criminal justice system. As defense counsel argued in the motion, there was no empirical evidence supporting the premise that criminal litigants were more abusive of jury voir dire procedures than civil litigants. (CT 200-215.)

The only "support" for distinguishing voir dire in criminal and civil trials is found in two court of appeal decisions. These courts upheld section 223 based on the "common knowledge" of voir dire abuses by criminal litigants. The courts speculated that section 223 was designed to expedite justice by preventing situations "where voir dire was tediously and unnecessarily prolonged for improper purposes." (***People v. Leung***, *supra*, 5 Cal.App. 4th at 496; ***People v. Boulerice***, *supra*, 5 Cal.App. 4th at 480.) The ***Leung*** and ***Boulerice*** courts had little if any evidence that voir dire abuses were more frequent in criminal as opposed to civil cases. These

courts of appeal relied solely upon two ancient cases, one 72 years old and the other 29 years old (***People v. Estorga*** (1928) 206 Cal. 81, 84; ***People v. Adams*** (1971) 21 Cal.App. 3d 972, 979), stating that in those times it was common knowledge that criminal attorneys abused the voir dire process.

The courts in ***Leung*** and ***Boulerice*** thus piled speculation upon conjecture and dated anecdotal evidence to justify the unequal treatment of civil and criminal litigants under section 223. This is plainly inadequate support for a statutory classification allowing disparate treatment of two similarly situated groups. Even assuming *arguendo* that there was credible evidence of voir dire abuses, this statute's classification does not effect a cure for that problem. If the State were truly interested in controlling excessive voir dire, it ought to have enacted the same restrictions in civil cases.

Section 233's classification establishing differential treatment for criminal and civil litigants not only lacks empirical support but it defies simple logic. An even more efficient solution would be to eliminate voir dire in civil cases as well as in criminal cases. For all of these reasons, the statute's classification falls of its own weight and cannot withstand strict scrutiny.

3. *The State cannot show even a rational relationship between the statutory purpose and the disparate treatment of civil litigants and criminal defendants*.

Even if a rational relationship analysis is applied to the classification used in section 223, the statute cannot withstand an equal protection challenge. Applying this level of scrutiny, the statutory classification need only bear a rational relationship to a legitimate state interest. (***Lucas v. Superior Court*** (1988) 203 Cal.App. 3d 733, 738.) The State presumably has a legitimate interest in preventing abuses of the voir dire process. Efficient administration of the criminal justice system may also be considered a legitimate interest. As discussed previously, the State has advanced no evidence demonstrating a relationship between the statutory classification and the protection of these interests. For all of the reasons set forth above, there is no basis for concluding that abuses of voir dire occur more often in criminal as opposed to civil trials. Antiquated anecdotal evidence gleaned from two court of appeal opinions briefly mentioning the "common knowledge" of such abusive defense tactics is insufficient under any constitutional standard of review. Moreover, as defense counsel contended in the trial court, there was far stronger evidence establishing the contrary proposition, i.e., that attorney conducted voir dire actually enhances efficiency rather than promoting delay. (CT 200-215.)

Counsel for James Robinson presented evidence and legal authority establishing that attorney-conducted voir dire was in fact more efficient than a system of exclusively court-conducted questioning. Counsel cited a survey of federal judges who reported insignificant differences in the duration of voir dire when supplemented by attorney questioning. (*See*, CT 200, 208, citing Bermant, Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges, (Federal Judicial Center 1977).)

Another study cited by trial counsel revealed that prospective jurors are more thorough and forthcoming in their responses to questions asked by counsel rather than by the court. (*See*, CT 200, 207, citing Jones, Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor," Law and Human Behavior 131 (June 1967). *See also*, ***People v. Williams*** (1981) 29 Cal.3d 392, 403.) These studies and others provide far more reliable evidence to support equal treatment of civil and criminal litigants with regard to voir dire. There is no comparison between ancient anecdotal information stated in a case from the 1920's and modern empirical studies reflecting unbiased data on recent attitudes and procedures for jury voir dire. It is, therefore, clear that there is no demonstrable relationship between the statute's stated goals and its restriction of voir dire in criminal cases. CCP § 223's disparate treatment of these two groups must, therefore, fail under any equal protection analysis.

4. *The strict application of Section 223 prevented a meaningful voir dire of prospective jurors in this capital case.*

The trial court's strict adherence to the voir dire procedures outlined in section 223, which deny criminal but not civil litigants the opportunity for meaningful jury questioning, denied James Robinson the equal protection of the law guaranteed by the federal constitution (***Cleburne v. Cleburne Living Center, Inc.***, *supra*, 473 U.S. 432, 439; ***Eisenstadt v. Baird***, *supra*, 495 U.S. 438, 446-447*;* ***Reed v. Reed***, *supra*, 404 U.S. 71, 75-76 ), and the California Constitution (***People v. Boulerice***, *supra*, 5 Cal.App.4th 463, 471; ***People v. Leung***, *supra*, 5 Cal.App. 4th 482, 494.) As discussed below in section D, the statute grants trial courts some discretion to modify voir dire procedures. In this case, however, the trial court refused to deviate from the rigid procedures for voir dire set forth in

section 223. Counsel had no opportunity to question the prospective jurors, and prospective jurors were not sequestered for questioning in significant areas. As a result, the voir dire did not yield enough accurate information about the prospective jurors for the court to meaningfully determine challenges for cause.

The statute thus operated to deny James Robinson due process of law, and a fair trial before an impartial jury under the Fifth, Sixth and Fourteenth Amendments. Accordingly, neither the convictions nor the sentence of death satisfies the Eighth and Fourteenth Amendments' guarantees of reliability in capital sentencing. For these reasons, the verdicts and the sentence of death must be reversed.

D. The Trial Court's Application of Section 223 in This Case is Not Entitled to Deference on Appeal Because the Court Was Mistaken About the Extent of Its Statutory Authority to Modify Voir Dire Procedures and Abdicated Its Responsibility to Ensure James Robinson's Right to an Impartial Jury.

1. *Introduction and overview of arguments.*

In the previous section, James Robinson attacks the constitutionality of California's statute governing jury selection in criminal cases. In the series of arguments which follow he asserts that, should this Court find that section 223 is constitutionally sound, the statute was unconstitutional as applied by the trial court in this case. In the sections which follow, the arguments describe the various errors in the court's handling of voir dire and jury selection. Any one of these errors would justify reversal of the convictions and sentence. In addition, James Robinson contends that reversal is absolutely mandated by the combined presence of these errors in the jury selection process. (*See*, section L, *infra.*)

The discussion in this section concerns the standard of review applicable to these claims. Although claims concerning voir dire and jury selection procedures are frequently reviewed for abuse of discretion, James Robinson contends that independent review is appropriate in this case. As discussed below, the trial court's handling of voir dire does not reflect an exercise of its statutory discretion and, therefore, should be subject to a stricter level of scrutiny on appeal.

2. *This Court should independently review the trial court's handling of voir dire and jury selection in this case*.

Under both state and federal law, trial courts customarily have wide discretion concerning voir dire procedures. The trial judge's decisions in this area are normally entitled to deference on appeal, and are reviewed only for abuse of discretion. (*See, e.g.*, ***United States v. Baldwin***, (9th Cir. 1979) 607 F.2d 1295, 1298; ***Covarrubias v. Superior Court*** (1998) 60 Cal.App.4th 1168, 1182-1183.) James Robinson, however, contends that the abuse of discretion standard of review should not apply in this case for several reasons.

First, the voir dire methods used here do not reflect an exercise of the court's discretion but, rather, a mistaken view of the law. The trial judge incorrectly concluded that California law prevented the court from asking open-ended questions on voir dire. Because the court's failure to probe juror's responses resulted from its misunderstanding of the law, there was no exercise of discretion entitled to deferential treatment on appeal.

Second, the trial court's handling of the voir dire is not entitled to deference because the court blindly adhered to the minimum requirements set by the California statute instead of exercising its statutory discretion. The trial judge did not undertake a reasoned analysis of the competing

considerations present in this trial, and made no attempt to modify voir dire procedures to address legitimate concerns including juror exposure to pre-trial publicity and then-existing strong racial hostilities in the area. Even where signs of bias were unmistakably present from a prospective juror's questionnaire, or where counsel called the court's attention to a potential problem with a prospective juror's response, the court failed to probe the area during voir dire. Instead, the trial judge rigidly followed the minimal questioning as set forth in its standard form questionnaire.

For these reasons and those discussed below, James Robinson contends that the trial judge's handling of jury selection was so ineffective that it amounted to a complete abdication of the court's duty to conduct a sufficient voir dire and was not an exercise of discretion. However, even if this Court views the trial judge's conduct of voir dire as discretionary action, the trial court's voir dire was so deficient that it failed to ensure that impartial jurors were selected. This in itself constitutes an abuse of discretion requiring reversal.

3. *The trial court had the statutory authorization to modify voir dire procedures and had an affirmative duty to do so to ensure fairness in jury selection*.

a. Section 223 provides for expanded voir dire where necessary to ensure juror impartiality in a particular case.

The trial court in James Robinson's case plainly had the discretion under section 223 to grant the defense requests concerning voir dire. The statute expressly provides, in relevant part:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, ***the court may permit the parties, upon a showing of good cause, to***

> ***supplement the examination by such further inquiry as it deems proper***, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, ***where practicable***, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

[Emphasis added.]

Although the statute codifies a system of court-conducted voir dire, CCP § 233 thus expressly grants trial judges considerable latitude to adapt voir dire procedures to meet the needs of specific cases. (***People v. Chapman*** (1993) 15 Cal.App.4th 136, 141.) Section 223 both expanded the trial court's participation in voir dire and increased its discretion to adapt jury selection procedures. The statute also increased the trial court's responsibility to ensure a thorough voir dire of prospective jurors.

b. <u>The trial court apparently did not understand the scope of its statutory discretion, because it mistakenly believed that it was not permitted to ask open-ended questions during voir dire</u>.

At the motion's hearing, the trial court denied the defense requests for expanded voir dire based on its reading of the Court of Appeal's opinion in ***People v. Taylor***, *supra*, 5 Cal.App.4th 1299. In its discussion of the ***Taylor*** opinion, the trial court stated: "A trial court is not allowed to ask open-ended questions but may ask those questions that could call for a yes or no answer." (RT 82.) The trial judge's statement is an incorrect statement of the holding in ***Taylor*** and reveals that this court did not understand the scope of its discretion under CCP section 223.

In ***Taylor***, the defendant's claim on appeal was that the voir dire had been inadequate in part due to the trial judge's failure to ask open-ended questions. The court of appeal held that, on the facts of that particular case, the trial court's failure to ask the open-ended questions was harmless error. However, the ***Taylor*** court noted that the voir dire was inadequate in several respects particularly in the area of racial bias. (*Id.* at 1316-1317.)

Contrary to the understanding of the trial court in James Robinson's case, the ***Taylor*** opinion does ***not*** state that trial judges may not pose open-ended questions to prospective jurors during voir dire. On the contrary, in ***Taylor***, the court of appeals remarked favorably upon the use of open-ended questions:

> We do not say that the use of open-ended questions would have been inappropriate in this case, or that they may not be required in some cases. We do say that they were not constitutionally compelled in this case.

(*Id.* at 1316.)

It is apparent that the trial court in James Robinson's case believed, based on its mistaken reading of the ***Taylor*** opinion, that it lacked the discretion to use open-ended questions during voir dire. Where a trial court is mistaken about the scope of its discretion under section 223, and rules on the basis of that mistaken impression, no true exercise of discretion has occurred. (***Covarrubias v. Superior Court*** (1998) 60 Cal.App.4th 1168, 1182-1183.) As a result, the trial court's ruling on the defense motion for expanded voir dire is not entitled to the deference normally accorded to the exercise of its discretion concerning voir dire.

c. <u>The trial court had an affirmative duty to modify its standard means of voir dire to ensure that the prospective jurors' biases and prejudices would be discovered</u>.

Along with the more active role for the trial court under section 223 comes a heightened responsibility to insure that the voir dire process is meaningful and sufficient to discover the biases and prejudices harbored by prospective jurors. (***People v. Wilborn*** (1999) 70 Cal.App.4th 339, 347.) "Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (***People v. Earp***, (1999) 20 Cal.4th 826, 852, quoting ***Rosales-Lopez v. United States*** (1981) 451 U.S. 182, 188.)

The trial court has not only the ability to modify the voir dire procedures but a clear duty to do so to ensure fairness. Consequently, "where the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, [the trial court] commits reversible error." (***People v. Chapman***, *supra*, 15 Cal.App.4th 136, 141, quoting ***United States v. Baldwin***, *supra*, 607 F.2d 1295, 1298.)

E. This Court Should Reverse the Verdicts in Both Phases of James Robinson's Capital Trial Because The General Voir Dire Was Not Sufficiently Comprehensive For The Trial Court to Validly Determine Challenges For Cause as Necessary to Ensure James Robinson's Right to an Impartial Jury.

1. *Introduction*.

In this appeal, James Robinson makes several claims concerning the trial court's voir dire. In Sections H and I, *infra*, he contends that reversal is required due to the trial court's inadequate voir dire in the areas of race and pre-trial publicity. In this section, he demonstrates that reversal is necessary for the additional reason that the general voir dire was not sufficiently comprehensive. As discussed below, the trial court erred by

determining challenges for cause based on an inaccurate standardized questionnaire and its own minimal and inadequate follow-up questioning. These measures were ineffective for gathering relevant information about the prospective jurors. There is, therefore, no guarantee that the jurors selected in either phase of the capital trial were fair and impartial.

The trial judge determined challenges for cause largely on the basis of the prospective jurors' written responses to the court's standard form questionnaire. (CT 232-255; 595-616.) This reliance on the questionnaire was misplaced because the form did not provide the court or counsel with enough reliable information. The questionnaires were inaccurate for several reasons. First, the jurors did not have time to complete the questionnaire in a thoughtful manner. Most prospective jurors spent less than an hour with the form, and many questionnaires were returned incomplete. Even the completed forms contained inaccuracies which were revealed later during voir dire. Because the trial court conducted only minimal follow-up questioning, it is highly likely that many mistakes were never discovered. Second, a number of the prospective jurors plainly did not understand the questions on the form. Even the court's limited voir dire revealed that many jurors were confused by the questions. Again, because voir dire was so limited it is uncertain how many other misunderstandings were never discovered and corrected. Finally, the voir dire revealed that prospective jurors sometimes changed the views they stated on the form after further consideration. Because the jurors completed the questionnaires on their own, were never subject to follow-up questioning by counsel and only rarely questioned further by the court, it is uncertain how many other prospective jurors might have changed their minds with more thorough probing of their views on voir dire.

The trial court's standardized questionnaire was thus not a reliable basis for determining whether prospective jurors were suitable to hear James Robinson's capital case. The court's inadequate voir dire failed to clarify the situation and added little to the scant information obtained through the forms. The court's voir dire was cursory and superficial. In most cases questioning was limited to the "death qualifying" inquiries. Even where a prospective juror's questionnaire indicated a potential problem the trial judge rarely probed the area even where counsel had notified the court of the specific problem. (*See*, Sub§ 4, *infra*.)

In addition to its lack of thoroughness, a pro-prosecution bias emerges throughout the voir dire. The trial court was clearly more interested in obtaining "correct" responses than in searching out the prospective juror's real views. In several instances the court encouraged jurors to change their minds. The court actively "rehabilitated" pro-death penalty and pro-prosecution jurors. In cases where the prospective juror indicated that his/her inclinations did not favor the death penalty, the court "cued" the jurors as to the answer which would lead to disqualification. (*See*, Sub§§ 5-7, *infra*.)

As discussed more fully below, the voir dire was not sufficiently comprehensive for the trial court to reliably determine challenges for cause. There are, therefore, no assurances that the jurors selected to hear the capital case were impartial. Reversal is required to ensure James Robinson's constitutional rights to due process of law and a fundamentally fair trial before an impartial jury.

2. *The standard form juror questionnaire was poorly administered and contained inaccurate information.*

a. The prospective jurors were not allowed enough time to complete the long and complicated questionnaire.

The standardized jury questionnaire used in this case was both lengthy and complex. The questionnaire was 24 pages long and contained 56 questions in major areas. Of these 56 question areas, most contained multiple sub-parts so that the actual number of responses required was approximately 96. (*See*, CT 232-255; 595-616.) The difficulty of the form lay not just in the number of responses required but in the types of questions asked. Prospective jurors were asked to reflect on difficult moral and ethical issues, particularly their attitudes concerning the death penalty. (*Id.*)

The procedure for administering the questionnaire was guaranteed to gather incomplete and inaccurate information. The prospective jurors were not given enough time to complete the form, much less to provide thoughtful answers to the questions. As defense counsel noted, the first jury panel of approximately 100 jurors received the form at around 11:00 a.m. (RT 74-75; CT 256.) The jurors were strongly encouraged to return the completed form by 12:00 noon. (RT 39-42.) This allowed an average of only 28 seconds to answer each question. In the second jury selection the situation was even more time pressured. The prospective jurors there did not receive the form until well past 11:00 a.m. (RT 1729; 1734.)[27] These jurors, therefore, had even less time to complete the form.

The trial court made it clear that the jurors were pressed for time to complete the questionnaire. Three times the trial judge stated on the record

[27] The record indicates that the panel entered the courtroom at 10:58 a.m. (RT 1729.) The prospective jurors were sworn, and the court addressed them for at least 10 to 15 minutes before they were excused. The record does not state when the panel of prospective jurors left the courtroom. (*See*, RT 1734.)

that the form was to be turned in by 12:00 noon. (*See*, RT 1729; 1732; 1734.) The court's final word to the juror's about the questionnaire was "turn it in before noon or 11:30." (RT 1734.) It was well past 11:00 a.m. when the court made this remark.[28]

It is fantastic to believe that even the most conscientious juror could answer questions concerning philosophical issues such as capital punishment under these time constraints. As discussed below, the insufficient amount of time allowed to complete the questionnaire is reflected in the jurors' responses.[29] Even during the trial court's limited and inadequate general voir dire, numerous inaccuracies, mistakes and misconceptions were discovered. If counsel had been permitted to do more thorough and probing voir dire, more inaccuracies would surely have surfaced.

b. <u>The questionnaires contained ill-considered responses which did not reflect the jurors' actual views</u>.

(1) *Many questionnaires were incomplete, requiring the trial court to obtain the information during voir dire*.

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[28] The panel was told to turn in the questionnaire by 1:30 p.m. at the latest. However, they were also informed that the courtroom would be locked from 12:00 noon to 1:30 p.m., and that they were free to leave after turning in the form. (RT 1732.)

[29] *See, e.g.*, RT 112-114, where the trial court had to question Prospective Juror Mr. Miller to elicit a number of negative responses to unambiguous questions such as: whether he had visited anyone in jail, prison or a detention facility; whether he had friends or relatives in law enforcement; and, whether he had served on a jury. *See* also, RT 171-173, voir dire of Prospective Juror Mr. Rodrigues.

Many jurors did not have enough time to provide even basic information before the trial court's deadline for submitting the questionnaire. A number of prospective jurors in the guilt phase left questions unanswered. (*See*, RT 112, 123, 159, 163, 169; 171, 236.) In most cases the trial court had to elicit the information. Sometimes the jurors themselves had to take the initiative, calling the trial court's attention to relevant facts omitted from the questionnaire. (*See*, RT 93-94; 165.)

In selecting the second jury, the court had to obtain answers to questions left blank by five prospective jurors. (*See*, RT 1818; 1862; 1870; 1913; 1927.) One prospective juror had omitted some four pages of questions, including those concerning capital punishment. (RT 1913-1915.)

While by no means the only example, the following is a typical exchange:

> The court: I have read your questionnaire. Is there anything here that you wish to have changed?
>
> Prospective Juror Bianci: No.
>
> The Court: Do you wish all the answers [to] remain the same?
>
> Prospective Juror Bianci: Yes.
>
> The Court: There are certain questions you didn't answer, and I want to ask you those questions.
> '15. Are you or any close friend or relative associated with any attorney who practices criminal law or any individual who

practices psychology or psychiatry?'

Prospective Juror Bianci: No.

The Court: '16. Have you or any close friend or relative ever been involved in a criminal incident or case either as a victim, suspect, defendant, witness, or other?'

Prospective Juror Bianci: No.

The Court: '21. Is there a crime prevention group in your neighborhood?

Prospective Juror Bianci: I am not sure.

The Court: Okay. 'And if so, do you participate in it?

Prospective Juror Bianci: What?

The Court: 'If so, do you participate in it? I take it the answer is no?

Prospective Juror Bianci: I am not sure.

The Court: '26. Would you characterize yourself as a leader or follower?

Prospective Juror Bianci: Leader.

The Court: That was definite.

It is apparent that time prevented Mr. Bianchi from providing written answers to the questions the court asked on voir dire. In contrast to other situations discussed in sections that follow where jurors were confused by the form, Mr. Bianchi understood the questions and readily provided the answers verbally. Given an appropriate amount of time, it is likely that he and the others would have been able to at least complete the questions, if not to provide thoughtful, reasoned responses.

(2) *Many prospective jurors did not understand the questions contained in the form.*

Several jurors plainly had not understood the questionnaire. In eight instances in the first jury's selection the trial court had to elicit further responses where answers on the prospective juror's questionnaire did not make sense. (*See,* RT 137-139 [prospective juror did not know if her prior jury service in a prostitution case counted as jury duty in a criminal trial, and did not comprehend why an information would be filed if defendant was presumed innocent]; RT 141-143 [social worker confused between presumptions applying to custody petitions and criminal information]; RT 165 [juror gave ambiguous response to question regarding pre-trial publicity]; RT 205 [juror explained that her response to a particular question should be read in light of later response to another part of the questionnaire]; RT 205 [juror misstated her views on the death penalty because she did not understand that those issues would be discussed in another section of the questionnaire]; RT 222-224 [prospective juror inclined to find defendant guilty because charges were filed but elsewhere stated belief in presumption of innocence]; RT 232-234 [juror expressed similar conflict between belief in defendant's probable guilt and the

presumption of innocence, and also had not understood that trial was likely to last longer than the ten days of paid leave from her employer].)

Similar misunderstandings surfaced during voir dire of the second jury. (*See*, e.g., RT 1811 [;1818 [juror was not fluent in English language]; 1855 [same]; 1862 [juror mistakenly did not answer question on form]; 1882 [juror made mistake indicating that he had been in jail but had only visited]; 1913 [juror left questions blank where the answer were "no.".)

In a few cases, the prospective jurors admitted their confusion on the record. Prospective Juror Ms. Alcantar admitted being "very confused" in response to the trial court's inquiry about her answers to questions 13 and 16 on the questionnaire. She also admitted misunderstanding the presumption of innocence in a criminal case, and that attorneys should not be disfavored for raising objections at trial. Ms. Alcantar stated: "No. I didn't mean that. I must have definitely misunderstood the question." (RT 160-161.) Prospective Juror Mr. Chen was similarly frank about his lack of understanding. When the court asked if he would lean toward finding the defendant guilty solely because the information was filed, Mr. Chen stated: "It was a misunderstanding." (RT 223.)

These instances demonstrate that significant misunderstandings were discovered ***only*** because the prospective jurors' questionnaires contained blatant inconsistencies or nonsensical responses. It is uncertain how many other prospective jurors had similar misconceptions or provided other misleading or inaccurate information which was never revealed because nothing obvious appeared in their questionnaire.

(3) *Several jurors changed their minds after completing the questionnaire and it is highly likely that more jurors would have provided different information if given*

*more time to reflect and during questioning by counsel*.

The opportunity for further reflection on the questions lead to many changes in the answers provided in the questionnaires. Several jurors in the first trial stated that they had changed their minds after they had filled out the form and had an opportunity to think further about the issues. (*See, e.g.*, RT 116, 130, 142, 161-162, 234.) Others recalled relevant information after completing the form. (*See*, e.g., RT 93-94, 165, 172-174, 181-182, 225.)

In the second jury's voir dire several jurors changed their responses concerning the death penalty in the five days between completing the questionnaire and returning to court for questioning. (*See*, RT 1870, 1889, 1894-1895; RT 1904; 1916.) Still other jurors changed their previous answers in additional relevant areas. (*See*, RT 1881-1882; 1924.) Some answers were not entirely changed but were modified during the extremely limited voir dire conducted by the trial court. (*See*, e.g., RT 1875; 1877-1878; 1882-1883; 1886-1887; 1889; 1919-1911.)

Common sense dictates that, given an appropriate amount of time to complete the questionnaire, the prospective jurors are likely to have provided more accurate information in the first instance. James Robinson, however, does not contend that there was anything improper about these jurors changing their responses. On the contrary, his point is that the trial court should have taken steps to uncover and clarify more inaccuracies and misunderstandings.

c. The trial court allowed insufficient time for voir dire, completing jury selection for both the first and second jury in only a few hours of court time for each.

The first jury was selected in just over one court day.[30] Jury selection was held five days after the prospective jurors had completed the questionnaires.[31] The panel of prospective jurors for the first jury entered the courtroom at 10:52 a.m. (RT 86.) Twelve prospective jurors were questioned before the lunch recess was taken at 12:01 p.m. (*See,* RT 90-127.) Returning after lunch at 1:42 p.m. the court completed its voir dire of forty jurors, taking one ten minute recess (RT 176), and adjourned for the day at 4:02 p.m. (*See,* RT 128-228.)

The second jury was selected in even less time. There, the court began voir dire at 10:42 a.m. (RT 1804.) Lunch recess began at 11:55 a.m., and ended at 1:43 p.m. (RT 1865-1866.) A 15-minute recess was taken in the afternoon. (RT 1920.) The jurors and the alternates were selected, sworn and admonished and court was adjourned at 3:32 p.m. (RT 1937.)

The first jury was questioned and selected in 199 minutes of court time, and the second jury was empaneled in a record 167 minutes. The average voir dire of a prospective juror in the guilt phase was something less than three minutes. In the penalty phase voir dire was even more rapid. Prospective jurors were questioned for less than two minutes each. In

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[30] Counsel exercised several peremptory challenges, and the 12 jurors and six alternates were chosen in the first few minutes of the next court day. (*See* RT 231-244.)

[31] The questionnaire was distributed and the court heard hardship voir dire on March 30, 1993. (CT 199; RT 46-71.)

reality the actual average time of the questioning in both phases was significantly less because the figures noted above were determined by dividing the amount of court time in voir dire by the number of jurors examined. The average times for juror voir dire therefore include time not devoted to voir dire, such as time the trial judge spent speaking to counsel about challenges for cause and other matters, and time spent on peremptory challenges.

d. The trial court's voir dire was wholly inadequate and gathered little information relevant to challenges for cause.

(1) *The court typically asked no questions on general voir dire, even where the questionnaire indicated that further inquiry was warranted*.

The trial court asked ***no*** follow up questions as a rule during the general voir dire. (*See*, e.g., RT 122-123.) The court's only effort was to ask each prospective juror as she or he was seated if there was anything about their answers they wished to change. (*See*, e.g., RT 90.) If the juror did not remember a problem with the questionnaire and the confusion was not obvious from the completed form, it was not likely to be discovered. In some instances the jurors admitted that they did not recall what their responses had been. (*See*, RT 93-94.) This was presumably a frequent occurrence as the questionnaires were completed quickly and several days elapsed between the time the forms were completed and the voir dire. (CT 199, 256.)

(2) *The trial court's questioning grew briefer and more superficial throughout the jury selection process.*

The trial court's voir dire was never extensive. However, it is apparent that even the court's minimal amount of questioning declined as the process went on. The panel of prospective jurors for the first jury entered the courtroom at 10:52 a.m. (RT 86.) Only 12 prospective jurors were questioned before the lunch recess was taken at 12:01 p.m. (*See*, RT 90-127.) After the lunch recess, the court completed its voir dire of 40 jurors, and adjourned for the day at 4:02 p.m. (*See*, RT 128- 228.)

As noted above, when the first jury was chosen, the court questioned 12 jurors before the lunch recess while 40 were questioned in the afternoon. As such, more time was spent with the jurors who were early in the order. Mr. Miller, the ninth prospective juror in the voir dire of the first jury, had a voir dire of 4 pages, and Mr. Bianchi, the 12th prospective juror, was questioned for 6 pages of trial record. (*See*, RT 93-96; 112-115; 123-128.) Both Bianchi and Miller were in the first group of 18 jurors examined before the lunch recess.

As the day continued, the trial court took less and less time probing the prospective jurors' views. Instead, the court often phrased an inquiry so as to blatantly suggest the correct response. (*See*, RT 134-135 [voir dire of Mr. Stevens].) In other cases, the court summarily granted challenges for cause or excused jurors on its own motion where they appeared to be even slightly inclined to favor life without possibility of parole over the death penalty as a general matter. (*See*, e.g., RT 194; 203; 207.) As the example below demonstrates, the trial court was also less willing to educate prospective jurors about the presumption of innocence and/or to probe their abilities to follow this guiding principle.

The decline in the court's interest in voir dire may be seen by comparing the questioning of Prospective Juror Mr. Rodrigues to that of Prospective Juror Ms. Nagle concerning the same questionnaire item.

The Court: There is one question I want to talk to you about, that's number 29. It says "Does the mere fact that an information," this is an accusatory pleading, "was filed against the defendant cause you to conclude that the defendant is more likely to be guilty or not guilty?" And you wrote "He is more likely to be guilty."

Do you understand this information is an accusatory pleading?

It is a piece of paper. It is just an accusation. Do you understand that?

Prospective Juror Nagle: Yes.

The Court: Do you understand that in every case, every criminal case, from the smallest of traffic tickets to any death penalty case, the defendant is presumed to be not guilty until the contrary is proved.

Do you understand that?

Prospective Juror Nagle: Yes, I do.

The Court: Do you still feel he is more likely to be guilty because there is a charge against him?

Prospective Juror Nagle: No, probably not.

The Court: "Probably" is not good enough.

Prospective Juror Nagle: No.

The Court: When I say it is not good enough, I don't want you to change your answer just to please me. Don't worry about me. I like all of you. I don't care how you think. Do you understand this is very, very important? Now again, I am asking you honestly, do you feeling [sic] he is more likely to be guilty because a charge is pending against him?

Prospective Juror Nagle: I have to say yes.

The Court: All right, I appreciate that. Is there a stipulation among counsel?

(RT 98-99.)

Mr. Rodrigues' was the twenty-ninth juror questioned. His voir dire on the same subject was considerably less probing:

The Court: There is just a couple questions that I want to ask you that you didn't answer. Let me get to these. First is number 29. 'Does the mere fact that an information has been filed against the defendant cause you to conclude

that he is more likely to be guilty than not guilty?'

Prospective Juror Rodrigues: (Moves head from side to side.)

The Court: You have to answer out loud.

Prospective Juror Rodrigues: No.

(RT 172.)

3. *The trial judge encouraged the prospective jurors to conform their answers to its expectations, thus misrepresenting their actual beliefs.*

a. Prospective jurors naturally tend to conform to perceived judicial expectations during voir dire.

Among the problems associated with court-conducted voir dire, as opposed to questioning by counsel, is the jurors' desires to conform their responses to the trial judge's expectations. In ***People v. Williams*** (1981) 29 Cal.3d 392, 403, this Court recognized that juror responses during voir dire are significantly influenced by what the individual believes the trial court wants to hear. Several empirical studies cited by defense counsel establish that during voir dire jurors tend to avoid contradicting or displeasing the judge, who is perceived as the most highly respected authority figure in the courtroom. Based on this perception, jurors attempt to respond to questions in ways which they believe the judge will approve of. (*See*, CT 200, 207, citing "Judges' Non-Verbal Behavior In Jury Trials: A Threat To Judicial Impartiality," 6 Va.L.Rev. 1226 (1975).

This tendency to conform or to "please" the judge is exacerbated when it is the judge and not counsel who is doing the questioning in voir

dire. Jurors will thus be far more honest in their responses to questions propounded by the attorneys than when the trial court is conducting the questioning. (*See*, CT 207, citing Jones, Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation Of Juror Candor, Law and Human Behavior 131 (June 1967).)

The prospective jurors' desire to please the trial court was evident during the voir dire in James Robinson's case. During voir dire of the first jury, one prospective juror was struggling to determine whether she could be fair and impartial in this case given the trauma she had experienced when three of her relatives were murdered. (RT 117-119.) When the court posed the four death qualifying questions, the juror clearly expressed her desire to give the judge the "right" answer.

> Prospective Juror Slettedahl: I feel trapped. I feel that I could say one thing to please the court, but on the other hand, on the last spur of the moment, would I lie just to be true to –
>
> The Court: I don't want you to lie. First of all, you are under oath. Secondly, you owe it to both attorneys to be honest.

(RT 119.)

Other jurors were less candid, but their voir dire responses indicate a strong desire to conform to the judge's expectations. As discussed below, a number of prospective jurors readily changed their positions after the trial court advised them of the "correct" viewpoint. The court also actively "rehabilitated" jurors whose responses indicated that they were not impartial and should be excused for cause or questioned more extensively.

The trial court in this case actively encouraged prospective jurors to change their responses.

In many cases the trial court's questioning indicated to the prospective juror the "correct" answer the judge was seeking. Numerous prospective jurors for the guilt phase stated in their questionnaires that they were predisposed to believe that the defendant was guilty because the charges had been filed. Others admitted a pro-prosecution bias. (*See*, RT 134; 138, 141; 161; 178; 205; 223; 234.) The court actively "rehabilitated" these jurors, although their responses indicated that they were not impartial and should be excused for cause or at least questioned more extensively. In each instance the trial judge persuaded the jurors to retreat from the positions stated in their questionnaires and to adopt the attitudes deemed correct for this purpose.

The same thing occurred in the penalty phase. There the trial judge "rehabilitated" a prospective juror who admitted in his questionnaire that he would have trouble giving equal consideration to the testimony of a witness from a different racial or ethnic group.

| | |
|---|---|
| The Court: | Question number 47, regarding a party or an attorney or a witness may come from a particular national, racial or religious group or has a life-style different from your own. And the question is would that affect your judgment or the weight you would give to his or her testimony? And your answer is "possibly." |
| Prospective Juror Thompson: | No. |

The Court: Do you understand I am going to give the jury instructions how to view a witness? What you use to base the believability of a witness, certain factors. No factors concern ethnicity, race, life-style. Do you understand that is not to be taken into account? Do you follow that?

Prospective Juror Thompson: Yes.

(RT 1886-1887.)

Clearly, the preceding voir dire was inadequate and coercive. The court is doing all of the talking; the juror answers in mono-syllables. The court browbeats the prospective juror with repeated questions such as "Do you understand, do you follow?"

b. The trial court's questionnaire and its inadequate voir dire did not yield sufficient information for it to validly determine challenges for cause.

California law allows the court to conduct all of the voir dire, even in a capital case. (*See*, California Code of Civil Procedure section 223.) This state also sanctions the use of standard form questionnaires in jury selection. (CCP § 205; ***People v. Waidla*** (2000) 22 Cal.4th 690, *rehearing denied*, *cert. denied*, 531 U.S. 1018.) However, no decision thus far has held that a standard form is a sufficient means to determine juror fitness, especially where the court-conducted questioning is inadequate and there are reasons to doubt the accuracy of the prospective jurors' responses. On the contrary, the reported cases clearly indicate that a standard form questionnaire is only a starting point for obtaining information and should

be used in conjunction with thorough and probing voir dire. (*See*, ***People v. Sanchez*** (1989) 208 Cal.App.3d 721, *review denied*, *cert. denied*, 493 U.S. 921 [trial court complied with obligations to ensure fair jury where in addition to questionnaire the judge examined prospective jurors in chambers concerning any indications of bias and permitted counsel to voir dire prospective jurors].)

In ***State v. Williams*** (1988) 113 N.J. 393, 550 A.2d 1172, the New Jersey Supreme Court reversed the defendant's conviction and death sentence where, as in James Robinson's case, the trial court relied heavily on prospective jurors' responses to a standardized form questionnaire. The trial court's style of questioning was substantially similar to that of the trial judge in James Robinson's case, and the defense made the same claims concerning the inadequacy of the questioning. The New Jersey Supreme Court called the court-conducted questioning based on the questionnaires "perfunctory." (*Id.* at 1179.) The New Jersey Supreme Court found that reliance on the questionnaire form with minimal follow-up questioning was not constitutionally sufficient because the "lack of significant information regarding jurors' attitudes on a host of issues effectively denied both parties the ability to challenge jurors for cause, and perhaps most importantly left the trial court unable to fairly evaluate their fitness of many jurors to serve." (*Ibid*.)

The New Jersey Supreme Court specified the shortcomings of several of the trial court's voir dire procedures, ***all*** of which were used in this case:

> Defendant objects to the *voir dire* because the procedure used by the trial court led to questions that prompted only yes or no responses from a prospective juror and therefore provided neither the prosecutor nor defense

> counsel with sufficient information to pick an unbiased jury. Moreover, defendant argues that the trial court repeatedly refused to ask follow-up questions requested by counsel in order to further explain the yes or no answers. Based on an independent review of the *voir dire*, we find that the trial court relied much too heavily on closed-ended questions, and on several occasions did not ask adequate follow-up questions to overcome the inadequacy of the initial inquiry.

(*Id*., at 1186.)

All of these same problems were present in James Robinson's case. As the New Jersey Supreme Court recognized, reversal is necessary because without adequate voir dire there is no assurance that impartial jurors were selected and that James Robinson received a fair trial.

c. The trial court's pressuring of jurors was inappropriate and almost certainly resulted in the retention of biased prospective jurors.

If jury voir dire is to be meaningful at all, the questioning must elicit the prospective jurors' real views. For this reason, the trial judge must avoid cuing the juror, or in any way indicating the court's preference for a particular response or viewpoint. (*See*, ***State v. Williams***, *supra*, [where the Court noted with disapproval that in several instances the trial court improperly led the prospective jurors to the "correct" response by the tenor of the questioning.].) In ***State v. Harris*** (1998) 716 A.2d 458, 156 N.J. 122, the New Jersey Supreme Court discussed the trial judge's obligation to conduct voir dire in a neutral manner:

> The purpose of a searching *voir dire* is to ferret out biases that jurors may not express initially but that they may reveal with more sophisticated, open-ended questions. *Voir dire* does *not* exist simply to induce jurors, through

> leading questions, to abandon problematic responses and to agree with the court's 'correct,' death-qualifying answers so that the jury selection process can end quickly with minimal dismissals for cause. The inappropriate approach, however, was the one that the trial court chose. The trial court's *voir dire* in a number of areas was seriously inadequate in its failure to delve substantially into important aspects of the case, its reliance on lectures and leading questions, and its acceptance of problematic responses which it attempted to cure through leading questions.

(716 A.2d at 238-239.)

The trial court in James Robinson's case was clearly not a neutral participant. This court committed every one of the errors noted with disapproval in the ***Harris*** opinion. Prospective Juror Thompson's answer to the only question dealing with racial bias in the court's standardized form questionnaire cried out for searching voir dire. Instead, the trial court lectured the juror and bullied him into adopting the "correct" position.

> The Court: Question number 47, regarding a party or an attorney or a witness may come from a particular national, racial or religious group or has a life-style different from your own. And the question is would that affect your judgment or the weight you would give to his or her testimony? And your answer is 'possibly.
>
> Prospective Juror Thompson: No.

The Court: Do you understand I am going to give the jury instructions how to view a witness? What you use to base the believability of a witness, certain factors. No factors concern ethnicity, race, life-style. Do you understand that is not to be taken into account? Do you follow that?

Prospective Juror Thompson: Yes.

(RT 1886-1887.)

When confronted with a possibly disqualifying response, the trial court's responded with lectures bordering on coercion. The court was plainly more interested in retaining the prospective jurors than in searching out their views.

The Court: There is one question I want to talk to you about. It's question 32(B) regarding what you have learned about this case already, and the question is, 'Did this information make you favor the prosecution or the defense'" and you said, 'with the little facts I heard, my sentiment would be with the prosecution.'

Prospective Juror Stevens: Yes. Sir.

The Court: Do you understand that as I told you, things on t.v., things in the news, they are wrong anyway. And, also, a defendant in a

criminal trial has an absolute presumption of innocence. Do you understand that?

Prospective Juror Stevens: Yes.

The Court: Is your mind made up right now?

Prospective Juror Stevens: No.

The Court: Okay. Can you give both sides an impartial trial?

Prospective Juror Stevens: Yes.

The Court: Okay, thank you.

(RT 134-135.)

The trial judge's lectures during voir dire were far from subtle. While questioning another prospective juror concerning the same question, 32(B), the court browbeat the juror with the "correct" response. By the end of the exchange, the prospective juror is trying to justify and explain away her answer on the questionnaire to obtain the trial judge's approval.

The Court: The last one is 32(B). You put your initials down on the question that's dealing – the question dealt with outside information 'Did it make you favor the prosecution or the defense' and you put down 'the prosecution. You said 'If a wrong had not been committed, there would be no charges brought

against the defendant.' Then you put your initials.

Prospective Juror Levans: I can't say by reading that question, black or white, whether I thought he was guilty or not guilty. I would have to hear the evidence.

The Court: Now, do you understand that, first of all, both sides are entitled to a fair or impartial jury?

Prospective Juror Levans: That's true.

The Court: Do you also understand the sacrosanct presumption of innocence? That is, defendant is presumed to be guilty until the contrary is proved. Do you understand that?

Prospective Juror Levans: Uh-huh.

The Court: If a wrong had not been committed, there would be no charge brought against the defendant. I have no idea if there is any evidence.

Prospective Juror Levans: I guess I was just trying to explain why I couldn't answer 'Yes' or 'No' at the time.

The Court: Okay, can you give both sides a fair or impartial trial?

Prospective Juror Levans: Yes, Sir.

The Court: Right now, do you understand the presumption of innocence?

Prospective Juror Levans: Yes, Sir.

The Court: Would you abide by that?

Prospective Juror Levans: Yes, Sir.

(RT 138-139.)[32]

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[32] The trial judge's strong arm tactics in voir dire were not confined to questions concerning the presumption of innocence. The court lectured the prospective jurors and pressured them for acceptable responses in all areas.

The Court: There is one question that I do want to ask you about, and again, this may be my problem, question number 50. It says, 'You will be given instructions by the court about the rules that apply to this case. Do you feel that you will be able to follow those rules with which you do not agree.' And you answered 'No.'

Prospective Juror Ward: Yes.

The Court: Would you be able to follow the instructions if you don't agree?

Prospective Juror Ward: Yes.

(continued...)

The trial court thus not only failed to gather relevant information through its voir dire, but obtained false information by coercing the prospective jurors to adopt views which they did not truly hold. Under these circumstances, there is no doubt that biased jurors were not discovered and excused for cause.

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[32](...continued)

The Court: Do you understand – I have got to find a better way to word that. Do you understand if you are not happy with the law, your problem and your dealings should be with the legislature in Sacramento and not with the instructions here? Do you understand that?

Prospective Juror Ward: Yeah.

(RT 130-131. *See* also, RT 141; 161; 178; 223.)

F. Reversal Is Required Because The Trial Court's Mishandling Of The Voir Dire Prevented James Robinson From Intelligently Exercising Challenges For Cause.

As discussed in the preceding section, the trial court erred by determining challenges for cause based on the inaccurate responses to the standardized questionnaire and its own minimal and inadequate follow-up questioning. These measures were ineffective for gathering information relevant to the court's determinations of challenges for cause. As a result, there is no guarantee that the jurors selected in either phase of the capital trial were fair and impartial.

This Court must reverse the convictions and judgment of death without a specific showing of prejudice because the errors in voir dire prevented the assurance of an impartial jury thus undermining the very structure of the capital trial. James Robinson contends, therefore, that this Court should independently review the record and conclude that the erroneous handling of voir dire and jury selection requires reversal without a specific showing of prejudice. Alternatively, he contends that reversal is required even applying the deferential "abuse of discretion" standard, and that prejudice may be shown on the facts of this case.

