SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, Vs. **DANIEL GARY LANDRY** Defendant and Appellant.	S100735 **AUTOMATIC APPEAL** (San Bernardino County Superior Court, Case No. FCH-02773)

ON AUTOMATIC APPEAL FROM THE SUPERIOR COURT,
STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO,
THE HONORABLE PAUL M. BRYANT, PRESIDING

APPELLANT'S OPENING BRIEF
(Volume Two Of Three, Pages 137-334)

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DEATH PENALTY

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IV.

BECAUSE OF INSUFFICIENT AUTHENTICATION, THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE LETTERS THE PROSECUTION CLAIMED WERE FROM APPELLANT TO ANOTHER INMATE AND ADDRESSED GANG ISSUES AND THE CIRCUMSTANCES OF THE CAPITAL/MURDER OFFENSE.

A. Introduction.

The prosecution offered in evidence two letters which it claimed were written by appellant and addressed the Addis homicide and prison gang activity. (Exh. No. 66, 5 CT 1227-30; Exh. No. 67; 5 CT 1231-34.) Appellant objected that that the letters were not properly authenticated, inadmissible hearsay, speculative, and vague. The purported reference to the Addis homicide in the first letter (Exhibit 66) was in fact uninterpretable and therefore irrelevant. (7 RT 1744-45, 1746, 1748, 1885-86.) The trial court overruled the defense objections and admitted the letters in evidence and permitted the prosecution gang expert to testify about them. (*Ibid.*; 7 RT 1753-54; 8 RT 1949.) Admission of this evidence violated appellant rights to a fair trial, to due process, to trial by jury, and to reliable capital trial proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

Officer Lacey testified that the first letter (Exhibit No. 66) had been forwarded up the chain of command to his office and was date stamped on the front envelope as received by his office on September 9, 1997. (7 RT 1760; 5 CT 1227.) The front of the envelope had appellant's name, address, and Department of Corrections' number as the return address and Joseph Lowery in Rancho Cucamonga, California, as the addressee. (5 CT 1227.) The letter was written with block printing and stated:

> Joseph, [¶] So, how's it hanging' down your way, dawg o' mine. I was just thinkin' about you, you know, L & L, brothers up. Yeah, upon my return, this punk decides to disrespect me, and threaten to do me harm, what nerve! Guess he came up short [smiley face]. I'll be calling Joey down to testify that he heard dude threatening to kill me on the yard, he was upstairs in the vent, and heard it all! Let him know I'll be callin'. Buz will be down to testify on my personality disorder (bi-polar), and it gets bad when I don't get my meds. He knows this, also, if you could, let him know I need em too, and will be callin'. They weren't given me my meds here, their fault! [smiley face].
>
> Yeah this 187 kinda put me at ease, had to earn it, bein' in prison for nothin' aint happenin. Tell all I'm of pure and sound mind.
>
> I promise I will keep in contact, as long as I can get a letter now and then [frowning face], and not when your bored!
>
> The fuck doesnt [sic] surprise me, [illegible] knew it was in him. He's got no luck! First he gets it by Sittin' Bull in Calipat [sic], then Pow!, multiple puncture wounds [smiley face]. I'll be glad to hel[p] you anyway I can. Enclosed is Gary's letter will be a letter from me to "B" with the [illegible].
>
> O.K. then, tell all I send mine with love, spinner too! Be seeing and writin' soon.
>
> Love always –S-
>
> Forgot to mention that Josh's little asst. is here, but is kickin' it under the palm trees, so I can't get at em! I want to talk to em! [smiley face] (5 CT 1228-29, Exh. No. 66, original emphasis.)