1. *The trial court's failure to conduct a constitutionally sufficient voir dire is reversible per se and not subject to a harmless error analysis*.

California courts have long held that insufficient voir dire is presumptively prejudicial because it undermines the entire trial structure:

> The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.

(***People v. Wheeler*** (1978) 22 Cal.3d 258, 283; see also ***People v. Gilbert*** (1992) 5 Cal.App.4th 1372, 1397; ***People v. Martinez*** (1991) 228 Cal.App.3d 1456, 1460.)

The denial of the right to an impartial jury is a structural defect. In the instant case there was not just an erroneous denial of a challenge for cause or an erroneous restriction on the substance or number of voir dire questions. There was a complete denial of general voir dire, which aborted the basic trial process and rendered the trial fundamentally unfair. Just as in the cases which hold that a violation of the guarantee of a public trial requires reversal without any showing of prejudice even though the values of a public trial may be intangible and unprovable (***Judd v. Haley***, 11th Cir. 2001) 250 F.3d 1308; ***Waller v. Georgia*** (1984) 467 U.S. 39, 49), so too the failure to allow general voir dire to ensure a defendant's right to an impartial jury should require reversal without a showing of prejudice. The consequences of a refusal to allow voir dire are necessarily unquantifiable and indeterminate. There is no *object*, so to speak, upon which the harmless error scrutiny can operate. The total failure of the voir dire process deprived James Robinson of the basic protection of an impartial jury without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair" (***Rose v. Clark*** (1986) 478 U.S. 570, 577. *See also*, ***Neder v. United States***, (1999) 527 U.S.1, 9.) Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied.

This Court recently reversed the death judgment due to inadequate voir dire in another capital case, ***People v. Cash*** (2002) 28 Cal.4th 703, 122 Cal.Rptr.2d 545. The limitation on voir dire in ***Cash*** was less comprehensive that the trial court's restrictions on voir dire in James

Robinson's case. In ***Cash***, defense counsel anticipated that two prior murders would be introduced in aggravation during the penalty phase of trial. During voir dire counsel wanted to ask prospective jurors if there were "any particular crimes" or "any facts" that would cause them to automatically recommend death over life without possibility of parole. The trial court refused to allow the inquiry, holding that counsel could not "go past the information." (*Id*. at 554-555.) This Court reversed the death judgment. In so holding it made clear that, where the comprehensiveness of the entire juror voir dire is at issue, a specific showing of prejudice was not needed:

> A defendant who establishes that any juror who eventually served was biased against him" is entitled to reversal. (***People v. Cunningham***, *supra*, 25 Cal.4th at p. 975; ***People v. Avena*** (1996) 13 Cal.4th 394, 413.) ***Here, defendant cannot identify a particular biased juror, but that is because he was denied an adequate voir dire*** about prior murder, a possibly determinative fact for a juror. By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted upon those views, thereby violating defendant's due process right to an impartial jury. (*See* ***Morgan v. Illinois***, *supra*, 504 U.S. at p. 739.) ***The trial court's restriction of voir dire "leads us to doubt" that defendant "was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment"*** (*Ibid.*). (***Cash***, *supra*, at 557 [emphasis added.].)

In ***Cash***, the penalty decision was reversed because the trial court neglected to voir dire the jury in ***one*** area which might have been outcome

determinative in sentencing. The circumstances of James Robinson's case are even more problematic. Here, the trial court's voir dire was wholly ineffective and discovered virtually no information relevant to challenges for cause. Where a jury is selected based upon such scant and or inaccurate information the defendant's constitutional guarantee of an impartial jury is rendered meaningless. The single voir dire question omitted in ***Cash*** might have allowed a person who was biased in that one area to serve on the jury. The voir dire in James Robinson's case was deficient in almost every area. As a result, there is no assurance that ***any*** of the jurors were impartial. Thus, James Robinson presents a stronger case for reversal than the defendant in ***Cash***. He is entitled to reversal of both the guilt and the penalty verdicts because there can be no assurance of fairness in any phase of these proceedings.

Courts of appeal in California and in other jurisdictions have similarly refused to apply a harmless error analysis, and have reversed convictions without a specific showing of prejudice where voir dire was ineffective. In a recent case where the trial court's handling of voir dire failed to ensure juror impartiality, the California Court of Appeal found that the error was ***not*** subject to harmless error analysis.

> This error – which inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors would evaluate the evidence – is a 'defect affecting the framework within which the trial proceeds' that is not subject to harmless error analysis."

(***People v. Mello*** (2002) 97 Cal.App.4th 511, 519, citing ***Arizona v. Fulminante*** (1991) 499 U.S. 279, 309-310; ***People v. Flood*** (1998) 18 Cal.4th 470, 500; ***People v. Sarazzawski*** (1945) 27 Cal.2d 7, 18-19.)

The New Jersey Supreme Court noted in ***State v. Williams***, *supra*, 550 A.2d 1172, 1179, "[i]f counsel is unable to screen out prejudice and bias, that inevitably leads to unfair juries. This result – or the possibility of this result – cannot be tolerated." (*Id*.) The Court in ***Williams*** refused to apply a harmless error analysis where the scant record made assessment of prejudice virtually impossible and the competing interests involved fundamental constitutional rights. As the New Jersey Supreme Court stated:

> Even in a case such as this, where the evidence of guilt is compelling, the right to a fair trial must be diligently protected to insure that all defendants, regardless of the crime charged or the weight of the evidence produced, are tried by a fair and impartial jury.

(*Id.* at 1179.)

In sum, James Robinson's convictions must be reversed because the court's wholly inadequate voir dire process failed to protect his Sixth Amendment right to an impartial jury and his Eighth Amendment rights to reliable guilt and penalty determinations and his rights under the Fourteenth Amendment.

2. *This Court should independently examine the record and must reverse the convictions and judgment even under the more deferential "abuse of discretion" analysis and absent a specific showing of prejudice because the entire voir dire was inadequate*.

Under ***People v. Cash***, *supra*, 122 Cal.Rptr.2d 545, James Robinson is entitled to an automatic reversal of his convictions and judgment of death. Even if this Court applies the more deferential "abuse of discretion" standard, reversal is still mandated. With the expanded discretion given to

trial courts under section 223, the voir dire must be adequate to ensure a fair and impartial jury.

This Court has recognized the necessity of searching voir dire as a means to secure the criminal defendant's right to an impartial jury.

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

(***In re Hitchings*** (1993) 6 Cal.4th 97, 110.)

A trial court abuses its discretion under section 223 when the scope of its voir dire is too narrow to produce sufficient information related to challenges for cause. (***People v. Banner*** (1992) 3 Cal.App.4th 1315.) The trial court's failure to conduct adequate voir dire shall be reversed for abuse of discretion. (***People v. Wilborn***, *supra*, 70 Cal.App.4th 339, 347; ***People v. Chapman***, *supra*, 15 Cal.App.4th 136, 141. *See also*, ***United States v. Jones*** (9th Cir. 1983) 722 F2d 528, 529; ***United States v. Baldwin***, *supra*, 607 F2d 1295, 1297.) An inadequate voir dire is one in which "the questioning is not reasonably sufficient to test the jury for bias or partiality." (***People v. Wilborn***, *supra*, at 347.) In such a case, the manner in which voir dire is conducted is a basis for reversal because the resulting trial is fundamentally unfair. (*Ibid*.)

Courts in other jurisdictions have also reversed convictions applying an abuse of discretion standard where the voir dire was insufficient. The New Jersey Supreme Court has held that, where the defendant challenges the overall comprehensiveness of the voir dire, the reviewing court must independently examine the entire voir dire process. (***State v. Williams***,

*supra*, 113 N.J. 393, 550 A.2d 1172, 1186.) In ***Williams***, the New Jersey Supreme Court explained why a trial court's discretion concerning voir dire is ***not*** entitled to deference where the voir dire is insufficient:

> Despite the deference normally accorded the trial court in assessing the demeanor and responses of potential jurors, our reading of this admittedly cold record leaves us no choice but to find that insufficient information was elicited from [juror] to evaluate properly his fitness to serve. Our conclusion does not constitute second-guessing of the trial court's determination, based on [juror's] credibility, that the juror was 'forthright, direct and clear' but rather constitutes a finding that the substance of the elicited information – yes or no answers to broad general questions *** – left both counsel and the trial court unable to evaluate [juror's] fitness to serve on the jury. Moreover, the paucity and narrowness of the responses left both the defense and the prosecutor unable to exercise peremptory challenges intelligently.

(*Id.* at 1186-1187.)

This reasoning applies to the present case and compels the same result. The voir dire in James Robinson's demonstrates the same inadequacies as the court-conducted questioning in ***Williams***. In both cases, the voir dire resulted in a "lack of significant information regarding jurors' attitudes on a host of issues [which] effectively denied both parties the ability to challenge jurors for cause, and perhaps most importantly left the trial court unable to fairly evaluate their fitness of many jurors to serve." (***State v. Williams***, *supra*, at 1179.) In James Robinson's case, the trial court's voir dire was cursory and superficial. Neither the court nor counsel had sufficient information to make informed decisions concerning jurors'

fitness for this case. In some instances, the trial judge's manner of questioning resulted not only in a lack of information but gathered misleading information by encouraging jurors to misstate their views.

Due to the inadequate voir dire, the trial court did not have enough information about these prospective jurors to determine challenges for cause. Its decisions concerning voir dire and jury selection thus cannot constitute a valid exercise of its discretion and are not entitled to deference on appeal. This Court should independently review the record and reverse the convictions and judgment because there is no assurance that impartial jurors were selected to hear James Robinson's capital case.

3. *James Robinson can demonstrate that the trial court's ineffective voir dire caused specific instances of prejudice justifying reversal.*

As discussed above, a number of jurors were not questioned thoroughly even though their questionnaire responses contained indications of bias. Counsel were forced to exercise peremptory challenges to remove many of these jurors because the trial court's voir dire was so inadequate. Indications of bias also appeared in the voir dire of two jurors who served on the jury in the guilt phase. (CT 257.) In neither case did the trial court pose the kind of thorough and probing questions which would have either revealed that the juror was biased and ought to be excused for cause or that there was no reason for concern.

In his questionnaire, Mr. Merager suggested that he would find it difficult to keep an open mind until he had heard all of the evidence.

> The Court: There is one question I want to ask you about. This is number 46. 'Will you have any difficulty keeping an open mind until you have heard all the evidence, and you have heard the arguments of

both counsel, and the court has given you all the instructions?' Your answer is you would go with that expectation, but something could be said that would form an opinion.

If that happens could you keep that in the back of your head and as to both sides be a fair and impartial juror until the case is finally submitted to you?

Prospective Juror Merager: Yes.

(RT 178.)

Here again, the trial court has not probed the juror's views. Although stated in the form of a question, the court is not making a true inquiry. The judge is effectively putting the desired response in the juror's mouth. Through this exchange nothing was learned about the juror's predispositions or biases, or how he might approach the task of sitting on a jury in a capital case. Instead, the judge simply tells the juror how he ***ought*** to think and respond.

In another instance, the trial court did not follow up where a juror's responses suggested that he might have been influenced by pre-trial publicity. Mr. Bianchi indicated that he was familiar with James Robinson's case. He also stated that he routinely followed criminal trials.

The Court: [referring to question number 32 on the questionnaire] '32. What, if anything, have you already learned about this case or about the defendant?

Prospective

Juror Bianci: I don't know anything about the defendant. I read it when it first came out in the paper. That's all. This is close to where I live.

The Court: Did this information make you favor the prosecution or the defense?

Prospective Juror Bianci: No.

The Court: Okay. '35. What are the most serious criminal cases you have followed in the media during the past year?

Prospective Juror Bianci: All I put down is that King and Milken and Keating, but those aren't . . .

The Court: '36. Do you try to follow stories about the functioning of the criminal justice system? Do you try?

Prospective Juror Bianci: I read 'em, yeah.

(RT 123-125.)

The court was well aware of the defense concerns about pretrial publicity in this case. The potential prejudice resulting from exposure to pre-trial publicity was a major justification advanced for expanded voir dire in the defense motion. (CT 200-215.) As counsel noted, the chances of a prospective juror being negatively affected by the media reports were even greater if the person lived in the community where the crime occurred due to the extensive coverage this case received in the local press. (*See*, CT 216-

232.) The trial judge ignored these valid concerns. Mr. Bianchi stated that he had read about this case, and that the crime took place near his home. He has also expressed an interest in reports of criminal cases and in the functioning of the justice system. These answers were red flags signaling the need for additional, follow up questioning.

Both Mr. Merager and Mr. Bianchi were seated on the jury that convicted James Robinson in the guilt phase of his capital case. (CT 257.)

G. The Trial Court's Voir Dire Was Not Sufficient to Discover the Prospective Jurors' Racial Biases And/or Whether They Would Be Unduly Influenced by Racial Tensions Existing in Los Angeles at the Time of James Robinson's Capital Trial.

In the previous sections, James Robinson argues that the entire voir dire was not comprehensive enough to ensure fairness. In the two sections which follow, he focuses upon specific aspects of the voir dire: racial prejudice and prospective juror exposure to prejudicial pre-trial publicity. (*See*, §§ H and I.) The trial court's voir dire in these areas was especially lacking and, as discussed below, these failures alone justify reversal of the convictions and sentence.

Voir dire on racial and ethnic prejudice is constitutionally required where a defendant is accused of a violent crime against a victim of another race or ethnicity. (***Turner v. Murray*** (1986) 476 U.S. 28; *see also*, ***Aldridge v. United States*** (1931) 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.) The trial court's voir dire was completely insufficient for discovering racial biases in these prospective jurors. Racial issues were especially sensitive in James Robinson's case for several reasons. The obvious reason was the racial difference between the defendant and the victims. James Robinson, an African-American, was charged with killing two young Whites. This fact alone indicated that more

thorough voir dire on racial issues was needed to ensure an impartial jury, particularly in a capital case. Yet in this case additional circumstances compelled a thorough and searching inquiry into the prospective jurors' racial attitudes.

As discussed below, the trial court was well aware of the racial tensions pervading the Los Angeles area at the time of this trial. Defense counsel pointed out that, in the then current environment, the prospective jurors, the vast majority of whom were White, would likely be feeling some subtle or subconscious animosity or fear about Blacks. The atmosphere of racial friction would make it even more difficult for these prospective jurors to publicly admit that they might be biased. The court's failure to sequester the voir dire made such an admission even less likely.

In spite of these circumstances favoring thorough voir dire on racial and ethnic attitudes, the trial court virtually ignored the subject. Even where the prospective jurors' questionnaires indicated possible bias, the court undertook no significant voir dire concerning race. For James Robinson to receive a fair trial before an impartial jury, it was essential to exclude prospective jurors who could not be impartial because of their racial prejudices. The trial court's voir dire was wholly inadequate for discovering this information. As result of the court's abdication of its duty to conduct a constitutionally appropriate voir dire, it is highly likely that biased jurors decided this case. Accordingly, the judgments of conviction and the sentence must be reversed.

1. *The trial court was on notice of the racial issues presented by this case and also of the racial tensions in the community which required careful voir dire to discern the prospective jurors' latent biases.*

Some of the racial aspects of this trial were readily apparent. The defendant, James Robinson who is African American, was accused of killing two young White males. As counsel pointed out, African Americans comprised only 4% of the venire in the North Valley District, as opposed to 11% county-wide. (*See*, CT 200, 203.) Moreover, the immediate residential community where the crime occurred was almost entirely White. These circumstances alone justified careful and searching voir dire of the sort designed to reveal subtle biases which might alter the prospective jurors' views of the evidence. Here the larger context of this trial made the need for thorough voir dire even more compelling.

Defense counsel asked the trial court to take into account the racial aspects of this trial, and to consider those factors in the larger social context. James Robinson's case was being tried during a time of heightened racial tensions in Los Angeles. This case went to trial in April of 1993, not quite a year after several White police officers were acquitted of charges arising from their videotaped beating of a Black man, Rodney King. The announcement of the verdict in the King case touched off several days of rioting, looting and violence in the city. In April of 1993, the Rodney King case was being tried again, this time in a federal court. In another high profile trial, a jury was determining whether male black suspects were guilty of beating white truck driver Reginald Denny during the unrest which followed the verdict in the first King case. (*See*, RT 78-79; CT 200-215.) In this historical context, prospective jurors would be extremely reluctant to be candid when asked about racial bias. As defense counsel noted:

> That would conclude my submission with just one additional caveat, and that is, that we are at a particularly unusual moment in history here in

> Los Angeles County in the sense that there are two major publicity cases, not this one, pending in downtown Los Angeles. At least one seems to have the prospect of going to the jury by the end of this week. Almost all of the jurors have indicated a familiarity with one, or both, of those particular cases, and I have a concern with respect to the expression of opinion by each individual juror that would have to do with their feelings relative to their duties as jurors in light of this particularly unusual and significant period of legal history in this country.

(RT 78-79.)

The trial court was also on notice of specific racial issues appearing in this panel of prospective jurors. At the hearing on the defense motion, counsel discussed the need for thorough voir dire on racial bias. Defense counsel stated that, after reading the jurors' responses to areas of the questionnaire concerning racial biases, further questioning was indicated. (*See*, RT 74-75.) The trial court disagreed and found based on its review of the completed questionnaires that no further inquiry was necessary. (RT 82-84.)

2. *The trial court's treatment of the racial issues in this case was completely insufficient to guarantee James Robinson's constitutional rights to an impartial jury.*

The trial court did ***not*** admonish the prospective jurors regarding race before starting voir dire for the first jury. The panel of prospective jurors were introduced to counsel and to James Robinson when they arrived in court for voir dire. (RT 88.) The prospective jurors could observe that James Robinson is African-American. The court did not, however, advise the jury that the victims in the case were White. (*See*, RT 86-90.)

The questionnaire contained only one question about race. And this question addressed only a narrow aspect of the race issue. Question number 47 stated:

> A part(ies), attorney(s) or witness(es) may come from a particular national, racial or religious group or has a life-style different from your own. Would that affect your judgment or the weight and credibility you would give to his or her testimony?

(CT 247.)

There was no inquiry about how the prospective juror might react to a situation where the victim(s) and the defendant were of different racial or ethnic backgrounds. The prospective jurors were not informed that the victims were white, and were never asked if they could be fair and impartial in this case where James Robinson, a Black man, was accused of killing two young White men.

Before beginning voir dire in the penalty phase, the court addressed the entire panel as follows:

> Now, one thing I will mention is the defendant, as you can see, is an African-American. The victims in this case are White. Now race is not

an issue at a penalty trial and is not to be considered by you.

Is there anyone on the panel before me that would ignore this dictate?

Negative response.

(RT 1807.)[33]

This was the extent of the court's investigation into racial prejudice in the penalty phase.

Even where possible prejudice was apparent from the responses to the single question on prejudice, question number 47 set forth above, the trial court failed to probe the area of racial bias. In two cases, one from the first and one from the second jury, the trial court virtually put the proper words into jurors' mouths to avoid either more questioning or an excusal for cause. In both instances the questioning was done in open court, further inhibiting these prospective jurors from stating a less than politically correct viewpoint by admitting to some bias.

The Court: Regarding question 47, this is the question regarding a party, an attorney or a witness coming from a different national, racial, ethnic group.

I am going to give you instructions on how to judge the credibility of a witness, how you can tell whether a witness is telling the truth and telling a lie, and it has nothing to do with any

[33] The trial court reminded the jurors not to consider race four times as new groups of prospective jurors were called for questioning. The court did nothing more. (*See*, RT 1845; 1880; 1906; 1910.)

racial characteristics or ethnic characteristics or any different life-style than yours. That is not to be considered in determining whether a witness is telling the truth or not.

Do you think that you can follow that?

Prospective Juror Gilbert: Yes, sir.

(RT 195-196.)

Toward the end of the voir dire for the penalty phase jury, the court took a similar approach to a juror whose response to the same item on the questionnaire revealed bias. This questioning was done in open court, not at side bar:

The Court: Question number 47, regarding a party or an attorney or a witness may come from a particular national, racial, or religious group or has a life-style different from your own. And the question is would that fact affect your judgment or the weight you would give his or her testimony? And your answer is 'Possibly.'

Prospective Juror Thompson: No.

The Court: Do you understand I am going to give the jury instructions how to view a witness? What you use to base the believability of a witness, certain factors. No factors

concern ethnicity, race, life-style. Do you understand that is not to be taken into account?

Do you follow that?

Prospective Juror Thompson: Yes.

(RT 1886-1887.)

Here the trial court simply pressured the prospective juror into giving the desired response. The court made no effort to find out why the juror felt inclined to give less weight to a Black witness' testimony. In the context of this case, where the defendant and several witnesses were African-American, the juror's racial biases were obviously relevant to his ability to serve in this case. Under these circumstances the trial court's failure to probe this issue on voir dire was inexcusable.

3. *The trial court's failure to advise prospective jurors selected for the first jury that the victims were of a different race than the defendant was reversible error according to the decisions of this Court and the United States Supreme Court.*

This Court has clearly held that "adequate inquiry into possible racial bias is . . . essential in a case in which an African-American defendant is charged with commission of a capital crime against a White victim." (***People v. Holt***, (1997) 15 Cal.4th 619, 660.) The United States Supreme Court has also found that voir dire on racial and ethnic prejudice is constitutionally required where a defendant is accused of a violent crime against a victim of another race or ethnicity. (***Turner v. Murray***, *supra*, 476 U.S. 28. *See also*, ***Aldridge v. United States***, *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.) The reasoning of

these cases establishes that the trial court erred by failing to inform the prospective jurors of the respective races of James Robinson and the victims, and by not conducting adequate voir dire concerning race or allowing counsel to do so. In ***Turner v. Murray,*** *supra,* 476 U.S. 28, the United States Supreme Court held that a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias. The defense in ***Turner*** submitted a single voir dire question to the trial court on the subject of race. The proposed defense question called for the trial court to advise the jury that the defendant was African-American, and the victim was White, and then to ask the jurors: "Will these facts prejudice you against [defendant] or affect your ability to render a fair and impartial verdict based solely on the evidence?" (***Turner***, *supra*, at 30-31.) The trial court denied the defense request, and did not mention race during voir dire. A jury of four Blacks and eight Whites convicted Turner, and recommended a death sentence in the penalty phase.

The United States Supreme Court reversed the death judgment, holding that the trial court's refusal to question prospective jurors about possible racial bias compelled automatic reversal of the penalty phase verdict. The trial court's failure to undertake even minimal voir dire on race was per se prejudicial and no showing of prejudice was needed. The Court remarked: "In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized." (*Id.* at 36.) The majority expressed the concern that potential racial bias might have operated more freely in the penalty phase of trial because of the essentially

normative judgments involved in capital sentencing. The Supreme Court stated:

> This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.

(*Id.* at 37.)

The fact that racial bias might operate more easily in the context of a normative decision such as capital sentencing does not mean that prejudice would not color a juror's view of the evidence during the guilt determination. Justice Brennan dissented from the portion of the opinion affirming only the guilt phase conviction. He noted that "the opportunity for racial bias to taint the jury process is . . . equally a factor at the guilt phase of a bifurcated capital trial." (***Turner*** at p. 41.)

In James Robinson's case, the trial record clearly reveals that the prospective jurors in the guilt phase were never told that the two victims were White. This Court has not focused on the phase of trial for assessing the adequacy of voir dire concerning race in capital cases. California decisions indicate that a failure to voir dire sufficiently on racial bias is considered an equally serious error where it occurs in the guilt phase of a criminal case. Moreover, the decision in ***People v. Holt***, *supra*, 15 Cal.4th 619, indicates that the guilt phase jurors in James Robinson's case were not sufficiently questioned about racial issues.

In ***Holt***, the trial court admonished the venire not to consider the defendant's race, and asked if they could be fair jurors in a case involving a Black defendant. The trial judge does not appear to have told the prospective jurors that the victim was White. However, the voir dire on

race was far more extensive in ***Holt***. The trial judge there inquired about whether the prospective jurors felt that Black people are more likely to commit murder. (*Id.* at 660.) This Court held that the voir dire was adequate because ***counsel*** had participated in the questioning:

> Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias and took advantage of that opportunity. The voir dire conducted in this case covered substantially all of the areas of inquiry in the Standards, and followed completion by each prospective juror of a questionnaire that covered an even broader range of topics. Those inquiries were supplemented by additional questioning of the jurors by counsel.

(*Id.* at 661.)

James Robinson's case is readily distinguishable and the reasoning this Court employed in ***Holt*** suggests that the voir dire on racial bias here was wholly inadequate. This court did far less than the trial court in ***Holt***, which at least took the step of repeatedly reminding prospective jurors that the defendant's race was not a factor. The trial court in ***Holt*** also asked whether the prospective jurors had beliefs about Black people as crime perpetrators. Most significantly, the trial court in ***Holt*** allowed the attorneys thorough voir dire concerning racial bias.

Under the circumstances present in ***Holt***, the defendant had ample opportunity to discover racial prejudices. In James Robinson's case, there was virtually ***no*** opportunity to make such a discovery. The standardized form questionnaire only asked whether the juror would give different weight to a witness' testimony if that witness was from a particular national, racial or religious group. (CT 247.) As a result, it is impossible to

determine whether the jurors who tried this capital case were impartial or whether their racial prejudices impacted their evaluation of the evidence in the guilt phase. This result amounts to fundamental unfairness requiring reversal of the verdicts obtained in the guilt phase. (***People v. Holt,*** *supra*, 15 Cal.4th at 661.)

4. *The trial court was obliged to undertake a more thorough voir dire on racial attitudes in selecting both juries for James Robinson's capital trial.*

The United States Supreme Court's decisions thus make clear that voir dire on racial prejudice is constitutionally required for interracial capital crimes. Failure to advise a jury that the victim(s) and defendant are of different races will result in reversal of the penalty phase. (***Turner v. Murray***, *supra*, 476 U.S. 28, 36-37.) However, the extent of the voir dire on race needed to satisfy the Fourteenth Amendment in other contexts is less certain. (*See*, ***Mu'Min v. Virginia*** (1991) 500 U.S. 415, 422-423. *See also,* ***Turner v. Murray***, *supra*, 476 U.S. 28; ***Aldridge v. United States,*** *supra,* 283 U.S. 308; ***Rosales-Lopez v. United States,*** *supra,* 451 U.S. 182.) The opinions of the United States Supreme Court and those of California courts and state courts in other jurisdictions offer some guidance in assessing a trial court's exercise of its discretion to conduct voir dire concerning racial bias. As discussed below, these opinions suggest that the voir dire (for both the guilt phase and the penalty phase juries) in James Robinson's case was inadequate considering both the racial aspects of the capital crime and the social context in which this trial took place.

a. The United States Supreme Court has not determined that a minimal voir dire on race will be constitutionally sufficient in all cases.

The trial court in James Robinson's case never informed the jury selected to hear the guilt phase that the victims were White. James Robinson contends that this failure, along with the lack of opportunity for counsel to question the jurors and the completely superficial voir dire of the trial court in any area, makes it impossible to conclude that racial bias did not influence his capital trial in the guilt phase. The trial court did make the inquiry that was absent from the ***Turner*** case in selecting the second jury for the penalty phase retrial. However, this does not establish that the voir dire on race was adequate in either the guilt or penalty phases considering the context of James Robinson's trial.

In ***Turner,*** the Supreme Court held that the proposed voir dire question was the constitutionally necessary ***minimum***. Reversal is automatic where the sentencing jury in a capital case was not advised of the racial difference between the defendant and the victim(s). (*See*, ***Turner v. Murray***, *supra*, 476 U.S. at 36-37.) The Supreme Court did not, however, indicate that the single query on race, the absence of which resulted in reversal in ***Turner***, would be sufficient in all circumstances. On the contrary, in the ***Turner*** opinion's discussion of racial bias the United States Supreme Court suggests that more attention should be paid to racial issues in voir dire, particularly in the context of a capital case:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are more violence prone or morally inferior might well be influenced by that belief in deciding

> whether petitioner's crime involved the aggravating factors specified Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

(*Id* at p. 35.)

b. California courts have approved of more searching voir dire on racial issues.

Like the United States Supreme Court in ***Turner***, California courts have expressed concerns about the subtle nature of racial bias and the difficulty in discovering these attitudes on voir dire. In ***People v. Taylor***, *supra*, 5 Cal.App.4th 1299, the court of appeals made several observations about voir dire for racial bias. The court remarked "bias is seldom overt and admitted. More often, it lies beneath the surface. An individual juror 'may have an interest in concealing his own bias or may be unaware of it'" (*Id.* at 1312, quoting ***Smith v. Phillips*** (1982) 455 U.S. 209, 221, 222 [concurring opinion by O'Connor, J.].) The ***Taylor*** court continued to suggest that the trial judge should take a major role in ferreting out bias.

> To paraphrase an earlier statement by this court, made in the context of attorney voir dire, because racial, religious or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence– and sometimes even good faith efforts to be objective – trial judges must, where appropriate, be willing to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or

> prejudice, whether consciously or subconsciously held.

(***People v. Taylor***, *supra*, at 1312-1313; ***People v. Wells***, (1983) 149 Cal.App.3d 721, 727 [internal quotation marks omitted].)

The trial court's voir dire in ***Taylor*** was similar to the court's questioning on racial prejudice in James Robinson's case. In ***Taylor***, the trial court pointed out the fact that the defendant was African-American and the victim Hispanic. The court told the jurors that race should be a neutral factor under the law and that people should not be judged based on race or ethnicity. The court then asked the jurors is anyone disagreed with that principle.

The court of appeal found that this voir dire on racial bias was inadequate. The court in ***Taylor*** noted that the trial court had told the jurors about the defendant's and victim's races, and informed them that race should not be a factor. The trial court also asked whether the prospective jurors could put side any biases they may have had as required by the United States Supreme Court's decisions in this area.[34] However, the court of appeal was not satisfied that this voir dire was sufficient because:

> [T]he [trial] court asked no questions designed to elicit whether any juror actually held such bias. In a case such as this, where there is a potential of racial or other invidious prejudice against the defendant, a further inquiry should be made.

(***Taylor*** at 1316.)

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[34] *See*, page 1313-1316, discussing, inter alia, ***Mu'Min v. Virginia***, *supra*, 500 U.S. 415; ***Turner v. Murray***, *supra*, 476 U.S. 28; ***Aldridge v. United States,*** *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.

The court of appeals in ***Taylor*** noted that the United States Supreme Court has not endorsed particular means for discovering bias during voir dire, and that both state and federal cases allow the trial judge considerable discretion concerning the methods used to root out prejudice in voir dire. However, the ***Taylor*** court strongly suggested that significant attorney participation and open-ended questions would be effective for discovering bias. The court stated: "[w]e do not say that open-ended questions would have been inappropriate in this case, or that they might not be required in some cases." (***Taylor*** at 1316.) In James Robinson's case, the trial court mistakenly believed that the ***Taylor*** case prohibited open-ended questions. (*See* RT 81-82.)

c. <u>A single question is insufficient where the defense requests voir dire concerning racial prejudice</u>.

Where the defense requests voir dire on racial attitudes, a single inquiry by the trial court is not sufficient. In ***State v. Williams***, *supra*, 113 N.J. 393, 550 A.2d 1172, the New Jersey Supreme Court reversed the defendant's conviction and death sentence due in part to the inadequacy of the voir dire on race. Both the defendant and the victim were African-American. The trial court posed only one question about the prospective jurors' racial attitudes: "Defendant is a Black man. Would that, in any way, prejudice or influence your sitting as a juror in this case?" (***Williams*** at 1191.) The New Jersey Supreme Court noted that ***Williams*** was not a case where race was "inextricably bound up with the conduct of the trial," and further noted that there were no indications that racial prejudice may have influenced the verdict. (*Id*. at 1190, quoting ***Ristaino v. Ross***, (1976) 424 U.S. 589.) Nonetheless the Court held that, where requested by the defense, more thorough voir dire on racial attitudes is mandatory in a capital case:

> Racial prejudice may be either blatant and easy to detect or subtle and therefore more difficult to discern. A probing *voir dire* that elicits more than a 'yes' or 'no' response will aid the trial court in excusing prospective jurors for cause and will assist the defense in exercising its peremptory challenges. When the defendant is a member of a cognizable minority group, a more searching *voir dire* should be conducted, if requested.

(*Ibid*.)

The New Jersey Supreme Court recognized not only that voir dire is essential where the defendant is a minority, but that the voir dire must be searching and thorough. In James Robinson's case the single question on racial attitudes was inadequate for the same reasons the New Jersey Supreme Court stated in ***Williams***. Moreover, the need for racial voir dire was even greater here because this case involved an African-American accused of killing two Whites.

d. Thorough voir dire on racial bias could have been easily accomplished in this case and would not have been unduly time consuming.

A more thorough and probing voir dire was clearly necessary to discover racial and ethnic biases. This case involved a Black male defendant charged with killing two White teenagers. These factors alone mandated an inquiry into racial attitudes. Voir dire in this area was essential here for the added reason that the social climate existing in Los Angeles at that time made race a highly charged issue. Under these circumstances, thorough questioning to discover any racial biases was particularly important.

The trial court could have accomplished a constitutionally appropriate voir dire on race through several means. Attorney-conducted

questioning, as defense counsel requested, would have been one way to ferret out biases. The court itself could have followed up on the questionnaire's inquiries in this area, particularly where the prospective juror's responses were unclear or indicative of possible bias. Open-ended questions would have been especially helpful here because the answer would reveal something about the juror's thought processes and might indicate a further question leading to relevant information. In addition, sequestering the jurors would have created an environment where the prospective jurors felt more comfortable acknowledging that they did in fact have some feelings and beliefs which might impair their judgment in this case. Both the guilt and penalty verdicts must be reversed due to the trial court's complete failure to undertake even minimal precautions to prevent racial bias from influencing a capital decision.

H. The Trial Court's Voir Dire Was Constitutionally Deficient In That It Failed To Discover Whether Prospective Jurors Were Biased By Prejudicial Pretrial Publicity, And/Or Whether They Would Be Improperly Influenced By The Social Context In Which James Robinson's Capital Trial Was Held.

1. *The trial court was aware of the need to question jurors about bias because this case had generated a great deal of highly prejudicial pretrial publicity and aroused considerable sentiment in the local community.*

The second specific area in which the trial judge's voir dire was inadequate was the subject on prejudicial pre-trial publicity. The trial court was well aware that prospective jurors in James Robinson's case had been exposed to a substantial amount of prejudicial pre-trial publicity. The defense motion for attorney conducted voir dire and sequestered death qualification questioning was based in part on the publicity attending this case. In support of the motion, defense counsel lodged with the court copies

of twelve newspaper articles written about the case both before and after the preliminary hearing. (RT 75; CT 232-255.)

As counsel argued at the hearing, the sheer volume of publicity was not the sole issue. The tone of many of these articles intensified defense concerns about the impartiality of this jury pool. As stated by defense attorney Bruce Hill:

> Without pointing to any one article in detail, it is significant to note that at least several of those articles dealt with what I would characterize and classify as human interest aspects of the case; that is to say, the funeral of the two young men, the appearance at the funeral by their families, and in at least one instance, a girlfriend. This has created a concern on my part and on the part of the defense.

(RT 75.)

As defense counsel noted, this publicity was likely to be particularly prejudicial because the case had generated a great deal of local interest. Various members of the community were interested in James Robinson's case and followed it for different reasons. The crime took place in the neighborhood of California State University, Northridge, in a fast food restaurant of the type frequently visited by the local students. The victims in this case were young men from the surrounding community who had been popular as high school students. The shootings and robbery also alarmed small business owners and people working in fast food restaurants in the Northridge area. Counsel further noted that a similar crime had occurred in the same neighborhood approximately one year after the crimes charged in this case. The second crime generated its own publicity and renewed public interest in James Robinson's case. (*See*, CT 200, 204.)

2. *Many prospective jurors acknowledged their awareness of the case and some indicated that they had been influenced by the publicity*.

The questionnaires completed by the first jury revealed that many prospective jurors ***had***, in fact, been exposed to these prejudicial media reports. Of the 84 questionnaires returned at the time of the hearing 33 prospective jurors, or 39% of the group, were somewhat familiar with the case. (RT 75-76.) Counsel again expressed the defense's concern with undue prejudice resulting from not only the quantity of coverage but the quality and tenor of the news reports in this case:

> [S]everal of those articles dealt with certain issues of poignancy and drama and could create a favorable tone with respect to the prosecution and a negative tone with respect to the defense. We would submit that the questionnaire, in and of itself, is inadequate with regard to addressing those issues.

(RT 76-77, citing ***Mu'Min v. Virginia***, *supra*, 500 U.S. 415.)

Although extremely limited, the trial court's voir dire revealed that many prospective jurors were aware of the case. (RT 125 [juror read newspaper articles because the crime was near his home]; RT 134-135 [prospective juror who had learned of the case was inclined to favor the prosecution]; RT 138-139 [same]; RT 166 [juror uncertain if inclined toward defense or prosecution based on information available]; RT 181 [prospective juror had heard about the case in the news].) One prospective juror changed her response to the questionnaire, telling the court that she recalled hearing news reports about the case. (RT 181-182.)

3. *The trial court made no significant effort to determine whether prospective jurors had been biased by the media reports*.

The trial court did virtually no questioning about potential bias resulting from previous media exposure despite several prospective jurors acknowledging that they had read and/or heard the media coverage of James Robinson's case. While by no means the only example, the following is a typical exchange and illustrates the cursory nature of the court's voir dire.

The Court: All right, is there anything in your questionnaire that you wish to have changed?

Prospective Juror Kessler: I am not sure if what I said as far as the crime itself. I had heard about it on the news. I don't know if I put that, but then I hadn't heard about it until we came into court as to what really happened.

The Court: Is there anything about that that would interfere with your fair or impartial judgment in this case?

Prospective Juror Kessler: No.

(RT 181-182.)

Even where a prospective juror stated that he was aware of the case and follows stories about criminal law, the court asked no further questions to probe the juror's attitudes to determine whether he could be impartial. After some preliminary questions about answers left incomplete on the questionnaire, the court questioned this prospective juror as follows:

The Court: That was definite.

‘32. What, if anything, have you already learned about this case or about the defendant?

Prospective Juror Bianci: I don’t know anything about the defendant. I read it when it first came out in the paper. That’s all. This is close to where I live.

The Court: Did this information make you favor the prosecution or the defense?

Prospective Juror Bianci: No.

The Court: Okay. ‘35. What are the most serious criminal cases you have followed in the media during the past year?

Prospective Juror Bianci: All I put down is that King and Milken and Keating, but those aren’t . . .

The Court: ‘36. Do you try to follow stories about the functioning of the criminal justice system? Do you try?

Prospective Juror Bianci: I read ‘em, yeah.

(RT 123-125.)

This exchange demonstrates the overall superficiality of the trial court's voir dire in this case. The court cuts off the prospective juror before he has a chance to complete an answer. The trial judge does no follow up, and almost appears not to be paying attention to the responses. Mr. Bianchi, who was seated as a juror in this case, plainly states that he follows criminal cases and that he has read about and recalls James Robinson's case. In spite of these obvious red flags indicating possible bias, the trial court forgoes the opportunity to explore the juror's state of mind. Instead, the court pressures the juror into a "correct" response, i.e., where Mr. Bianchi agrees with the court that he does not favor the prosecution or the defense. The trial court has not only failed to probe an obviously important area of possible bias but has also cued the juror to the correct answer.

4. *The trial court was obligated to determine whether prejudicial publicity had resulted in bias.*

The right to a fair trial before an impartial jury is a fundamental constitutional guarantee. (***In re Murchison***, (1955) 349 U.S. 133, 136.) This right may be compromised by prejudicial publicity surrounding the crime and or the legal proceedings. (***Irwin v. Dowd***, *supra*, 366 U.S. 717; ***Mu' Min v. Virginia***, *supra*, 500 U.S. 415.) Prospective jurors who have been influenced by media accounts of events and issues to the extent that they cannot give the accused a fair hearing must be excused for cause. "'The theory of the law is that a juror who has formed an opinion cannot be impartial.'" (***Reynolds v. United States***, (1878) 98 U.S. 145, 155, quoting Chief Justice Marshall in 1 Burr's Trial 416 (1807).)

The due process clause of the Fourteenth Amendment requires the trial court to undertake voir dire questioning sufficient to determine whether prospective jurors have been so biased by media reports that they cannot be fair to the defendant. (***Mu' Min v. Virginia,*** *supra*, 500 U.S. at p.428.)

Particularly in the context of a capital case, the inquiry must probe beyond the jurors' assurances of impartiality. "[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *(Id.* at 429, quoting ***Patton v. Yount***, (1984) 467 U.S. 1025, 1031.) In ***Irwin v. Dowd***, *supra*, 366 U.S. 717, the Supreme Court remarked further on the psychological tendency of jurors to assert their ability to be fair to the defendant even where the circumstances indicate that impartiality is unlikely:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellow's is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you see and hear.'

(*Id.* at 728, citing ***Stroble v. State of California*** (1952) 343 U.S. 181; ***Sheperd v. State of Florida*** (1951) 341 U.S. 50 [concurring opinion]; ***Moore v. Dempsey*** (1923) 261 U.S. 86.)

As discussed above the atmosphere surrounding James Robinson's trial was uniquely prejudicial, mandating particular attention to ferreting out bias. The facts of the case alone were sufficient to trigger prospective jurors' prejudicial tendencies. James Robinson, an African American male, was accused of killing two white boys who were widely known and well thought of in the immediate community. The crime gathered considerable media interest for several reasons noted by counsel including the tragic "human interest" aspects of the case involving young victims from local

families and the Subway Sandwich shop's proximity to the University neighborhood which alarmed both students and small business owners.

The larger social context at the time of this trial was a strong factor encouraging prejudice. As discussed above and at the hearing, James Robinson's trial took place during a time when race relations in Los Angeles were especially tense and unstable. Prospective jurors could not avoid being affected by the pervasive atmosphere of fear and distrust between the White and African-American communities. This particularly volatile atmosphere not only increased the chances that jurors would be biased by news accounts, but decreased the odds that they would feel comfortable admitting even a mild tendency toward any sort of prejudice. By conducting a public voir dire, the trial court effectively foreclosed any possibility of prospective jurors disqualifying themselves by acknowledging their real views.

5. *The trial court should have conducted much more searching voir dire and also excused for cause any and all prospective jurors where there was an indication of potential bias.*

The efforts of the federal district court in ***United States v. Blanton*** (6th Cir.1983) 719 F.2d 815, provide a better example for managing voir dire in cases where prospective jurors have been subjected to adverse publicity. The defendants in ***Blanton*** were former public officials accused of various types of misconduct while in office. The case was highly publicized making it difficult to find jurors who had not formed some opinion about the events. The federal district court conducted voir dire en masse, and did not sequester jurors for questioning concerning possible bias. However, the trial court in that case took several steps to avoid impaneling biased jurors.

The district court in ***Blanton*** addressed the entire panel and acknowledged that the case had been the subject of extensive publicity. The judge repeatedly emphasized, on 18 different occasions, that the jurors must be able to set aside any opinion they might have formed and decide the case solely on the evidence. By handling the voir dire in this manner rather than conducting in-depth questioning about the contents of the news reports each juror had seen, the court avoided re-exposing jurors to the damaging publicity.

The trial judge in ***Blanton*** excluded jurors where there was any hint of possible bias. Seventy out of a total of ninety-two prospective jurors were excused for various reasons. The Sixth Circuit noted "[the trial court] was sensitive to every suggestion of prejudice which came either from jurors' answers or defense counsel suggestion, and in most instances responded with free use of his power to excuse a juror for cause." (*Id*. at 820.) In ***State v. Harris***, *supra*, 716 A.2d 458, 156 N.J. 122, the New Jersey Supreme Court was highly critical of the trial court for failing to undertake a sufficiently thorough voir dire in a highly publicized case. However, the Supreme Court noted in ***Harris*** that the trial court had discharged every prospective juror providing ambiguous responses on the questionnaire items concerning racial or ethnic attitudes. The trial court in ***Harris*** also excused virtually every prospective juror who regularly read the tabloids.

James Robinson contends that the trial court's voir dire in this area was completely insufficient for rooting out bias. As a result, it is highly likely that many jurors were exposed to prejudicial accounts of the crimes but, due to the court's cursory voir dire, the exposure was never revealed.

What is possible to quantify is the number of prospective jurors who did indicate familiarity with the facts as reported in the media. Five prospective jurors indicated during voir dire that they had been exposed to prejudicial publicity. (See, RT 125 [juror read newspaper articles because the crime was near his home]; RT 134-135 [prospective juror who had learned of the case was inclined to favor the prosecution]; RT 138-139 [same]; RT 166 [juror uncertain if inclined toward defense or prosecution based on information available]; RT 181 [prospective juror had heard about the case in the news].) One prospective juror changed her response to the questionnaire, telling the court that she recalled hearing news reports about the case. (RT 181-182.) At a minimum, these people ought to have been removed from the pool of prospective jurors in this capital case. The trial court could easily have excused every prospective juror who indicated familiarity with James Robinson's case and still been left with an adequate jury pool. This was a minimal step to safeguard James Robinson's constitutional rights. Reversal is necessary because, as a result of the trial court's failure to conduct an adequate voir dire and its refusal to take even the small precaution of discharging any juror who had been exposed to prejudicial material, there can be no assurance that impartial jurors decided either the guilt or the penalty phase of this capital trial. (***People v. Cash***, *supra*, 122 Cal.Rptr.2d 545.)

I. The Trial Court's Refusal To Grant Counsel's Requests For Modified Voir Dire Procedures Compounded The Problems With The Court-conducted Questioning And Further Interfered With The Discovery Of Information Concerning Challenges For Cause.

Before voir dire began, defense counsel requested that the trial court exercise its authority pursuant to section 223 to make certain modifications to the standard voir dire procedures. Counsel requested that the attorneys

be permitted to conduct voir dire, and that the prospective jurors be sequestered during the questioning. The trial court denied both of these requests. As discussed below, the trial court's refusal to grant the defense requests, neither of which was opposed by the prosecutor, exacerbated the problems with the trial court's voir dire discussed in the preceding sections. By allowing counsel to question the prospective jurors privately, the court would have had a great deal more reliable information from which to determine challenges for cause. In addition, by sequestering the voir dire the trial court could have avoided the documented conditioning effects which occur when prospective jurors hear repeated discussion of the death penalty. By failing to adopt either of the defense suggestions the trial court displayed a fundamental lack of concern for fairness to the defendant in a capital trial. Here again the court abdicated its duty to ensure that a capital defendant, James Robinson, received a fair trial before an impartial jury.

1. *Attorney-conducted voir dire would have been the most effective means of identifying juror bias.*

Thorough and probing voir dire by the attorneys is often necessary to discover juror biases which might otherwise go unrevealed. This is especially so where the facts of the case touch on deeply held prejudices such as racism or political beliefs, or where the potential jurors have been subjected to extensive pre-trial publicity. (***Ham v. South Carolina*** (1973) 409 U.S. 524, 527-528; ***Silverthorne v. United States***, 400 F.2d at 637-639; ***United States v. Ahmad, Berrigan, et al***, MD Pa., CR 14886 (1972); ***Sheppard v. Maxwell*** (1966) 384 U.S. 333, 350-351.)

In this case, defense counsel made several arguments in support of the request to allow attorney questioning. Counsel noted that both he and the prosecutor were experienced lawyers who could quickly and expeditiously follow-up on the prospective jurors' questionnaire responses.

Because they had been preparing the case, counsel were far more knowledgeable about the facts than the trial court and, therefore, better equipped to recognize subtle signs of bias which could have particular significance in the context of this case. (CT 200-215.) The prosecutor made no objection to the defense request for attorney voir dire, and appeared to concur with defense counsel's analysis. (*See*, RT 79.) The trial court refused the request for attorney voir dire in spite of all of these valid reasons for allowing counsel to participate. (RT 84.)

The trial court's resistance to counsel's participation in jury selection finds little support in California law, even following the enactment of section 223. In ***People v. Taylor***, *supra*, 5 Cal.App.4th 1299, the California Court of Appeals remarked on the essential role of counsel in voir dire:

> In a system of court-conducted voir dire, the role of the attorney remains significant, even vital. Counsel are present, and observe the text and manner of the prospective jurors' answers and reactions to questions, and to the responses of other prospective jurors. Based on voluntary and involuntary responses, the facts and issues of the case, and their own skill and experience, counsel may formulate specific questions and areas of inquiry for further questioning by the court. An attorney is not relegated to reposing in the courtroom like the now proverbial potted plant.

(*Id*. at 1313.)

The trial court in James Robinson's case handled voir dire in exactly the opposite manner the Court of Appeal endorsed in ***People v. Taylor***. The trial judge not only refused to allow counsel to conduct any voir dire but ignored specific requests for follow-up questions in particular areas where counsel had legitimate concerns. In selecting the second jury defense,

counsel pointed out to the court that several jurors had, in responses to the questionnaires, expressed the view that more criminal defendants should be executed to save taxpayer money. (*See*, RT 1837-1839.) Other jurors indicated in their questionnaires that the death penalty was proper in all cases of premeditated murder. (*Id*.) The trial court refused to pose any follow-up questioning in these areas, and later denied defense challenges for cause as to these jurors. As a result, clearly biased prospective jurors remained in the pool from which James Robinson's penalty phase jury was chosen.

2. *Because the trial court refused to hold individual, sequestered voir dire, the prospective jurors were also under social pressures to conform by providing "correct" responses.*

The trial court's refusal to sequester the voir dire hindered the search for reliable information from which to determine challenges for cause. Because the prospective jurors were questioned in a group, various social pressures influenced their responses. As trial counsel noted, several independent studies document the failure of large group voir dire as a means for eliciting accurate information. In one such study, the former jurors admitted lying or failing to volunteer pertinent information out of nervousness or embarrassment. (*See*, CT 200, 209, citing, Broeder, "Voir Dire Examination; An Empirical Study," 38 S.Cal.L.Rev. 503 (1965).)

A related problem with group voir dire concerns the jurors' ability to "learn" which responses will lead to a particular result. In another study, jurors in a large group who observed the voir dire examinations of other prospective jurors noticed that certain types of responses caused a prospective juror to be retained or excused. They were then able to tailor their own responses to fit the expectations. (*See*, CT 200, 209, citing Bush,

"The Case For Expansive Voir Dire," 2 Law and Psychology Review 9 (1976).)

There are clear examples of both these phenomena in James Robinson's capital trial. Several jurors modified their responses to a question about what circumstances would incline them toward a death verdict as opposed to life imprisonment without the possibility of parole (hereinafter "LWOPP"). (*See*, e.g., RT 1904 [juror states that she would no longer require an eyewitness or a confession to impose a death sentence]; RT 1889 [prospective juror changes response on one of death qualifying questions when questioned publicly].)

Towards the end of the voir dire in the second jury selection the prospective jurors had realized which responses would cause them to be excused from the case. Several jurors who did not wish to serve quickly stated that they had reconsidered and that their views were such that they would automatically vote for a death sentence or for LWOPP. (*See*, RT 1894-1895; RT 1896: RT 1916.) Other jurors who did not wish to be disqualified modified their answers to reflect a neutral stance on the penalty. (*See*, e.g., RT 1889.)

California courts have endorsed the practice of using individual, sequestered voir dire, especially in cases where there has been a substantial amount of media coverage in the local community. (***Odle v. Superior Court*** (1982) 32 Cal.3d 932, 936, fn. 2, 946, fn. 13.) As discussed previously, James Robinson's trial generated considerable media attention and aroused a great deal of public concern in the community where his trial was held. Under these circumstances, thorough voir dire of the prospective jurors in a sequestered setting was the only means to protect James Robinson's constitutional rights to a fair trial before impartial jurors. The

trial court's minimal voir dire was insufficient and counsel could not determine whether cause existed to remove the juror for bias.

3. *The group questioning concerning death qualification inclined the prospective jurors toward believing that James Robinson was guilty and also desensitized them to the idea of imposing a death sentence*.

In the moving papers, defense counsel urged the trial court to conduct individual, sequestered voir dire for that portion of the questioning necessary to "death qualify" the prospective jurors, i.e., to determine whether they were capable of following the court's instructions with respect to sentencing and would not automatically return a death verdict, or vote against a death sentence, as a result of deeply held personal convictions on the issue. At the hearing, counsel modified the request to include all portions of the voir dire and not just the death qualification area. The trial court denied the request for sequestered voir dire for any and all stages of the questioning. The failure to sequester the death qualification or ***Hovey*** voir dire was prejudicial for additional reasons.[35]

There were several reasons for counsel's request that this portion of the questioning be conducted privately, away from the other members of the jury panel. All of the problems associated with group questioning were equally applicable to the penalty phase. Just as in the general questioning, studies show that juror are reluctant to speak candidly in front of a large group, and will modulate their answers to conform to judicial expectations and social pressures. (*See*, CT 200-215.) There are, however, additional concerns where group voir dire is used in the death qualification phase of the questioning.

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

A group of prospective jurors who repeatedly listen to the death qualification process become conditioned to accept death as an acceptable punishment. Through exposure to repeated questioning about the process of deciding to execute someone, prospective jurors are likely to begin to view a capital sentencing decision as "normal" or even expected. They are effectively de-sensitized in this area. (*See*, CT 200, 210, citing, Haney, Craig, "The Biasing Effects of the Death Qualification Process (prepublication draft 1979); Haney, "On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process," 8 Law and Human Behavior 121 (1984).) The Haney Study was the basis for this Court's ruling in ***Hovey v. Superior Court***, *supra,* 28 Cal.3d 1, mandating that death qualification voir dire should be conducted individually to avoid prejudicing the jury pool through repeated exposure to questioning concerning death qualification.

As this Court observed in ***Hovey***, this phenomenon of juror conditioning through exposure to death qualification affects not only the penalty phase but also the jurors' determination of guilt. Jurors who are accustomed to the idea of deciding to kill another human being become more prone to convict the defendant:

> A penalty trial is contingent on a guilty verdict and a finding of special circumstances. Jurors undergoing death-qualification would have reason to infer that the judge and the attorneys personally believe the accused to be guilty or expect the jury to come to that conclusion. Only such an inference could serve to explain to the jurors why so much time and energy are devoted to an extensive discussion of penalty before trial. Provided with the cues from people who are not only experts in the courtroom but are also presumably acquainted with all the

> evidence in the case, the relevant law and the 'correct' application of one to the other, death-qualified jurors may themselves become more inclined to believe that the accused is guilty as charged.

(***Hovey v. Superior Court***, supra, 28 Cal.3d at .)

In this case, the questioning was conducted in the presence of the entire panel of prospective jurors, approximately 84 people. (*See*, RT 75.) In a group this large the afore-mentioned problems with large group voir dire were certainly amplified. These prospective jurors could not help but be influenced by the prolonged exposure to the death qualification process. Reversal of the guilt and penalty verdicts is required because James Robinson was denied a fair and impartial jury as required by the Sixth and Fourteenth Amendments. The verdicts in this case lack the heightened reliability in capital proceedings required by the Eighth Amendment.

4. *The Trial Court Managed Voir Dire And Jury Selection So As To Exclude Prospective Jurors Who Were Not Strongly In Favor Of The Death Penalty.*

Throughout the voir dire and jury selection, the trial court demonstrated a clear preference for jurors who actively favored the death penalty. This bias was expressed in several ways. As discussed above in section E, the trial court conducted very little voir dire in this case. However, the jurors who expressed any scruples about capital punishment were singled out for more extensive inquiry from the court.

On some occasions the court discouraged prospective jurors from serving where they had expressed doubts about the death penalty. (*See*, *e.g.*, RT 93; 218.) In determining challenges for cause, the court often removed prospective jurors on its own motion, and without giving counsel a chance to "rehabilitate" the juror through further questioning, where that

person indicated doubts or concerns about capital punishment. (*See*, RT 115; 169; 203 [first jury]; RT 1835; 1846; 1854; 1870; 1895, 1896; 1916 [second jury].) In all but one case, the court granted every challenge for cause by the prosecutor. The court granted three prosecution challenges for cause in selecting the first jury, and seven in the second jury's voir dire. (*Id.) Only three defense challenges were granted where a prospective juror expressed a bias in favor of capital punishment. (See*, RT 1847; 1872; 1906.) Finally, the trial court permitted the prosecutor to exercise peremptory challenges to remove all prospective jurors expressing any reservations regarding the death penalty.

a. <u>The trial court singled out jurors with scruples against the death penalty for more extensive questioning.</u>

As previously discussed, the trial court's voir dire was wholly inadequate in all areas. In selecting both juries, the court rarely asked prospective jurors for additional information during voir dire apart from the four death qualifying questions. The exception to this rule was in cases where prospective jurors expressed scruples about imposing the death penalty. The court then became more engaged and posed further inquiries. Only fifteen prospective jurors were asked any significant questions at all during voir dire. (*See*, sub-section (B)(1)(e), *supra*.) Of these, six were questioned further because they expressed some degree of reservation about capital punishment. (RT 93, 101, 115, 203, 205, 218.)

Prospective Juror James Hawkes underwent the most extensive questioning of any prospective juror participating in this case. The examination comprises around 6 pages of trial record. (RT 100-106.) Mr. Hawkes was an attorney who had practiced criminal law in another state. (RT 101.) The juror clearly had scruples about capital punishment,

and stated that it would be difficult for him to impose the death penalty. (*See*, RT 102-104.) However, he responded "correctly" to the court's four questions. Mr. Hawkes stated that he could vote to impose the death penalty "in some situations." (RT 103.) Mr. Hawkes confirmed that he could vote for a death verdict depending upon "[h]ow the crime was carried out." (RT 105.) The trial court ultimately overruled the prosecution's challenge for cause because Mr. Hawkes gave the "correct" answers, stating that he could consider a death sentence under certain circumstances. (RT 106.)

Another juror with scruples against the death penalty, Ms. Slettedahl, was questioned extensively. (RT 115-122.) Mr. Glass, the second prospective juror, was questioned for four pages, largely due to his hesitation about the death penalty. (RT 93-96.) Prospective jurors who openly opposed capital punishment were removed for cause almost immediately by the trial court without counsel having any opportunity to explore their views, the extent of their opposition or to discover whether and under what circumstances they might find the death penalty appropriate. (*See*, RT 115, 203, 205.) Jurors favoring the death penalty were not subject to additional voir dire, despite defense counsel's express request for further questioning where prospective jurors' questionnaires stated that they favored the death penalty in all cases of premeditated murder. (RT 1837-1839.) As defense counsel recognized, these jurors would be strongly inclined to automatically return a death verdict for James Robinson based on the convictions in the guilt phase.

b. <u>The prosecutor used peremptory challenges to remove jury prospective jurors who, although not able to be excluded under ***Witherspoon***</u>

and/or ***Witt***, expressed reservations about the death penalty and a willingness to consider a life sentence.

Early in the voir dire of the first jury, defense counsel correctly surmised that the prosecutor planned to remove any juror who did not actively favor capital punishment. After the court denied the prosecutor's challenge for cause with respect to Mr. Hawkes, defense counsel expressed concern about how the prosecutor would exercise his peremptory challenges.

Mr. Hill: Judge, if I can bring up one individual point. It is my understanding that Mr. Barshop [the prosecutor] will be using a peremptory challenge to a particular juror. That is one I would like to be heard at this time.

The Court: As to the peremptory challenge, you can be heard. this is somewhat premature. Normally I would say no. I have a feeling that you are talking about prospective juror number 4, Mr. Hawkes.

Mr. Hill: That's correct.

The Court: You don't have to answer this, Mr. Barshop.

Mr. Barshop: Yes.

The Court: The answer is you intend to peremptorily challenge Mr. Hawkes?

Mr. Hill: With regard to that, I am aware of the decision in California which states both sides can exercise peremptory challenge based on their viewpoint with a juror's decision. Nevertheless, with respect to this particular juror, it is the feeling of defense counsel that essentially ***Witherspoon v. Illinois*** precluded the wholesale elimination of a juror who might have a predisposition against a death penalty. Essentially, by exercising his peremptory challenge, the prosecution may be attempting to do by indirection what it could not do directly.

For that reason, the defendant would be deprived of a cross-section jury with regard to this case and essentially Mr. Hawkes is being eliminated because of his feelings and inclinations against the death penalty.

The Court: One moment, please. Without citing the last 15 cases, I will just cite the most recent, ***People v. Pinholster***, at 1 Cal.4th 865, that those with scruples about imposing the death penalty are not a cognizable class and does not deny a defendant a cross section of the community for peremptory challenge. (RT 155-156.)

The prosecutor subsequently removed Mr. Hawkes through a peremptory challenge. (RT 157.)

Prospective juror Ms. Rants received similar treatment. Ms. Rants expressed reservations about capital punishment, but also "correctly" answered the four death qualifying inquiries. She too was removed through a peremptory challenge. (RT 212.) Two other prospective juror who were even slightly hesitant about the death penalty were removed through peremptory challenges. (RT 157 [Mr. Glass]; 232 [Mr. Lapides].)

c. The efforts of the trial court and the prosecutor to obtain a pro death penalty jury violated James Robinson's federal constitutional rights.

The Sixth, Eighth and Fourteenth Amendments to the federal constitution guaranteed James Robinson the rights to a jury drawn from a representative cross-section of the community, to a fair trial in the guilt phase and a fair and reliable determination of the penalty. The United States Supreme Court has found that the Sixth and Fourteenth Amendment guaranty of a fair trial prohibits the exclusion of all potential jurors who express general objections to the death penalty, or moral or religious scruples against its imposition. (***Witherspoon v. Illinois*** (1968) 391 U.S. 510, 522; ***People v. Mattson*** (1990) 50 Cal.3d 826, 844, [superceded on other grounds].) James Robinson contends that the actions of the trial court and the prosecutor's treatment of the prospective jurors during voir dire caused him to be tried and sentenced by biased juries.

Excusing all jurors who expressed scruples about capital punishment resulted in a jury comprised of people strongly in favor of capital punishment. This skewed the results in both the guilt phase and at sentencing. Studies establish that persons with pro-death attitudes generally favor the prosecution and are likely to believe that a criminal defendant is guilty. (*See*, CT 200-215.) The effects were far more serious in the penalty determination where, due to the jury composition, the verdict was almost a

forgone conclusion. "[A] state may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (***Witherspoon v. Illinois***, *supra*, at 520.) James Robinson submits that reversal of both the guilt and penalty verdicts is required due to the composition of the juries in his capital trial.

J. Conclusion.

James Robinson's case presents virtually every imaginable form of error which can possibly occur in voir dire and jury selection. As discussed above, any one of these deficiencies alone would justify reversal. The combined effects of these errors mandates reversal of the convictions and sentence as there can be no assurance of fairness or impartiality for either of the jury selections in James Robinson's capital case. (See, ***People v. Hill***, *supra*, 17 Cal.4th 800, 844-846.)

The voir dire in this case was deficient in two obvious areas: racial prejudice and pretrial publicity. (See, Sub§§ G and H, *supra*.) While significant at all times, especially where the case involves an inter-racial homicide, the court's refusal to question jurors in these areas was absolutely unsupportable in the social context of James Robinson's capital trial. The court's deliberate ignorance of the prevailing atmosphere of bias and suspicion existing in Los Angeles at that time certainly prevented it from discovering bias in the panel of prospective jurors. Similarly, its refusal to question prospective jurors further about pretrial publicity, even where the jurors stated that they were familiar with the case, reveals the court's cavalier attitude toward ensuring James Robinson's constitutional rights to due process of law and a fair trial.

The problems in jury selection were not limited to these two significant areas. This court refused to exercise its statutory authority to

revise voir dire procedures by, for example, allowing the attorneys to conduct some questioning and/or sequestering some or all of the voir dire. (See Sub§ D, and I, *supra*.) The trial court's voir dire was woefully inadequate overall. As discussed above, the standardized form questionnaire was so poorly administered that the prospective jurors had an average of 28 seconds each to provide a written response to some 90 complex inquiries, including their views on capital punishment and the criminal justice system. The court's follow up questioning was rushed and superficial if it occurred at all. In many cases, the prospective jurors answered no questions apart form the two (four in the first trial) "death qualifying" questions. The average juror spent between 2 and 3 minutes in voir dire, and the entire jury selection was accomplished in under one court for both phases of trial. (See, Sub§ E, *supra*.) The trial judge clearly conveyed, through the style and tenor of his questioning, that the important thing was for the jurors to provide the "correct" answer. This court did not approach voir dire with an interest in discovering information about these prospective jurors' real views and attitudes. Rather, it was solely interested in impaneling a jury as quickly as possible. (See, Sub§ F, *supra*.)

Apart from speed in jury selection, this trial judge was concerned with impaneling a "pro-death" jury. The court's treatment of prospective jurors who had scruples about capital punishment and its patterns for granting challenges for cause are further evidence of the judge's inclination to direct the outcome by selecting jurors who would favor the prosecution and would then be inclined to impose a death judgment. (See, Sub§ J, *supra*.)

In its haste to accomplish jury selection, and due to the judge's own pro-prosecution bias, the trial court sacrificed James Robinson's most

significant constitutional rights: the right to a fair trial before an impartial jury; the right to due process of law; the right to fundamental fairness; and, the right to a reliable determination of guilt and of the penalty. (U.S. Constit. Amends, V, IV, and XIV; ***Irwin v. Dowd*** (1961) 366 U.S. 717, 722; ***Rose v. Clark*** (1986) 478 U.S. 570, 577; ***Beck .v. Alabama***, *supra*, 447 U.S. 625; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***People v. Cash*** (2002) 122 Cal.Rptr.2d 545.) Reversal is required to give meaning and effect to these fundamental constitutional rights.

## III. THE TRIAL COURT'S ADMISSION OF THE CORONER'S TESTIMONY CONCERNING THE PROBABLE RELATIVE POSITIONS OF THE VICTIMS AND THE KILLER(S) WAS CONTRARY TO CALIFORNIA LAW AND A VIOLATION OF JAMES ROBINSON'S FEDERAL CONSTITUTIONAL RIGHTS.

### A. Factual Background.

#### 1. *The defense motion in limine, the arguments of counsel at the hearing and the trial court's rulings.*

Los Angeles Deputy Coroner Christopher Rogers, M.D. testified in the guilt phase and in the retried penalty phase of James Robinson's trial. (RT 626; 2008.) Defense counsel made a motion in limine to exclude one area of the coroner's proposed testimony. A hearing on the defense motion was held immediately before Dr. Rogers' scheduled appearance in the guilt phase. (*See*, RT 617-623.)

At the hearing, the court asked the prosecutor for an offer of proof describing the scope of the coroner's proposed testimony. (RT 619.) In addition to technical, medical information about the causes of death, the

coroner was prepared to describe the bullets' trajectories. He was also prepared to state that, in his opinion, the shots in this case had been contact wounds or fired at a very close range. (*Id.*) Defense counsel did not object to the evidence concerning the bullet trajectories or to the coroner's conclusions regarding the nature of the wounds, i.e., whether these were contact wounds or shots fired at a close range. (RT 617-618.) Instead, the defense objected to the coroner offering an opinion in an unorthodox area.

The prosecutor wanted the coroner to give an expert opinion describing the relative positions of the victims and the shooter(s) when the shots were fired. Extrapolating from the medical evidence concerning the contact nature of the wounds and the bullet trajectories, the coroner would state that both victims had been shot in the back of the head while they were kneeling in front of the shooter(s). (RT 621–622.)

Defense counsel raised several specific objections to this novel area of expert testimony. First, counsel noted that the proposed testimony was not relevant. An expert opinion was not needed in this area because the jurors were fully capable of drawing their own conclusions about how the crimes occurred based on the relevant and admissible medical testimony and other evidence. (RT 618-619.) Counsel also made a foundational objection, noting that the coroner was not an expert in this distinct area. (RT 618.) In addition, defense counsel argued that the expert would be speculating to arrive at an opinion about the crime scene positions. (RT 647.) Finally, defense counsel objected that this testimony was more prejudicial than probative and therefore should not be admitted under Evidence Code section 352. (RT 647.)

In response to defense counsel's relevancy and foundational objections, the trial court asked the prosecutor for an offer of proof

concerning the coroner's qualifications to support the proposed opinion. The prosecutor merely recited what he expected the coroner to say.[36] He did not explain why or how the coroner's expertise allowed him to extrapolate the victims' positions from the bullet trajectories. The trial court's remarks at the conclusion of the motion hearing indicate that the court too was concerned about the adequacy of the foundation for this evidence. Even the court noted that hypothesizing about the likely positions of the parties at the crime scene was a matter of common sense and not a subject calling for expert testimony. (*See*, RT 623.) At the conclusion of the hearing, the trial court reserved its ruling to allow the prosecutor to lay a foundation for the testimony on direct examination. The court, however,

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[36] "The Court: All right. Now based upon what you indicated regarding both victims, that based upon the coroner's expertise he could give an opinion as to the most likely position. As an offer of proof, what is this expertise? Not in terms of the medical physician in general – ."

Mr. Barshop: I believe it is dealing with the likelihood of how someone might fire a weapon.

The decedent was 73 inches tall. The defendant is, I believe, five feet ten. The angle of the bullet is, again, at the top of the crown of the skull, straight down, back to front, and ten degrees.

The shot, the individual would have to be standing, shot something like this. If he is lying down, he would be something in this. And if he was on his knees, it would be something like this.

And by "this" perhaps I should describe each of those for the record.

For the record, the first one we are talking about is an individual standing, would be with the gun almost perpendicular to the top of the plane of the skull with the hand pointed down.

When I was talking about the individual on the ground, it was a bent over position. The hands, well, it could be either perpendicular or parallel to the ground with the whole body bent over.

With the individual on his knees, it's a standing height with the gun directly in front of him at a slightly downward angle. (RT 622-623.)

indicated that it was inclined to admit the evidence on a showing of minimal qualifications by the coroner. The trial court stated:

> All right. On a properly laid foundation, I believe that a coroner can give such opinion evidence.
>
> **It doesn't take much imagination, or much of an expertise based upon trajectory and the angle and the contact nature of a wound, to proffer an opinion whether a person was standing on a stepladder or on tiptoes or laying on his stomach when he fired a weapon or aiming down when a victim is on his knees.**

The same with victim White regarding the probable position of the person at the time of the shooting.

> However, **I haven't heard any qualifications at this time, so I will reserve my ruling pending a proper qualification of the doctor,** at which time I'll render my ruling. And I would ask at that time, Mr. Barshop, that prior to asking the questioning you wish to ask, you approach the bench and I will give my ruling.
>
> Again, I haven't heard the doctor's qualifications and **this may or may not have been his first autopsy. I don't know.**"

(RT 623-624 [emphasis supplied].)

The prosecutor's direct examination included only a few foundational questions to establish the witness's basic competency to perform autopsies. This portion of the coroner's testimony takes up less than one and one half pages of trial record. (*See*, RT 627-628.) Dr. Rogers testified that he has a medical degree, and is board certified in forensic pathology. He received additional pathology training at his job at the

County Coroner's Office. Dr. Rogers stated that he had performed "hundreds" of autopsies involving gunshot wounds and is familiar with two leading treatises in the field. (*Id*.) The prosecutor posed no questions concerning the witness' training or experience, if any, in crime scene reconstruction or investigation. The prosecutor asked no questions requiring the witness to explain whether or in what respect he was qualified to render an opinion about the relative positions of victims to killer(s) when the fatal shots were fired. (*See*, RT 627-628.)

The trial court overruled the foundational objection without comment after hearing this brief review of the coroner's background. (RT 648.) With regard to the defense objection under Evidence Code section 352, the court found that the coroner's testimony was probative because, if believed, it supported the theory of premeditated and deliberate murder. The court further noted that expert testimony about an "execution style" slaying was relevant in aggravation in the penalty phase. The trial court concluded that the evidence would not be unduly consumptive of time. In addition, the court stated that the coroner's testimony would not be unduly prejudicial because other prosecution witnesses had testified that James Robinson had confessed to killing the victims at close range. (RT 648.) The trial court did not address defense counsel's argument that no expert testimony was necessary on this matter. However, prior to ruling, the court remarked: "I have to say that based upon the proffered offer of proof that the people have made it doesn't take too much of [sic] expertise to render an opinion as to the position of the bodies based upon the medical evidence. In fact, it is something that almost a lay person, given these facts, could render." (RT 647.)

2. *The coroner's testimony in the guilt phase and the prosecutor's closing argument based on this evidence*.

Resuming his direct examination of Dr. Rogers, the prosecutor posed a series of supposedly hypothetical questions involving a victim who stood 6'1" tall, and a shooter with a height of approximately 5'10" to 5'11". The coroner agreed that, because the entry wound to victim White was on the top or crown of the head, the shooter must have been holding the gun above the victim's head. (RT 649-650.) The bullet path, which extended straight down at a slight (ten degree) angle from the crown of the head to the front of the head, also indicated that the shooter had been positioned above the victim. (*Id*.) In the coroner's opinion, the most likely scenario was that victim White had been kneeling when the shooter placed the gun in contact with his scalp at or near the top of the head, and shot him at an angle of approximately 90 degrees. (RT 650-651.) The doctor testified that the shot to victim Berry's head was also a lethal contact wound, with the bullet entering the side of the head. (RT 651.)

The prosecutor discussed the manner of the shootings in his guilt phase closing argument. Trying to explain a discrepancy between the prosecution's theory of the case and Dennis Ostrander's testimony regarding James Robinson's alleged confession, the prosecutor argued that it was not significant that Ostrander stated that James had shot the victims in back of the head rather than on top of the head while they were kneeling. (RT 1334-1336.) The prosecutor argued that James changed his story about the way he shot the victims to appear more "macho." (RT 1335.)[37]

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[37] Referring to Ostrander's testimony, the prosecutor argued:

"He didn't tell you he was there. He didn't tell you that he knew his facts were accurate or not. All he could tell you was that he got his

(continued...)

3. *The coroner's revised testimony in the retried penalty phase, the additions to the victim impact witnesses' testimony and the prosecutor's argument.*

Dr. Rogers was called to testify again in the retried penalty phase. (RT 2008.) The prosecutor adjusted the presentation of the doctor's testimony to place greater emphasis on the allegedly expert determination concerning the relative positions of the victims and the shooter(s). In the guilt phase this portion of the coroner's testimony covered only three transcript pages. (RT 649-652.) Dr. Rogers stated his opinion, i.e., that the victims were probably shot while in a kneeling position, only one time. (RT 652.) In the penalty retrial, Dr. Rogers' testimony in this area expanded to cover thirteen pages of trial transcript. (*See* RT 2016-2029.)

For the penalty retrial, the prosecutor had the coroner review every possible scenario for the parties' relative positions in detail. (*Id.*) The prosecutor again asked the coroner to speculate concerning possible scenarios for the shootings. However, the prosecutor did not simply rely upon verbal descriptions of the hypothetical possibilities. Instead, the prosecutor actually re-enacted what he believed to be the likely positions of the victims and the shooter. With the court's permission, the prosecutor placed himself in several different positions to demonstrate what he believed to have happened during the crimes. During these demonstrations, the prosecutor was holding James Robinson's gun, the alleged murder weapon. (RT 2024-2025.) First, the prosecutor stood and held the gun in

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[37](...continued)
information from the defendant. If the defendant lied to him, he would be restating exactly the same statements and which sounds more macho, which is better, if you are going to try to talk about doing it? That I had somebody on their knees when I shot them at the top of their head or I shot him in the head as he was going by. I shot him in the face." (RT 1335.)

the awkward angle that would have been required to shoot victim White on top of the head at or near the entry wound. (*See* RT 2025-2026.) The coroner agreed that it was unlikely that both the shooter and victim White had been standing, unless the shooter stood on a counter top or was otherwise elevated above the victim. (RT 2026.)[38] Next, the prosecutor lay on the ground on his stomach and asked the coroner to speculate as to whether the shooter had crouched down to hold the gun in contact with the victim's head at the downward ten degree angle. (RT 2026-2027.) Finally, the prosecutor demonstrated the position which he would later argue was the only viable scenario of how the crime had occurred:

> Q: Mr. Barshop: Now, if we were to have Mr. White on his knees with head slightly forward, is that consistent? If I am holding the gun in a manner straightforward with the same angle, if I am on my knees such as this, would that be consistent? (RT 2027.)
>
> A. That is consistent.
>
> * * *
>
> Q: What about an individual who was on his knees, head forward, and was consistent with a shot, the arm held straight out, the gun to the top of the head. This is consistent with the angle of the bullet?
>
> A: This is consistent.

[38] Eyewitness Rebecca James believed that she had seen the person on the customer side of the counter jump on top of the counter and chase the person standing in the employee area. (RT 268.)

Q: This is consistent with the contact wound to the top of the head?

A: Yes.

Q: And this is a perfectly normal position to be in, is it not?

A: It appears to be a normal position.

Q: The person's head is down perhaps praying for their life?

A: It is consistent with the head down position.

Q: Again, there was no exit wounds [sic]?

A: That's correct.

Mr. Barshop: I have nothing further. (RT 2027.)

The calculated effect was to elevate the prosecution's scenario, in which the victims are kneeling with their backs to their killer, to the level of an established scientific fact in the minds of the jurors.

The victim impact witnesses modified their testimony in the penalty phase retrial to emphasize the coroner's conclusion regarding the positions of the victims and the shooter(s). Only in the penalty retrial did the family members of the two victims describe their horror and distress at having their sons killed while kneeling before the killer, begging and praying for their lives. (*See*, RT 2253; 2283.) Based on Dr. Rogers' testimony about the victims' positions, the family members gave their opinions about the despicable and cowardly type of person who could kill in this fashion. (*Id*.)

The coroner's opinion about the victims' likely positions was a centerpiece of the prosecutor's closing argument in the retried penalty phase. The "execution style" manner of the killings was, according to the prosecutor, the strongest aggravating factor in the crime.[39]

> Let's start with the testimony of Dr. Rogers.
>
> * * *
>
> And is there any one of you who reasonably does not believe that Mr. White was on his knees, head down, praying for his life when the defendant took the gun that he was holding, his .380, placed it to the top of his head and fired the death shot?
>
> * * *
>
> And I submit to you, ladies and gentlemen, that is an aggravating factor. The manner in which James White was executed on his knees, asking that the defendant just take the money, don't hurt him, don't hurt his friend Brian Berry, because we have evidence of that, remember – we will get to that in a bit – that that's what they said, just take the money, don't hurt us.
>
> What did Dr. Rogers tell us about Brian Berry?
>
> That he was shot twice. He has the shot to the side of his nose from a distance of six to 18 inches. The eye was open at the time of this

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[39] The prosecutor asked for the death penalty in this case based on the way in which the crimes were carried out. However, there is no evidence that the jurors were in agreement concerning the manner of the homicides. The jury made no findings concerning the relative positions of the victims and the shooter and the prosecution's version of events was not proven beyond a reasonable doubt. (*See* Argument V, *infra*.)

> shot. He saw the gun in his face. He saw his killer. He saw what was going to happen when the defendant pulled the trigger for that shot. And then to put the coup de grace he takes his gun and places it to the side of his head, behind the ear, as a contact wound and shoots him again. The acts of a coward. (RT 2779-2780.)

B. Standard Of Review.

This Court typically reviews a trial court's evidentiary rulings for abuse of discretion. (*See* ***People v. Burgener***, *supra*, 41 Cal.3d 505; Evid. Code §§ 350, 352.) However, James Robinson contends that heightened scrutiny is appropriate and necessary because this claim involves error of constitutional magnitude in the context of a capital case. This evidence should not have been admitted pursuant to several provisions of California law (Evidence Code Sections 352, 720 and 801(a), and the trial court's errors deprived James Robinson of his constitutional rights to due process of law, a fair trial and a reliable determination of guilt and of the penalty. (U.S. Const. Amends. V, VI, VIII and XVI; Cal.Const., Art. I, §§ 7, 15 and 17; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Beck v. Alabama***, *supra*, 447 U.S. 625, 638; ***Ford v. Wainwright***, *supra*, 447 U.S. 399.)

The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is [] different." (***Gardner v. Florida***, *supra*, 430 U.S. 349, 357-58. *See also*, *e.g.*, ***Lockett v. Ohio***, *supra*, 438 U.S. 586; ***Godfrey v. Georgia***, *supra*, 446 U.S. 420.) As the Ninth Circuit Court of Appeal has noted, this increased concern with accuracy in capital cases has led the Supreme Court to "set strict guidelines for the type of evidence which may be admitted, must be admitted, and may not be admitted." (***Lambright v. Stewart***, *supra*, 167 F.3d 477, citing ***Skipper v. South Carolina***, *supra*, 476 U.S. 1; ***Booth v.***

***Maryland***, *supra*, 482 U.S. 496.) According to the reasoning of these cases, this Court should independently examine the record to determine whether the trial court's erroneous admission of this prejudicial evidence was harmless beyond a reasonable doubt. (***Chapman v. California***, *supra*, 386 U.S. 18, 24.)

C. Overview Of Legal Arguments.

The trial court's decision to allow the coroner to offer an opinion in this area was erroneous in several respects. First, as the court itself recognized, the jurors could draw their own conclusions about the probable positions of the victims and the shooter(s). Because the jury received no appreciable help from the coroner's opinion testimony about the likely positions of the persons at the crime scene, this testimony was not relevant and should not have been admitted. (*See*, ***People v. Champion*** (1995) 9 Cal.4th 879, 924; ***Soule v. General Motors Corp.*** (1994) 8 Cal.4th 548, 567; section D, *infra*.) Second, even assuming that an expert opinion regarding the positions of the victims and shooter would have been useful for the jury, the prosecutor did not lay a proper foundation for this witness to render an opinion on this precise question. (*See*, section E, *infra;* ***Alef v. Alta Bates Hospital*** (1992) 5 Cal.App.4th 208, review denied.) Finally, the court erred in its analysis under Evidence Code section 352 by concluding that the probative value of this opinion testimony outweighed the resulting prejudice. (*See*, ***People v. Clark*** (1980) 109 Cal.App.3d 88; ***People v. Roscoe*** (1985) 168 Cal.App.3d 1093; section F, *infra*.)

For all of these reasons, the trial court's admission of this expert opinion testimony was contrary to established California law. The erroneous admission of this evidence was highly prejudicial, and the error affected both the guilt and penalty phases of the capital trial. As a result,

James Robinson was denied his state and federal constitutional rights to due process of law, to a fundamentally fair trial and reliable determination of guilt and penalty. (U.S. Const., Amends. V, VI, VIII and XIV; Cal.Const., Art. I, §§7(a), 15 and 17; ***Gardner v. Florida***, *supra*, 430 U.S. 349; ***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Ford v. Wainwright***, *supra*, 477 U.S. 399.) The trial court's actions in contravention of California law also deprived James Robinson of a state created liberty interest and denied him equal protection of the law as guaranteed by Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.)

D. This Expert Opinion Testimony Was Not Relevant Because The Jurors Were Capable Of Drawing Their Own Conclusions About The Manner Of The Shootings Without The Expert's Opinion.

The coroner should not have been permitted to give an opinion about the likely positions of the shooter to the victims because the jury did not need expert opinion or testimony to understand the evidence. Any juror of average intelligence was capable of understanding the medical testimony about the placement of the entry wounds and the angles of the bullet paths. The jurors could, therefore, draw their own conclusions about the positions of the parties at the crime scene. Because the expert testimony was not necessary for the jurors' understanding, it was not relevant and ought to have been excluded. The fact that this testimony was received through an allegedly qualified expert increased the substantial prejudicial effect and lent unjustified support to the prosecutor's case.

The California standard for qualified expert opinion is set forth in Evidence Code section 801 which provides, in pertinent part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

Both factors listed in Evidence Code subsection (a) must be satisfied. In order to be admissible, the expert's opinion must be on a subject "beyond common experience," and the opinion must also be of appreciable help to the jury. (***People v. Champion***, *supra,* 9 Cal.4th 879, 924; ***Soule v. General Motors Corp.,*** *supra,* 8 Cal.4th 548, 567.)[40]

Where the jurors are able to draw a conclusion from the facts in evidence as easily and intelligently as the expert could, expert testimony is not admissible. (***McCleery v. City of Bakersfield*** (1985) 170 C.A.3d 1059, 1074, n 10.) This was precisely the argument made by defense counsel in this case. Defense counsel did not object to the coroner's testimony regarding the locations of the bullet wounds, the medical evidence of gunshot residue in and near the wounds and the interpretation of those findings indicating close range or contact shots. Counsel posed no objections to any other medical facts and interpretation, including the times of death and estimates concerning how long the victims may have lived

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[40] Evidence Code section 801(a) codified pre-existing California law on expert opinion testimony. (*See*, ***People v. Cole*** (1956) 47 C.2d 99, 103 ["[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."]; ***People v. Hopper*** (1956) 145 C.A.2d 180, 191.)

following the shootings. (*See*, RT 617-618.) Similarly, defense counsel had no objections to testimony concerning the trajectories taken by the bullets inside the victims' bodies. (*See* RT 620-624.) Defense counsel did contend, however, that the jurors should be given the medical information and allowed to draw their own conclusions about the most likely scenario at the crime scene. (RT 617-619.) Counsel argued that any reasonable juror could draw his/her own conclusions based on the facts presented and that the coroner should not be allowed to present one particular scenario as an "expert" opinion. (*Id.*)

Even the trial court noted that drawing a conclusion about the probable positions of the victims and the shooter(s) was a matter of common sense and not something calling for expert testimony:

> The Court: All right. On a properly laid foundation, I believe that a coroner can give such opinion evidence.
>
> It doesn't take much imagination, or much of an expertise based upon trajectory and the angle and the contact nature of a wound, to proffer an opinion whether a person was standing on a stepladder or on tiptoes or laying on his stomach when he fired a weapon or aiming down when a victim is on his knees.

(RT 623.)

Under these circumstances, the trial court erred by allowing the coroner to testify on this subject.

Cases in this Court and in other California courts have permitted expert opinion evidence where the subject matter calling for the opinion

would ***not*** be understood by the average juror. (*See, e.g.*, ***People v. Champion***, *supra*, 9 Cal.4th 879, 924 [expert in street gangs allowed to testify regarding gang terminology and unusual slang expressions used in tape recorded conversation]; ***People v. Harvey*** (1991) 233 Cal.App.3d 1206, 1226 [police agent's opinion in narcotics case about relative roles of defendants in drug organization].) Here, even the court recognized that it was a simple matter to imagine the positions of the victims and the shooter based on the information at hand, i.e., the victims' heights, the position of the bullets entry (atop the head), and the bullet trajectories (angled downward at approximately ten degrees from back to front). Expert opinion, therefore, did not clarify any ambiguity or prevent any misinterpretation of the evidence.

In this instance, the expert opinion testimony ought to have been excluded. Excluding the "expert" opinion about the positions of victims to shooter(s) would not have deprived the jury of any factual, medical evidence. Dr. Rogers was able to testify about the medical information discovered through the autopsies and was competent to explain the technical terms and processes to the jury. However, having done so, he was not qualified to reach a conclusion about the positions of the parties any more effectively than the average juror. His opinion in that precise area therefore was not of appreciable help and ought to have been excluded. (***People v. Stoll*** (1989) 49 Cal.3d 1136, 1154 [exclusion of expert opinion evidence is required where it would add nothing to the jury's common pool of information].)