The second letter (Exhibit No. 67) was a letter attached to a facsimile transmission cover dated December 22, 1997, from Ray Harrison, an officer at Corcoran State Prison, to David Lacy at "I.S.U." (Exh. No. 67;

5 CT 1231-1234.) The letter without an envelope was signed by "Smurf", which was appellant's moniker, and captioned to "Mr. Lowery." (7 RT 1737; 5 CT 1233.) The letter was written in cursive and stated:

> O.K. then dawg o' mine, I hope this finds you in good health and strong mind.
>
> Now, I've been relocated, 'so the KGB has been befuddled once again, but dammit man!, the sweatsuits are on. I can clarify events of the ol' guy. It was done by [illegible], but guided by yours truly! Ol Bull from Mop's hometown did an extraordinary job of it. Good guy!
>
> So what do I do to get a letter out of you [smiley face and middle finger], (I like it, now I can get the last word in, ha!)
>
> I should be truckin to court in Jan. sometime, I don't think they'll come callin before the holidays?, they have until Feb. on the 1381, possible reject? [illegible] possible!
>
> O.K. then homeplate, my love to you and to Mr. Hayes when you got a chance, and of course those whom stand worthy!
>
> Love & respect – Smurf – [with hatted figure.] (5 CT 1233.)

Glen Willet, the prosecution's gang expert, testified that gang members use the term "KGB" to refer to correctional officers and the police. The phrase "dawg o' mine, I hope this finds you in good health and strong mind"' was an expression used by white supremacist gangs. (7 RT 1737-38.) Additional gang expressions included "homeplate", "homey", "brother", and "comrade". (7 RT 1735, 1740.)

The statement in the first letter about being of "'pure and sound mind"' was often used in correspondence by white supremacist gangs and refers to purity of race. (7 RT 1736.) In the second letter, the moniker "Mop" referred to Gary Green. (7 RT 1739.) Regarding the reference to a "Mr. Hayes", Willet testified that he knew of a AB gang member by the

name of Joey Hayes who was in custody at Pelican Bay State Prison. (*Ibid.*) Lowery was a well-known and high ranking NLR gang member. (7 RT 1754.)

Willet also testified that in his opinion, the statement in the second paragraph of the first letter - "'Yeah, this 187 kinda put me at ease, had to earn it.'" - meant that appellant had to work hard at getting a murder. (7 RT 1735-36.) Speaking of a murder in terms of earning it meant that it would elevate the status of someone who was trying to get into the AB gang. (7 RT 1736-37.) Another phrase - "'[T]his punk decides to disrespect me and threaten me harm, what nerve? Guess he came up short.'" - was white supremacist parlance and it meant that the person referred to had disrespected the author's status or manhood. (7 RT 1744-45.)

Appellant asked the court to strike the answer on grounds that it was "speculation who's being referred to and therefore it's irrelevant." (7 RT 1745.) However, the court overruled the objection. (*Ibid.*) The prosecutor then asked Willet to assume that the author of the letter was referring to being disrespected by "the victim in this case ...." (*Ibid.*) Appellant objected that the question was "improper" because "[t]here is no basis to make the assumption." (*Ibid.*) The court sustained this objection. (*Ibid.*)

The prosecutor asked Willett to again read the first two paragraphs of the first letter (Exhibit No. 66) at which point defense counsel requested a sidebar.[16] (7 RT 1744-45.) The court excused the jury for the afternoon recess and defense counsel objected that it "is vague and uninterpretable "as to whom the letter referred. In addition, there was no basis to relate the "187" in the second paragraph to the "disrespect" in the first paragraph and the letters had not been authenticated. (7 RT 1746, 1748.) The prosecutor

16. "In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or any other law, shall not be made in the presence of the jury." (Evid. Code, § 1522, subd. (b).)

contended that it was "obvious" that the letter referred to the charged murder in this case because it was received by Lacey's office on September 9, 1997. (*Ibid.*)

The court reviewed Exhibit No. 66 and then overruled the defense objection without explanation. (7 RT 1747.) When the jury returned, Willett testified that in his opinion the murder referred to in the letter was the murder of Daniel Addis and that appellant had been "upset" and had taken offense because Addis had disrespected and threatened to do harm to appellant. (7 RT 1753.)