Excluding this portion of the coroner's opinion testimony would not have prevented the jury's consideration of the crime scene scenario envisioned by the prosecution. The prosecutor could properly have argued

for his interpretation of the coroner's evidence (i.e., trajectories and angles of bullet wounds consistent with an execution style killing of kneeling victims) in closing argument. The prosecution should not, however, have had the benefit of adding supposedly "expert" authority to what was merely one interpretation of the facts commonly understood by the jurors.

E. There Was No Foundation For The Coroner To Give An Expert Opinion Concerning The Positions Of The Parties At The Crime Scene.

In addition to Evidence Code section 801, which addresses the subject matter of expert opinion, California law imposes specific requirements for the qualification of the particular expert witness. Evidence Code section 720 states in relevant part:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

As noted above, defense counsel raised a foundational objection concerning Dr. Rogers' qualifications to give an expert opinion on the likely positions of the parties at the crime scene. (RT 618.) In this instance, the prosecutor did not establish a proper foundation for Dr. Rogers' expertise in this area. Because there was insufficient information before the trial court concerning the witness's qualifications, the court's decision to admit the expert opinion testimony was not a valid exercise of the court's discretion.

F. The Prosecutor Did Not Lay A Proper Foundation For This Aspect Of The Coroner's Testimony.

Where a foundational objection is raised, the proponent of the expert testimony has the burden of proving its admissibility. (***Alef v. Alta Bates Hospital***, *supra*, 5 Cal.App.4th 208, review denied.) Moreover, that burden will not be met simply by establishing that the witness has credentials in the general field. The proponent of the testimony must affirmatively show that the witness' expertise is directly and specifically related to the subject of the opinion they plan to offer. (*See*, ***Salasguevara v. Wyeth Laboratories, Inc.*** (1990) 222 Cal.App.3d 379 [reversing grant of summary judgment in favor of the defense in a medical malpractice action where the defendants relied on the deposition testimony of the plaintiff's own doctor because nothing in the record demonstrated that the doctor was a specialist qualified to render an opinion on the precise issues involved in the action].)

The prosecutor failed to meet the statutory burden in this case. When the court asked for the coroner's qualifications to offer this opinion, the prosecutor merely recited what he expected the coroner to say.[41] He did

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[41] "The Court: All right. Now based upon what you indicated regarding both victims, that based upon the coroner's expertise he could give an opinion as to the most likely position. As an offer of proof, what is this expertise? .Not in terms of the medical physician in general – ."

Mr. Barshop: I believe it is dealing with the likelihood of how someone might fire a weapon.

The decedent was 73 inches tall. The defendant is, I believe, five feet ten. The angle of the bullet is, again, at the top of the crown of the skull, straight down, back to front, and ten degrees.

The shot, the individual would have to be standing, shot something like this. If he is lying down, he would be something in this. And if he was on his knees, it would be something like this.

And by "this" perhaps I should describe each of those for the record.

(continued...)

not explain why or how the coroner's expertise allowed him to extrapolate the victims' positions from the bullet trajectories. During his direct examination of the coroner, the prosecutor posed no questions concerning the witness's training or experience, if any, in crime scene reconstruction or investigation. The prosecutor asked no questions requiring the witness to explain whether or in what respect he was qualified to render an opinion about the subject matter of his proposed testimony, i.e. the relative positions of victims to killer(s) when the fatal shots were fired.

1. *The Trial Court Did Not Have Enough Information To Validly Exercise Its Discretion.*

The court allowed the coroner to offer an opinion as to where and how the victims and shooter(s) were located at the crime scene after hearing a very brief description of the coroner's training and experience on direct examination. (*See*, RT 647-649.)[42] The trial judge's remarks (both at the earlier hearing on the defense objections, and after hearing the testimony describing the coroner's basic background and training) indicate that, in the

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[41](...continued)

For the record, the first one we are talking about is an individual standing, would be with the gun almost perpendicular to the top of the plain of the skull with the hand pointed down.

When I was talking about the individual on the ground, it was a bent over position. The hands, well, it could be either perpendicular or parallel to the ground with the whole body bent over.

With the individual on his knees, it's a standing height with the gun directly in front of him at a slightly downward angle. (RT 622-623.)

[42] The coroner testified that he had performed "hundreds" of autopsies where death resulted from gunshot wounds, and that he was familiar with two leading treatises dealing with the subject of gunshot wounds. (*See*, RT 627-628.) Dr. Rogers was not asked, and did not indicate whether he had any background or experience in crime scene reconstruction or in determining the positions of victims prior to death. (Id.)

court's view, general autopsy experience involving gunshot cases was satisfactory.[43] The trial court's ruling was erroneous because the court failed to evaluate the coroner's qualifications in light of the *specific subject* on which an expert opinion was being sought, i.e., the probable positions of the victims to the shooter(s) when the fatal shots were fired.

Trial courts are obligated to contain expert opinion testimony within the area of professed expertise and to require that there be an adequate foundation for the opinion testimony. (***Korsak v. Atlas Hotels, Inc.*** (1992) 2 Cal.App.4th 1516, review denied.) A trial court must have adequate information in order to exercise its discretion regarding whether the expert's credentials are sufficient. (***Mayer v. Alexander*** (1946) 73 Cal.App.2d 752.) Whether the trial court has properly exercised its discretion as to qualification of an expert depends on whether the witness has disclosed sufficient knowledge of the subject to entitle his or her opinion to go to the jury. (***Agnew v. City of Los Angeles*** (1950) 97 Cal.App.2d 557; ***Valdez v. Percy*** (1939) 35 Cal.App.2d 485.)

In the present case, the trial court had only scant information about the coroner's qualifications. Nothing before the court suggested that this

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[43] The trial court reserved its ruling on the defense motion *in limine*, but its remarks suggested that a showing of minimal medical qualifications would be sufficient: The trial court noted: "Again, I haven't heard the doctor's qualifications and **this may or may not have been his first autopsy. I don't know.**" (RT 623-624 [emphasis supplied].)
After very brief testimony by the coroner describing his medical training and background the court ruled against the defense, stating: "I have to say that based upon the proffered offer of proof that the people have made it doesn't take too much of [sic] expertise to render an opinion as to the position of the bodies based upon the medical evidence. In fact, it is something that almost a lay person, given these facts, could render." (RT 647.)

witness had the necessary expertise to offer an opinion about the positions of the actors at the time of the crime. Accordingly, the court's ruling does not reflect a true exercise of judicial discretion but, rather, an abdication of the court's duty to evaluate the coroner's credentials relative to the subject matter of the expert opinion sought. (*See*, e.g., ***Agnew v. City of Los Angeles,*** *supra*, 97 Cal.App.2d 557; ***Valdez v. Percy***, *supra*, 35 Cal.App.2d 485.)

The general standard for qualifying an expert to give an opinion is whether the witness' peculiar skill, training or experience enable him to form an opinion which would be helpful to the jury. (Evid. Code § 720; ***People v. Davis*** (1965) 62 Cal.2d 791.) However, this Court has repeatedly held that the qualifications of a purported expert must be ***directly related*** to the subject of the proposed expert opinion. The competency of an expert is in every case is a relative one, that is, relative to the topic about which the expert is to make a statement. (***Huffman v. Lindquist*** (1951) 37 Cal.2d 465.)

Expert qualifications receive especially close scrutiny where the proposed opinion testimony involves the interpretation of crucial evidence from a crime scene. In ***People v. Hogan*** (1982) 31 Cal.3d 815, this Court held that the expert was not qualified where, although qualified to testify about whether stains found on defendant's pants and shoes were blood and about blood typing of the stains, he was not qualified as an expert on the particular subject of whether blood was deposited by flying drops or by surface to surface contact. (*See* also, ***People v. Fierro*** (1991) 1 Cal.4th 173, rehearing denied, *certiorari* denied, 506 U.S. 907, rehearing denied, 506 U.S. 1029 [licensed private investigator could not be certified as an expert in ballistics and crime scene reconstruction where his experience was based

on military service 20 years earlier at which time he took photographs of plane and car crashes; witness had never photographed a crime scene involving a gun shot death, and his opinion on the effects of bullets on the victim's body was based on viewing of documentary films of men in combat].) Precise training in criminal investigation methods is never more important than when the opinion is given in a capital case. In this context, this Court has typically required very specific credentials before upholding the trial courts' decisions to admit expert opinion. (*See*, e.g., ***People v. Bolin*** (1998) 18 Cal.4th 297, modified on denial of rehearing, *certiorari* denied 526 U.S. 1006 [criminalist was qualified to give expert testimony in murder prosecution regarding the positions of the victims at the time they were shot in view of his educational background in biochemistry and serology and his training for 13 years as criminalist which included attending and giving lectures on blood-spatter analysis and crime scene investigation]; ***People v. Clark*** (1993) 5 Cal.4th 950, rehearing denied, cert.denied, 512 U.S. 1253.) [witness was qualified to give expert "blood-spatter" testimony in capital murder prosecution where the witness had attended lectures and training seminars on the subject of blood dynamics, read relevant literature, and conducted relevant experiments and visited crime scenes where blood spatter tests were conducted].)

The trial court here failed to investigate the coroner's credentials to determine whether this witness had the necessary background and training to support his opinion about the way in which this crime occurred. Instead, the court relied on the coroner's medical training and his experience with autopsies involving gunshot wounds. Other cases make clear that medical training alone is not sufficient. (*See*, ***Salasguevara v. Wyeth Laboratories***, Inc., *supra,* 222 Cal.App.3d 379 [child's treating physician did not have

medical expertise to offer competent medical testimony on subject of whether administration of DPT vaccine caused child's seizures, where it could not be determined based on information before the court whether this doctor had adequate skill training or experience]; ***Miller v. Silver*** (1986) 181 Cal.App.3d 652 [psychiatrist lacked credentials permitting him to give expert testimony concerning surgical technique used in highly specialized field of plastic surgery].) The mere fact that this witness had experience in performing autopsies where death resulted from gunshot wounds is similarly unpersuasive. As discussed above, nothing in this record suggests that the coroner had any training enabling him to determine the positions of the victims and the shooter(s) immediately before the crimes. What the record does reflect of the coroner's training and background indicates only that this witness was qualified to testify in what defense counsel described as "traditional" areas for a coroner or medical examiner, i.e., describing the cause(s) of death, the bullet paths and time of death. Without additional information supporting his qualifications to give an opinion about the actors' positions, this witness should have been limited to those "traditional" areas of medical testimony where his qualifications were established.

G. The Trial Court's Admission Of This Testimony Was An Abuse Of Its Discretion Under Evidence Code section 352 Which Was Contrary To California Law And Abridged Both State And Federal Constitutional Rights.

The trial court's decision to admit this expert opinion testimony resulted from its incorrect assignments of value to the competing interests of probative value and potential prejudice to the defense. According to the trial court, the coroner's opinion that the victims had been killed while kneeling in front of the shooter was relevant and probative because this testimony supported an alternate theory for the prosecution, i.e., premeditated and deliberate murder. (*See*, RT 648.) The court also found that this evidence was highly probative because it was "relevant as to the aggravating nature of these crimes." (*Id.*) With respect to prejudice, the court held "it will be no more prejudicial than that evidence which the jury has already received regarding the 'execution style' slaying as admitted to by the defendant if the people's witnesses thus far are believed." (RT 648.) The court's decision to admit this evidence was an abuse of the trial court's discretion under Evidence Code section 352, resulting from the overstatement of the probative value of the expert opinion and a simultaneous underestimation of the prejudicial effects of this evidence.

The trial court here assigned far too much probative value to the coroner's opinion in this area. As demonstrated above, the jury did not need expert testimony to understand the evidence. Extrapolating the positions of victims to shooter(s) was a matter of common sense well within the ability of an average person. (*See*, section D, *supra*.) Where there is no need for an expert opinion that testimony has no probative value. It is error under Evidence Code section 352 to admit expert opinion testimony in a criminal case where the need for any expert opinion is questionable and, on

the other hand, the result depends upon a "credibility contest" between defense and prosecution witnesses. (***People v. Clark***, *supra*, 109 Cal.App.3d 88 [error to admit testimony of rape expert that the victim's conduct was reasonable where the case was a close contest on credibility and the trial court had questioned the need for any expert opinion]. *See* also, ***People v. Roscoe*** (1985) 168 Cal.App.3d 1093 [probative value of psychologist's testimony regarding specific responses of the victim in that case was far outweighed by the prejudicial effect especially where the expert could have relied upon general studies and not a detailed, case specific analysis].)

The exclusion of the expert opinion would not have prevented the prosecution from arguing premeditation and deliberation as an alternative theory to felony murder, and/or arguing that the manner of the killings was a factor in aggravation at the penalty phase. The prosecutor had all of the factual, medical evidence from the un-objectionable portions of the coroner's testimony to support its theory that the victims had been killed while kneeling. As the trial court itself pointed out, the coroner's opinion testimony was cumulative. Other prosecution witnesses testified that James had confessed to killing the victims in this manner. (*See*, RT 647-648.) There was, therefore, other evidence which the prosecution could have used to argue that the crimes were premeditated and the coroner's opinion in this area was not necessary to support this interpretation of the evidence.

The trial court's valuation of the potential prejudice from this testimony was equally incorrect. The court here concluded that any prejudice from the coroner's opinion was slight because, according to other prosecution witnesses, James had confessed to killing the victims in a manner consistent with the opinion the prosecutor was eliciting from the

coroner. The analysis of prejudice does not depend upon the existence of other testimony on the same point. Thus, even where an expert's opinion is briefly stated and cumulative of other testimony, the prejudice resulting from that evidence may be "devastating," especially when considered in combination with other errors. (*See*, ***Smith v. AC and S, Inc.*** (1994) 31 Cal.App.4th 77, 92; ***Maben v. Lee*** (1953) 260 P.2d 1064.)

Two prosecution witnesses testified that James had confessed to killing the victims "execution style," in a manner basically consistent with the scenario most likely in the coroner's opinion.[44] As the court itself recognized, the prosecution's chances of proving the "execution style" aspect of this case depended upon the credibility of those prosecution witnesses. Their testimony, and the case in aggravation against James Robinson, gained tremendous support with the admission of this allegedly objective and scientific "expert" opinion stated by the coroner.

For all of the reasons discussed above, the trial court erred in admitting this supposedly expert opinion testimony about the victims and shooter(s) relative positions at the time of the crime. The improper introduction of this evidence was contrary to California law and denied James Robinson his rights to due process of law under both the federal and state constitutions. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477; U.S. Const., Amends. VIII, XIV; Cal. Const., Art. I, §§ 7 and 15.) The trial court's error also deprived James Robinson of a fundamentally fair trial in violation of the Sixth and Fourteenth Amendments. (***Estelle v. McGuire*** (1991) 502 U.S. 62, 72; ***Walters v. Maass*** (9th Cir. 1995) 45 F.3d 1355, 1357.)

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[44] *See*, testimony of Dennis Ostrander (RT 783-797) and testimony of Tommy Aldridge (RT 547-573).

H. The Erroneous Admission Of The Coroner's Irrelevant And Highly Prejudicial Opinion Testimony In The Penalty Phase Of The Capital Trial Violated The Eighth And Fourteenth Amendments To The Federal Constitution.

The coroner's penalty phase testimony was the single piece of evidence most responsible for the death verdict in this case. The supposedly heartless way in which the two victims were killed was the central element in the prosecution's appeal for the death penalty. (*See* Argument VII, *infra*.) The prosecutor's closing argument featured Dr. Rogers' allegedly expert opinion about the "execution style" murders of the two boys who, according to the prosecutor, were either praying or begging for their lives when the final shots were fired. (*See*, RT 2779-2780.) Absent Dr. Rogers' testimony, the prosecutor would have had little credible basis for this scenario. In fact, there is reliable evidence directly contradicting this version of events. Eyewitness Rebecca James testified that the person on the customer's side of the counter jumped over the counter in pursuit (which, at the time, she believed was playful rough housing) of the person in the employee area. (RT 268.) Ms. James' testimony thus supported the alternate version of the events the coroner had postulated, i.e., that the trajectories of the shots were consistent with the shooter having been standing on the counter top and firing down on the victims. (*See*, RT 2026.) Under these circumstances, it can hardly be doubted that the expert's testimony was highly prejudicial if not determinative of the outcome. However, as demonstrated above, this evidence was without foundation, was not relevant and should not have been admitted. James Robinson's death sentence returned on the basis of this testimony thus violates the Eighth and Fourteenth Amendments to the federal constitution.

The United States Supreme Court has consistently affirmed two fundamental values in capital sentencing: 1) that the evidence underlying the sentence be acute[ly] reliable; and, 2) that the evidence should not be so inflammatory as to encourage a decision based on "caprice or emotion" rather than rational reflection. (***Monge v. California*** (1998) 524 U.S. 721, 732; accord ***Johnson v. Mississippi***, *supra*, 486 U.S. p. 584.) The ***Monge*** court developed this point at some length.

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. ***'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.'*** (***Gardner v. Florida***, 430 U.S. 349, 358 (1977). Because the death penalty is unique both in its severity and its finality,' *Id.* at 357, we have recognized an ***acute need for reliability in capital sentencing proceedings.*** *See* ***Lockett v. Ohio*** 438 U.S. 586, 604 (opinion of Burger, C.J.) (Stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); *see also* ***Strickland v. Washington***, 446 U.S. 586, 604 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for the procedural fairness and accuracy of fact-finding'). (***Monge v, California***, *supra*, 524 U.S. at 731-732 [emphasis added].)

The coroner's testimony fails to satisfy either of these essential criteria for basic, fundamental fairness in capital sentencing. As discussed

in detail above, there was no "expert" basis for this testimony. The coroner was not qualified to offer an opinion about the positions of the parties at the crime scene. Moreover, this was not a proper subject for expert testimony as the jurors were equally capable of speculating on the likely scenario at the time of the murders. By introducing this one possible scenario through allegedly "expert" evidence, the prosecutor was able to disguise supposition about what had occurred as absolute fact. (*See*, Argument VII, *infra*.) In fact, the prosecutor conveniently forgot to mention Rebecca James' testimony that she had seen someone on top of the counter, a likely vantage point for firing shots with the trajectories of the victims' wounds.

It is equally clear that the prosecutor's emotional and inflammatory closing argument, wherein he described the victims as kneeling in submission while praying for their lives and/or begging for mercy, could not have been given without the coroner's testimony. This testimony and the argument following from it are precisely the sort of evidence which will result in a death verdict based on "caprice and emotion." (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358.) James Robinson submits that this is exactly what occurred at the re-tried sentencing phase of his case. The jury first heard Dr. Rogers' testimony accompanied by the prosecutor's dramatic re-enactment of the victims' possible positions while he held the alleged murder weapon. (RT 2008-2029.) The jurors were then subjected to an excessive amount of very disturbing and highly prejudicial victim impact testimony from several witnesses. (RT 2247-2285.) (*See*, Argument V, *infra*.) Finally, they were left with the imagery induced by the prosecutor's closing argument where, based on the coroner's testimony, he repeatedly referred to the helpless victims kneeling in prayer before their killer. Under these conditions, it is simply fantastic to believe that the jury was capable of

calm and rational deliberation on an appropriate sentence. Having been so moved by their emotions, they were primed to disregard the entire defense case in mitigation and to follow the prosecutor's directive to return a death verdict. The result was a sentence of death for James Robinson in violation of the Eighth Amendment to the federal constitution.

## I. This Court Must Reverse James Robinson's Capital Conviction and Sentence of Death.

### 1. *The State cannot establish that the erroneous admission of the coroner's testimony in the guilt phase of trial was harmless beyond a reasonable doubt.*

Errors involving a trial court's decisions to admit evidence are typically reviewed under the less stringent standard of ***People v. Watson***, *supra*, 46 Cal.2d 818. However, this Court has made an exception for state law errors implicating important constitutional rights. In ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1102-1103, this Court held that errors involving merely state evidentiary rules are analyzed under the ***Watson*** standard, but if the error is of constitutional dimensions the ***Chapman*** standard is controlling. Because federal constitutional rights are implicated here, this Court should independently review the record, and reverse the convictions and sentence if the errors complained of are not found to have been harmless beyond a reasonable doubt. (***Chapman v. California***, *supra*, 386 U.S. 18, 24; ***People v. Fudge, supra,*** 7 Cal.4th 1075, 1102-1103.) Under the ***Chapman*** standard, the burden shifts to the state to prove that the error was harmless beyond a reasonable doubt. (***Chapman v. California***, *supra*, 386 U.S. 18, 24.) The State cannot meet this burden on the facts of this case.

As previously discussed, the coroner's testimony about the victims' positions at the time of the crime was highly prejudicial. The coroner was

inherently credible as the jurors could reasonably expect that he would be objective and professional. (*See* ***Smith v. AC and S, Inc.***, *supra*, 31 Cal.App.4th 77, 92; ***Maben v. Lee,*** *supra,* 260 P.2d 1064.) The trial court's ruling allowed the prosecutor to present one possible scenario of what had taken place (i.e., the victims kneeling before their killer) through the coroner's supposedly "expert" testimony. Presenting the prosecution's scenario through the expert made this version of events appear to be based on scientific facts. Instead, the prosecutor's theory was merely one of several hypotheses concerning what actually occurred at the Subway. The weight of the evidence actually supported the coroner's alternate explanation for the bullet trajectories, i.e., that the shooter stood above the victims on the counter top and fired downwards. Rebecca James' testimony about seeing the person atop the counter is consistent with this scenario. (RT 268.) The prosecutor, however, chose the "execution style" theory because, although it had less evidentiary support, this was plainly the most inflammatory version of the events.

To fully appreciate the prejudicial effects of the coroner's testimony it must be assessed in conjunction with the other guilt phase evidence. (***People v. Hill*** (1998) 17 Cal.4th 800, 844-846.) The verdict in the guilt phase of this trial depended upon the outcome of a credibility contest between the prosecution's witnesses and James Robinson. Prosecution witnesses Dennis Ostrander and Tommy Aldridge testified that James confessed to the Subway robbery/murders, and admitted shooting each of the victims in the head. (*See* RT 564-565; 792-795.) James flatly denied any involvement in the Subway crimes, and testified that he had never made any statements to either Dennis or Tommy. (RT 905; 959; 2362.)

As discussed in Argument I, the jury had good reasons to be suspicious of Dennis Ostrander's testimony. Tommy Aldridge's testimony was suspect as well.[45] The prosecution, however, was able to bolster the credibility of these witnesses with the coroner's testimony. The prosecutor framed his questioning of the coroner so that the expert's testimony was consistent with the confessions James allegedly made to Dennis Ostrander and Tommy Aldridge. The coroner's testimony reinforced Tommy's and Dennis' testimony by adding the credibility of expert opinion to confirm their stories. When the coroner's testimony about the likely scenario at the crime scene was added to these witnesses' testimony, the prejudice was surely overwhelming. Because the coroner's testimony was sufficiently consistent with these witnesses' testimony, the jury was sure to disregard any doubts they may have had about Tommy Aldridge's and/or Dennis Ostrander's credibility. As a result, they convicted James Robinson without seriously examining the inconsistencies in the witnesses' testimony and without giving sufficient consideration to the defense evidence about what had taken place at the Subway Sandwich Shop.

The prejudicial effects of the coroner's testimony were amplified by the trial court's erroneous ruling excluding defense evidence about Tommy Aldridge's and Tai Williams' gun possession arrests and the evidence that a car exactly like Tai's was seen at the scene of the crime. (*See* Argument I, *supra*.) This excluded evidence would have caused the jury to question Tai's and Tommy's motives and their truthfulness. Without it, the jury had no reason to disregard or even to critically evaluate either the coroner's

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[45] As discussed in Argument I, *supra*, the jury was largely unaware of the reasons to doubt Tommy Aldridge's credibility as a result of the trial court's erroneous exclusion of evidence bearing on his motives and on his truthfulness.

testimony about the victims' positions or Tommy's testimony on this point. The erroneously excluded evidence and the erroneously admitted evidence thus interplayed to create a scenario which was highly prejudicial and did not deserve the credibility which it was undoubtedly accorded by the jury.

2. *Reversal of the convictions in the guilt phase is required under the standard of **People v. Watson** because it is at least reasonably probable that the jury would have reached a different result absent this evidence*.

In ***People v. Watson***, *supra*, 46 Cal.2d 818, 836, this Court held that reversal is required where it is "reasonably probable" that a more favorable result would have been obtained absent the error. Errors involving a trial court's decisions to admit evidence are typically reviewed under the ***Watson*** standard. However, this Court has made an exception for state law errors implicating important constitutional rights. In ***People v. Fudge***, *supra*, 7Cal.4th 1075, 1102-1103, this Court held that errors involving merely state evidentiary rules are analyzed under the ***Watson*** standard, but if the error is of constitutional dimensions the ***Chapman*** standard is controlling. James Robinson submits that the ***Chapman*** standard should apply in this case. However, reversal of both the convictions and the sentence is required even if this Court applies the standard of ***People v. Watson***.

As discussed above, the coroner's testimony about the likely positions of the victims was highly prejudicial, especially considering its inter-relationship to Tommy Aldridge's and Dennis Ostrander's descriptions of James' supposed admissions concerning how he shot the victims. Absent the erroneous admission of the coroner's opinion, it is at least reasonably probable that the jury would have reached a different result

and concluded that there was a reasonable doubt concerning James Robinson's guilt. Reversal of the convictions is, therefore, required.

3. *Reversal is required under the state law standard of **People v. Brown** because there is at least a reasonable possibility that the jury would have reached a different verdict in the penalty phase if the error had not occurred.*

In ***People v. Brown*** (1988) 46 Cal.3d 432, this Court reaffirmed the "reasonable possibility" test as the appropriate standard for assessing the effect of state law error in the penalty phase of a capital trial:

> [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.

(***Brown***, *supra*, at 448.)

In ***People v. Ashmus*** (1991) 54 Cal.3d 932, 983-984, this Court again invoked ***Brown***, explaining that to apply the standard required the reviewing court to reverse based on even the possibility that a hypothetical juror ***might*** have reached a different decision absent the error: "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id* at p. 983-984.)

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in ***People v. Watson*** (1956) 46 Cal. 2d 818, 836. The Court in ***Brown*** stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (***People v. Brown***, *supra*, 46 Cal.3d at 447.) The reason for the heightened standard is the

different level of responsibility and discretion held by the sentencer in the penalty phase. The ***Brown*** Court stated:

> A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant – i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the ***Watson*** standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 [emphasis in original], *quoting* ***Woodsen v. North Carolina***, *supra,* 448 U.S. at 305. *See also*, ***People v. Ashmus***, *supra,* 54 Cal.3d at 965 [equating the reasonable possibility standard of ***Brown*** with the federal harmless beyond a reasonable doubt standard].)

In James Robinson's case, it is at least reasonably possible that the jury would have returned a verdict of life without the possibility of parole ("LWOP") if the trial court had not permitted the coroner to testify about the relative positions of the victims and shooter(s).

The coroner's testimony was even more highly prejudicial in the sentencing phase of trial. Dr. Rogers' testified that, in his expert opinion, the likeliest scenario was that the victims had been kneeling with their backs to the shooter when the fatal shots were fired. (*See* RT 2027-2029.) The testimony was accompanied by the prosecutor's dramatic re-enactment of the victims' possible positions, featuring the prosecutor himself acting out the scene by kneeling and then lying on the courtroom floor. During this demonstration the prosecutor held the alleged murder weapon. (*See* RT

2025-2029.) The jurors were also subjected to an excessive amount of very disturbing and highly prejudicial victim impact testimony from several witnesses. (*See*, Argument V, *infra*.) The family members of the two victims described their horror and distress at having their sons killed while kneeling before the killer, begging and praying for their lives. (RT 2253; 2283.) Based on Dr. Rogers' testimony about the victims' positions, the family members gave their opinions about the despicable and cowardly type of person who could kill in this fashion. (*Id*.) Finally, the jury was left with the imagery induced by the prosecutor's closing argument. There, supported by the coroner's testimony, the prosecutor repeatedly invoked the image of the helpless victims kneeling in prayer before their killer. (RT 2779-2780; 2791; 2805.) The prosecutor's argument continued in this emotional and inflammatory manner, with him encouraging the jury to impose a death sentence for the sole reason of how the crimes were allegedly carried out. (*See*, RT 2782-2785; 2791; 2805; 2810. See also, Argument VII, *infra*.)

Under these conditions, it is simply fantastic to believe that the jury was capable of calm and rational deliberation on an appropriate sentence. Having been so moved by their emotions, the jurors were primed to disregard the entire defense case in mitigation and to follow the prosecutor's directive to return a death verdict. Dr. Rogers' allegedly expert opinion about the victims' probable positions relative to the shooter was the central underpinning for this theme. Particularly in combination with the improper and excessive victim impact testimony in the penalty phase, the prejudice was surely overwhelming. (***People v. Hill***, *supra*, 17 Cal.4th 800, 844-846; Argument V, *infra*.)

Under the circumstances present here, the state cannot meet its burden of establishing that the error was harmless beyond a reasonable doubt. (***Chapman v. California****, supra,* 386 U.S. 18, 24.) It is equally clear that there was at least a reasonable possibility that the jury would have returned a life sentence but for the admission of this testimony. (***People v. Brown****, supra,* 46 Cal.3d 432.) Accordingly, this Court should reverse James Robinson's sentence of death.

## IV. THE TRIAL COURT ABANDONED ITS DUTY TO CONTROL AND DIRECT THE TRIAL AND DENIED JAMES ROBINSON HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL BY ALLOWING THE COURT REPORTER TO SELECT IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY FOR THE REQUESTED READBACK.

### A. Proceedings In The Trial Court.

During their deliberations in the guilt phase, the jury sent a note to the trial court requesting a read back of certain items of testimony. (CT 308.) Both counsel and James Robinson were brought into court for the trial judge to discuss the handling of the jury's request. (RT 1392.) The court stated that the jurors had requested "testimony of Barbara Phillips regarding the position of fingerprints on the bag. Also, the number of prints and whether put on at the same time." Secondly, they are requesting "testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning." Finally, the court stated that the jury had asked to hear "whether James had the gun Sunday morning after he returned home." (RT 1392-1393.)

The trial court let the court reporter decide which testimony was responsive to the jury's request. After giving the above description of the

testimony the jury requested, the court stated: "[a]nd I take it all the testimony has been found as to those items and the jury and alternates will be read those in the jury room." (RT 1393.) That is, the trial court let the court reporter decide which testimony was responsive to the jurors' questions.

At the trial court's suggestion, both counsel and Mr. Robinson waived their rights to be present for the read back. (RT 1393-1394.)[46] The jurors were brought in to the courtroom and informed that there was no testimony by James Robinson about whether Tai had been home when he returned to the apartment early Sunday morning. (RT 1395.) The jurors were then directed to return to the jury room for the court reporter to read back Barbara Phillips' and James' testimony. (RT 1396.)

The court reporter read back portions of the testimony by Barbara Phillips, the fingerprint examiner. (RT 1396.)[47] Next, the reporter read a very lengthy excerpt from James Robinson's cross-examination. Only the last few lines of the excerpt (set forth below in boldface) were responsive to the jury's question, i.e. whether or not James had the gun when he was at

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[46] The waiver of rights to be personally present does not undermine this claim. The defense was entitled to rely, and did rely, on the trial judge's representation that the appropriate testimony was selected for the read back. Had defense counsel been present during the readback, he would have objected.

[47] The testimony pertaining to Ms. Phillips testimony was: Volume 9, page 768, line 23 to line 24; page 770, line 6 to line 8; page 774, line 5 to page 775, line 6. This claim concerns the remainder of the testimony the court reporter selected and chose to read back to the jury: Volume 11, page 1176, line 19 to line 24; page 1069, line 23 to page 1073, line 17. (RT 1396.)

the apartment early in the morning hours of June 30th. Yet the jury heard much prejudicial, non-responsive testimony:

Q: At any time after 2:20 in the evening [sic] could you have walked out of the apartment, walked that hundred yards over to Von's, put a quarter in the phone, dialed 911 and said "there are two kids injured at the Subway at Zelzah and Devonshire" and hung up. Could you have done that?

A: Yes sir, that could have been done.

Q: It was not a difficult task, was it?

A: No, sir.

Q: You chose not to do it, right?

A: I didn't choose against doing it, I just didn't make any decisions. I just didn't come to any decisions.

Q: And you didn't do it?

A: No, sir.

Q: Now during this two and a half hour period – actually, you left at about six o'clock in the morning?

A: Yes, sir.

Q: This two and a half hour period, did you call the police and tell them about Tai?

A: No, sir.

Q: Were you afraid of Tai at this time?

A: Yes, sir.

Q: Terrified, right? Would that be a fair statement?

A: I was scared but I was – I was terrified but I was still trying to assume that I knew him and that maybe I could talk to him, but then I didn't think the risks of finding out, you know, one or the other was worth it. I –

Q: Do you think that he had set you up?

A: No, sir.

Q: Why do you think, in your own mind, what's going through your mind at that time because he has told you to meet him at the Subway?

A: I had thought, well, I didn't understand if he wanted to meet me there, and I was thinking, did he want to meet me there and then just do this just because he had thought about it or did he plan to do this or did he think I would help him do this. Or did he plan to kill me or I didn't, you know, I thought of all those and I couldn't tell which one might have been, what I just wasn't sure.

Q: So you thought he might want to kill you too, right?

A: Yes, sir.

Q: So you are in fear for your life at this time, right, because you think he is going to kill you?

A: No, sir. I just wondered if he had planned to.

Q: So you are not in fear for your life?

A: I was in fear.

Q: And you are in fear because you think he is going to kill you, right?

A: Well, I thought he had intended to. I wasn't sure if he still was or – I wasn't sure why his reason was for him wanting me to be there after what I saw and I was wondering, you know, did he, you know, think that I was going to go along with something like this or did he want to do me or did he just not intend to do any of this and he just did it. I swear, I didn't know.

Q: So it is 2:30 in the morning, Tai has committed the robbery, Tai has injured these two people. You think that Tai is going to kill you, might want to kill you?

A: Yes, sir.

Q: And you sit in the apartment and wait. Is that what you do?

A: Yes, sir.

Q: And watch television, right?

A: I had the t.v. on to keep me awake because I was tired.

Q: Killing people wears you out, doesn't it?

A: I never –

Q: Then at six o'clock in the morning you get up and you decide, well, now I am going to go get an apartment, right?

A: No, sir. I decided to go to the hotel.

Q: Because you decided these two and a half hours you have thought and you have planned and you said, 'well, Tai might want to kill me. Maybe I ought to leave now and get an apartment, get a motel room?'

A: No, sir. I didn't think or plan anything. I had just assumed as soon as he wake up, you know, came in and said, 'I want you gone,' this and that, and then I figured, you know, now that it is daylight out, and I can do a lot of things, a lot of things that are not open are open now.

**Q: You got the apartment – well, when you left Tai's apartment, you took all your money with you, right?**

**A: Yes, sir.**

**Q: You took your gun with you?**

**A: Yes, sir.**

**Q: As a matter of fact, when you were waiting there with Tai, you had your gun because you were afraid of him, right ?**

**A: Yes, sir. I – yes, sir, I did.**

(RT 1069-1073.)

The re-reading of testimony continued with the following passage from defense counsel's redirect examination:

Q: In response to Mr. Barshop's questions, you have indicated for us that you did have the gun in the apartment in the period of time between 2:00 or three o'clock in the morning and somewhere

around six o'clock in the morning when you left.

A: Yes, sir.

The court reporter ***omitted*** the very next question:

Q: Did you have it during the hours of, say, 11 o'clock on Saturday night and the time when you returned to the apartment?

A: No, sir.

(RT 1176.)

Following the readback, the jury resumed deliberations. (RT 1396.) The following day they reached a verdict, finding James Robinson guilty on all counts charged in the information. (CT 310; RT 1399-1402.)

B. Legal Argument On Appeal.

The trial court's handling of the jury's request for a readback of testimony violated the applicable California statute, Penal Code section 1138, and also denied James Robinson his federal constitutional rights to due process of law and to a fair trial under the Fifth, Sixth, and Fourteenth Amendments. Pursuant to section 1138, trial courts have the discretion to grant jury requests for testimony to be reread. However, the court must maintain control and supervision of the process. (***People v. Litteral*** (1978) 79 Cal.App.3d 790, 794.)

Where, as James Robinson's case, the court merely delegates the responsibility to a party (such as the court reporter) who is not authorized to make the proper determinations there has not been a true exercise of judicial discretion. (*See*, ***Fisher v. Roe*** (9th Cir. 2001) 263 F.3d 906; ***Riley v. Deeds*** (9th Cir. 1995) 56 F.3d 1117.) The trial court in James Robinson's case failed to exercise any discretion concerning the readback. Simply ordering

that the requested testimony be re-read is clearly insufficient. As discussed in the Ninth circuit's cases above, the trial court was obligated to take some steps to ensure that the readback it ordered was carried out properly. Instead, the trial court here abdicated all responsibility to the court reporter. This was not a valid exercise of the trial court's discretion and, therefore, the error was structural in nature and reversal is required without a showing of prejudice. (***Riley v. Deeds***, *supra*, 56 F.3d 1117, 1122.)

Should this Court determine that the trial judge exercised some discretion in connection with the readback, James Robinson contends that the trial court's actions here were an abuse of that discretion. The reporter's choice of testimony for the read back was inappropriate in several respects. First, the four-page excerpt of James Robinson's cross-examination was largely irrelevant to the question asked. Second, the excerpt selected was misleading and presented a skewed picture of the evidence by overemphasizing the prosecution's cross-examination. It was as if the state was allowed to re-introduce its evidence on an *ex parte* basis. Because James' credibility was crucial to the state's case, the skewed readback acted as an argumentative pinpoint instruction. The excerpt of defense counsel's redirect examination included in the readback was limited to a single question and answer while the selection of cross-examination covered four transcript pages. Third, the court reporter omitted some material which was relevant to the jury's request. The very next question and answer in James Robinson's redirect testimony should have been read back. Finally, the majority of the testimony read back to the jury was not only irrelevant but highly prejudicial.

As a result of the trial court's unauthorized delegation of responsibility to the court reporter the jury heard irrelevant, incomplete, and misleading testimony during deliberations in James Robinson's capital trial.

The fact that this testimony was reread during deliberations and at the jury's request increased the prejudicial effect. The trial court's actions, which allowed the reporter's selection of irrelevant and highly prejudicial testimony for the read back, thus denied James Robinson his rights to due process of law and to a fair trial as required by the Fifth, Sixth and Fourteenth Amendments to the federal constitution. The erroneous inclusion of this testimony in a capital trial also undermines the heightened reliability required by the Eighth Amendment. For all of the reasons set forth in greater detail below, reversal of the convictions is required.

C. Standard Of Review.

This Court has reviewed claims of error concerning readbacks of testimony for abuse of discretion. (*See*, ***People v. Frye***, (1998) 18 Cal.4th 894, 1007; ***People v. Jennings*** (1991) 53 Cal.3d 334, 384-85; ***People v. Ainsworth*** (1988) 45 Cal.3d 984.) However, James Robinson contends that de novo review is appropriate here because the trial court's actions in his case amount to an effective "abdication of judicial control" over the readback and not an exercise of judicial discretion. (***Riley v. Deeds***, *supra*, 56 F.3d 1117, 1122.) As discussed below, the trial court's unauthorized delegation of authority to the court reporter and the court's failure to control the readback process was structural constitutional error which requires automatic reversal of the convictions. (*Id.*)

D. The Trial Court Had No Authority To Delegate The Selection Of Testimony For The Readback To The Court Reporter.

1. *The trial court had a duty to control and supervise the readback process under California law*.

California Penal Code section 1138 sets forth the trial court's duties where a deliberating jury has requested a readback of testimony. The statute provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

Under section 1138, the trial court has an affirmative duty to honor the jury's request to have testimony reread wherever possible. (***People v. Box*** (2000) 23 Cal.4th 1153, *rehearing denied, cert. denied*, 532 U.S. 963; ***People v. Moore*** (1996) 44 Cal.App.4th 1323; ***People v. Butler*** (1975) 47 Cal.App.3d 273.) This Court has repeatedly held that "although the primary concern of section 1138 is the ***jury's*** right to be apprised of the evidence, a violation of the statutory mandate implicates a defendant's right to a fair trial conducted in accordance with law." (***People v. Frye***, *supra*,18 Cal.4th 894, 1007, *cert. denied*, 526 U.S. 1023, citing ***People v. Weatherford*** (1945) 27 Cal.2d 401, 420; ***People v. Butler***, *supra*, 47 Cal.App.3d 273, 280 [emphasis added].)

Due to the importance of the rights involved, Penal Code § 1138 also obliges the trial court to supervise and control a readback of testimony or a re-instruction of the jury. (*See*, ***People v. Litteral***, *supra*, 79 Cal.App.3d 790, 794.) Where, as in the present case, the trial court fails to participate in the planning and supervision of the readback, it has not fulfilled the statutory mandate of Penal Code § 1138. Moreover, the defendant has been denied due process of law and a fair trial. (*See*, ***People v. Frye***, *supra*, 18 Cal.4th 894, 1007.)

2. *Where a trial judge abandons control over the readback process there has not been any exercise of judicial discretion.*

The Ninth Circuit has reversed a conviction without a showing of prejudice where the trial court delegated the responsibility for a readback. In ***Riley v. Deeds***, *supra*, 56 F.3d 1117, the trial judge was away from the courthouse when the deliberating jury asked for a readback of the victim's direct testimony. Unable to locate the judge, the law clerk convened the jury. With the defendant, his counsel and the prosecutor present, the court reporter read back the testimony as requested. On appeal , the defense did not argue that the testimony chosen for the readback had been inappropriate in any way. The Ninth Circuit, however, reversed the conviction without a showing of prejudice. The Court found that the district court's lack of participation constituted structural error.

In ***Riley v. Deeds***, the Ninth Circuit characterized the specific errors as:

> [T]he trial judge's absence during the readback of the victim's direct examination, coupled with the judge's failure to rule upon the jury's request for the readback, his failure to exercise any discretion over what testimony would be read, and his unavailability during the proceeding . . . .

(*Id.* at 1122.)

While not all of these circumstances were present in James Robinson's case the critical feature in the analysis – the lack of judicial control and oversight – is the same. In ***Riley v. Deeds***, the Ninth Circuit was less concerned with the district court's physical absence than with the judge's failure to select the testimony for the readback and to supervise those proceedings. The Ninth Circuit stated:

> In this case, the judge was not only absent from the readback, ***he exercised no discretion in the decision whether to permit Leatrice's testimony to be read back, or how much of it should be read or whether other testimony also should be read. This complete absence of judicial discretion distinguishes this case*** . . . .

(*Id.* at 1120; *see also*, ***People v. Litteral***, *supra*, 79 Cal.App.3d 790, 794 [suggesting that "strong supervision" by trial court is appropriate in context of jury readbacks].)

3. *The trial court in this case abdicated its duties concerning the readback and its actions in this regard cannot be viewed as a valid exercise of its discretion.*

The trial court in James Robinson's case exercised no greater control over the content of the readback than the district court in ***Riley v. Deeds***. The trial judge here directed the court reporter to select the passages from the record. (RT 1396.) It was the court reporter who chose the testimony which she felt was appropriate and responsive to the jury's request. Like the law clerk in ***Riley v. Deeds***, the court reporter had no authority to make this determination. The trial court could not properly delegate this responsibility to the reporter within the limits of the court's discretion under Penal Code § 1138. Allowing the court reporter to select the testimony for the readback was, therefore, not a valid exercise of the trial court's discretion but an improper delegation of its authority which denied James Robinson his rights to due process of law and to a fair trial.

E. Even If this Court Determines That the Trial Court Was Authorized to Permit the Court Reporter to Select the Testimony for the Readback, the Court's Lack of Oversight and Supervision Was an Abuse of its Discretion.

Even if this Court determines that a trial court may, consistent with its statutory discretion, properly delegate some functions to the court

reporter, the trial court's handling of the readback in James Robinson's case was an abuse of discretion. The trial judge not only had the court reporter select the testimony for the readback, but apparently failed to review the court reporter's selections. Having delegated the job of locating and selecting the portions of the record responsive to the jury's request the court was, at a minimum, responsible for seeing to it that the court reporter had carried out the task correctly. The trial court's failure to oversee and supervise the court reporter was an abuse of its discretion under the statute.

The selection of testimony and the handling of the readback to a deliberating jury is critical to the criminal defendant's ability to defend against the charges. (***Fisher v. Roe***, *supra*, 263 F.3d 906.) In upholding the district court's granting of habeas corpus relief where the defense attorney was not notified of a readback, the Ninth Circuit specified why oversight is crucial to fairness in a readback procedure:

> It is undisputable that their absence, and that of their attorneys, greatly increased the risk of prejudice. If present and participating, Fisher and Collins or their lawyers could have made certain, where appropriate, that testimony of defense witnesses was read as well as that of the state's witnesses. They could also have ensured that any cross-examination of prosecution witnesses would be read in addition to their direct testimony. They could also have made certain that the court reporter's notes were accurate, that her notes accurately reflected the witnesses' testimony, and that she did not unduly emphasize any part of the requested testimony or use any improper voice inflections. Finally, they could have created for review on appeal a clear record of what occurred.

(*Id.* at 915.)

Both state and federal courts have considered the extent of trial judges' discretion in connection with jury requests for readbacks of testimony. The cases reveal several criteria for a proper exercise of judicial discretion concerning a readback. Trial courts must be actively involved in selecting the testimony and in supervising the way in which the readback is conducted. (*See*, ***People v. Litteral***, *supra*, 79 Cal.App.3d 790, 794.) The testimony which is reread must be responsive to the jury's request. (***People v. Rogrigues*** (1994) 8 Cal.4th 1060, 1123; ***People v. Cooks*** (1983) 141Cal.App.3d 224.) The testimony must be repeated accurately (***People v. Aikens*** (N.Y. 1983) 465 N.Y.S. 480) and in such a way that no undue emphasis is placed on any portion of the readback. In addition, the testimony selected should also present a balanced view of the evidence. (***Fisher v. Roe***, *supra*, 263 F.3d 906; ***United States v. Hernandez*** , *supra*, 27 F.3d 1403.) The better practice is to include both the direct and the cross-examination. (*See*, *e.g.*, ***State v. Wilson*** (2002) 165 N.J. 657, 762 A.2d 647.) The excerpts of testimony chosen for the readback in this case failed to satisfy these minimal requirements.

Trial courts are under an affirmative duty to ensure the fairness of any readback ordered. In ***Fisher v. Roe***, *supra*, 263 F.3d 906, 917 the Ninth Circuit stated:

> Moreover, we have reversed convictions and said that a trial judge abuses his discretion if he fails to take measures to present a balanced view of testimony when a jury requests a readback.

(*See*, *e.g.*, ***United States v. Hernandez***, *supra*, 27 F.3d 1403, 1409 [district court abused its discretion where it allowed jury to re-read transcript of critical testimony without admonishing jury that it must weigh all evidence and not rely solely on the transcripts].)

The trial court in James Robinson's case made no effort at supervision. The court apparently concluded that its responsibilities were over after summoning counsel, and subsequently the jury, and announcing its decision to provide the jury with the testimony they had requested. The trial court's remarks clearly indicate that it had no involvement in selecting the testimony. The court stated: "And I take it all the testimony has been found as to those items and the jury and alternates will be read those in the jury room." (RT 1393.)

The trial judge's failure to provide even minimal supervision of the readback process resulted in the jury not receiving testimony which was relevant and responsive to their request. In addition, the testimony which was provided was misleading as it portrayed a slanted view of the case. This was not only misleading for the jurors, but was also highly prejudicial to James Robinson.

The majority of the testimony included in the readback was not relevant to the jurors' request. This is plainly not attributable to any ambiguity in the jury's communications. The jurors' request was clear and concise -- they wanted to hear again James' testimony about whether he had the gun while at Tai's apartment early in the morning of June 30th. (RT 1393; CT 308.) As may be seen from the excerpt set forth in section A, the court reporter read ***four pages*** of James' testimony on cross-examination before coming to any testimony concerning the gun. The testimony about the gun comprised only a few lines. The excerpt set forth below is only a small portion of what was actually read back and is provided here to illustrate what a proper selection of testimony would have been:

> Q: You got the apartment – well, when you left Tai's apartment, you took all your money with you, right?

A: Yes, sir.

Q: You took your gun with you?

A: Yes, sir.

**Q: As a matter of fact, when you were waiting there with Tai, you had your gun because you were afraid of him, right ?**

**A: Yes, sir. I – yes, sir, I did.**

(RT 1069-1073.)

Even the portion of James' testimony set forth above is slightly over-inclusive. The jury's inquiry could have been satisfied with only the last question and James' response which are in boldface. Any need to place the testimony about the gun in context is easily satisfied by including the few lines from the record as they are set forth above (in regular typeface). There was plainly no need to introduce the testimony about the gun with the previous four pages of cross-examination on other topics. The four preceding pages of James Robinson's cross-examination were completely irrelevant and non-responsive to the jury's request. Inclusion of this superfluous material cannot be justified on the grounds that it was needed to explain James' testimony about whether he had the gun early that morning at Tai and Donna's apartment. James' testimony concerning the gun is clear on its face.

It is equally clear that no effort was made to balance the amount of cross-examination with James' testimony on re-direct. The excerpted cross-examination covers some four pages of record. The re-direct examination, however, consists of only one question and one reply. Moreover, the reporter's selection of testimony omits obviously relevant material. The

very next question and answer on redirect were **not** included in the readback. Referring to the gun, defense counsel poses the following question to James:

> Q: Did you have it during the hours of, say, 11 o'clock on Saturday night and the time when you returned to that apartment?
>
> A: No, sir.

(RT 1176.)

This exchange is easily as relevant as any of the cross-examination and its omission is a further indication of the pro-prosecution slant taken in the readback. The disparity in the amount of testimony alone would be enough to create a misleading picture of the evidence. (*See*, ***Fisher v. Roe,*** *supra,* 263 F.3d 906.) In this case, however, other factors further distorted the slanted picture created by the readback.

F. The Excerpts of James Robinson's Cross-examination Testimony Were Irrelevant, Misleading and Highly Prejudicial and Their Inclusion in the Readback Requested by the Jury During its Deliberations Requires Reversal of James Robinson's Convictions.

This Court has yet to reverse a conviction based on a trial judge's handling of a readback of testimony absent a showing of actual prejudice. (*See*, ***People v. Frye***, *supra*, 18 Cal.4th 894, 1007; ***People v. Jennings***, *supra*, 53 Cal.3d 334, 384-85; ***People v. Ainsworth***, *supra*, 45 Cal.3d 984, 10-20.) As discussed above, the trial court's failure to control and supervise the readback in this case was effectively an abdication of judicial responsibility amounting to structural error. (*See* ***Arizona v. Fulminante***, *supra*, 499 U.S. 279, 309-310.) Prejudice, therefore, should not be required to reverse the convictions. If, however, this Court determines that the trial court acted within its discretion by delegating the selection of the record for

the readback to the reporter, James Robinson contends that this was an abuse of discretion given the circumstances of this case. Because the trial court's handling of the readback resulted in substantial and demonstrable prejudice, James Robinson's convictions must be reversed.

In this case prejudice arose not only from the skewed amount of cross-examination relative to re-direct examination, but from the content of the prosecutor's questions. Through his questions about matters wholly unrelated to the jury's request, the prosecutor repeatedly insinuated that James was a heartless killer. Several questions concerned whether James ever thought about helping the victims. (RT 1069-1070.) Elsewhere, the prosecutor asked James whether he considered calling the police. (RT 1070.) Apparently not satisfied with the answers to these questions, the prosecutor resorted to a blatantly hostile attack. After James said that he had been tired upon returning to the apartment early in the morning hours after discovering the scene at Subway, the prosecutor stated: "Killing people wears you out, doesn't it?" (RT 1072.) The repetition of this cross-examination, and particularly the gratuitous remark about killing people, emphasized the prosecutor's irrelevant and highly prejudicial point of view. This was not a balanced presentation of relevant testimony which the jury could use to arrive at a verdict. The readback in this case amounted to an argumentative pinpoint instruction for the prosecution. It was as if the prosecution was allowed to re-introduce, *ex parte*, highly prejudicial evidence. The day after the readback, the jury reached a verdict finding James Robinson guilty on all charged counts. (CT 310; RT 1399-1402.)

G. Conclusion.

As discussed above, the trial court abdicated all of its responsibility under Penal Code section 1138 to ensure that the readback was responsive the jury's request and fairly presented the evidence. The court's handling

of this jury's request for a readback of testimony was so ineffective that its actions cannot be considered an exercise of discretion. Even if this Court determines that the trial court's handling of the readback was in some sense an exercise of judicial discretion, the trial judge's failure to participate in selecting the transcript to be re-read or, at a minimum, reviewing the court reporter's selections, was an abuse of its discretion.

In this case a jury deliberating in a capital case heard several pages of highly prejudicial cross-examination of the defendant, James Robinson. There is no question that James' testimony was significant to the jury because they had specially requested the readback. What the jury received, however, was largely non-responsive while James' relevant testimony was omitted from the readback. This alone skewed the presentation in the readback in favor of the prosecution. In addition, this jury was read over four pages of irrelevant and highly prejudicial testimony from James' cross-examination. The combined prejudice to the defense resulting from these errors in the selection of testimony for the readback was impossible to overcome.

For all of the foregoing reasons, the trial court's handling of the jury's request for a readback of testimony was error under California law and denied James Robinson his federal constitutional rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart,*** *supra*,167 F.3d 477.) Moreover, because the error here contributed to the convictions in a capital case, the judgment is not sufficiently reliable to satisfy the Eighth Amendment. (***Beck v. Alabama,*** *supra*, 447 U.S. 625, 637-38). For all of these reasons, the trial court's erroneous handling of the jury's request for a readback of testimony requires reversal of James Robinson's conviction and sentence of death.

## V. THE TRIAL COURT'S ADMISSION OF A VAST QUANTITY OF IRRELEVANT AND HIGHLY INFLAMMATORY VICTIM IMPACT EVIDENCE WAS CONTRARY TO CALIFORNIA LAW AND DENIED JAMES ROBINSON HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE DETERMINATION OF THE PENALTY.

### A. Introduction And Overview Of Argument.

An unusual amount of victim impact evidence was presented in the penalty phase of James Robinson's case. Four members of the victims' families testified concerning the impact of the crime and the loss of the victim. This testimony was lengthy, taking up approximately forty pages of trial record. (RT 2247-2285.) In addition to the large volume of evidence, the content of the testimony and the way in which it was presented was deeply disturbing. The witnesses spoke at length and in narrative form. Their descriptions of the effects the crime has had on them were very upsetting. Often crying on the witness stand, the parents of both victims described ongoing feelings of intense grief, despair and hopelessness which had continued unabated in the three years between the crime and their testifying in the penalty phase. The witnesses touched on highly emotional subjects like religion and thoughts of suicide. In other portions of their testimony, the witnesses spoke of the victims and the central role each of them had held in his family. The picture which emerged from all of this testimony was one of, as one of the witnesses put it, the complete "devastation" of all of their lives as a result of the crime. (*See* RT 2253.)

The trial court's admission of the victim impact evidence and the prosecutor's arguments thereon violated James Robinson's constitutional rights in several respects. The discussion which follows centers around two main constitutional violations. First, the victim impact evidence in this case was so overwhelmingly prejudicial that it created a fundamentally unfair

atmosphere for the penalty trial and resulted in an unreliable sentence of death. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15 17 and 24; ***Payne v. Tennessee***, *supra*, 501 U.S. 808; ***People v. Edwards*** (1991) 54 Cal.3d 787.) Second, the trial court arbitrarily and capriciously applied California's death penalty law by admitting irrelevant victim impact testimony which did not concern the circumstances of the crime, thereby denying James Robinson a state created liberty interest as well as his state and federal constitutional rights to due process of law. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.) For all of the reasons discussed below, this Court must reverse the judgment of death.

B. The Standard Of Review.

The United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness and a higher standard of reliability. (***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Lockett v. Ohio***, *supra*, 438 U.S. 586; ***Monge v. California***, *supra*, 524 U.S. 721.) This Court should, in accordance with these dictates, review *de novo* the trial court's admission of victim impact evidence in a capital trial. (*See* ***People v. Gordon*** (1990) 50 Cal.3d 1223, 1265.)

C. The Victim Impact Testimony, Photographic Evidence and the Prosecutorial Argument Presented in the Penalty Phase.

1. *The Testimony of the Victim Impact Witnesses.*

Four victim impact witnesses testified in both the first penalty phase (which ended in a hung jury) and also in the retried penalty phase. They were: Jan Stephen Berry and Terry Lynn Berry, Brian Berry's parents; Shannon Berry, Berry's twin sister; and, Kristine White, victim James White's mother. The combined testimony of these witnesses is extensive,

covering some thirty seven pages of trial record in the retried penalty phase. (*See* RT 2247-2285.)

All four witnesses were examined in exactly the same manner. At the outset, the witness was asked to identify various photographs of the victims and to describe the subjects and the settings. Twenty-two photographs of the victims taken at different times throughout their lives were received in evidence. (People's Exhs. 99 through 102 [RT 2248-2249]; 103-105 [RT 2256-2257]; 106-108 [RT 2261-2262]; 109-121 [RT 2269-2272].) The prosecutor then posed the same basic questions to each witness, asking them to describe: 1) how they learned of the death of their son/brother; 2) their immediate reaction to the news; 3) their relationship with the victim; and, 4) the impact of the death on them and on the family. (*See*, e.g., RT 2247-2259.)

Brian Berry's father was the first of the family members to testify. (RT 2247.) Mr. Berry began his testimony with a detailed account of how he and Mrs. Berry had learned of their son's death:

> It was eight o'clock on Sunday morning, the 30th of June, and we were awakened by a knocking by the sheriff at our cabin door in Big Bear. All he told us was to call home about a death in the family.
>
> Terry's mom was with us and my first thought was that it was probably news of one of my parents. I said that to Terry, but as I said it to her she started to cry and said, oh, my God, our children. That was unthinkable to me, and I couldn't give it any consideration or credence at all.
>
> We had been together just that Saturday before kidding around at home, having fun, and

enjoying grandma's visit from Northern California. Everybody was fine.

We didn't have a phone in the cabin so we drove to a phone booth outside a little restaurant on Highway 18. Terry and I squeezed into the phone booth, and I placed a call to our home.

It was a little breath of sunshine and heaven when Shannon answered the phone. I said Hi Shannon so her mom could hear her voice and know that she was okay. I groped for words to ask what had happened.

Shannon said that Brian had been killed. And I was stunned, I couldn't believe what I had heard. I asked if there had been a traffic accident. She said no. Then I continued to try and ask questions as she struggled to try and tell me what had happened.

After several repeats and repeats and repeats I could understand what she was trying to tell us. She was trying to tell us that Brian had been killed, he had been murdered at the Subway Sandwich Shop where Jimmy had worked. Jimmy had been killed also.

Numb and shaken I told her that I loved her, that we'd be home as soon as we could.

Terry and I stood in that little tiny phone booth screaming and crying for a long while. Finally, we went back to our car and we sat and cried and screamed and carried on trying to comprehend what we had been told. It was a long time before we could get ourselves together enough to drive back to the cabin.

> When we finally headed home, it was in numb shock and disbelief. How could this be? It couldn't possibly be true. (RT 2249-2251.)[48]

Through Mr. Berry's, and later in Mrs. Berry's and Shannon Berry's, testimony, the jury learned a great deal not only about the victim as an individual but about the entire family. Mr. Berry described how he and his wife had waited and planned to have children and how they had struggled to put Mr. Berry through engineering school. (RT 2251-2252.) He testified about the family values he and his wife tried to instill in their children. (RT 2253.) Mr. Berry spoke of the family outings and activities, and of his hopes and plans for his son. (RT 2252-2253.) He also described Brian's personality, character, interests and accomplishments from the time his son was a small child to adulthood. (RT 2252-2253)

While all of Mr. Berry's testimony was moving, his response when asked to describe the impact of his son's death on the family was especially emotional:

> Words absolutely fail to convey the devastation. It's like trying to describe seeing to a blind person or music to someone who can't hear.
>
> We hear terrible things on the news every day. You just can't imagine what the impact is until it is our leg amputated or our 18 year old son killed. It is pain like I have never known before in my life.

---

[48] Mrs. Berry also gave dramatic testimony relating the same information concerning how she and her husband learned of their son's death. She described her "total shock and disbelief," and how she and her husband had become "hysterical" upon receiving the news. In this connection, Mrs. Berry told the jury how worried she had been about her daughter, Shannon, who was home alone when the police came to break the news. (*See* RT 2262-2264.)

> His dreams of life and adventure gone. We struggled to help him learn and grow. For what? The sharing of his joys and sorrows, gone. All his potential, gone. The hope of some day his children to love and share, gone. The friends he had yet to make we'll never know the extent of this loss. The friends left behind, empty and hurting and asking why.
>
> Our family torn apart, struggling to accept and unacceptable loss.
>
> His twin sister alone after being there for each other all their lives. They were so different from one another, yet such good friends.
>
> Even though he was 18 years old and now an adult, as a father you always feel that you are there to protect your children and it is very difficult to think that at the time when he most needed somebody I couldn't be there to help him.
>
> **How can I ever escape the image of my son's terror as he defenselessly pleaded for his life and not by accident, not in anger, not in fear, but for a few hundred dollars someone could look my son in the eye, and without feeling or mercy, in a point-blank range shoot him in the face, then put the gun against the side of his head and shot him again.**
>
> The family and friends and church family and counseling and prayer, books. Almost three years the grief goes on, and I guess it will the rest of my life.

(RT 2253-2254.)

Brian Berry's sister, Shannon, described her immediate reactions upon learning of her brother's death. (RT 2257-2258.) She then told the

jury about the especially close relationship she had with her twin brother. (RT 2258-2259.) Shannon Berry next described the long term impact of her brother's death:

> I can't even say everything that it's impacted. It impacted everything. From going to having a built-in best friend I'm alone. I don't have my brother, my other half. My birthdays aren't a celebration anymore. I can't share them with the person I shared them with for 18 years. Instead of celebrating birthdays I have to mourn on them.
>
> All the things that I want to share with him I have to go to the cemetery. I bought a new car, and I took it to the cemetery to show my brother.
>
> There is so many things that we had left to share: getting married and having kids. And having family barbeques. And all those things that brothers and sisters are supposed to do together.
>
> And I think about when my parents die, I always expected him to be there for me and for me to be there for him, and now I'm all alone.
>
> I have this huge empty hole inside of me, and I'm searching for something to fill it. I have five animals now because nothing can fill that hole.
>
> I have fallen two years behind in college because school isn't important anymore. Things that used to matter to me don't. My life is revolving around court date after court date, trial after trial.
>
> I have been through therapy for three years. I went through a session of teenage grief group. I have been to compassionate friends. I have been to support groups in therapy. Nothing makes it better.

> Everything that used to be is gone. Nothing is the same and nothing ever will be.
>
> My friends don't know how to relate to me. I'm 21 years old, and I feel like I'm 40.
>
> Things that young people are supposed to care about don't matter. My world is gone.

(RT 2259-2260.)

Brian Berry's mother, Terry Lynn Berry, testified after her daughter and her husband. (RT 2261.) Repeating much of her husband's testimony on this point, Mrs. Berry again described how the Big Bear police contacted them at the family's cabin and told them to call home. (RT 2262-2264.) She described how both she and her husband reacted immediately with hysteria, shock and disbelief when Shannon their daughter, broke the news of Brian's death on the phone. (*Id.*) Mrs. Berry then described the exceptionally close and loving relationship she had with her son. She told the jury about his many exceptional qualities, what a fine person he had been and how proud she was to have raised him. (RT 2264-2265.) Then Mrs. Berry spoke at even greater length about the lasting impact of her son's death on herself and the family:

> I don't know how a mom can put into words what it's like to have a child murdered. There are no words that can fully explain the impact. And no one can truly understand unless you, too, have a child die.
>
> Brian had many goals and many dreams for his future. He will never be able to fulfill those goals. His life was taken away from him. The possibility of marriage and children, all gone. His career and goals and plans will never become a reality.

Brian and Shannon had always planned to spend time together when they had families of their own. They would go on vacations together, Summer barbeques, all of those precious family things that people always do, and she doesn't have anybody to share that with now.

When the future for your child has been destroyed, then all the hopes and dreams that you have for your child and yourself are gone.

Brian Berry and James White were childhood friends. They became friends in the fourth grade. Their friendship remained strong through elementary, junior high and senior high school. They were like brothers. They had plans to share an apartment and life's experiences together, but instead, they died together.

Brian was one of my dearest friends. When I needed a shoulder to lean on, or someone to talk to, he was there for me. We had our special time when he would come home from work, and we'd sit on the porch and we would share the day's events and feelings about good things or bad things. But that was a very special time for me and these, too, are gone. I don't have those precious times anymore.

When your child dies, a large part of you dies too. The hole that's left in your heart never heals. The emptiness cannot be explained but only experienced. So many lives have been devastated by Brian and Jimmy's tragic and senseless death. My life has been destroyed.

Yesterday was Mother's Day. I should have been able to be at home with both of my children to celebrate the joy of being a mom,

> but instead I had to go to the cemetery to thank Brian for 18 years.
>
> I, too, have been in and out of therapy for the last two and a half years, but I still can't find any joy. I find only sorrow and pain. I have become a member of compassionate friends hoping to find some peace and understanding, but that's difficult too.
>
> I wish I could tell you many stories about my darling Brian, my beloved son, so that you would know and understand the love that we share. And I pray that no other family will ever stand before you as we have and that you may never know the pain and heartache that we live with each and every day.

(RT 2265-2267.)

Following the testimony of the Berry family, the jury heard the testimony of victim James White's mother, Mrs. Kristine White. (RT 2268.) Ms. White was also asked to describe how she learned of her son's fatal injury. (RT 2272-2275.) Because James White did not die immediately from his wound, the police took Mrs. White and her daughters to the hospital. Mrs. White gave a detailed account of holding her son in his hospital bed, talking to him and crying as he passed away. She then testified about her emotional reactions immediately after his death. (RT 2275-2278.) Mrs. White testified that things felt "unreal" to her. She went through the motions of funeral preparations, planning and attending memorial services, news conferences, and going to the police station. (RT 2275-2278.) She spoke of meeting with her pastor, and feeling comforted when he told her that "he didn't think [her son's death] was God's plan." (RT 2276.) Mrs. White also described how she kept her son's things in his room, and how she sleeps with his teddy bear for comfort. (RT 2276-2278.)

She stated repeatedly that her grief has never subsided since that time. (RT 2277, 2278, 2280.)

The prosecutor then asked Ms. White to describe the impact of her son's death on herself and on the family "at this time." (RT 2280.) In a lengthy narrative, comprising some four and one half pages of the trial record, Mrs. White testified in detail about the loss she and her family felt:

> Even though the boys are gone, James is gone, they are still here (indicating) with us always.
>
> You miss them always. Every part of your life is touched by that missing family.
>
> You still love them. That love still goes on. You search for ways to express it even though they are not there so you talk to the air, you talk to his teddy bear, you talk to them when things remind you of them and hope that they can hear you.
>
> I miss his love. I miss his big smiles and his hugs. I miss the fun and the companionship.
>
> I miss the dirty socks on the floor that I was forever complaining about and picking up. The holidays, birthdays, special things are never going to be the same. Life will never be the same.
>
> You go shopping and looking at a box of Ritz crackers, it's Jimmy.
>
> Songs you hear on the radio. Roxanne I can remember him singing. His sisters wear his clothes, T-shirts to sleep in. Jackie, who was eight at the time, now 11, has an old tennis shoe that she dug out of her trash and keeps in the drawer. She doesn't know that I know she has

it there. Old empty gum wrappers she has in a drawer.

I'm an elementary principal and every little blond boy that's slightly pigeon-toed reminds me of my son.

I try to picture what he'd be like at 22 now: if his face would be different. If you would be able to see that moustache that you could hardly see before. If he would still be as skinny.

He'd probably be going to Northridge now working on his teaching credentials. He wanted to be a history teacher in high school. I think he would have been a good one.

Forgive me for having notes. It's real hard being up here and there is so many things I want to share with you.

I worry about my mom and my dad who loved him dearly. My dad was more like a father to him than anyone else in the world.

It is hard even to go to church because everything in church reminds you when you cry in front of strangers, and I hate to cry in front of strangers, and here I am crying in front of you.

You feel out of sync with the world. You spend a lot of time alone. You become more and more like a hermit because your friends don't understand. My family is the only one that does, and the Berry's, and the boys' friends.

I cry reading stories in the newspapers. I can't watch t.v. like Rescue 911 because those are real people, and I start thinking about the person, what they went through, the families, what they are going through.

Your friends expect you to be over it. They don't realize that you never are.

In life you look forward to certain things happening. Jenny is 15 now. She was with me here the other day. I am still trying to screen things from her as far as all of this.

I had looked forward to her dating and seeing Jimmy being the big brother and teasing her about it. Jackie is graduating from 6th grade. Jimmy should have been there for that.

I looked forward to him getting married, becoming a father. He would have been a great dad. He was a wonderful brother, a wonderful son. He would have been a great teacher and helped lots of other people in the world.

This trial itself, the whole legal process, is very bewildering. I sit here and listen to the facts of the case and know it's my son, my little boy.

**All of these things that you have heard about replay in our minds like videotape, the events of what happened at Subway. I can see James and what his terror must have been like in seeing his best friend shot. How afraid he must have been on his knees asking for his life. I can feel the gun to his head. To this day I don't understand how I slept so soundly and didn't know. You'd think that you would.**

**I don't understand anybody being able to do that.**

**I can hear him moaning as he lay on the ground and bled from his wound and there wasn't anybody there to help him.**

> Jackie, the 11 year old, asked me a couple of weeks ago if I ever wished that I was dead so that I could be with Jimmy. I had to tell her yes. But she had to have that thought herself to be able to ask me. This is an 11 year old girl.
>
> She believes like I do, that there is life after this one. And sometimes I long to be there because I miss my son so much.
>
> I wonder if he will look the same in heaven. I wonder if I will be able to hug him.
>
> They have that saying that time heals all wounds. That's not true. You just go on hurting. You just go on missing, longing. It never goes away. It still feels like a nightmare. Sometimes I wish I could just turn the clock back and it would all go away. It seems like yesterday and it's been three years.
>
> I can close my eyes, and I can see him so clearly walking into the room with his big smile and saying, Hi Mom, I'm going to Brian's, and holding out his hands to give me a hug.
>
> There really aren't words to express what it's like to go through what we have, and I pray that none of you will ever know what it's like. With all my heart I pray that for you.
>
> That's it.

(RT 2280-2284.)

2. *The Photographs of the Victims*.

Each victim impact witness began their testimony by identifying various photographs of the victims and describing the subjects and the settings. Twenty-two photographs of the victims were received in evidence. (People's Exhs. 99 through 102 [RT 2248-2249]; 103-105 [RT 2256-2257]; 106-108 [RT 2261-2262; 109-121 [RT 2269-2272.) One photograph

depicted James White in his Subway uniform, around two months before his death. (People's Exh. 109; RT 2269.) The exhibits included one recent photograph of Brian Berry, taken around a week before his death. (People's Exh. 110; RT 2269.)

The remaining 20 photographs were taken at various times and covered virtually every aspect of the victims' lives. The pictures were clearly chosen because they depicted the victims as members of exceptionally close and happy families. The White family is shown giving each other a "family hug." (People's Exh. 120; RT 2272.) In another photo James White is shown with his grandmother. (People's Exh. 114.) The jury saw numerous vacation pictures showing each of the victims with their younger siblings, parents, grandparents, and extended family including aunts, uncles, and cousins. In these photos the families are skiing, camping, hiking, and enjoying outdoor activities together. (*See* People's Exhs. 100; 102; 113; 116; 117; 118.) Other photographs depicted the victims and their families celebrating Christmas and family birthday parties. (*See* People's Exhs. 101; 104; 105; 121.) There were also several graduation pictures. Mrs. Berry had a photograph of her son and James White together at their junior high school graduation, when the victims would have been around 14 years old. (People's Exh.106.) The senior high school graduation photos showed each of the victims alone, with their families, and with each other. (*See* People's Exhs.107; 108; 111.) Other pictures displayed the victims with their friends at the senior prom and on other occasions. (*See* People's Exhs. 110; 112.)

The photographs showed the victims at various times throughout their lives. In one picture, James White is shown at age 7 holding his baby sister who is only one month old. (People's Exh. 119.) The Berry family introduced a family portrait photo taken when the twins were around 14

years old. (People's Exh. 99; RT 2248.) In another vacation picture Brian and his sister would have been around 10. (People's Exh. 100.)

As each photograph was introduced, the witness described the subjects and the setting. Mrs. White introduced 12 of the 22 photographs. As she introduced the photos, Mrs. White not only gave a detailed account of what was depicted but interpreted the photograph for the jury. In almost every case she described the family interaction and generalized about her family members' relationships with one another. While by no means the only example, while introducing one photo she stated "[w]e tease a lot in our family and this picture shows you a lot about Jimmy and all the love and teasing that goes on. We were a close family. That's our gift to us." (RT 2270.)

3. *The Prosecutor's Closing Argument.*

The prosecutor referred to the Berry and White families and their suffering several times during closing argument. In discussing the factors in aggravation, the prosecutor urged the jury to contrast the victims' feelings against James Robinson's alleged callousness. According to the prosecutor's reasoning, the death sentence was warranted based on the extreme suffering of the two families:

> Look at what he has done to the Berry and White family. You were here. You heard their testimony. You heard their sorrow. You heard their grief. You heard their suffering and it goes on and on and on. And where is the defendant's remorse? Where is his humanity? There is none.

(RT 2800.)

Elsewhere in his closing argument, the prosecutor used the victim impact testimony to contrast the "privileges" James would have in prison against the suffering of the Whites and Berrys. The prosecutor then specifically

asked the jury to sentence James Robinson to die based on the ongoing impact to the victims' families. The prosecutor once again advanced the victim impact as a sole justification for a death sentence:

> In fact, if you remember, they talked about vacation. ETO, extra time off. Well, you can go to prison and have vacation.
>
> You can have visits from your family. He can go and see his mother, and put his arms around his mother and give her a hug, get a kiss, see his sisters, see a sunrise, see a sunset. There are pleasures in life.
>
> **And what did we hear from the Berrys and the Whites?**
>
> **Mrs. Berry told you that on Mother's Day she got to go to the cemetery to talk with her son. And Shannon Berry, who shared everything with her twin brother, got to go to the cemetery to show him her car. Take that into account.**

(RT 2802.)

D. The Victim Impact Evidence And Argument Presented in James Robinson's Capital Trial Was Excessive And Unduly Prejudicial According to The Supreme Court's Reasoning in *Payne v. Tennessee*.

1. *The Supreme Court's Decision In **Payne v. Tennessee** Did Not Authorize The Admission Of All Victim Impact Evidence No Matter How Irrelevant Or Inflammatory*.

Just prior to the homicides charged in this case, the United States Supreme Court decided ***Payne v. Tennessee*** (1991) 501 U.S. 808, partially overruling its previous decisions in two cases (***Booth v. Maryland***, *supra*, 482 U.S. 496 and ***South Carolina v. Gathers*** (1989) 490 U.S. 805), which had strictly prohibited the introduction of victim impact evidence in the

sentencing phase of a capital trial. A divided Supreme Court held that the Eighth Amendment is not a ***per se*** bar to all evidence or argument concerning the effect of the capital crime on the victim's family. (***Payne v. Tennessee***, *supra*, 501 U.S. 808.) The Supreme Court overturned ***Booth*** and ***Gathers*** to the extent that those established a blanket prohibition on any evidence, testimony or argument about the effects of the crime.

The High Court determined that the victim impact testimony and arguments in ***Payne*** served legitimate purposes which did not *per se* offend the Eighth Amendment. (*Id.* at 825.) Its earlier decision in ***Booth v. Maryland***, *supra*, 482 U.S. 496, the Court reasoned, had been too restrictive as it "barred [the state] from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." (***Payne v. Tennessee***, *supra*, 501 U.S. at p. 822.) A state may choose to authorize the use of victim impact evidence which demonstrates "the specific harm" caused by the defendant's capital crimes, because this information may be relevant "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness . . . ." (*Id*. at 825.) The state was entitled to present victim impact bearing on the defendant's moral culpability as a means of balancing the mitigating evidence presented by the defense in capital sentencing. (*Ibid*.) The Eighth Amendment thus did not absolutely bar the admission of victim impact evidence, including the personal characteristics of the victim and the impact of the crime on the victim's family. (*Id.* at 827.)

While ***Payne v. Tennessee*** opened the door to victim impact testimony and argument in capital sentencing, the decision did not remove all constitutional constraints on this type of evidence. The Court in ***Payne*** specified that victim impact evidence could be so prejudicial in a particular

case that its admission would undermine the reliability required by the Eighth Amendment in capital sentencing. In addition, the ***Payne*** Court stated that the admission of sufficiently prejudicial victim impact evidence could result in a capital sentencing which was "fundamentally unfair" thereby violating the Due Process Clause of the federal constitution. (*Id*. at 825.)

The Supreme Court did not consider in ***Payne***, or in any subsequent case, precisely which types of victim impact evidence are constitutionally permissible. However, as discussed below, the Supreme Court's reasoning in ***Payne*** and the decisions of various state courts applying that decision provide some guidance concerning where the federal constitutional limits on victim impact may be set. These cases establish that an erroneous amount of victim impact testimony was admitted in James Robinson's trial. Moreover, the content of the testimony and the way in which it was presented to the jury was highly emotional and inflammatory. Under these circumstances, reversal is required because the admission of this victim impact evidence and argument violated federal due process and resulted in a sentencing hearing which was fundamentally unfair and not sufficiently reliable under the Eighth Amendment and the Fourteenth Amendment.

2. *The Victim Impact Evidence Presented in James Robinson's Case Was Far More Prejudicial than That Considered in* ***Payne v. Tennessee***.

In ***Payne***, a mother and her two year old daughter were killed with a butcher knife in the presence of the mother's three year old son who survived critical injuries in the attack. The victim impact testimony involved a single response to a question posed to the surviving child's grandmother. When asked about what she had observed in the child after witnessing his mother's and sister's murders, the grandmother testified that

the boy cried for his mother and that he missed her and his sister. In closing argument, the prosecutor argued that the boy will never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Ibid*.)

James Robinson's case is readily distinguishable from ***Payne*** in several respects. The first and most obvious difference is the amount of victim impact testimony. The objectionable testimony in ***Payne*** consisted of a single response by one witness, the grandmother. In this case four witnesses spoke at length and in great detail about the effects of the crime. The jury in James Robinson's case heard 37 transcript pages of narrative testimony from the parents of both victims and from Brian Berry's twin sister, who herself had been a close friend of victim James White. (RT 2247-2285.) Through these witnesses testimony the jury learned of a widening circle of friends, siblings, classmates, grandparents and others affected by the deaths of the two young men. The quantity of victim impact testimony in this case thus far outweighed the brief remark at issue in ***Payne***.

The victim impact testimony in this case differed both qualitatively and quantitatively from ***Payne***.[49] In ***Payne***, the grandmother's response was a very brief observation about the sadness and sense of loss any normal child would experience after losing a parent and a sister. The testimony in this case was far more detailed and the information was related in a highly emotional manner by witnesses who were clearly distraught. These witnesses portrayed the victims as exceptional young men who had unusually close and loving relationships with their families. Both the

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[49] A detailed discussion of each form of victim impact testimony erroneously admitted in this case follows in section E, sub §§ (a) through (h), *infra*.)

Berrys and Mrs. White described their sons as uniquely talented young men who would have been an asset to society. James White's mother told of his plans to be a high school teacher. (RT 2281.) Mr. and Mrs. Berry told of their son's upbringing, and spoke with pride of his accomplishments, plans for the future and good character. (*See*, RT 2253-2254; 2265-2266.)

The witnesses in this case not only provided more information about the victims but also described a far greater sense of loss in several people as opposed to the one survivor who had been personally present during the crime in ***Payne***. Shannon Berry gave moving testimony about how her life is forever ruined by her brother's death. (RT 2258-2260.) Christine White testified that she has thought of suicide. (RT 2283.) Mr. Berry related that even their religious beliefs and church activities afford them no comfort concerning their son's death. (RT 2254.)

For all of these reasons, as well as others discussed in greater detail below, this case concerns victim impact evidence and testimony of a magnitude never contemplated in ***Payne v. Tennessee***. The ***Payne*** decision, therefore, does not support the admission of all of the victim impact received in James Robinson's case. On the contrary, the reasoning of ***Payne*** and other decisions in the state and federal courts suggests that James Robinson's sentence must be reversed due to the enormity of the prejudice which surely flowed from the testimony and argument at issue in this case.

E. <u>The Testimony And Evidence At Issue Here Should Have Been Excluded According To Decisions Of The California Supreme Court, And Other State And Federal Courts, Concerning Victim Impact Evidence</u>.

1. *The Victim Impact Evidence Presented in James Robinson's Case Was Unduly Prejudicial and*

*Inflammatory under this Court's Decisions in this Area Both Before and After* ***Payne v. Tennessee***.

Shortly after the United States Supreme Court's decision in ***Payne v. Tennessee***, this Court decided ***People v. Edwards***, *supra*, 54 Cal.3d 787, holding that victim impact evidence and argument could be properly admitted under factor (a) of Penal Code § 190.3 – which allows the jury to consider at sentencing the circumstances of the capital murder underlying the defendant's conviction in that case. (*Id.* at 835-836.)[50] This Court made clear, however, that even victim impact evidence falling within the statutory provision was subject to exclusion or limitation like any other proffered evidence. In ***People v. Edwards***, this Court emphasized the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence:

> Our holding does not mean that there are no limits on emotional evidence and argument. In ***People v. Haskett***, *supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's

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[50] James Robinson contends that in addition to being unduly prejudicial the victim impact evidence admitted here did not concern "circumstances of the crime" and therefore was not properly admitted under California Penal Code section 190.3(a). (*See* section F, *infra*.)

> attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*Id.* at p. 836.)

Neither ***People v. Edwards*** nor any subsequent case defines the scope of admissible victim impact evidence and argument under California law.[51] This Court has, however, considered a variety of cases concerning the admission of victim impact evidence first under ***Booth*** and later under ***Payne v. Tennessee***. In most of these decisions the capital defendant's claim alleged prejudice based on only one or two prejudicial aspects of the prosecution's penalty phase case.[52] As discussed below, James Robinson's

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[51] In ***Edwards***, this Court stated: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that [Penal Code § 190.3] factor (a) necessarily includes all forms of victim impact evidence and argument allowed by ***Payne*** . . ." (*Id*. at p. 835-836.)

[52] Claims in several cases did not concern victim impact testimony per se but, rather, prosecutorial arguments about the crime's impact on the victim. (*See*, e.g., ***People v. Lewis*** (1990) 50 Cal.3d 262, 282-84 [prosecutor's closing argument containing mention of murder victim's dreams and aspirations]; ***People v. Malone*** (1988) 47 Cal.3d 1, 38-39 [prosecutor's comment that jury should consider the feelings of one of the defendant's prior three murder victims and the feelings of that victim's family found harmless in context of case where evidence in aggravation was "overwhelming."]; ***People v. Haskett*** (1982) 30 Cal.3d 841, 846 [in closing argument prosecutor invited jury to consider the murder victim's point of view].) In other cases prosecutors' arguments touching on victim impact have been upheld because they directly related to the circumstances of the crime already established in the guilt phase of trial. (*See*, e.g., ***People v. Clark***, *supra*, 5 Cal.4th 950, 1033 [upholding argument concerning victim's age, vulnerability and innocence]; ***People v. Zapien*** (1993) 4 Cal.4th 929, 991-92 [prosecutor's argument concerning impact of crime on victim's children]; ***People v. Fierro***, *supra*, 1 Cal.4th 173, 235 [comment (continued...)

case is distinguishable by the presence of several different forms of improper and highly prejudicial victim impact evidence. Under these circumstances, there is an unacceptable risk that this jury's decision to impose a death sentence was based on emotion rather than reason. (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

To date, this Court has not reversed a capital case due to the erroneous admission of victim impact evidence. The victim impact evidence here, however, was more plentiful, its content more inflammatory and the manner of its presentation more emotional than in any other case considered by this Court. This case contains several erroneously admitted and highly prejudicial forms of victim impact evidence, any one of which could support a claim for reversal. The combination of these circumstances created an overwhelmingly prejudicial atmosphere in which the jury was unable to perform its proper function at sentencing.

2. *The Victim Impact Testimony And Evidence Combined Numerous Forms Of Prejudice Recognized As Highly Inflammatory And Particularly Inappropriate In Capital Sentencing*.

The victim impact evidence admitted in this case was excessive, unduly emotional and highly prejudicial in several respects. Moreover, the prejudice from the witnesses' testimony was magnified by the way in which the testimony was presented and by the emphasis it received in the prosecutor's closing argument. As discussed below, various state and federal courts have considered claims involving similar types of evidence or argument. In each case the victim impact material was held to have been

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[52](...continued)
that victim was shot in front of his business of 40 years and that his wife, who was present, will have to live with the memory of the shooting].)

unduly prejudicial. Here the prejudice was amplified because the prosecutor presented several forms of improper victim impact evidence, and referred to this evidence again in closing argument.

a. The testimony concerning how the witnesses learned of the crime and the victims deaths was irrelevant, cumulative and unduly prejudicial.

All four witnesses were asked to describe how they learned of their loved one's death. (*See* RT 2249; 2257; 2262; 2272.) In response to this question, each of them related a long narrative answer containing a great deal more information than the bare facts about when, how, and by whom they were told of the crime. The witnesses described in detail their emotional reactions ranging from shock, horror and disbelief to hysteria. (*See*, RT 2249-2251; 2257-2258; 2272-2275.) While these are certainly understandable responses to dreadful news, this testimony was irrelevant to any issues at sentencing. As discussed in section F, *infra*, California's statute permits only those ***actually present*** at the crime scene to describe their reactions to the news. In this case the victims' family members testified about how they learned of the crime. None of them, however, were physically present at the crime scene. Obviously, it would be shocking and traumatic for parents and siblings to learn that their 18 year old son/brother had been killed under any circumstances. However, there is no reason to believe that the impact on these families would have been lessened if the victims had been killed in an accident.

This testimony was not only irrelevant but tremendously cumulative. Two witnesses, Mr. and Mrs. Berry, were together when they received the news from their daughter, Shannon, who also testified in the penalty phase as a victim impact witness. All three of the Berrys related what was said on the telephone that morning. Mr. and Mrs. Berry's testimony is virtually identical regarding the circumstances surrounding the phone call and their reactions to the news. (*Compare*, RT 2249-2251, and 2262-2265.) Having each of them repeat the story imparted no new information whatsoever.

The only plausible purpose for posing the same question to all of them was to have the jury hear a horrible and sympathetic tale told three times over.

Testimony which is objectionable on the multiple grounds that it is cumulative, irrelevant and unduly prejudicial has no place in capital sentencing. In ***People v. Love*** (1960) 53 Cal.2d 843 (Traynor, C.J.), cited with approval in ***People v. Edwards***, *supra*, 54 Cal.3d 787 and ***People v. Haskett***, *supra*, 30 Cal.3d 841, 846, this Court reversed a death judgment based on the admission of irrelevant, highly prejudicial and cumulative penalty phase evidence. In ***Love***, the defendant was convicted of murdering his wife at close range with a shotgun. In the guilt phase, photographs of the victim's injuries were admitted over the objection that they were to gruesome and prejudicial. (*Id*. at 852-853.) This Court affirmed the trial court's decision allowing the photographs in the guilt phase. In the penalty phase, however, a different photograph of the victim was admitted – a frontal view of the victim lying dead on the hospital table. The jury also heard a tape recording taken in the hospital emergency room shortly before Mrs. Love died. The recording dealt with the facts of the shooting but also preserved Mrs. Love's groans as she died from her wound. (*Id*. at 854-855.) This Court reversed, holding that this evidence was improperly admitted. The evidence in ***Love*** was likely to inflame the jurors and to distract them from their duty to make a "reasonable decision" concerning the appropriate penalty. (*Id.* at 856.) This Court also noted that the evidence was cumulative and irrelevant, having no significant probative value in the penalty phase.

b. The evidence concerning the two victims' exceptional qualities, their unusually close and loving relationships with their families and friends, and their longstanding childhood friendship was highly prejudicial and irrelevant.

Testimony or photos revealing admirable aspects of the victims' character, and/or indicating that the victim's loss will be unusually difficult for the family or community are especially prejudicial and inappropriate. In ***Cargle v. State***, *supra*, 909 P.2d 806, the Oklahoma Court of Criminal Appeals held that it was error to admit testimony and evidence of how the victim "dressed up as Santa Claus, saved the county thousands of dollars through a personal fund-raising effort, was a talented athlete and artist, and was thoughtful and considerate to his family . . ." (*Id*. at p. 829.) Similarly, in ***Smith v. State*** (1996) 919 S.W.2d 96, the Texas court found reversible error where the trial court had allowed the victim's sister and one of the victim's friends to testify about the victim's good qualities, her education and ambitions and the effect her death had on her students. (***Smith v. State***, *supra*, at p. 97.)

In this case, the prosecution used the family members to convey a plethora of similar information, all of which was superfluous, in order to obtain a death sentence for James Robinson by manipulating the jury's emotions. Each variety of prejudicial victim impact evidence noted in the ***Cargle*** and ***Smith*** decisions is present in this case, as well as several other forms of inflammatory victim impact information. None of this testimony and/or the accompanying photographs, were relevant to issues the jury could legitimately consider in the penalty phase. The effect of the combined presence of these numerous forms of prejudicial victim impact was that the jury was so overwhelmed that the sentencing decision resulted

from pity and emotion rather than reason. (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

(1) *The victims' as responsible members of society*.

Through their testimony, the victims' parents portrayed their sons as kind and responsible people who were contributing to society. Both families depicted the victims as an exemplary young men who, as adults, were certain to become a valued members of the community. Mr. Berry described Brian's upbringing and his character in the following way:

> We didn't hand our children lots of material things. We tried to give them an opportunity to earn what they wanted, to grow into responsible reliable adults, free to make their own decisions and mistakes.
>
> Brian was willing to work for what he wanted and stand up for what he believed to be right.
>
> * * *

Mrs. Berry gave a similar description of Brian as a responsible young man.

> At 18 years old Brian was becoming a young man taking on many adult responsibilities. He was a hard worker. He worked six days a week as a welder at Eckhart Trailer Hitches. He did not expect things to be handed to him. He was willing to work for the things he wanted.
>
> He bought his own car. He paid his own car insurance. He was a contributing member of society.

(RT 2265.)

Mrs. White described her son in similar terms, stating "[h]e had become a wonderful young man," who was "thoughtful of others." (RT 2279.) She

told the jury about his plans to go to college that Fall. (RT 2276.) Mrs.White testified that her son intended to get a teaching credential at California State University, Northridge, so that he could teach history to high school students. (RT 2281.) Finally, she stated "[h]e would have been a great teacher and helped lots of other people in the world." (RT 2282-2283.)

(2) *The victims were portrayed as central members of especially close and loving families.*

Some 22 photographs of the victims were introduced in connection with the victim impact witnesses' testimony. The pictures were clearly chosen because they depicted the victims as members of exceptionally close and happy families. The testimony describing each photograph as it was marked for identification and shown to the jury clarified and reinforced the favorable impressions conveyed in the images. In one photo, the White family is shown giving each other a "family hug." Mrs. White stated "[w]e give each other family hugs and this is James and Jennie and myself hugging. The love's there, you can see it." (People's Exh. 120; RT 2272.) In another photo James White is shown with his grandmother. (People's Exh. 114.) Mrs White not only identified the people portrayed (James White and his grandmother), but took yet another opportunity to state how close and loving her family had been. "This is James with grandma. We tease a lot in our family and this picture shows you a lot about Jimmy and all the love and teasing that goes on. We were a very close family. That's our gift to us." (RT 2270.)

Both sets of parents described how much they enjoyed their sons' company on hiking and camping trips. (RT 2252-2253; 2270-2272.) The jury heard testimony related to numerous vacation pictures showing each of

the victims with their younger siblings, parents, grandparents, and extended family including aunts, uncles, and cousins. In these photos the families are skiing, camping, hiking, and enjoying outdoor activities together. (*See* People's Exhs. 100; 102; 113; 116; 117; 118.) In the course of identifying these exhibits, the parents told the jury stories about wonderful family vacations. They described the times when they got lost on hiking trips, and how the victims and the other children teased them during these outings. (*See*, e.g., RT 2268-2272.) Other photographs showed the families with the victims during holidays and other special occasions. Several photographs depicted the victims and their families celebrating Christmas, graduations and family birthday parties. (*See* People's Exhs. 101; 104; 105.) One photograph was of the White family during their "last Christmas together." (People's Exh. 121; RT 2272.)

There were also several graduation pictures. Mrs. Berry had a photograph of her son and James White together at their junior high school graduation, when the victims would have been around 14 years old. (People's Exh.106.) The senior high school graduation photos showed each of the victims alone, with their families, and with each other. (*See* People's Exhs.107; 108; 111.) Other pictures displayed the victims with their friends at the senior prom and on other occasions. (*See* People's Exhs. 110; 112.)

(3) *The descriptions of the victims as young children.*

The witnesses imparted a great deal of irrelevant and highly prejudicial information about the victims in early childhood. Brian Berry was described as a friendly, eager and active little boy. The jury learned that he was good at many sports; and excelled at soccer which he played competitively from age 5 to age 17. (RT 2252.) His parents portrayed Brian as eager and active child. "Brian was an enthusiastic little boy, quick to

smile and full of life. We had a great time in the Indian Guide program at the West Valley program at the Y.M.C.A. I participated in sports, organized sports, and baseball and track. And then with family and friends he did all the usual stuff: bowling, handball, racquetball, hiking, skiing, swimming, all the normal things." (RT 2252.) Mrs. Berry testified that, from the time he was born, Brian had been "a perfect son," who was "full of love and life for his family and friends." (RT 2264.) She fondly recalled for the jury how close she and Brian were when he was little, and how that closeness continued as he grew up. (RT 2264-2265.) Mrs. Berry described how Brian "had smiling blue eyes, a big warm smile, and sometimes a silly grin." (RT 2264.)

Mrs. White's description of her son's personality in early childhood was equally glowing and sentimental. "He was always, always happy. Always cheerful. When he was little, he loved people. He would have been the world's best salesman if that would have been what he chose to do. I can remember him pushing a cart around in the market and to anybody, "Hi, what's your name?" He wanted to talk and get to know them. (RT 2278.)

Mrs. White reminisced about her son James' sense of humor. She related stories of practical jokes he played on her and his sisters. (*Id*.) According to her testimony, she and her son were very close throughout his life. (RT 2278-2279.)

The testimony about the victims' early childhoods was enhanced with a number of family pictures. Several photographs showed the victims and their families at various times throughout their lives. In one picture, James White is shown at age 7 holding his baby sister who is only one month old. (People's Exh. 119.) Mrs. White identified this photo stating "[t]hat's one of my favorite pictures ever." (RT 2272.) The Berry family

introduced a family portrait photo taken when the twins were around 14 years old. (People's Exh. 99; RT 2248.) In another vacation picture Brian and his sister would have been around 10. (People's Exh. 100.)

In ***Cargle v. State*** (Okla.Crim. 1995) 909 P.2d 806, the Oklahoma Court of Criminal Appeals held that it was error to admit evidence "portraying [the victim] as a cute child at age four." (*Id*. at 829-830.) The court explained why this type of victim impact evidence should be prohibited in ***Conover v. State*** (Okla. Crim. 1997) 933 P.2d 904. There, the Oklahoma Court of Criminal Appeals observed that "[c]omments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death . . .[but] address only the emotional impact of the victim's death . . . [and increase] the risk a defendant will be deprived of Due Process." (*Id*. at p. 921.)

The victims in this case were not young children. Legally speaking they were not "children" at all, as Brian Berry and James White were both 18 or slightly older when they died. In their parents' eyes, however, both victims remained children who had been stolen from them in a violent and senseless crime. However, as noted in ***Conover***, the descriptions of the victims as young boys had no relevance to the circumstances surrounding their deaths. This type of testimony was not only completely irrelevant, but extremely prejudicial. The victims' parents were already very sympathetic figures, and their testimony was bound to be very persuasive with the jury. Allowing them to indulge in detailed reminiscences about their sons as little boys created an unduly emotional atmosphere in which sympathy could easily overwhelm the jurors' reasoned judgment with regard to sentencing. (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

(4) *The unusually close relationships the victims had with their parents*.

The parents of both victims' parents claimed to have enjoyed close relationships with their sons. Mr. Berry stated:

> At 18 years old, and six feet tall, he could still comfortably give his dad a hug in front of his friends. I knew he loved me, and he knew I loved him, and I'd stand by him through anything. He was a warm and friendly young man. I was always proud to call him my son.

(RT 2253.)

Mrs. Berry's testimony portrayed an unusually close relationship between a mother and her 18 year old son:

> Brian was one of my dearest friends. When I needed a shoulder to lean on, or someone to talk to, he was there for me. We had our special time when he would come home from work, and we'd sit on the porch and we would share the day's events and feelings about good things or bad things. But that was a very special time for me and these, too, are gone. I don't have those precious times anymore.

(RT 2266-2267.)

> As a little boy we were very close as mothers are with their children. As he became a young adult we developed a very special deep friendship. He knew that I would always be there for him to help him work out any problems that he might have, that I would support him through times of hardship and good times. And Brian had some testy times, as most children do, but those times made our bonds, our relationship, even stronger.
>
> ***

> Even though Brian made adult decisions he was still my little boy. He still was in need of loving, caring that moms give to their children. My children, Brian and Shannon, are my life.

(RT 2264-2265.)

Mrs. White also described a special bond with her child. When asked to describe her relationship with him, she began by stating "James was my only son. He was born when I was 22. He was my first child. * * * We were always close." (RT 2278.) As Mrs. White continued with her testimony, her close relationship to her son was evident from some of the anecdotes she told about his growing up. She reminisced about running out of milk, about having all of her son's friends for sleep overs and pool parties. (RT 2279.) Mrs. White fondly recalled that all of the kids he knew called her "Mom." (RT 2279.) Mrs. White's lengthy descriptions of her extreme and ongoing grief also revealed the closeness of the relationship she had enjoyed with her son. (*See*, RT 2280-2284. *See* also, sub§ (c.), *infra*.)

(5) *The unusually close relationships between these two victims and their sisters.*

Both Brian Berry and James White were survived by sisters who, due to the circumstances of their families, were highly affected by the victims' deaths. Brian Berry had a twin sister, Shannon Berry. At trial, Shannon was asked to describe her relationship with her brother.

> Brian was my twin brother. He was my confidante; I could tell him anything that I needed to talk to him about. He was like a big brother and a little brother all in one. He was there to look out for me and to protect me, and I was there to do the same for him.

> He was somebody that was always there. I never knew any different. He was always there for me since the day I was born. We shared everything from birthdays to high school graduation to getting our driver's license. Everything was together. Everything. He was always there. Somebody that was built in. (RT 2258-2259.)

Elsewhere in her testimony Shannon was asked to describe the impact Brian's death had on her. There she expressed her grief in far stronger terms.

> I can't even say everything that it's impacted. It impacted everything. From going to having a built-in best friend I'm alone. I don't have my brother, my other half. My birthdays aren't a celebration anymore. I can't share them with the person I shared them with for 18 years. Instead of celebrating birthdays I have to mourn on them.
>
> All the things I want to share with him I have to go to the cemetery. I bought a new car, and I took it to the cemetery to show my brother.
>
> There is so many things that we had left to share: getting married and having kids. And having family barbeques. And all those things that brothers and sisters are supposed to do together.
>
> And I think about when my parents die, I always expected him to be there for me and for me to be there for him, and now I'm all alone.
>
> I have this huge empty hole inside of me, and I'm searching for something to fill it. I have five animals now because nothing can fill that hole.
>
> I have fallen two years behind in college because school isn't important anymore.

> Things that used to matter to me don't. My life is revolving around court date after court date, trial after trial.
>
> I have been through therapy for three years. I went through a session of teenage grief group. I have been to compassionate friends. I have been to support groups in therapy. Nothing makes it better. Everything that used to be is gone. Nothing is the same and nothing will ever be.
>
> My friends don't know how to relate to me. I'm 21 years old and I feel like I'm 40.
>
> Things that young people are supposed to care about don't matter. My world is gone.

(RT 2259-2260.)

Through Mrs. White's testimony, the jury learned about the impact James White's death had on his younger sisters. The White's two girls were ages 8 and 12 when their brother was killed. (RT 2281-2282.) They were sleeping when the police arrived to tell Mrs. White that her son was hospitalized and in critical condition. She described waking the girls, and riding with them to the hospital in the patrol car as they asked questions which she could not answer. (RT 2273.)

The girls continued to miss their brother, and still expressed sorrow and anxiety which continued to the time Mrs. White testified in the penalty retrial. Both girls still wore their brother's T-shirts and other clothing. (RT 2281.) The youngest sister, Jackie, appeared to have been very deeply affected. Mrs. White reported that Jackie keeps, hidden in her room, some old gum wrappers and an old tennis shoe she dug out of the trash as mementos of her brother. (RT 2281.) Only a few weeks before Mrs. White's testimony at trial, some three years after the victims' deaths, Jackie

asked her mother if she ever wished to be dead so that she could be with Jimmy. (RT 2283.)

(6) *The victims' longstanding friendship with one another, and the impact their deaths had on their friends and their extended families.*

The close friendship between the victims was a poignant feature of the case discussed by all of the victim impact witnesses. Mrs. Berry stated:

> Brian Berry and James White were childhood friends. They became friends in the fourth grade. Their friendship remained strong through elementary, junior high and senior high school. They were like brothers. They had plans to share an apartment and life's experiences together, but instead, they died together.

(RT 2266.)

During her testimony, she identified a photograph of her son and James White together at their junior high school graduation, when they would have been around 14 years old. (People's Exh.106.) The senior high school graduation photos showed each of the victims alone, with their families, and with each other. (*See* People's Exhs.107; 108; 111.) Other pictures displayed the victims together with friends at the senior prom and on other social occasions. (*See* People's Exhs. 110; 112.)

Mrs. White also testified about the boys' close friendship, and reminisced about watching them grow up together.

> James was very close with all his friends. They traveled as a group, so if Jimmy was there it wouldn't be to long when Brian and the other kids were there.
>
> They all called me Mom. I remember Brian coming in with his sunglasses on, Hi Mom,

> walking back to Jimmy's room. And being loud and shutting the doors, as if that would help because the walls would vibrate.
>
> Coming home. I just bought milk yesterday and all the milk was gone because the kids were there.
>
> The sleep overs. Brian snored.

(RT 2279.)

She also spoke of her son and Brian Berry's closeness in death as well as in life.

> We had to have a memorial service for the boys. We couldn't have the burial service right away because the bodies were with the coroner.
>
> The boys are buried together for some reason. We figured that they'd want that.
>
> * * *
>
> James' friends were all close to him, the Berry family, my family, because they traveled as a group.

(RT 2277.)

Elsewhere in the witnesses' testimony the jury learned of other friends and family members affected by the victims' deaths. Mr. Berry spoke of his son's friends being "left behind, empty and hurting and asking why." (RT 2254.) Shannon Berry mentioned her brother's girlfriend, who he had been dating for one year and five months when he died. (RT 2257.) Mrs. White expressed concern about her parents, and the effects of losing their grandson. Mrs. White called her family immediately when the police told her that her son had been injured and was in the hospital. (RT 2273.) They met her there, drove her home and stayed with her to help. (RT 2276.) In describing the impact of her son's death on the family, Mrs.

White stated "I worry about my Mom and Dad who loved him dearly. My Dad was more like a father to him than anyone else in the world." (RT 2281-2282.)

c. The deep and sustained depression and emotional upset described by these family members was unduly prejudicial and irrelevant to the jury's determination of the penalty.

This parental perspective may explain the extreme emotional reactions these witnesses described in their testimony some three years after the victims' deaths. However, although the witnesses' reactions may be understandable, their descriptions of utter emotional, psychological and spiritual devastation as a result of the crimes created overwhelming prejudice to the defense which was wholly improper in the sentencing phase of a capital trial.

The three parents, and Shannon Berry, spoke of how the victims' deaths had ended all happiness the witnesses could obtain from own lives. Testifying three years after the deaths, all four witnesses convincingly described their unrelenting grief and misery. Mr. Berry was asked to describe the ongoing effects of his son's death.

> Words absolutely fail to convey the devastation. It's like trying to describe seeing to a blind person or music to someone who can't hear.
>
> We hear terrible things on the news every day. You just can't imagine what the impact is until it is our leg amputated or our 18 year old son killed. It is pain like I have never known before in my life.
>
> * * *
>
> Our family torn apart, struggling to accept and unacceptable loss.

(RT 2253.)

Mrs. Berry gave an equally graphic description of how her son's death had ruined her life forever. In spite of her efforts in therapy and through counseling groups, Mrs. Berry's grief was unabated. After Brian's death, life had lost all meaning for her.

> I don't know how a mom can put into words what it's like to have a child murdered. There are no words that can fully explain the impact. And no one can truly understand unless you, too, have a child die.
>
> * * *
>
> When the future for your child has been destroyed, then all the hopes and dreams that you have for your child and yourself are gone.
>
> * * *
>
> When your child dies, a large part of you dies too. The hole that's left in your heart never heals. The emptiness cannot be explained but only experienced. So many lives have been devastated by Brian and Jimmy's tragic and senseless death. My life has been destroyed.
>
> Yesterday was Mother's Day. I should have been able to be at home with both of my children to celebrate the joy of being a mom, but instead I had to go to the cemetery to thank Brian for 18 years.
>
> I, too, have been in and out of therapy for the last two and a half years, but I still can't find any joy. I find only sorrow and pain. I have become a member of Compassionate Friends hoping to find some peace and understanding, but that's difficult too.

> I wish I could tell you many stories about my darling Brian, my beloved son, so that you would know and understand the love that we share. And I pray that no other family will ever stand before you as we have and that you may never know the pain and heartache that we live with each and every day.

(RT 2265-2267.)

When asked to describe the present impact of her son's death, Mrs. White gave a long and heart wrenching narrative answer, comprising more than four pages of trial transcript. Like the Berry's, her testimony conveyed irremediable sadness.

> Even though the boys are gone, James is gone, they are still here (indicating) with us always.
>
> You miss them always. Every part of your life is touched by that missing family.
>
> You still love them. That love still goes on. You search for ways to express it even though they are not there so you talk to the air, you talk to his teddy bear, you talk to them when things remind you of them and hope that they can hear you.
>
> I miss his love. I miss his big smiles and his hugs. I miss the fun and the companionship.
>
> I miss the dirty socks on the floor that I was forever complaining about and picking up. The holidays, birthdays, special things are never going to be the same. Life will never be the same.

(RT 2280-2281.)

Throughout her testimony, Mrs. White expressed her continuing sense of hopelessness, and her lack of interest in life. Her son's death had

even ruined her enjoyment of her daughters, and prevented her from taking any pleasure in watching them grow up.

> In life you look forward to certain things happening. Jenny is 15 now.
>
> * * *
>
> I had looked forward to her dating and seeing Jimmy being the big brother and teasing her about it. Jackie is graduating from 6th grade. Jimmy should have been there for that.

(RT 2282.)

Pleasant family activities, her career as an elementary school principal, and even mundane chores such as grocery shopping, had become painful reminders of her son's death.

> You go shopping and looking at a box of Ritz crackers, it's Jimmy.
>
> * * *
>
> Songs you hear on the radio. Roxanne I can remember him singing. His sisters wear his clothes to sleep in.
>
> * * *
>
> I'm an elementary principal and every little blond boy that's slightly pigeon-toed reminds me of my son.

(RT 2281.)

Testifying three years after her son's death, Mrs. White related how she had remained withdrawn from the world. Keeping up with friends and social acquaintances was no longer possible because she was always on the verge of tears and felt that no one understood her pain.

> You feel out of sync with the world. You spend a lot of time alone. You become more and more like a hermit because your friends don't understand. My family is the only one that does, and the Berry's, and the boys' friends.
>
> * * *
>
> Your friends expect you to be over it. They don't realize that you never are.

(RT 2282.)

Even watching television or reading the newspaper was too painful for her to tolerate.

> I cry reading stories in the newspapers.
>
> I can't watch t.v. like Rescue 911 because those are real people, and I start thinking about the person, what they went through, the families, what they are going through.

(*Id.*)

Mrs. White had even stopped going to church because she could not maintain her composure around other people. "It is hard even to go to church because everything in church reminds you when you cry in front of strangers, and I hate to cry in front of strangers, and here I am crying in front of you." (RT 2282.)

In a particularly disturbing portion of her testimony, Mrs White admitted that she would prefer to be dead so that she and her son could be re-united in heaven.

> Jackie, the 11 year old, asked me a couple of weeks ago if I ever wished that I was dead so that I could be with Jimmy. I had to tell her yes. But she had to have that thought herself to be able to ask me. This is an 11 year old girl.

> She believes like I do, that there is life after this one. And sometimes I long to be there because I miss my son so much.
>
> I wonder if he will look the same in heaven. I wonder if I will be able to hug him.

(RT 2283-2284.)

Mrs. White concluded her testimony by again emphasizing the depth of her despair, and the endlessness of her suffering.

> They have that saying that time heals all wounds. That's not true. You just go on hurting. You just go on missing, longing. It never goes away. It still feels like a nightmare. Sometimes I wish I could just turn the clock back and it would all go away. It seems like yesterday and it's been three years.
>
> I can close my eyes, and I can see him so clearly walking into the room with his big smile and saying, Hi Mom, I'm going to Brian's, and holding out his hands to give me a hug.
>
> There really aren't words to express what it's like to go through what we have, and I pray that none of you will ever know what it's like. With all my heart I pray that for you.
>
> That's it.

(RT 2280-2284.)

d. <u>The witnesses were unable to control their emotions and their obvious distress was likely to improperly influence the jury</u>.

Not only the content of the testimony, but the manner of its presentation is significant for purposes of evaluating prejudice. At least two courts have recognized that the sight of a crying and emotional witness may inflame the passions of the jurors. In ***State v. Muhammad*** (N.J. 1996) 678

A.2d 164, the New Jersey Supreme Court noted that trial courts "will not allow a witness to testify if the person is unable to control his or her emotions." (*Id*. at 180.) The federal district court in ***United States v. Glover*** (D. Kansas 1999) 43 F.Supp.2d 1217, expressed the same concern with the tone of the witness' testimony. The district court held that victim impact evidence should be "factual, not emotional, and free of inflammatory comments or references." (*Id*. at 1236.) The district court further held that no victim impact witness may be permitted to testify "if the witness is unable to control his or her emotions." (*Ibid.*)

This victim impact testimony in this trial was presented in this type of inflammatory and emotional manner. All of the victim impact evidence in this case was upsetting, and the witnesses surely appeared to be distraught during their testimony. The record reflects that Mrs. White was weeping as she spoke. At one point she remarked to the jury, "And I hate to cry in front of strangers, and here I am crying in front of you." (RT 2282.)

e. <u>The testimony about the victims' plans and aspirations, and their parents hopes for their futures, was irrelevant and highly prejudicial.</u>

The parents' hopes and aspirations for their murdered child are irrelevant to the sentencing decision, and this type of testimony carries an unacceptable risk of creating prejudice. In ***Conover v. State***, *supra*, 933 P.2d 904, the Oklahoma Court of Criminal Appeals observed that "[c]omments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death . . .[but] address only the emotional impact of the victim's death . . . [and increase] the risk a defendant will be deprived of Due Process." (*Id*. at 921.)

Both the Berrys and Mrs. White testified about their hopes and aspirations for their sons. Mr. White expressed the frustration of raising, and then losing, his son.

> His dreams of life and adventure gone. We struggled to help him learn and grow. For what? The sharing of his joys and sorrows, gone. All his potential, gone. The hope of some day his children to love and share, gone. The friends he had yet to make we'll never know the extent of this loss.

(RT 2253-2254.)

Mrs. Berry gave similar testimony.

> Brian had many goals and many dreams for his future. He will never be able to fulfill those goals. His life was taken away from him. The possibility of marriage and children, all gone. His career and goals and plans will never become a reality.

(RT 2266.)

Mrs. White also voiced her disappointment not seeing her son live out the dreams she had for him.

> I looked forward to him getting married, becoming a father. He would have been a great dad. He was a wonderful brother, a wonderful son. He would have been a great teacher and helped lots of other people in the world.

(RT 2282-2283.)

f. <u>The parents' expressions of outrage concerning the way in which the victims were allegedly killed were irrelevant and unduly prejudicial</u>.

The victim impact testimony was almost identical in both the original and the retried penalty phases, with one notable exception. In the retried penalty phase, the victims' parents added strong statements to their

narratives expressing outrage and moral indignation about the alleged manner of their sons' deaths. (*Compare*, RT 1406-1445 [testimony in first penalty phase] and RT 2247-2285 [victim impact testimony in second penalty trial].) The parents' testimony in this regard is clearly based on the prosecutor's speculative theory (the support for which was the coroner's highly questionable interpretation of the autopsies) about how the crime occurred. According to the prosecutor the terrified victims were kneeling before the killer, praying and begging for their lives. The prosecutor used this theory throughout the penalty retrial in both direct and cross-examinations, and made it the centerpiece of a highly prejudicial closing argument. (*See*, Argument III, *supra*.) This highly inflammatory theory of the crime gained enormous emotional force when joined with the victims' expressions of shock and anguish concerning the manner of their sons' deaths, infecting the entire penalty retrial with incurable prejudice.

The prosecution's "victims kneeling in prayer" scenario would have had far less emotional force without the corresponding victim impact testimony in the retried penalty phase. Consistent with the prosecution's theory, the victims' parents altered their testimony in the retrial to include their feelings about the way in which their sons supposedly died. Mr. Berry began by describing how he felt guilty and helpless because he had not been able to protect his son. "Even though he was 18 years old and now an adult, as a father you always feel that you are there to protect your children and it is very difficult to think that at the time when he most needed somebody I couldn't be there to help him." (RT 2253-2254.) Mr. Berry then expressed his outrage about the crime.

> **How can I ever escape the image of my son's terror as he defenselessly pleaded for his life and not by accident, not in anger, not in fear, but for a few hundred dollars someone could**

> **look my son in the eye, and without feeling or mercy, in a point-blank range shoot him in the face, then put the gun against the side of his head and shot him again.**

(RT 2254 [emphasis supplied].)

Mrs. White's testimony was even more emotionally charged.

> **All of these things that you have heard about replay in our minds like videotape, the events of what happened at Subway. I can see James and what his terror must have been like in seeing his best friend shot. How afraid he must have been on his knees asking for his life. I can feel the gun to his head. To this day I don't understand how I slept so soundly and didn't know. You'd think that you would.**
>
> **I don't understand anybody being able to do that.**
>
> **I can hear him moaning as he lay on the ground and bled from his wound and there wasn't anybody there to help him.**

(RT 2283 [emphasis supplied].)

This is clearly the type of victim impact testimony which will overwhelm a jury's reason and result in sentence based on emotion. (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

g. The witnesses suggested that their suffering was being unduly prolonged by the trial process, thereby implying that a death verdict was appropriate because it would provide emotional closure for them.

In yet another example of wholly irrelevant victim impact testimony, the witnesses described the stress inflicted on them by the justice system.

In her testimony, Shannon Berry told of how her entire life has been derailed by the crime. She implied that, three years later, she could not recover and move on, in part because of the justice system. "Things that used to matter to me don't. My life is revolving around court date after court date, trial after trial." (RT 2260.) Mrs. White described how the pain of her son's death was being exacerbated by the trial process. "This trial itself, the whole legal process, is very bewildering. I sit here and listen to the facts of the case and know it's my son, my little boy." (RT 2282.) According to her testimony, her daughters were also at risk of emotional harm as a result of the legal system. "Jenny is 15 now. She was with me here the other day. I am still trying to screen things from her as far as all of this." (RT 2282.)

Elsewhere in her testimony, Mrs. White expressed her need to guard the last physical reminders of her son so that they too would not be lost to her in the justice system.

> You have treasured items, things that may seem silly.
>
> * * *
>
> A lock of Jimmy's hair that I cut off before he was cremated that no longer looks blond; it's brown from all the blood.
>
> I'd bring it in, but it would become People's 132 or something.

(RT 2277-2278.)

h. Mrs. White's testimony describing her son's death at the hospital was unduly prejudicial and irrelevant because it was unrelated to any circumstances of the crime.

In ***Payne v. Tennessee***, *supra*, 501 U.S.808, the Supreme Court upheld the introduction of victim impact testimony describing the crime's impact on a family member who was *personally present during the capital crime*. (501 U.S. at p. 816.) None of the victim impact witnesses testifying in James Robinson's case fall into this category. As previously discussed, James Robinson contends that the witnesses should not have been permitted to describe how learned of the victims' deaths because this testimony was irrelevant, cumulative and highly prejudicial. Equal if not greater prejudice resulted from Mrs. White's testimony in this area. Mrs. White not only testified about how she learned of the crime and her son's fatal injury, but also described in detail the death bed scene at the hospital.

Like the other witnesses, Mrs. White was asked how she learned of her son's fatal injury. (RT 2272-2275.) Because James White did not die immediately, Mrs. White was permitted to relate all of the events from the initial police contact through the time (several hours later) immediately after her son was pronounced dead. Her lengthy narrative was filled with poignant details creating an emotional and highly sympathetic picture of the White family.

> There was a knock at the door. It was late at night. I thought it was Jimmy, that he had forgotten his key, so I ran out in my pajamas, and there was glass in the window at the front door. I looked out, there was a police car and the lights were blinking.
>
> I opened the door and peeked through. There was two young policemen at the door, and they told me they had come to take me to the hospital, that my son had been in an accident. And I said was it a car accident and they said no, there had been an accident at the Subway. And I said was it a robbery? They said yes, that he had been shot.

I asked them where and they said they didn't know.

So I asked them to wait a minute, and I'd get dressed. I let them know I was a single parent and I had to get my two daughters dressed because they were too young to leave at home alone. So I went and woke up the girls.

Their clothes were all laid out because we had been planning to go to Knott's Berry Farm the next day and so they got dressed and somehow I got dressed. I called my Mom and Dad to ask them to please come to the hospital too, and I called my sister, who is a surgical nurse, so that if there is any advice I needed as far as medical, she would be there to help me.

I didn't know how bad it was. As I was gathering my girls together to go out the door, one of the policemen asked me if I had my phone book with me, and then I knew it was bad.

We drove in the police car to the hospital, my girls asking questions all the way that I didn't know how to answer.

When we got there, the brought us into the emergency room and we sat for a little while. And the police brought us back to a little tiny room all by themselves. The policemen brought my girls orange juice. A little while later a doctor came in and told me that he wanted to speak with me and my girls should wait probably out in the hallway with the policemen.

The doctor told me that – on the way in the car the policemen had told me that James had been shot in the head. I had asked them if anyone else was with him, and they said yes. I assumed it was someone that James had worked with.

And I asked if that person was okay, and they told me that he had been found dead at the scene.

The doctor, when he sat me down, told me that James had been shot in the head and it wasn't a mortal wound, and that he was still alive but his heart was getting weaker. I just bowed my head and asked to see my son.

We walked out of the room and I asked the policemen to keep my daughters with them until my family arrived, and the doctor led me through the corridors to the room.

I walked in and James was laying there on the bed. There were bandages all over his head. Fluid was in the bandages on the pillow. He was on life support systems. The machine was moving and breathing up and down on his chest for him. There were tubes everywhere. And I just held him and I cried and I talked to him.

Sometime during that my family came. James' father came. I didn't let the girls come in because I didn't want them to see their brother that way.

I wasn't even sure exactly when James died. The nurse came in and told me that they had pronounced him dead, and it seemed hard to believe because the machine was still working.

One of the hardest things I ever had to do was to get up and walk away and leave my son there in that hospital room, but I couldn't take him with me.

The policeman came in while I was there with my son and asked me if I knew a Brian Berry, and I knew then that Brian was the other one that was with Jimmy. They were together all

> the time. And I had the phone number and the phone book which I gave to the policeman, which is how they contacted Shannon. (RT 2273-2275.)

None of the testimony set forth above was remotely relevant to this case, and most the witness' lengthy answer was not responsive to the question. The prosecution's only reason for presenting this testimony was to persuade the jury that they should sentence James Robinson to die to somehow compensate Mrs. White for the pain of having to see her son on his deathbed. This Court has held that victim impact evidence of this type is unduly prejudicial has no place in capital sentencing.

In ***People v. Love***, *supra*, 53 Cal.2d 843 (Traynor, C.J.), cited with approval in ***People v. Edwards***, *supra*, 54 Cal.3d 787, and ***People v. Haskett***, *supra*, 30 Cal.3d 841, 846, this Court reversed a death judgment based on the admission of similar evidence. In ***Love***, the defendant was convicted of murdering his wife at close range with a shotgun. In the penalty phase, the jury saw a photograph of the victim lying dead on the hospital table. The jury also heard a tape recording taken in the hospital emergency room shortly before Mrs. Love died. The recording dealt with the facts of the shooting but also preserved Mrs. Love's groans as she died from her wound. (*Id.* at 854-855.) This Court reversed, holding that this evidence was likely to inflame the jurors and to distract them from their duty to make a "reasonable decision" concerning the appropriate penalty. (***Love***, *supra*, at 856.) This Court also noted that the evidence had no significant probative value in the penalty phase.

The "deathbed" evidence in ***Love*** was arguably more probative than Mrs. White's testimony because the tape recording in that case contained some relevant facts concerning the crime. Here the testimony imparted no information about the crime scene or the circumstances of the crime.

Mrs. White's description of her son's last moments illustrated her fear and sadness, and her daughters' confusion and trauma. Her testimony was designed to show the jury how this happy, loving family (living a normal life which included activities such as family outings to Knott's Berry Farm) was torn apart by James' White's death. This was precisely the sort of testimony capable of inflaming the passions of the jury and causing them to act on emotion rather than reasoned judgment in the penalty phase of this capital trial. (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.) This narrative, like so much of the other victim impact evidence in this capital trial, was irrelevant and unduly prejudicial and ought to have been excluded.

F. The Victim Impact Evidence Presented In This Case Was Not Properly Admitted Under Penal Code section 190.3(a) As A Circumstance Of The Capital Crime.

The United States Supreme Court has held that California's death penalty statute, including section 190.3, subdivision (a), is not unconstitutionally overbroad or void for vagueness. (***Tuilaepa v. California*** (1994) 512 U.S. 967, 976; ***People v. Bacigalupo*** (1993) 6 Cal.4th 457, *cert. denied*, 512 U.S. 1253 (1994).) However, a statute that is facially valid may be unconstitutional in its application. A distortion of section 190.3(a) to include extraneous classes of victim impact evidence as "circumstances of the crime" thus raises serious state and federal constitutional concerns of vagueness and the arbitrary application of California's death penalty statute. (U.S. Const., Amends. V, VIII, XIV; Cal.Const., Art. I, §§ 7, 15, 17, 24.)

In California, the list of factors which may be considered in capital sentencing decisions is set forth in Penal Code § 190.3. Subdivision (a) of that statute provides for consideration of the "circumstances of the crime of which the defendant was convicted in the present proceeding . . ." Shortly

after the United States Supreme Court's decision in ***Payne v. Tennessee***, this Court decided ***People v. Edwards***, *supra*, 54 Cal.3d 787, holding that some victim impact evidence and argument could be properly admitted under factor (a) of Penal Code § 190.3. (*Id.* at 835-836.) However, this Court warned in ***Edwards*** that its decision did **not** authorize the admission of broad categories of victim impact evidence: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by ***Payne*** . . ." (*Id*. at 835-836.)

In the years following ***Edwards***, this Court has not expressly defined the boundaries for admitting victim impact evidence as a circumstance of the crime under Penal Code § 190.3(a). However, the decisions of this Court and other state courts interpreting similar statutory provisions, provide guidance concerning the relevance and admissibility of victim impact evidence as a circumstance of the offense. As discussed below, these cases establish that under California's statute the phrase "circumstances of the crime" encompasses only two forms of victim impact evidence: (1) testimony describing the effect on a family member who was personally present at the crime during or immediately after the homicide; and/or, (2) victim impact describing circumstances known or reasonably foreseeable to the defendant at the time of the alleged crime. The majority of the victim impact evidence admitted in James Robinson's case does not satisfy either of these criteria. Accordingly, admission of the victim impact evidence presented here cannot be upheld as relevant to a circumstance of the capital crime.

G. None Of The Victim Impact Witnesses Testifying In This Case Were Present At The Crime Scene During Or Immediately After The Homicides.

This Court has never upheld the admission of victim impact testimony as a "circumstance of the crime" where the witness was not personally present at the scene during or immediately following the homicide. On the contrary, the cases suggest that personal presence is necessary for victim impact testimony to concern a circumstance of the crime under the statute. In ***People v. Fierro***, *supra*, 1 Cal.4th 173, 235, the victim was accompanied by his wife when he was shot to death in front of a business he had owned for 40 years. This Court held that the prosecutor could properly argue that the victim's wife would be traumatized for life as a result of witnessing her husband's murder. Recently, in ***People v. Taylor*** (2001) 26 Cal.4th 1155, this Court upheld the admission of testimony from a victim who, by sheer luck, was severely injured but not killed in the course of the capital homicide. This Court again emphasized the significance of the surviving victim's proximity to the capital crime, stating "[e]vidence of the impact of the defendant's conduct on victims other than the murder victim ***is relevant if related directly to the circumstances of the capital offense.***" (*Id.* at 1172 [emphasis added], quoting ***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1063.)

The interpretation of Penal Code § 190.3(a) as allowing only the testimony of victims who were witnesses to the traumatic events is supported by the holding and the reasoning of ***Payne v. Tennessee***. There the United States Supreme Court upheld the admission of victim impact evidence and argument to the extent that it described the capital crime's effects on a family member who had been personally present during the homicide. (501 U.S. at p. 816.)

The death penalty statute in the state of Texas also authorizes the jury to consider all of the evidence "including the circumstances of the offense." (Tex. Code Cri. Proc., Art. 37.071, § 2(e).) The Texas Court of

Criminal Appeals has held that the only type of victim impact evidence qualifying as a circumstance of the crime is evidence describing the impact on a family member who was present during or immediately after the crime. (***Ford v. State*** (Tex.Crim.App. 1996) 919 S.W.2d 107, 115-116; ***Smith v. State***, *supra*, 919 S.W.2d 96, 97, 102.) In ***Ford v. State***, the court upheld the admission of testimony from the victim's family members who were present at the shootings resulting in the capital murder charge and also the testimony of the victim's father who described arriving at the crime scene and how he was affected by seeing members of his family murdered and injured. (***Ford v. State***, *supra*, 919 S.W.2d at p. 109-113.)

In this case, the victims' family members testified extensively about how they learned of the crime. None of these witnesses, however, were physically present at the crime scene. Their emotional reactions concerned the death of their loved one, not the circumstances of the crime. All of the emotions experienced by family here would normally occur under any circumstances in which parents or siblings are told that their child/twin brother has been killed. The evidence concerning the witnesses' reactions, therefore, should not have admitted.

H. Victim Impact Evidence Is Only Admissible To The Extent That It Describes Circumstances Known To The Defendant Or Reasonably Forseeable At The Time Of The Crime.

As previously noted, this Court has not expressly set the boundaries of permissible victim impact evidence under California's death penalty statute. (*See* ***People v. Edwards***, *supra*, 54 Cal.3d 787.) However, this Court's decisions do offer guidance in determining whether victim impact evidence is properly admitted as a circumstance of the crime pursuant to Penal Code section 190.3(a). Writing separately in ***People v. Fierro*** (1991) 1 Cal.4th 173, 256-266, Justice Kennard provides a thorough and compelling analysis of this issue concluding that, in order to be relevant under California's statute, victim impact evidence must concern facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the underlying charges adjudicated at the guilt phase." James Robinson contends that applying Justice Kennard's analysis in this case compels the conclusion that the victim impact evidence admitted here was not relevant as a circumstance of the crime.

In her opinion in ***Fierro***, Justice Kennard began by noting that the Eighth Amendment "does not bar consideration of a victim's personal characteristics to determine penalty in a capital case, but evidence and argument on this subject must be authorized by statute." (***Fierro*** at p. 257.) Whether and to what extent victim impact evidence and argument is allowed is therefore determined in reference to the terms of California's death penalty statute, Penal Code section 190.3. Justice Kennard framed the issue as a problem of statutory construction, i.e., whether the "circumstances of the crime" which the jury may consider under Penal Code section §190.3(a), includes personal characteristics of the victim. (***Fierro*** at pp. 259.)

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

Justice Kennard recognized that, although partially overruling ***Booth*** and ***Gathers*** in ***Payne v. Tennessee***, the Supreme Court had **not** revised the definition of "circumstances of the crime" used in those earlier cases. Rather, the ***Payne*** Court found that certain victim impact evidence was admissible **not** as a circumstance of the crime but as its own independent factor characterized as the "harm caused by the crime." (***People v. Fierro***, *supra*, 1 Cal.4th at p. 260, conc. and dis. opn. Kennard, J., citing ***Payne v. Tennessee***, *supra*, 501 U.S. 808, 115 L.Ed.2d at 735-736, 111 S.Ct. at pp. 2608-2609.) Following ***Payne v. Tennessee*** a state could, consistent with the Eighth Amendment, draft a statute allowing the jury to consider the victim's personal characteristics and other circumstances which the defendant was unaware of. This type of victim impact, however, would need to be authorized by a different statutory provision than one permitting the jury to consider the "circumstances of the crime."

As noted by Justice Kennard, the High Court in ***Payne*** expressly reaffirmed the distinctions it had drawn in its earlier cases, ***Booth*** and ***Gathers***, concerning the victim's personal characteristics which the defendant knew or could readily observe and those which were not apparent at the time of the crime. ***Payne*** not only fails to authorize but actually prohibits the admission of this type of victim impact evidence as a "circumstance of the crime." The ***Payne*** court held that evidence about the victim's personal attributes was permissible to counteract similar evidence proffered by the defense in mitigation of the penalty – not because this evidence was a circumstance of the crime." [53] Noting the unfairness that would result if only the defendant were allowed to present evidence of personal characteristics the Supreme Court, referring to the defense mitigation testimony, stated "None of this testimony was related to the circumstances of Payne's brutal crimes." (***Fierro*** at 261, citing ***Payne v. Tennessee*** at 111 S.Ct. at 2608-2609.) Based on the Supreme Court's construction of "circumstances of the crime" and the plain meaning of that phrase, Justice Kennard concluded that "[a]s used in Penal Code section 190.3(a), 'circumstances of the crime' should be limited to those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the underlying charges adjudicated at the guilt phase." (***People v. Fierro***, *supra*, 1 Cal.4th at p. 264 [Kennard, J., conc. and dis. opn.].)

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

Justice Kennard's construction of "circumstances of the crime" limiting victim impact evidence to facts and circumstances known to the defendant or proven at trial in the guilt phase is consistent with the policy concerns the United States Supreme Court expressed in ***Payne v. Tennessee***. The High Court decided to allow some evidence of the victim's personal characteristics so that the jury could better assess the defendant's moral blameworthiness. Clearly, this purpose is served only by considering facts and circumstances which the defendant was aware of at the time. The Louisiana Supreme Court has, on this basis, defined relevant victim impact evidence consistently with Justice Kennard's formulation in ***Fierro***. That court has held that:

> To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime.

(***State v. Bernard*** (La. 1992) 608 So.2d 966, 972.)

James Robinson maintains his innocence, as he has throughout these proceedings. (*See*, RT 876.) However, assuming *arguendo* that he was guilty of the White and Berry homicides, there is no evidence establishing that James Robinson had any information about the victims. He submits, therefore that it was reversible error to allow the penalty phase jury to consider circumstances which were not known or reasonably foreseeable at the time of the crime. Reversal is required because the erroneous admission of this evidence is a violation of due process and contravenes the need for reliability in capital sentencing. (U.S. Const., Amends. V, VIII, XIV;

Cal.Const., Art. I, sections 7, 15, 17, 24; ***Hicks v. Oklahoma***, *supra*, 477 U.S. 343, 346; ***Beck v. Alabama***, *supra*; ***Ford v. Wainwright***, *supra*, 447 U.S. 399.)

I. James Robinson's Death Sentence Must Be Reversed Due To The Erroneous Admission Of This Vast Amount Of Irrelevant And Highly Prejudicial Victim Impact.

As discussed above, excessive quantity and highly emotional content of the victim impact evidence erroneously admitted in the penalty retrial trial created an atmosphere of prejudice in which emotion prevailed over reason. (***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.) James Robinson was deprived of several of his rights under the federal constitution, as well as rights guaranteed to him under California law. Accordingly, the error must be reviewed under the standard set forth in ***Chapman v. California***, *supra*, 381 U.S. at pp. 24), holding that reversal is mandated unless the state can show that the error was harmless beyond a reasonable doubt. When a violation of the constitution occurs in the penalty phase of a capital case, a reviewing court must proceed with special care. (***Satterwhite v. Texas*** (1988) 486 U.S. 249, 258 ["[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer."].) In evaluating the effects of the error, the reviewing court does **not** consider whether a death sentence would or could have been reached in a hypothetical case where the error did not occur. Rather, the court must find that, in that particular case, the death sentence was "surely unattributable to the error." (***Sullivan v. Louisiana***, *supra*, 508 U.S. 275, 279.) The State cannot satisfy this standard in James Robinson's case.

As discussed in detail above, this case involved an unusually large amount of victim impact evidence and testimony. The victim impact

evidence was not only plentiful but was also remarkable for its content. The testimony of these witnesses, three parents and the twin sister of two young victims, was heart-rending. Their testimony contained multiple forms of prejudice and was almost wholly irrelevant to any legitimate considerations in capital sentencing. It seems obvious as a matter of common sense that the victim impact evidence presented in this case was unduly prejudicial and that it at least reasonably probable that its admission affected the result. There are, however, additional reasons to support this conclusion.

James Robinson's death judgment was returned in a penalty retrial, after the original jury became hopelessly deadlocked during penalty phase deliberations in the first penalty phase of the case. (RT 1663-1667; CT 518.) As discussed in section E, sub§(2)(f) above, the second penalty phase jury heard additional victim impact evidence not presented in the first penalty trial. In the second penalty phase the parents gave powerful testimony expressing their horror regarding the way in which the victims had died. (*See*, RT 2254; 2283.) The parents described how they were tormented by the mental picture of their terrified young sons kneeling before a cruel and remorseless killer while pleading in vain for mercy. (*Id*.)

The prosecutor altered his presentation of the case in the penalty phase to give greater emphasis to this speculative scenario of what occurred at the crime scene. the coroner's testimony about the relative positions of the victims and the shooter(s) was expanded from 3 pages in the guilt phase (RT 649-652) to 13 pages in the penalty retrial (RT 2016-2029). In the penalty retrial, Dr. Roger's allegedly expert opinion was accompanied by a dramatic crime scene re-enactment. While questioning the coroner about the parties' possible relative positions, the prosecutor himself posed as the victims to illustrate each possible scenario. To demonstrate the version of

events he had advanced (i.e., the victims kneeling in front of the shooter), the prosecutor at one point got down on the floor, while holding James Robinson's gun to the back of his own head, to show the jury that the coroner's testimony concerning the angle of the entry wounds was consistent with the victims having been in that position when they were shot. (*See*, RT 2024-2025; 2026-2027; Argument III, *supra*.)

The jury in the first penalty phase split seven to five. (RT 1666.) The prosecution's revised strategy in the penalty retrial was effective, resulting in a death judgment. (RT 2865-2868; CT 680-681.) This success is a strong indication of the prejudicial effects of the victim impact evidence. This Court has recognized that where certain evidence is not admitted in one trial, and subsequently introduced during a second trial where a different verdict results, this demonstrates the prejudicial nature of the error almost to a certainty. (*See* ***People v. Kelley*** (1967) 66 Cal.2d 232, 245; ***People v. Taylor*** (1986) 180 Cal.App.3d 622, 634.)

The significance the prosecutor assigns to erroneously admitted evidence provides another recognized measure for assessing the evidence's prejudicial impact. (*See*, *e.g.*, ***People v. Minifie*** (1996) 13 Cal.4th 1055, 1071-1072; ***People v. Patino*** (1984) 160 Cal.App.3d 986, 994 [no prejudice where prosecutor does not dwell upon the evidence improperly admitted].) As noted above, the prosecutor altered his presentation of the second penalty phase to emphasize this emotional scenario. The image of the frightened victims kneeling in prayer became a centerpiece of the prosecutor's closing argument in the penalty retrial. The prosecutor called up this image again and again through references to the coroner's testimony, the family members and then through the victims themselves.

The shootings of James White and Brian Berry are referred to as "executions" nine times during the prosecutor's closing argument. (RT

2780; 2782; 2783; 2794; 2795; 2801; 2805; 2806; 2810.) The image of the victims on their knees, praying and begging for their lives is also repeated throughout the argument. The first mention occurs in the prosecutor's review of the various statutory factors under Penal Code section 190.3 and their application in this case.

> Whether or not the victim participated in the defendant's homicidal conduct or consented to the homicidal act. Well, we know that's not the case. In fact, we know that's just the opposite. We know that the victim here pleaded for his life, and we will get to that when we talk about the facts of the case, so I submit to you that this is a factor in aggravation.

(RT 2776-2777.)

The prosecutor also used the coroner's testimony to support the "praying victims" scenario.

> And let's start with the testimony of Dr. Rogers.
>
> * * *
>
> You have Dr. Rogers who basically said he performed the autopsy on Brian Berry and James White, and that James White was shot – bullet contact wound at the top of the head going, I believe, at a ten degree angle straight down.
>
> * * *
>
> Is there any one of you who reasonably does not believe that Mr. White was on his knees, head down, praying for his life when the defendant took the gun he was holding, his .380, placed it to the top of his head and fired the death shot?

> Is there any one of you who believes that Mr. White was not in that position? (RT 2778-2779.)

The prosecutor continued, urging the jury that the manner of the killing was established as a factor in aggravation. Yet, this fact was not actually proven beyond a reasonable doubt. (*See*, Argument VII, *infra*.)

> And I submit to you, ladies and gentlemen, that is an aggravating factor. The manner in which James White was executed on his knees, asking that the defendant just take the money, don't hurt him, don't hurt his friend Brian Berry, because we have evidence of that – remember, we will get to that in a bit – that that's what they said, just take the money, don't hurt us.
>
> What did Dr. Rogers tell us about Brian Berry?
>
> He told us that he was shot twice. He has the shot to the side of his nose from a distance of six to 18 inches. The eye was open at the time of this shot. He saw the gun in his face. He saw the face of his killer. He saw what was going to happen when the defendant pulled the trigger for that shot. And then to put in the coup de grace he takes his gun and places it to the side of his head, behind the ear, as a contact wound and shoots him again. The acts of a coward.
>
> And I submit to you, ladies and gentlemen, this is an aggravating factor.
>
> You are going to have the pictures of the wounds to Brian Berry, the wounds to James White. Look at the angles, look at the contact.
>
> Those are factors in aggravation.

(RT 2779-2780.)

The scenario was reviewed again when the prosecutor discussed Dennis Ostrander's testimony concerning Ostrander's alleged conversation with James Robinson about the crime.

> He [referring to James Robinson] said that the guys were pleading asking him not to kill'em. Just take the money.
>
> Is that consistent with a person on his knees?
>
> And we know that Mr. White was on his knees. Leave me alone. Don't hurt me. Don't hurt my friend who came to visit me. Just take whatever you want and be gone. We are not going to get in your way. We are not going to cause you any problems.
>
> And then the defendant's statement, when he said he put the gun to the head of one of them and pulled the trigger and it was out of bullets, 'The gun doesn't have enough fucking killing power.' That's what you are dealing with. That's the defendant. 'The gun doesn't have enough fucking killing power.'
>
> After he has put it to the head of James White and shot him while he was on his knees, as he shot Brian Berry with the gun six to 18 inches from his face, and then put the coup de grace to the side of his head. 'The gun doesn't have enough fucking killing power.'
>
> Those are the facts. Those are the facts in aggravation.

(RT 2790-2791.)

Toward the end of his closing argument, the prosecutor linked the alleged manner of the victims' deaths to the parents and connected it to their grief and loss. In order to persuade the jury to disregard the testimony by James' mother, Mrs. Robinson, the prosecutor subtly directed the jury's

attention to the victims' feelings about the way their sons died. "What mother could think that your son, in cold blood, could go to a location and execute two boys, put the gun to their head as they are praying begging for their lives and shoot them?" (RT 2795.)

After discussing the other aggravating factors, the prosecutor directed the jury to sentence James Robinson to death for the harm he caused to the Berry and White families.

> What other aggravation is there in this case?
>
> Look at what he has done to the Berry and White family. You were here. You heard their testimony. You heard their sorrow. You heard their grief. You heard their suffering and it goes on and on and on. And where is the defendant's remorse? Where is his humanity? There is none.

(RT 2800.)

The prosecutor continued to return to the themes of the crime scene and the victims' distress all the way through the end of his closing speech. He contrasted the "privileges" ands "pleasures" James Robinson would enjoy if imprisoned for life against the endless suffering of the victims' families.

> And what did we hear from the Berrys and the Whites?
>
> Mrs. Berry told you that on Mother's Day she got to go to the cemetery to talk with her son. And Shannon Berry, who shared everything with her twin brother, got to go to the cemetery to show him her car. Take that into account.

(RT 2802.)

Later he argued that mercy for James Robinson was improper based on the way in which the victims died.

> And think of the mercy that the defendant showed Brian Berry and think of the mercy that the defendant showed James White as he was on his knees, praying, begging him not to shoot him, not to hurt him, just take the money and be gone. The defendant deserves no more mercy than what he has shown others.
>
> In determining whether the penalty of death is appropriate I ask you, look at the totality of the defendant's actions.
>
> Look at his viciousness in the manner in which he executed these two boys.
>
> Look at his cruelty as James White is begging, don't hurt us, don't hurt us, just take the money.

(RT 2805-2806.)

Finally, the prosecutor commented on how Mrs. Robinson would like to remember James as he appeared in a photograph introduced as a defense exhibit. (Defense Exh. C; RT 2809.) He contrasted the picture of James as happy child to the mental picture the victims' families live with of their sons lying dead and dying at the crime scene.

> Mrs. White and the Berry family, they would like to remember their children like this too (indicating) the high school graduation. [People's Exh.106] It would be nice. The difference is they have to remember them like this (indicating) [toward crime scene photos]. Take that into account when you must determine what's appropriate for the defendant.
>
> The defendant's cruelty justifies your finding that the maximum penalty available, that of death, is appropriate.
>
> Look at his actions. He made his choices knowingly and without regard for anybody but

> himself. His actions warrant the death penalty; he has earned it based upon what he has done, based upon the devastation that he has caused.

(RT 2809.)

J. Conclusion.

The erroneously admitted victim impact testimony in this trial was emotionally powerful and excessive. It was used effectively by the prosecutor, in conjunction with other erroneously admitted evidence and inflammatory argument, to convince this jury that victim impact was not merely one factor in the sentencing decision, but a sufficient reason for imposing a death sentence irrespective of any other statutory considerations. Under these circumstances, it is clear that the erroneously admitted victim impact evidence contributed to the penalty verdict in this case. Accordingly, this Court should reverse James Robinson's sentence of death.

## VI. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON LINGERING DOUBT AS TO JAMES ROBINSON'S GUILT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Background and proceedings in the trial court.

The trial court and counsel had a conference concerning the jury instructions before closing arguments were given in the penalty phase retrial. (RT 2766-2770.) The trial court refused to instruct the jury with either of the alternative proposed defense instructions regarding lingering doubt. (RT 2766-2767.) The defense proffered two alternative versions of a lingering doubt instruction. Defense Special Instruction 32 provided:

> Each juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant intentionally killed the victims. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts.
>
> Thus, if any juror has a lingering or residual doubt about whether the defendant intentionally killed the victims, he or she must consider this as a mitigating factor and assign to it the weight deemed to be appropriate.

(CT 672.)

Defense Special Instruction 33 provided:

> It may be considered as a factor in mitigation if you have any lingering doubt as to the guilt of the defendant.

(CT 671.)

The trial court refused to give the jury any instructions concerning lingering doubt. The court relied on ***People v. Johnson*** (1992) 3 Cal.4th 1183, and

***People v. Desantis*** (1992) 2 Cal.4th 1198. The court noted, however, that defense counsel was free to argue lingering doubt when addressing the jury. (RT 2767.)

Lingering doubt about James Robinson's guilt was the centerpiece of the defense case in the penalty phase. Counsel began his closing argument with a discussion of lingering doubt:

> He [the prosecutor] also said that I am going to talk about lingering doubt. Well, at least he listened to my opening argument because my opening statement was I told you that James Robinson was going to take the stand, he was sorry for what happened to James White and Brian Berry, but he was going to tell you that he didn't do it.
>
> Now is he lying? That's for you to consider because Mr. Barshop [the prosecutor] says lingering doubt doesn't mean anything. It does mean something, ladies and gentlemen. He has already been convicted. I told you that. We can't take that away. So you don't have to find whether he is guilty or not guilty. That's not in issue.
>
> ********
>
> But, if you look at the evidence, you can also consider was that other jury right or were they wrong. That's where the lingering doubt comes in. Because if you have a doubt as to whether he committed these two, and they are horrible murders, they are vicious, they are cruel, they are every adjective you can think of and use, but if he didn't do it, you don't give death. We all know that. (RT 2811-2812.)

Defense counsel then reviewed the evidence for the purpose of pointing out the weaknesses in the state's case. In a closing argument of 24 transcript

pages, counsel spent approximately 12 pages, half of his entire closing argument, reviewing the evidence concerning guilt. (*See*, RT 2812; 2814; 2815-2823; 2824; 2827-2828.) The purpose was to demonstrate the weaknesses in the state's case against James Robinson, and to encourage the jury to doubt that James really had committed these crimes.

The prosecutor gave his closing argument before defense counsel argued. He reviewed the testimony of the state's witnesses and compared it to James Robinson's. The prosecutor argued that the state's witnesses were far more credible, and told the jury that their versions of the events had been proven in the guilt phase. (*See*, RT 2786; 2788-2790; 2804-2805.) According to the prosecutor, the discrepancies between their testimony and James Robinson's established only that James had lied in court. (*Id*.) The prosecutor urged the jury to disregard any residual doubts they might have about James' guilt. More than once he informed the jury that lingering doubts were not relevant.

> **What happened at the Subway is not before you. That's been proven beyond a reasonable doubt.**
>
> * * *
>
> The fact that the defendant did it is not in issue.

(RT 2786-2787.)

> **I anticipate that counsel will argue something to the effect, are you sure he did it? He told you he didn't. It's not in his character to do it. And if you are not sure he did it, how can you impose the penalty of death upon him? Think about a lingering doubt that you might have.**
>
> **Remember when I told you the fact of whether he did it or not is not in issue.**

**That's been proven. What is in issue is how and why.**

And, as you recall, I told you you are not going to hear all the evidence in this case; and obviously, you are aware that you did not hear everything in this case because you heard the factors presented by the defense or presented by me that deal with aggravation and mitigation because that's what this case is about, the aggravating factors and the mitigating factors and not everything was heard.

And you'll be instructed that neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events or to produce all objects or documents mentioned or suggested by the evidence.

You were told that the defendant is guilty, has been found guilty, and that's the state of the evidence. That's what you are to consider, that the defendant personally used a handgun when he executed James White and Brian Berry; that he is guilty of robbery; the special circumstances of multiple murder are true; the special circumstance of committing these murders during the course of a robbery are true. **So when counsel talks about this lingering doubt, I submit to you it doesn't mean anything. Ignore it.** You deal with aggravation and mitigation as the law requires.

(RT 2804-2805 [emphasis added].)

B. James Robinson was entitled to have the penalty phase jury instructed on lingering doubt as a circumstance of the offense offered in mitigation under the Fifth, Eighth and Fourteenth Amendments to the federal constitution.

Several federal constitutional doctrines affirm a capital defendant's right to present evidence and argument and to have the jury properly instructed on the defense case in mitigation of the death penalty. Under the Eighth Amendment, the jury in the sentencing phase of a capital case may not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record or ***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 [emphasis added]; see also ***Hitchcock v. Dugger***, *supra*, 481 U.S. 393, 394; ***Eddings v. Oklahoma***, *supra*, 455 U.S. 104.) Fundamental due process and the heightened due process applicable to capital cases similarly require that the defendant be allowed to offer any mitigating evidence or testimony that might justify a sentence less than death. (***Skipper v. South Carolina***, *supra*, 476 U.S. at pp. 4-5, citing ***Lankford v. Idaho*** (1991) 500 U.S.110, 126, fn. 22; ***In re Oliver*** (1948) 333 U.S. at 257, 273.)

Lingering doubt was the dominant defense theory in the penalty phase retrial. James Robinson testified, and again denied having committed the capital crimes. Defense counsel challenged prosecution witnesses Dennis Ostrander and Tommy Aldridge, attempting to cast doubt on their testimony in an effort to undermine the certainty of the state's case for guilt. Both counsel addressed the issue of lingering doubt in the closing arguments. However, while at least half of defense counsel's argument was devoted to urging lingering doubt as a reason for a life sentence, the prosecutor's argument was directly contradictory. The prosecutor flatly told the jury that they could ***not*** legally consider any doubts they had about James' responsibility for the crimes.

Given the prosecutor's argument, James Robinson was clearly entitled to an instruction advising the jury that lingering doubt could be

considered as a reason not to sentence him to death. Here a proper instruction on the consideration of lingering doubt was needed for the additional reason that the prosecutor mislead the jury. Under these circumstances, the trial court ought to have instructed the jury as requested by the defense to counteract the mis-information imparted by the prosecutor. By failing to provide a correct instruction the court effectively barred the jury's consideration of this relevant defense evidence.

This Court has held that "[w]hen any barrier, whether statutory, **instructional**, evidentiary, **or otherwise** [citation], precludes a jury from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as '***Skipper*** error.'" (***People v. Mickey*** (1991) 54 Cal.3d 612, 693 [emphasis added]; see ***Skipper v. South Carolina***, *supra*, 476 U.S. 1.) Furthermore, the United States Supreme Court has ruled that a criminal defendant in a capital case has an Eighth Amendment right to an instruction directing the jury to consider a particular mitigating factor. (***Penry v. Lynaugh*** (1989) 492 U.S. 302, 328 [finding Eighth Amendment error where the trial court failed to instruct the jury that it could consider and give effect to mitigating evidence of the defendant's mental retardation and abused background].)

C. California law required that the court instruct the jury concerning lingering doubt as requested by the defense.

California law holds that the defendant in a capital penalty trial is entitled to show that he or she may be innocent of the capital crime:

> section 190.1 specifically sanctions the presentation of evidence as to 'the circumstances surrounding the crime . . . and of any facts in . . . mitigation of the penalty." This language can hardly exclude defendant's version of such circumstances surrounding the crime or his contentions as to the principal events of the instant case in mitigation of the penalty.

(***People v. Terry*** (1964) 61 Cal.2d 137, 146.) [54]

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[54] Section 190.1 specifically sanctions the presentation of evidence as to the ". . . circumstances surrounding the crime . . . and of any facts in . . . mitigation of the penalty." This language can hardly exclude defendant's version of such circumstances surrounding the crime or of his contentions as to the principle events of the instant case in mitigation of the penalty.

Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting the defendant the opportunity of presenting his claim of innocence. The jury's task, like the historians, 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 decisions that are not free from doubt; only the most fatuous could 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. Even were it desirable to insulate the psychological reactions of the jurors as to each trial, no legal dictum could compel such division, and, in any event no statute designs it. [¶] The purpose of the penalty trial is to bring within its ambit factors such as these. In this respect we particularly heed . . . ***People v. Friend*** (1957) 47 Cal.2d 749, 767-678 . . .: 'In deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the consideration of . . . *or an apprehension that explanatory facts may exist*

(continued...)

Under California law, a defendant is entitled to an instruction on his theory of the defense if supported by evidence in the record. (***People v. Sedeno*** (1974) 10 Cal.3d 703, 715-716.) Common sense dictates that, since the defendant is entitled to present evidence and argument on lingering doubt, an appropriate instruction should be given advising the jury how they should evaluate the evidence.

In ***People v. Cox*** (1991) 53 Cal.3d 618, 676, this Court refused to impose on trial courts a general duty to sua sponte instruct on lingering doubt in the penalty phase of a capital trial. However, in ***Cox*** this Court affirmed the capital defendant's right to present evidence and argument concerning lingering doubt as mitigation in the penalty phase. The Court further noted that where the defense requests an appropriate lingering doubt instruction the trial court must so instruct:

> As a matter of statutory mandate, the court must charge the jury on 'any points of law pertinent to the issue, if requested' [citations] thus, it may be required to give a properly formulated lingering doubt instruction when warranted by the evidence. (*Id.* at 676, quoting ***People v. Terry,*** *supra*, 61 Cal.2d 137, 145-147.)

In the present case, it is clear that James Robinson requested that the court give an appropriate instruction. Defense counsel proposed two alternative instructions on lingering doubt. (CT 670; 671.) As discussed above, there was ample evidence supporting the lingering doubt instruction as this was the focus of the defense case in both phases of the trial. The trial court's refusal to grant the defense request and its unwillingness to give

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[54](...continued)
*which have not been brought to light . . ..*"
(***People v. Terry***, *supra*, 61 Cal.2d at p. 146.)

any instruction on lingering doubt was clearly erroneous under California law. Because James Robinson was entitled to have the jury consider lingering doubt in the penalty phase according to California law, the court's refusal to give a proper jury instruction denied him due process of law and equal protection under the Fourteenth Amendment to the federal constitution. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346.)

D. Reversal is required because the trial court's erroneous refusal to properly instruct the jury on lingering doubt was highly prejudicial under the circumstances of this penalty phase.

As discussed above, James Robinson was entitled to have the jury instructed on lingering doubt in the penalty phase of his capital trial under several provisions of the federal constitution. It is settled law that the capital defendant may present any circumstance of the offense which could be a mitigating factor. (*See*, ***Lockett v. Ohio***, *supra*, 438 U.S. 586, 604; ***Hitchcock v. Dugger***, *supra*, 481 U.S. 393, 394; ***Eddings v. Oklahoma***, *supra*, 455 U.S. 104.) Fundamental due process and the heightened due process applicable to capital cases similarly require that the defendant be allowed to offer any mitigating evidence or testimony that might justify a sentence less than death. (***Skipper v. South Carolina***, *supra*, 476 U.S. at pp. 4-5, citing ***Lankford v. Idaho*** (1991) 500 U.S.110, 126, fn. 22; ***In re Oliver*** (1948) 333 U.S. at 257, 273.) California law not only permitted but mandated that a lingering doubt instruction be given where, as in this case, requested by the defense and where argued by the prosecutor to be irrelevant. (*See*, ***People v. Cox,*** *supra*, 53 Cal.3d 618, 676; ***People v. Terry,*** *supra*, 61 Cal.2d 137, 145-147.) The trial court's refusal to give a proper lingering doubt instruction was thus plain error, and that error was especially prejudicial under the circumstances of this case.

James Robinson's entire case in both phases of trial centered around his denial of any involvement in the Subway robbery and homicides. James testified again in the retried penalty phase. Defense counsel cross-examined the prosecution's witnesses and tried to negate the state's case for guilt. In closing arguments, both counsel spoke about lingering doubt. Their arguments, however, were directly opposed on the subject of how the jury should view the evidence of lingering doubt. At least half of defense counsel's argument was devoted to urging the jurors to rely on lingering doubt about James' guilt as a reason to impose a life without possibility of parole ("LWOPP") sentence:

> That's for you to consider because Mr. Barshop **[the prosecutor] says lingering doubt doesn't mean anything. It does mean something, ladies and gentlemen.** He has already been convicted. I told you that. We can't take that away. So you don't have to find whether he is guilty or not guilty. That's not in issue.
>
> ********
>
> But, **if you look at the evidence, you can also consider was that other jury right or were they wrong. That's where the lingering doubt comes in. Because if you have a doubt as to whether he committed these two,** and they are horrible murders, they are vicious, they are cruel, they are every adjective you can think of and use, but if he didn't do it, **you don't give death. We all know that**.

(RT 2811-2812.)

Defense counsel correctly told the jury that, notwithstanding the first jury's verdicts in the guilt phase, they were entitled to weigh any lingering doubts about James' guilt as a mitigating factor in support of a sentence of LWOPP. Yet argument by defense counsel on a theory of law unsupported

by an instruction will carry little weight with the jury. As observed by the United States Supreme Court, " . . .arguments of counsel cannot substitute for instructions by the court." (***Taylor v. Kentucky***, *supra*, 36 U.S. 478, 488-489. *See also* ***People v. Clair***, *supra*, 2 Cal.4th 629, 623 [reviewing court must presume that jurors treat the court's instructions as a statement of the law and counsel's comments as words spoken by an advocate in an attempt to persuade].)

Whatever persuasive value the defense argument may have had was obliterated by the prosecution's argument. Although not a correct statement of the law, the prosecutor's argument directly contradicted defense counsel. Several times during his closing speech the prosecutor flatly told the jury that they could **not** legally consider any doubts they had about James' responsibility for the crimes in sentencing:

> What happened at the Subway is not before you. That's been proven beyond a reasonable doubt.
>
> * * *
>
> The fact that the defendant did it is not in issue.

(RT 2786-2787.)

> **I anticipate that counsel will argue something to the effect, are you sure he did it? He told you he didn't. It's not in his character to do it. And if you are not sure he did it, how can you impose the penalty of death upon him? Think about a lingering doubt that you might have.**
>
> **Remember when I told you the fact of whether he did it or not is not in issue.** That's been proven. What is in issue is how and why.
>
> You were told that the defendant is guilty, has been found guilty, and that's the state of the

> evidence. That's what you are to consider, that the defendant personally used a handgun when he executed James White and Brian Berry; that he is guilty of robbery; the special circumstances of multiple murder are true; the special circumstance of committing these murders during the course of a robbery are true. **So when counsel talks about this lingering doubt, I submit to you it doesn't mean anything. Ignore it.** You deal with aggravation and mitigation **as the law requires**.

(RT 2804-2805 [emphasis added].)

The jury was undoubtedly confused by the opposing messages received from the defense and the prosecution. The trial court should have clarified the situation created by the prosecutor's incorrect statement of the law. The court could have accomplished this by providing a correct statement of the law in its instructions to the jury, i.e., by advising the jury that lingering doubt could be considered in mitigation. Instead, by its silence the trial court communicated its approval of the prosecution's directive to the jury not to consider any residual doubts about James' guilt. The trial court's failure to give a lingering doubt instruction as requested by the defense was thus especially prejudicial under the circumstances of this case.

E. Conclusion.

James Robinson was clearly entitled to an instruction advising the jury that lingering doubt could be considered as a reason not to sentence him to death. After the prosecutor's misstatement of the law directing the jury not to consider lingering doubt for any reason, the trial court had a duty to correct that mis-information. By failing to instruct the jury that lingering doubt was a relevant consideration, the trial court prevented this jury from

affording James Robinson the individualized consideration of the penalty the federal constitution requires. (***Lockett v. Ohio***, *supra*, 447 U.S. at 604.)

For all of the reasons discussed above, the death verdict resulting from these errors was arbitrary, capricious and unreliable in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. (***Gardner v. Florida***, *supra*, 430 U.S. 349.) The trial court's actions also contravened the guarantees of a fair trial, due process of law and the heightened due process in a capital case contained in the Fifth, Eighth and Fourteenth Amendments. (*See* ***Hicks v. Oklahoma***, *supra*, 447 U.S. at p. 346; ***Gardner v. Florida***, *supra*, 430 U.S. at pp. 357-362; ***Chambers v. Mississippi***, *supra*, 410 U.S. at p. 294; ***Beck v. Alabama,*** *supra*, 447 U.S. at pp. 637-638, and fn.13.)

Because James Robinson was entitled to a lingering doubt instruction as a matter of California law (*See*, Penal Code § 190.3; ***People v. Cox***, *supra*, 53 Cal.3d 618, 676; ***People v. Terry***, *supra*, 61 Cal.2d 137, 146; ***People v. Friend***, *supra*, 47 Cal.2d 749, 763) the trial court's refusal to do so deprived him of a state created liberty interest without due process of law in violation of the Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.)

The State cannot demonstrate that these errors had no effect on the penalty verdict in this case. (***Chapman v. California***, *supra*, 386 U.S. 18, 24.) The prosecution's case against James Robinson was not overwhelming. The state's witnesses were not especially credible. The sole eyewitness, Rebecca James, failed to identify James Robinson shortly after the crime. Both she and Dennis Ostrander had financial interests in the outcome when they testified against James Robinson. Rebecca James positively identified James Robinson only after she consulted an attorney about claiming the reward money in exchange for her assistance. (RT 300-

301.) Dennis Ostrander not only failed to reveal his alleged conversation with James about the Subway crimes, but denied any knowledge of the events until after the reward had been announced. ( RT 816.) As previously discussed, Tai Williams and Tommy Aldridge were critical prosecution witnesses with their own powerful motives for lying about James Robinson. (*See* Argument I, *supra*.)

The defense evidence was at least capable of raising a reasonable doubt as to James' guilt. In his testimony James' explained how his fingerprints came to be on the plastic bag found in the alley behind the Subway. A number of defense witnesses who had known James for most of his life described him as a kind and gentle person who would never hurt others. *See*, e.g., RT 2700-2704 [testimony of H.B. Barnum]; RT 2705-2710 [testimony of Mr. and Mrs. Walton]. There was absolutely no evidence of other violent or assaultive behavior by James, and he had no prior felony convictions. As discussed elsewhere, the outcome would surely have been different if the defense had been allowed to introduce the evidence of Tai's and Tommy's gun possession in Beverly Hills (see Argument I, *supra*), and the evidence of Ralph Dudley's sighting of a grey Ford Mustang in the alley behind Subway at the time in question. (*Id*.) However, even without these two items of evidence against Tai and Tommy, the case against James was still subject to doubt. Under these circumstances, the state cannot establish that failure to properly inform the jury that they could consider lingering doubt at sentencing had no effect on the penalty verdict. (***Chapman v. California***, *supra*, 386 U.S. 18, 24.) Accordingly, this Court should reverse James Robinson's sentence of death. (***Caldwell v. Mississippi***, *supra*, 472 U.S. at p. 341; ***Hitchcock v. Dugger***, *supra*, 481 U.S. at pp. 399.)

## VII. JAMES ROBINSON DID NOT RECEIVE A DEATH VERDICT PREMISED ON FINDINGS BY A UNANIMOUS JURY BEYOND A REASONABLE DOUBT OF THE PRESENCE OF ONE OR MORE AGGRAVATING FACTORS; HIS CONSTITUTIONAL RIGHTS TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL ELEMENTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED.

### A. Introduction.

James Robinson was convicted of two counts of first degree murder. As special circumstances, the jury further found that he had been engaged in a robbery. (CT 310-312.) The case arose from the robbery of the Subway Sandwich Shop at Zelzah Street and Devonshire Boulevard in Northridge, California, at around 1:00 a.m. on the morning of June 30, 1991. Two people, Subway night manager, James White, and his friend, Brian Berry, were found at the scene. Each of them had fatal gunshot wounds to their heads. The cash register and the floor safe were open and empty of paper money.

Police recovered latent fingerprints from several locations inside the Shop including the floor safe and the cash register. No prints were matched to James Robinson. A shoe print found on the counter top, but it did not match any of James' shoes. A Subway sandwich was found wrapped and inside a plastic bag outside the Subway in the rear alley. Two prints were lifted from the plastic bag holding the sandwich, and were matched to James Robinson. Approximately $640 was missing from the Subway.

The only eyewitness to the robbery, Rebecca James, saw three people (One Black male and two White males) inside the Subway as she walked by. She saw someone jump on top of the counter and assumed the people were playing or rough-housing. (RT 268.) Ms. James failed to identify James Robinson from a photo "six pack" a few days after the

crime. She did identify him at trial. However, Ms. James agreed that the Black male she had seen was lighter skinned and had different features than James Robinson. (RT 271; 295.)

The Subway robbery and the deaths of Brian Berry and James White received substantial attention in the local media. Both young men had grown up in the community, and were popular and well known. Rewards totaling $50,000 were offered for information about the case. (*See*, CT 216-232.)

After the reward was announced, James' childhood friends Tai Williams and Tommy Aldridge contacted Northridge police. For around a month before June 30, 1991, James Robinson was living temporarily with Tai and Tai's girlfriend, Donna Morgan, in their apartment in Northridge. Williams, Aldridge and Morgan told police that James Robinson had planned to rob the Subway. Aldridge claimed to have had a conversation with James Robinson in which James admitted "doing" the Subway, and shooting Berry and White.

Dennis Ostrander also came forward to claim the reward. Ostrander worked with James Robinson in the meat department of Lucky Market around the end of June and early July of 1991. Shortly after James' arrest, Ostrander told Lucky's management that he knew nothing about the crime and had no information about James Robinson. Ostrander later contacted Northridge police. He claimed that James Robinson had given him a detailed account of the Subway robbery and shootings. Ostrander sought the police department's assistance in obtaining a substantial stress disability settlement from Lucky Markets in exchange for his testimony at trial.

James denied any involvement in the Subway crimes. He testified that Tai Williams had spoken of robbing the Subway. On the evening before the robbery, Tai asked James to meet him at the Subway at 1:00 a.m.

James arrived at the Subway just in time to hear someone fleeing through the back door leading to the alley. James ran after the person, following them into the alley. In the alley he saw Tai's grey Ford Mustang driving away.[55] James was stunned and in shock at the though that Tai actually robbed the Subway. He saw a plastic bag on the ground and went to pick it up to show Tai that he knew what he had done, but changed his mind and let it fall back to the ground. Although James was deeply troubled about what he had seen, he did not tell anyone what he knew or turn Tai in to the police.

Several days after James Robinson's arrest in this case Tai Williams and Tommy Aldridge were arrested in Beverly Hills at 1:30 a.m. They were driving around with loaded hand guns, one of which was a .380 - the same caliber gun as the hand gun James Robinson owned. The defense was not allowed to introduce evidence of Williams and Aldridge's misdemeanor convictions for illegal weapons possession which resulted from this arrest. The trial court also refused to allow defense counsel to impeach Williams or Aldridge with the convictions, and would not permit counsel to cross-examine them concerning this incident. (*See* Argument I, *supra*.)

At trial, the coroner testified about the victims' wounds. In his opinion, the shots were fired at a range of six to eighteen inches. The bullet trajectories indicated that the shooter would have been standing over the victims firing almost straight down at the tops of their heads. Over defense objection concerning his lack of training in crime scene reconstruction, the coroner gave his opinion about the probable positions of the shooter and the

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[55]A witness, Ralph Dudley, contacted Northridge police with information that he too had seen the grey Ford Mustang in the alley behind Subway around the time of the crimes. The defense was not allowed to introduce this evidence. (*See*, Argument I, *supra*; RT 1186.)

victims. (*See* Argument II, *supra*.) According to the coroner, the victims were probably shot while in a kneeling position. He agreed, however, that the shooter could have been standing on the counter top and firing down at the victims.

Based largely on the coroner's testimony, the prosecutor argued that James Robinson killed the victims while they were on their knees praying and begging for their lives. In the penalty phase, the victims' families gave highly emotional testimony concerning their feelings about the way in which their sons were killed. (*See* Argument V, *supra*.) The prosecutor made the alleged manner of the killings (which he characterized repeatedly as "brutal" and "callous" among other things) a central feature of his penalty phase closing argument. The jury was told several times that the way in which the crimes were carried out was an aggravating circumstance justifying the death penalty. (RT 2779-80; 2782-85; 2791; 2805; 2810.)

The reasons why the jury imposed a death sentence were not articulated. Very likely, however, they were not centered on the mere elements of the concomitant offense or on the special circumstance of robbery-murder, nor upon James Robinson's prior bad conduct (he had never suffered a felony conviction prior to this conviction), but rather on the circumstances of the offense that were argued by the prosecutor to be aggravating. For instance, the prosecutor strenuously argued that James Robinson should be put to death because he shot the victims at close range, execution style as they were praying for their lives. The prosecutor made this argument despite the fact that the one eyewitness saw a person standing on the counter of the Subway Sandwich Shop, which would have allowed that person to shoot from above. As such, this alleged circumstance of the crime was a fact that had yet to be proven. These additional aggravating

factors were the heart of the prosecutor's closing argument; that they were error is challenged in this appeal in Argument III, *supra*.

Appellant's jury was not told that it had to find any of these purported aggravating factors true beyond a reasonable doubt, or that they had to find the presence of any of the aggravating factors specified by California Penal Code section § 190.3 beyond a reasonable doubt. In fact, they were not told that they needed to agree at all on the same aggravating factors before determining whether or not to impose a death sentence, and they were not asked to submit written findings specifying the aggravating circumstance or circumstances on which they relied.

All this was acceptable under previous law, and all this now seems violative of the constitution since the U.S. Supreme Court's decisions in ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000), and ***Ring v. Arizona***, 122 S.Ct. 1428 (2002). California's highest court has held that ***Apprendi*** has no application to findings of fact made by the jury in the penalty phase of California trials, but its basis for that decisions was ***Walton v. Arizona***, 497 U.S. 639 (1990), a case specifically overruled by ***Ring***.

Mr. Robinson's penalty was based on a raft of innuendo and dubious testimony. It is not at all clear which of the aggravating factors specified by California's statute was relied on by the jury, nor is it clear which foundational factors were accepted by the jury, or if any of them were accepted by all the jury as true beyond a reasonable doubt. This proceeding clearly violated ***Ring***.

B. Burden of Proof.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the

prosecution, and three additional states have related provisions.[56] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[57] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof

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[56] (*See* Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2) (a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[57] *See* Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

beyond a reasonable doubt. (***State v. Wood*** (Utah 1982) 648 P.2d 71, 83-84.)

California 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. The state court has reasoned that penalty phase determinations are "moral and . . . not factual" functions, and they are therefore not "susceptible to a burden-of-proof quantification." ***People v. Hawthorne***, 4 Cal.4th 43, 79 (1992). California statutory law, however, does require fact-finding before the decision to impose death or a lesser sentence is finally made.

Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (***People v. Farnam***, 28 Cal.4th 107, 177 (2002)), "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 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.

The fact that under the Eighth Amendment, "death is different" cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. ***Ring***, *supra*, 122 S.Ct. at 1443. 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"].)

In ***Monge***, the U.S. Supreme Court foreshadowed ***Ring***, and expressly found the ***Santosky*** statement of the rationale for the burden of proof beyond a reasonable doubt requirement[58] applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding,* as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. (***Bullington v. Missouri,*** 451 U.S. at 441 [quoting ***Addington v. Texas*** (1979) 441 U.S. 418, 423-424 [99 S.Ct. 1804, 1807-1808, 60 L.Ed.2d 323].)" (***Monge v. California***, *supra*, 524 U.S. at p. 732 [emphasis added].)

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 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment.

In ***Ring***, the court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial means that such determinations must be made by a

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[58]"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." (***Santosky v. Kramer*** (1982) 455 U.S. 745, 755 [internal citations omitted].)

jury, and must be made beyond a reasonable doubt. Before ***Ring*** was decided, the state court rejected the application of ***Apprendi*** to the penalty phase of a capital trial. In so doing, it relied on ***Walton v. Arizona***, 497 U.S. 639 (1990) and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. ***People v. Ochoa***, 26 Cal.4th 398, 453 (2001)[***Walton*** "compels rejection of defendant's instant claim [that he was entitled to a finding beyond a reasonable doubt of the applicability of a particular section 190.3 sentencing factor]".)

In ***Ochoa***, the court found that a finding of first degree murder in Arizona was the "functional equivalent" of a finding of first degree murder with a section 190.2 special circumstance in California: "both events narrowed the possible range of sentences to death or life imprisonment....a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further ***Apprendi*** bar to a death sentence." ***People v. Ochoa***, *supra*, at 454.

This contention was specifically rejected by the high court in *Ring*, which (1) overruled ***Walton*** to the extent *Walton* allowed a sentencing judge, sitting without a jury, to make factual findings necessary for imposition of a death sentence; and (2) held ***Apprendi*** fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial: "Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense'....". (***Ring***, 122 S.Ct. At 2443, quoting ***Apprendi***, 530 U.S. at 494, n. 19 (2000). At Ring's sentencing hearing, the judge sitting alone

found the presence of aggravating factors which justified the imposition of a death sentence. Specifically, the judge concluded that Ring, and not the co-conspirators, was the one who shot and killed the victim and that Ring was a major participant in the robbery. In Arizona, the judge, and not the jury, was charged with finding these aggravators which resulted in a death sentence. For this reason, the United States Supreme Court reversed Ring's penalty because the jury did not unanimously find to be true beyond a reasonable doubt every fact that subjected Ring to a sentence of death.

In light of *Ring*, this Court's holding, made in reliance on ***Walton***, that there is no need for any jury determination of the presence of an aggravating factor because the jury's role as factfinder is complete upon the finding of a special circumstance, is no longer tenable. California's statute requires that the "trier of fact" find one or more aggravating factors before it can decide whether or not to impose death. These findings exposed Mr. Robinson to a greater punishment than that authorized by the special circumstances finding alone.

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

*Ring*, 122 S. Ct. at 1443.

C. Jury Agreement

The state court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (***People v. Taylor***, *supra*, 52 Cal.3d 719, 749; *accord*, ***People v.***

***Bolin*** (1998) 18 Cal.4th 297, 335-336. Consistent with this construction of California's capital sentencing scheme, no instruction was given to Mr. Robinson's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote, had it been put to the jury as a reason for the death penalty.

It is inconceivable that a death verdict would satisfy the Eighth and Fourteenth Amendments if it were based on (i) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death, and (iii) each such vote coming out 1-11 against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in ***Schad v. Arizona***, 501 U.S. 624, 633 (1991) [plur. opn. of Souter, J.].

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor -- including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further

violative of the Sixth, Eighth and Fourteenth Amendments. (*E.g.*, ***Murray's Lessee***, *supra*; ***Griffin v. United States***, *supra*.) And it violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

Under ***Ring***, the finding of one or more aggravating factors is a critical element of California's sentencing scheme, and a prerequisite to the weighing process in which normative determinations are made. The U.S. Supreme Court has held that such determinations must be made by a jury, and cannot be somehow attended with fewer procedural protections than decisions of much less consequence. *See* ante, section I.B.

D. Jury Unanimity

Mr. Robinson's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from the factors relied on by the other jurors, i.e., there was no actual agreement on why Mr. Robinson should be condemned.

The United State Supreme Court decision in ***Apprendi*** confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (*Id.*, 530 U.S. at 478.) 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 to the jury's satisfaction beyond a reasonable doubt.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (***People v. Taylor***, *supra*, 52 Cal.3d at 749.) This holding was overruled by ***Ring***, which held that any factual findings prerequisite to a death sentence must be found beyond a reasonable doubt by a unanimous jury.

The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (***Brown v. Louisiana*** (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (***Monge v. California***, *supra*, 524 U.S. at p. 732;[59] *accord* ***Johnson v. Mississippi***, *supra*, 486 U.S. at p. 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

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[59]The ***Monge*** court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. `It is of vital importance' that the decisions made in that context `be, and appear to be, based on reason rather than caprice or emotion.' ***Gardner v. Florida*** 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique `in both its severity and its finality,' *id*., at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. *See* ***Lockett v. Ohio***, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the `qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also ***Strickland v. Washington***, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) (`[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." ***(Monge v. California***, *supra*, 524 U.S. at 731-732.)

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. *See*, e.g., sections 1158, 1158a. Since capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (*see* ***Monge v. California***, *supra,* 524 U.S. at p. 732; ***Harmelin v. Michigan***, *supra,* 501 U.S. at p. 994), and certainly no less (***Ring***, 122 S.Ct.at 1443), and 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***, *supra*, 897 F.2d at 421), unanimity with regard to the presence of one or more aggravating factors is constitutionally required.[60]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[61] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (***People v. Medina***, 11 Cal.4th 694, 763-764 (1995) ) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

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[60]Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

[61]The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (*See* ***People v. Wheeler***, (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (***People v. Raley*** (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (***Monge v. California***, *supra*, 524 U.S. at p. 726; ***Strickland v. Washington***, 466 U.S. at pp. 686-687; ***Bullington v. Missouri*** (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed – particularly in a case like Mr. Robinson's case, where the chief reasons presented to the jury for imposing a death sentence were various forms of misconduct that were not part of the commitment offense.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." ***People v. Miranda***, *supra*, 44 Cal.3d at p. 99 (emphasis added). But unanimity is not limited to final verdicts. For example, it is not enough that California jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. ***People v. Diedrich*** (1982) 31 Cal.3d 263, 281-282.

Where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating

circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity as to the existence of particular aggravating factor supporting that decision should be required. ***Ring*** makes clear that these "foundational factors" of the sentencing decision are precisely the types of factual determinations for which Mr. Robinson is entitled to unanimous jury verdicts beyond a reasonable doubt.

## VIII. THE MULTIPLE INSTRUCTIONS CONCERNING REASONABLE DOUBT VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, MANDATING REVERSAL.[62]

The jury was repeatedly instructed regarding the concept of reasonable doubt. The trial court read CALJIC No. 2.90 (1979 Rev.) to the jury, regarding the general presumption of innocence and reasonable doubt. [63] The court also gave two related instructions which discussed reasonable

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[62] This court rejected related, but distinct, arguments in ***People v. Jennings***, *supra*, 53 Cal.3d 334, 385-386. The instant case presents a stronger factual showing on different issues and therefore mandates reversal. However, to the extent that this court finds ***Jennings*** applicable, appellant very respectfully asks that it reconsider its holdings therein.

[63] The defendant in a criminal case is presumed to be:

> . . . innocent until the contrary is proved, and in a case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt because every thing relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. [¶] It is that state of the case, which, after the entire comparison and consideration of all the

(continued...)

doubt's relation to circumstantial evidence. Although the latter two instructions addressed different evidentiary points, they all nearly identically stated that if one interpretation of the evidence appeared reasonable and another interpretation reasonable, it would be the jury's duty to accept the reasonable. (CT 320; 365.)

CALJIC No. 2.90 is incomprehensible to a modern jury. Furthermore, its inherent problems were greatly exacerbated by the quadruple reiteration that the standard was actually only proof that evidence "appears reasonable," rather than proof beyond a reasonable doubt.[64]

A. CALJIC No. 2.90 Was Condemned in ***People v. Brigham*** as Was a Similar Instruction in ***Cage v. Louisiana***.

Due process requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (***In re Winship***, *supra*, 397 U.S. at 361-364; ***Jackson v. Virginia***, *supra,* 443 U.S. at pp. 318-319.) In ***Eversole v. Superior Court*** (1983) 148 Cal.App.3d 188, 199, the California Court of Appeal cited the concurring opinion of Justice Mosk in ***People v. Brigham*** (1979) 25 Cal.3d 283, concerning the manner in which ". . . legal definitions sometimes obscure rather than illuminate their subjects . . .," and observed that Justice Mosk ". . . persuasively advances the view that no definition of 'beyond a reasonable doubt' is better than the definition set

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[63](...continued)

> evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CT 342.)

[64]Appellant did not object on these grounds below, but as this court has recently held, ". . . the defendant is deemed to have objected to *instructions actually given* (§ 1259) . . . ." (***People v. Montiel*** (1993) 5 Cal.4th 877, 928, n. 22, original emphasis; *see also*, ***People v. Hannon*** (1977) 19 Cal.3d 588, 600; § 1469.)

forth in the standard jury instruction. [CALJIC No. 2.90.]" (***Eversole***, *supra*, at n. 6.)

In ***People v. Brigham***, *supra*, the majority opinion disapproved a different definition of reasonable doubt contained in former CALJIC No. 22 and also criticized CLAJIC No. 2.90 for using archaic language [65] regarding the presumption of innocence and reasonable doubt instruction, which ". . . more than any other is central in preventing the conviction of the innocent . . . ," and joined Justice Mosk in calling for revision of CALJIC 2.90. (***People v. Brigham***, *supra*, 25 Cal.3d at p. 290 and n. 11.)

Justice Mosk's concurrence analyzed the history of CALJIC No. 2.90's definition and its statutory counterpart, section 1096, and concluded that the problem is to make the principles involved ". . . intelligible to modern juries . . . ." (*Id.* at 307.)

> Unless the legislature takes action in the matter, juries in all California criminal trials will continue to be mystified at best and misled at worst by hearing the concept of reasonable doubt defined in the archaic idiom of CALJIC No. 2.90. 'But this, now hallowed, language produces the same sheep-like acceptance as the "Emperor's New Clothes." Judges awesomely intone the ponderous gibberish, as lawyers hypnotized into believing they understand the fatuity listen respectfully, while jurors, noticing His Honor's serious mien and the lawyers' sage expression, mimic the exampled air of grave comprehension. Thus, the linguistic parade begun in 1850 continues through today without so much as a smile from the marchers. . .' [¶] Whether parade or charade, it is time the pretense was ended and plain speaking was restored to the courtroom. Respect for the

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[65] *See* ***People v. Territory of Guam v. Yang*** (9th Cir. 1986) 800 F.2d 945, 950-951, and cases cited therein.

> conscientious men and women who serve on our juries to the best of their abilities demands no less.

(*Id.* at pp. 315-316, quoting Sinetar, A Belated Look at CALJIC (1968) 43 State Bar J. 546, 551-552.)

Justice Mosk traced the language of CALJIC No. 2.90 and section 1096 to ***Commonwealth v. Webster*** (1850) 59 Mass. (5 Cush.) 295, 320. (***People v. Brigham***, *supra*, 25 Cal.3d at p. 294.)[66] In 1927, the Commission for Reform of Criminal Procedure proposed that the legislature incorporate this language verbatim into section 1096, to be accompanied by the further admonition that ". . . no further instruction on the subject of the presumption of innocence or defining reasonable doubt need to give, "after noting the numerous reversals of California convictions resulting from erroneous instructions defining reasonable doubt. (***People v. Brigham***, *supra*, 25 Cal.3d at p. 294.) The legislature complied, although this language was " . . . already obsolete in 1927 . . . [and] . . . hopelessly superannuated in 1979 . . ." at the time of ***Brigham*** (*id.* at 294-295), and is even more so today.

Justice Mosk criticized CALJIC No. 2.90 phrase by phrase (*id.* at 295-307), based on extensive authority to the effect that no words are plainer than "reasonable doubt" and none so exact. (*Id.* at 311-312, citing 1

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[66] Another commentator traces the language to the year 1600 (Shapiro, "To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850, 38 Hast.L.J. 153); a third writer suggests the "beyond a reasonable doubt" test was introduced by prosecutors as a lesser standard from the "any doubt" debt. (*Id.* at 170), citing Moreno, A Re-examination of the Reasonable Doubt Rule, 55 B.U.L.Rev. 507, 514-515 (1975).) The "beyond a reasonable doubt" standard apparently was first employed in the Boston Massacre trials of 1770. (*Id.* at 171, citing A Re-examination of the Reasonable Doubt Rule, *supra*, 55 B.U.L.Rev. at 516-519.)

Bishop's New Criminal Procedure (1985) § 1094, p. 682.)[67] It is futile to define the self-evident; the resultant ". . . straining for making the clear more clear has the trap of producing complexity and consequent confusion." (*Id.* at 308-309, quoting ***United States v. Lawson*** (7th Cir. 1974) 507 F.2d 433, 442.[68])

Justice Mosk saved his strongest criticism for the phrases "abiding" (***People v. Brigham***, *supra*, 25 Cal.3d at pp. 299-300), "moral evidence" and "moral certainty," the latter being the ". . . most crucial phase of the instruction . . ." (*Id.* at 300), but meaningless to modern juries.[69] Justice Mosk noted that "moral certainty" has been extensively criticized by numerous courts for being a ". . . contradiction approaching absurdity . . . [T]aken literally . . . the term imports a truth of fact *probably* proved *beyond*

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[67] E.g., *see* ***Brigham***, *supra*, 25 Cal.3d at p. 311, fn. 16, where over a dozen appellate opinions from various states are cited for the proposition that no definition of "reasonable doubt" conveys to the juror's mind any clearer idea than the term itself.

[68] Justice Mosk also notes that the Model Penal Code cites section 1096 as an example of an attempted definition of reasonable doubt which ". . . add[s] nothing helpful to the phrase." (***People v. Brigham***, *supra*, 25 Cal.3d at p. 312, citing Model Penal Code (Tent. Draft No. 4, 1955) Com. to § 1.13, p. 109.)

[69] Today's jurors have no idea what "moral evidence" is, and

> . . . it would be improper to revive the distinction to which it originally referred. Furthermore, the explanation is essentially uninformative: because "moral evidence" is proof that by definition is incapable of resulting in certainty, a person is said to be "morally certain" in this sense when he is as certain as he can be of a fact of which he cannot be certain.

(*Id.* at 301.)

*any doubt . . . .*" (*Id.* at 304, original emphasis, quoting ***United States v. Thompson*** (W.D.Wash. 1926) 11 F.2d 875, 876; see further criticisms, ***People v. Brigham***, *supra*, 25 Cal.3d at pp. 305-307.)

The United States Supreme Court voiced a similar criticism in ***Cage v. Louisiana***, *supra*, 498 U.S. 39, in reversing a death sentence due to a reasonable doubt instruction allowing conviction where jurors found guilt to a "moral certainty," with reasonable doubt defined as any "grave uncertainty" or "actual substantial doubt." (*Id.* at 498.) The unanimous opinion found the related instruction violated the due process clause, which protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged (*id.* at 341, citing ***In re Winship***, *supra*), using an automatic reversal standard. (*Id.*, ***Sullivan v. Louisiana*** (1993) 508 U.S. 275.) The United States Supreme Court specifically condemned the use of "moral certainty," rather than "evidentiary certainty." (***Cage v. Louisiana***, *supra*, 498 U.S. 39; *see* Justice Mosk's similar criticisms of "moral certainty" in ***Brigham***, above.) The key point is that due process ensures a defendant's right to have the jury deliberate solely on the basis of the evidence (***Taylor v. Kentucky***, *supra*, 436 U.S. 478, 489 [56 L.Ed.2d 468, 98 S.Ct. 1930]) rather than on jurors' subjective, moral disapproval of the defendant's conduct.[70]

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[70] *Id.*, *see* ***United States v. Indorato*** (1st Cir. 1980) 628 F.2d 711, 721, n. 8; ***State v. Manning*** (S.C. 1991) 409 S.E.2d 372, 374 [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction]; ***People v. Hewlett*** (N.Y.App.Div. 1987) 519 N.Y.S. 555, 557; ***Dunn v. Perrin*** (1st Cir. 1978) 570 F.2d 21, 24; ***United States v. Nolasco*** (9th Cir. 1992) 926 F.2d 829 (*en banc*).

B. The Trial Court's Use of CALJIC No. 2.90 Violated the Fifth, Sixth, Eighth and Fourteenth Amendments, Mandating Automatic Reversal.

The use of this instruction violated Appellant's rights to due process of law and heightened due process in a capital case, as well as his rights to a jury trial, fundamental fairness at trial, and a reliable determination of guilt and penalty, in violation of the Fifth, Sixth and Fourteenth Amendments. Per ***In re Winship***, *supra*, and ***Cage v. Louisiana***, *supra*, automatic reversal is mandated as to both the guilt and penalty phases.

C. The Use Of CALJIC 2.90 In Conjunction With The Other Two Instructions On Reasonable Doubt Undermined The Constitutional Requirement Of Proof Beyond A Reasonable Doubt.

In addition to CALJIC 2.90, two other instructions addressed reasonable doubt and told the jury that, if one interpretation of the evidence appeared reasonable and the other unreasonable, it would be the jury's duty to accept the reasonable,[71] contrary to the due process requirement that a defendant may be convicted only on proof of guilt beyond a reasonable doubt. (***In re Winship***, *supra*, 397 U.S. at pp. 361-364; ***Jackson v. Virginia***, *supra*, 443 U.S. at pp. 318.)

These instructions required that the jury accept an indication that the evidence was incriminatory if it "appeared reasonable," i.e., a standard substantially below proof beyond a reasonable doubt. (But see ***People v. Jennings***, *supra*, 53 Cal.3d at pp. 386.) In ***Cage v. Louisiana***, *supra*, the United States Supreme Court addressed a similar problem, concerning instructions that equated reasonable doubt with grave or substantial doubt

[71] CALJIC No. 2.01, CT 320 [sufficiency of circumstantial evidence to show guilt]; and, CALJIC No. 8.83, CT 365 [sufficiency of circumstantial evidence to show special circumstances].)

and therefore unconstitutionally allowed a finding of guilt based on a degree of proof below that required by the due process clause. (***Cage v. Louisiana***, *supra*, 498 U.S. 39.)

If due process is violated by jury instructions requiring reasonable doubt to be grave or substantial, as in ***Cage***, then the instant jury instructions are also violative of the Fifth, Sixth, Eighth and Fourteenth Amendments, as they negated reasonable doubt if evidence of guilt merely "appeared reasonable." Reversal is automatic. (***Sullivan v. Louisiana***, *supra*, 508 U.S. 275.)

Furthermore, these instructions also contained an impermissible mandatory, conclusive presumption of guilt upon a preliminary finding that evidence of guilt merely "appears reasonable." Such a presumption violates not only due process, but also the defendant's right to a jury trial by

removing fundamental questions from the jury. (***Carella v. California*** (1989) 491 U.S. 263, 265. *See also*, Argument VII, *supra*.)

The confusing, archaic language of CALJIC 2.90 discussed above could only have heightened the likelihood that the jury looked to these other instructions for clarification, which told them two times, in modern language, that they should follow evidence of guilt that "appears reasonable." And even if the jury was trained in archaic English and found CALJIC 2.90 to merely be in conflict with the other two instructions, those instructions' failure to resolve this constitutional question does not ". . . absolve the infirmity." (***Francis v. Franklin*** (1985) 471 U.S. 307, 322.)

These instructions greatly influenced the closing arguments of both counsel. Defense counsel argued that the circumstantial evidence indicating guilt also had a reasonable explanation indicating innocence. The instructions, however, prevented counsel from arguing that, even if the

circumstantial evidence had no reasonable interpretation favoring innocence, the same evidence also did not establish guilt beyond a reasonable doubt. The evidence of James Robinson's fingerprint found on the plastic sandwich bag in the alley behind the Subway illustrates this point. This item of circumstantial evidence was a key point in the prosecution's case. In his testimony, James Robinson provided an innocent explanation for how his print came to be on the bag. James explained how he had seen the plastic bag, reached down to pick it up to prove to Tai that he had seen him there, and then changed his mind and dropped it on back on the ground. The prosecutor's interpretation was that James had ordered a turkey and bacon sandwich, left the print on the plastic bag as he carried it away after the robbery, and accidentally dropped the sandwich in the alley. In closing argument, the prosecutor used James' testimony about the plastic bag to argue that James' was guilty because his testimony concerning how the print was left on the bag was improbable. The prosecutor's argument all but bluntly stated that the jury was bound to accept the more reasonable interpretation of the evidence, the prosecution's version of events made more sense, and therefore James was guilty.

The jury instructions were very useful to the prosecutor as they lightened the state's burden of proof. The prosecutor effectively argued that his explanation of the circumstantial evidence was the more reasonable and, therefore, James was lying and should be found guilty consistent with the jurors' "common sense." These instructions and the argument thereon involved the basic standard of proof to be applied at trial, undermining the verdicts and operating as a mandatory, conclusive presumption in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Reversal is subject to a special harmless error analysis, which is ". . . wholly unlike the typical form . . ." (***Carella v. California***, *supra,* 491 U.S. at pp. 267-273 [Scalia, J.,

conc.].) The use of conclusive presumptions, like those used here, can be held harmless ". . . only in those 'rare situations' when the reviewing court can be confident that [such an] error did not play any role in the jury's verdict . . .," such as an instruction regarding a charge on which the defendant was acquitted or an element of a crime that the defendant admitted. (*Id*., 491 U.S. at pp. 269-270, quoting ***Connecticut v. Johnson*** (1983) 460 U.S. 73, 87 [Scalia, J., conc.].) This is not such a situation. Therefore, reversal is mandated.

## IX. THIS COURT SHOULD REVERSE JAMES ROBINSON'S CONVICTIONS AND SENTENCE OF DEATH DUE TO THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE.

In the preceding arguments, James Robinson has demonstrated that reversal of his convictions and sentence of death is required as a result of the various errors occurring at trial. However, even if this Court determines that none of the errors warrants reversal standing alone, it is necessary to consider their cumulative impact. (***Taylor v. Kentucky*** (1978) 436 U.S. 478, 487, fn. 15; ***Fields v. Woodford*** (9th Cir. 2002) __F.3d __, 2002 WL 253821; ***United States v. Frederick*** (9th Cir. 1996) 78 F.3d 1370, 1381.) This Court has also held that the cumulative effect of multiple errors may be so unduly prejudicial that reversal is necessary though the prejudice from any one instance of error would not be sufficient standing alone. (***People v. Hill*** (1998) 17 Cal.4th 800.)

A. Guilt Phase Errors.

The prosecution's case against James Robinson depended largely upon the credibility of witnesses Tai Williams and Tommy Aldridge. The trial court erroneously excluded evidence which not only undermined these witnesses' credibility, but indicated that they were the actual perpetrators in this case. The trial court's elimination of this evidence prevented James Robinson from presenting a valid defense of third party culpability in contravention of established state law. (***People v. Hall***, *supra*, 41 Cal.3d 826.) The court's action thus deprived James Robinson of a state created liberty interest and denied him due process of law as mandated by the Fifth and Fourteenth Amendments to the federal constitution. (***Hicks v. Oklahoma,*** *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.) Moreover, excluding this evidence denied James Robinson his constitutional rights to confront and cross-examine witnesses as guaranteed

by the Sixth and Fourteenth Amendments. (***Crane v. Kentucky***, *supra*, 476 U.S. 683, 690-691; ***Washington v. Texas***, *supra*, 388 U.S. 14, 22-23; ***Chambers v. Mississippi***, *supra*, 410 U.S. 284, 302.) Because this evidence was the only means available to attack the credibility of prosecution witnesses Williams and Aldridge, the trial court's erroneous decision to exclude it virtually guaranteed James Robinson's conviction. Moreover, because this evidence was wrongly excluded, the convictions in the guilt phase are not sufficiently reliable to satisfy the standards set by the Eighth and Fourteenth Amendments for convictions underlying a capital case. (***Beck v. Alabama***, *supra*, 447 U.S. 625, 637-638.) (*See*, Argument I, *supra*.)

Another instance of error affecting the guilt phase was the trial court's wholly inadequate voir dire of the prospective jurors. Without accurate and sufficient information concerning the prospective jurors' attitudes in a number of areas of concern in this trial, including racial bias and pretrial publicity, the trial court could not meaningfully determine challenges for cause. As a result, there is no assurance that James Robinson was tried by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments. (*See*, Argument II, *supra*.)

The trial court's decision to permit the coroner, Dr. Rogers, to testify concerning the probable positions of the victims and the shooter(s) at the crime scene was another highly prejudicial error which affected both phases of James Robinson's capital trial. Over defense objections on the grounds of relevancy, lack of foundation, and undue prejudice under Evidence Code section 352, the coroner was permitted to give largely speculative testimony supporting the prosecution's highly prejudicial and inflammatory version of the crime. According to the prosecution's theory, the victims were shot in the back of their heads while in a kneeling position – supposedly praying

for their lives. By allowing the coroner to add supposedly scientific authority to this scenario, the prosecutor was able to use the image of the praying victims effectively in closing argument in both phases of trial. In addition, the victim impact witnesses testified in the penalty phase describing their reactions to the image of their loved ones dying in this manner. (*See*, Argument V, *supra*.)

The trial court's handling of the jury's request for a readback of testimony during guilt phase deliberations was also highly prejudicial. The court abdicated its duty to supervise and control the read back process by allowing the court reporter to select the testimony which was responsive to the jury's request. The court reporter selected a long passage of James Robinson's testimony which was irrelevant and presented a skewed and misleading picture of the evidence. The day after the readback of this prejudicial excerpt of testimony the jury reached a verdict, finding James Robinson guilty on all counts charged in the Information. (*See* Argument IV, *supra*; CT 310; RT 1399-1402.)

Finally, the trial court's instructions on reasonable doubt were confusing and conflicted with other instructions the jury received. The combined effect of the guilt phase errors was that the jury received a misleading picture of the evidence and was encouraged (through the confusing instruction on reasonable doubt and the prosecution's closing argument which capitalized on the trial court's erroneous evidentiary rulings) to adopt an incorrect view of the law which reduced the prosecution's burden of proof. The net result was that James Robinson was denied a fair and reliable determination of guilt. Accordingly, this Court must reverse the convictions.

B. Penalty Phase Errors.

The errors in the penalty phase of James Robinson's capital trial had a similar cumulative effect, resulting in an unfair and unreliable sentence of death in violation of the Eighth and Fourteenth Amendments for the federal constitution. The penalty phase of this capital trial was dominated by an excessive amount victim impact evidence which was both irrelevant and highly inflammatory. The massive amount of cumulative, irrelevant and extraordinarily prejudicial victim impact evidence, testimony and argument violated federal due process and resulted in a sentencing proceeding which did not satisfy the Eighth and Fourteenth Amendments' guarantees of fundamental fairness and reliable capital sentencing. (*See* Argument V, *supra*.)

The prosecutor used the coroner's testimony regarding the probable positions at the crime scene, the victim impact evidence and the testimony of Tai Williams and Tommy Aldridge to create for the jury a scenario of what happened at the crime scene. The prosecutor's version of the events was purely speculative. However, the prosecution's depiction of the execution style killing of the two victims allegedly down on their knees begging and praying for their lives was sure to be emotionally compelling – especially in conjunction with the testimony of the victims' distraught families. Under these circumstances, the jury was unlikely to question the coroner's purportedly "expert" conclusion about the likely positions of victims and the shooter(s). It would have been equally improbable for the jury to view Tai's and Tommy's testimony with suspicion, especially when the defense was prevented from impeaching them or introducing the only available evidence capable of undermining their credibility, i.e., their arrests for unlawful gun possession at 1:30 a.m. in Beverly Hills within weeks of the Subway crimes. Thus, the cumulative effect of the trial court's

erroneous rulings was to remove any reason the jurors may have had not to adopt the State's theory of this case.

The prosecutor reaped the benefit of the trial court's errors when, in closing argument, he successfully urged the jury to treat the way in which the crimes were carried out as a factor in aggravation which alone justified a death sentence, even though the jury could not make any findings and unanimous agreement on this point was not required . (*See*, Argument VII, *supra*.) The trial court's refusal to instruct the jury on lingering doubt (even where such an instruction was requested by the defense, argued by defense counsel and the subject of counter-argument by the prosecutor), further encouraged the jury to accept the prosecution's theory of the case and the conclusion that the manner of the killings in this case were sufficient reason to impose a death sentence. (*See*, Arguments VI and VII, *supra*.)

C. Conclusion.

The errors in the guilt and penalty phases of James Robinson's capital trial were tremendously prejudicial because they involved interrelated issues. Each erroneous evidentiary ruling strengthened the overall presentation of the prosecution's theory of the case while simultaneously weakening the defense. Under these circumstances, it cannot be said that the errors had "no effect" on at least one juror. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320, 341.) The combined effect of the guilt phase and penalty phase errors was a fundamentally unfair capital trial. James Robinson's convictions and sentence of death must be reversed due to the cumulative effects of the many errors affecting both phases of his trial.

D. California's Death Penalty Statute, as Interpreted by this Court and Applied at James Robinson's Trial, Violates the United States Constitution.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Challenges to most of these features have been rejected by this Court. Therefore, rather than unduly lengthening this brief, these arguments are presented 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. Individually and collectively, these various constitutional defects require that James Robinson's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and 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 of California's death penalty statutes 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. 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. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

E. James Robinson's Death Sentence Is Invalid Because § 190.2 Is Impermissibly Broad.

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

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

(***People v. Edelbacher***, *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:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(***Zant v. Stephens*** (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has

explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (***People v Bacigalupo*** (1993) 6 Cal.4th 857, 868.

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. 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 James Robinson the statute contained twenty-six special circumstances[72] 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.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated:

> And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*

(See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

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

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. 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 intentional murders. (See ***People v. Hillhouse*** (2002) 27 Cal. 4th 469, 117 Cal.Rptr. 2d 45, 69-70, 79-80; ***People v. Morales*** (1989) 48 Cal.3d 527, 557-58, 575.) By establishing so many categories of special circumstance murder, the statute comes very close to achieving its goal of making every murderer eligible for death. section 190.2 does not genuinely narrow the class of persons eligible for the death penalty.

Comprehensive and meticulous research has been done to see just what proportion of murderers are made eligible for death by these special circumstances, and how many of these are actually sentenced to death. (See Schatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1331-1334 (1997).) This work has shown that California's special circumstances are so broad in definition as to encompass the facts established in approximately 87% of the cases ending in a conviction of first-degree murder. Excluding those convicted first degree murderers who are 16 and 17 years old, and are therefore statutorily ineligible for death, approximately 84% of convicted first degree murders are death-eligible. Of these, only 9.6% of all those convicted of

first degree murder are sentenced to death. California thus has a death sentence ratio of approximately 11.4%. (Schatz and Rivkind, *supra*, at p. 1332.)

As in pre-***Furman*** Georgia, being sentenced to death in California is cruel and unusual, in the same sense that being struck by lightning is cruel and unusual. A statutory scheme under which 84% of first-degree murderers are death-eligible does not "genuinely narrow" (see ***Wade v. Calderon*** (9th Cir. 1994) 29 F.3d 1312, 1319 *cert. den*. 130 L.Ed.2d 802 (1995)). Since only 11.4% of those statutorily death-eligible are sentenced to death, California's death penalty scheme permits an even greater risk of arbitrariness than the schemes considered in ***Furman v. Georgia*** (1972) 408 U.S. 238, 33 L.Ed.2d 346,[73] and, like those schemes, is unconstitutional.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing, and does so with very little discussion. In ***People v. Stanley*** (1995) 10 Cal.4th 764, 842, this Court stated that the

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[73]At the time of the decision in ***Furman***, the evidence before the high court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at p. 386 n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . ." (402 U.S. at p. 309, n. 10) Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, ***Furman***, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment. See also, *The California Death Penalty Scheme*, *supra*, 72 NYU L.Rev. at 1288-1290.

United States Supreme Court rejected a similar claim in ***Pulley v. Harris*** (1984) 465 U.S. 37, 53. Not so. In ***Harris***, the issue before the Court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. The U.S. Supreme Court's assumption that the 1977 law limited death-eligibility to a "small sub-class" was no more than an assumption, and the court contrasted that law with the 1978 law under which appellant was convicted, which had "greatly expanded" the list of special circumstances. (***Harris***, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and prevailing international law. (See, section E. of this Argument, *post*).

F. James Robinson's Death Sentence Is Invalid Because § 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 found to be "aggravating" within the statute's meaning.

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[74] or because three weeks after the crime defendant sought to conceal evidence,[75] or threatened witnesses after his arrest,[76] or disposed of the victim's body in a manner that precluded its recovery.[77]

The purpose of § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (***Tuilaepa v. California*** (1994) 512 U.S. 967, 987-988), 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

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[74]***People v. Nicolaus***, (1991) 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09, *cert. den.*, 112 S. Ct. 3040 (1992).

[75]***People v. Walker***, (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

[76]***People v. Hardy***, (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[77]***People v. Bittaker***, 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35 (1989), *cert. den.* 496 U.S. 931 (1990).

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[78] or because the defendant killed with a single execution-style wound.[79]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[80] or because the defendant killed the victim without any motive at all.[81]

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[78]See, e.g., ***People v. Morales***, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); ***People v. Zapien***, No. S004762, RT 36-38 (same); ***People v. Lucas***, No. S004788, RT 2997-98 (same); ***People v. Carrera***, No. S004569, RT 160-61 (same).

[79]See, e.g., ***People v. Freeman***, No. S004787, RT 3674, 3709 (defendant killed with single wound); ***People v. Frierson***, No. S004761, RT 3026-27 (same).

[80]See, e.g., ***People v. Howard***, No. S004452, RT 6772 (money); ***People v. Allison***, No. S004649, RT 968-69 (same); ***People v. Belmontes***, No. S004467, RT 2466 (eliminate a witness); ***People v. Coddington***, No. S008840, RT 6759-60 (sexual gratification); ***People v. Ghent***, No. S004309, RT 2553-55 (same); ***People v. Brown***, No. S004451, RT 3543-44 (avoid arrest); ***People v. McLain***, No. S004370, RT 31 (revenge).

[81]See, e.g., ***People v. Edwards***, No. S004755, RT 10,544 (defendant killed for no reason); ***People v. Osband***, No. S005233, RT 3650 (same); ***People v. Hawkins***, No. S014199, RT 6801 (same).

c. Because the defendant killed the victim in cold blood[82] or because the defendant killed the victim during a savage frenzy.[83]

d. Because the defendant engaged in a cover-up to conceal his crime,[84] or because the defendant did not engage in a cover-up and so must have been proud of it.[85]

e. Because the defendant made the victim endure the terror of anticipating a violent death[86] or because the defendant killed instantly without any warning.[87]

f. Because the victim had children,[88] or because the victim had not yet had a chance to have children.[89]

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[82]See, e.g., ***People v. Visciotti***, No. S004597, RT 3296-97 (defendant killed in cold blood).

[83]See, e.g., ***People v. Jennings***, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[84]See, e.g., ***People v. Stewart***, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); ***People v. Benson***, No. S004763, RT 1141 (defendant lied to police); ***People v. Miranda***, No. S004464, RT 4192 (defendant did not seek aid for victim).

[85]See, e.g., ***People v. Adcox***, No. S004558, RT 4607 (defendant freely informs others about crime); ***People v. Williams***, No. S004365, RT 3030-31 (same); ***People v. Morales***, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[86]See, e.g., ***People v. Webb***, No. S006938, RT 5302; ***People v. Davis***, No. S014636, RT 11,125; ***People v. Hamilton***, No. S004363, RT 4623.

[87]See, e.g., ***People v. Freeman***, No. S004787, RT 3674 (defendant killed victim instantly); ***People v. Livaditis***, No. S004767, RT 2959 (same).

[88]See, e.g., ***People v. Zapien***, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[89]See, e.g., ***People v. Carpenter***, No. S004654, RT 16,752 (victim

(continued...)

g. Because the victim struggled prior to death,[90] or because the victim did not struggle.[91]

h. Because the defendant had a prior relationship with the victim,[92] or because the victim was a complete stranger to the defendant.[93]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because

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[89](...continued)
had not yet had children).

[90]See, e.g., ***People v. Dunkle***, No. S014200, RT 3812 (victim struggled); ***People v. Webb***, No. S006938, RT 5302 (same); ***People v. Lucas***, No. S004788, RT 2998 (same).

[91]See, e.g., ***People v. Fauber***, No. S005868, RT 5546-47 (no evidence of a struggle); ***People v. Carrera***, No. S004569, RT 160 (same).

[92]See, e.g., ***People v. Padilla***, No. S014496, RT 4604 (prior relationship); ***People v. Waidla***, No. S020161, RT 3066-67 (same); ***People v. Kaurish*** (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

[93]See, e.g., ***People v. Anderson***, No. S004385, RT 3168-69 (no prior relationship); ***People v. McPeters***, No. S004712, RT 4264 (same).

the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[94]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[95]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[96]

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[94]See, e.g., ***People v. Deere***, No. S004722, RT 155-56 (victims were young, ages 2 and 6); ***People v. Bonin***, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); ***People v. Kipp***, No. S009169, RT 5164 (victim was a young adult, age 18); ***People v. Carpenter***, No. S004654, RT 16,752 (victim was 20), ***People v. Phillips***, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); ***People v. Samayoa***, No. S006284, XL RT 49 (victim was an adult "in her prime"); ***People v. Kimble***, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); ***People v. Melton***, No. S004518, RT 4376 (victim was 77); ***People v. Bean***, No. S004387, RT 4715-16 (victim was "elderly").

[95]See, e.g., ***People v. Clair***, No. S004789, RT 2474-75 (strangulation); ***People v. Kipp***, No. S004784, RT 2246 (same); ***People v. Fauber***, No. S005868, RT 5546 (use of an ax); ***People v. Benson***, No. S004763, RT 1149 (use of a hammer); ***People v. Cain***, No. S006544, RT 6786-87 (use of a club); ***People v. Jackson***, No. S010723, RT 8075-76 (use of a gun); ***People v. Reilly***, No. S004607, RT 14,040 (stabbing); ***People v. Scott***, No. S010334, RT 847 (fire).

[96]See, e.g., ***People v. Howard***, No. S004452, RT 6772 (money); ***People v. Allison***, No. S004649, RT 969-70 (same); ***People v. Belmontes***, No. S004467, RT 2466 (eliminate a witness); ***People v. Coddington***, No. S008840, RT 6759-61 (sexual gratification); ***People v. Ghent***, No. S004309, RT 2553-55 (same); ***People v. Brown***, No. S004451, RT 3544 (avoid arrest); ***People v. McLain***, No. S004370, RT 31 (revenge); ***People v.***

(continued...)

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[97]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[98]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. 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, § 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were

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[96](...continued)
***Edwards***, No. S004755, RT 10,544 (no motive at all).

[97]See, e.g., ***People v. Fauber***, No. S005868, RT 5777 (early morning); ***People v. Bean***, No. S004387, RT 4715 (middle of the night); ***People v. Avena***, No. S004422, RT 2603-04 (late at night); ***People v. Lucero***, No. S012568, RT 4125-26 (middle of the day).

[98]See, e.g., ***People v. Anderson***, No. S004385, RT 3167-68 (victim's home); ***People v. Cain***, No. S006544, RT 6787 (same); ***People v. Freeman***, No. S004787, RT 3674, 3710-11 (public bar); ***People v. Ashmus***, No. S004723, RT 7340-41 (city park); ***People v. Carpenter***, No. S004654, RT 16,749-50 (forested area); ***People v. Comtois***, No. S017116, RT 2970 (remote, isolated location).

enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (***Maynard v. Cartwright*** (1988) 486 U.S. 356, 363.)

G. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing, and Therefore Violates the Eighth and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute effectively 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). A defendant, like James Robinson, convicted of felony-murder is automatically eligible for death, and freighted with an aggravating circumstance to be weighed on death's side of the scale. 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 believe 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 process

of making the most consequential decision a juror can make – whether or not to impose death.

1. *The trial court's failure to instruct the jury on any penalty phase burden of proof violated James Robinson's constitutional rights to due process and equal protection of the laws, and to not be subjected to cruel and unusual punishment.*

James Robinson's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See ***Santosky v. Kramer*** (1982) 455 U.S. 745, 754-767; ***In re Winship*** (1970) 397 U.S. 358.)

Some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (***Eddings v. Oklahoma*** (1982) 455 U.S. 104, 112; emphasis added.) The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (***Sullivan v. Louisiana****, supra*.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove

mitigation in penalty phase would continue to believe that. Such jurors do exist.[99] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a mis-allocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty.

The error in failing to instruct the jury on what the proper burden of proof is or is not, is reversible *per se*. (***Sullivan v. Louisiana***, *supra*.) In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

2. *Beyond a reasonable doubt is the appropriate burden of proof for factors relied on to impose a death sentence, for finding that aggravating factors outweigh mitigating factors, and for finding that death is the appropriate sentence.*

Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[100] Only

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[99]See, e.g., ***People v. Dunkle***, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 725.

[100](See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38,

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[101] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (***State v. Wood*** (Utah 1982) 648 P.2d 71, 83-84.) California 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

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[100](...continued)
para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); ***State v. Stewart*** (Neb. 1977) 250 N.W.2d 849, 863; ***State v. Simants*** (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); ***State v. Pierre*** (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[101]See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and ***State v. Goodman*** (1979) 257 S.E.2d 569, 577.

of prior criminality relied upon as an aggravating circumstance – and even in that context, the required finding need not be unanimous.

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (***People v. Hawthorne*** (1992) 4 Cal.4th 43, 79.) The moral basis of a decision to impose death, however, does not mean that the decision of such magnitude should be made without rationality or conviction. No greater interest is 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"].) In ***Monge***, the U.S. Supreme Court expressly found the ***Santosky*** statement of the rationale for the burden to proof beyond a reasonable doubt requirement[102] applicable to capital sentencing proceedings: *"[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. [***Bullington v. Missouri***, 451 U.S., at 441, quoting ***Addington v. Texas***, 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1807-1808, 60 L.Ed.2d 323 (1979).] (***Monge v. California***, *supra*, 524 U.S. at p. 732 [emphasis added].)

In ***Apprendi v. New Jersey*** (2000) 530 U.S. 466, the U.S. Supreme Court confirmed that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all

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[102]"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." (***Santosky v. Kramer*** (1982) 455 U.S. 745, 755 [internal citations omitted].)

of the findings the sentencing jury must make as a prerequisite to returning a verdict of death. 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. Under California's capital sentencing scheme, the jury may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) Accordingly, under ***Apprendi***, both the existence of any aggravating factors relied upon to impose a death sentence and the determination that such factors outweigh any mitigating factors must be made beyond a reasonable doubt.

This Court has rejected the application of ***Apprendi*** to the penalty phase of a capital trial, relying in large part on ***Walton v. Arizona*** (1990) 497 U.S. 639, and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (***People v. Ochoa*** (2001) 26 Cal.4th 398, 453.) This authority is now doubtful. Every member of the U.S. Supreme Court has either authored or joined opinions that state or suggest that ***Walton'***s holding is called into question by ***Apprendi*** and ***Jones v. United States*** (1999) 526 U.S. 227[103]. That court has granted a petition for writ of certiorari in ***Ring***

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[103]***Apprendi***, 530 U.S. at 538 (O'Connor, J., joined by Rehnquist, C.J., Kennedy, and Breyer, JJ., dissenting) ("If the Court does not intend to overrule ***Walton***, one would be hard pressed to tell from the opinion it issues today"); ***Jones***, 526 U.S. at 272 (Kennedy, J., joined by Rehnquist, C.J., O'Connor, and Breyer, JJ., dissenting) (stating that the constitutional rule identified in ***Jones*** and subsequently adopted in ***Apprendi*** cast doubt on the continued viability of ***Walton,*** and noting that ***Walton*** was "a better candidate" than ***Jones*** itself for the application of that rule); ***Apprendi***, 530 (continued...)

***v. Arizona***, No. 01-488, to determine if ***Apprendi*** has overruled ***Walton***'s holding that judges could make factual determinations that increase the prescribed range of penalties despite the Sixth Amendment's guarantee of a jury trial.

> 3. *Even if proof beyond a reasonable doubt were not the constitutionally required burden of persuasion for finding (1) that an aggravating factor exists, (2) that the aggravating factors outweigh the mitigating factors, and (3) that death is the appropriate sentence, proof by a preponderance of the evidence would be constitutionally compelled as to each such finding*.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in <u>any</u> sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of <u>any</u> historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., ***Griffin v. United States*** (1991) 502

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[103](...continued)
U.S. at 523 (Thomas, J., concurring) (stating that ***Walton***'s continued viability in light of the constitutional mandate recognized by Justice Thomas in joining the ***Apprendi*** majority was "a question for another day"); ***Jones,*** 526 U.S. at 253 (Stevens, J., concurring) (stating that ***Walton*** should be reconsidered"in due course" in light of the constitutional principles identified in ***Jones*** and subsequently adopted in ***Apprendi***).

U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; ***Murray's Lessee v. Hoboken Land and Improvement Co.***, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (***People v. Hayes***, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (***Eddings v. Oklahoma***, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (***Proffitt v. Florida***, *supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (***Mills v. Maryland*** (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

California <u>does</u> impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of

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

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (***Hicks v. Oklahoma***, *supra*, 447 U.S. at p. 346.)

Accordingly, James Robinson respectfully suggests that ***People v. Hayes***--in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, the jury in this case should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing James Robinson to death without adhering to the procedural protection afforded by state law violated federal due process. (***Hicks v. Oklahoma***, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments, and is reversible *per se*. (***Sullivan v. Louisiana***, *supra*.) That should be the result here, too.

For all of the foregoing reasons, James Robinson, Jr. respectfully submits that this Court should reverse the convictions and the sentence of death.

Respectfully submitted,

_____

SUSAN K. MARR
Attorney for Appellant

**DECLARATION OF SERVICE BY MAIL**

**Case Name:** ***People v. James Robinson, Jr.***

**Case Number:** **Crim. S040703**
**Los Angeles County Superior Court No. PA007095**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On September____, 2002, I served the attached

**REQUEST FOR RELIEF FROM DEFAULT**

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Brentwood, Tennessee, with postage thereon fully prepaid.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September _____, 2002, at Brentwood, Tennessee.

_____
SUSAN K. MARR