At the conclusion of the guilt phase, when the parties addressed admission of the trial exhibits outside of the presence of the jury, defense counsel further objected to the two letters. Counsel objected that "there's no foundation that Mr. Landry wrote them." (8 RT 1885-86.) The prosecutor asserted that their was testimony that the letters were sent from appellant to Lowery and other evidence showed that they had been cell mates at Calipatria State Prison. In addition, Exhibit No. 66 had appellant's name and correct C.D.C. number and return address on the envelope. (8 RT 1886; see 5 CT 1227.) Exhibit No. 67 was signed "Smurf", which was Landry's nickname. Therefore, in the prosecution's view, the letters were self-authenticating. (8 RT 1886.)

Defense counsel objected that there was insufficient authentication of the letters because the only testimony about them was from Willett, the prosecution's gang expert, who had no personal knowledge of their origins. (8 RT 1886-87; *see also* 7 RT 1748.) Because there was no evidence that appellant wrote the letters, they had not been properly authenticated and the letters were "just hearsay." (8 RT 1887.) The trial court agreed that there was no evidence as to where, when, how, or by whom the letters were obtained. (*Ibid.*)

The prosecutor argued that the letters had been sufficiently authenticated because Officer Lacey testified that inmate mail was monitored and regularly inspected and Exhibit No. 66 had been sent to his office. The envelope was stamped with a received date of September 9, 1997, which in the prosecutor's view was "very soon" after the August 3, 1997, assault on Addis. (8 RT 1887-88; *see* 5 CT 1227). The letters were not hearsay because they were admissions by a party opponent. (8 RT 1887-88.) "The foundation has been laid as much as it is possible that these are Xeroxes because the actual letters went on to the recipient." (8 RT 1888.)

The court agreed that they had to deal with copies because the originals had been sent to the recipient. "What I was thinking about is whether or not we needed testimony from a person who actually seized them." (8 RT 1888.) In response to question from the court, Officer Lacey stated that there were no records to indicate when or who seized the letters. The court reserved its ruling. "Let me think about it. I'll rule on it Monday morning." (*Ibid.*) On Monday, April 9, 2001, the court overruled the defense objections and admitted both letters in evidence. (8 RT 1949.)

B. <u>The Standard Of Review</u>.

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question [Citations]." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) "'Abuse of discretion has at least two components: a factual component ... and a legal component.' [Citation.]" (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737-738.) "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with

the legal principles essential to an informed, intelligent and just decision." (*People* v. *Rist* (1976) 16 Cal.3d 211, 219.)

"A trial court abuses its discretion when the factual findings critical to its decision find insufficient support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) In addition, "[w]here the trial court's decision rests on an error of law, ... the trial court abuses its discretion." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742; *accord Koon v. United States* (1996) 518 U.S. 81, 100 [116 S.Ct. 2035; 135 L.Ed.2d 392] [A trial court "by definition abuses its discretion when it makes an error of law."].)

Admission of the letters was an abuse of discretion in this case because of interrelated legal and factual errors. Moreover, the admission of unreliable hearsay evidence in the form of the letters violated appellant's rights to a fair trial, to due process, to trial by jury, and to reliable capital trial proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., Ford v. Wainwright* (1986) 477 U.S. 399, 411 [106 S.Ct. 2595; 91 L.Ed.2d 335] ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."].) The question of whether admission of the evidence violated appellant's constitutional rights is a mixed question of law and fact subject to independent review. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553; *People v. Cromer* (2001) 24 Cal.4th 889, 901.) These constitutional claims are cognizable for the reasons previously explained in above in Argument Section III.A.

C. The Trial Court Erred In Admitting Secondary Evidence Of The Letters.

"The content of a writing may be proved by an otherwise admissible original." (Evid. Code, § 1520.) The prosecution claimed it could not

produce the original letters because they had been sent on to the recipient. (8 RT 1888 ["The foundation has been laid as much as it is possible because the actual letters went on to the recipient."].) The trial court agreed with this and therefore concluded that the prosecution was entitled to present secondary evidence in the form of photocopies. (*Ibid.* ["I understand that these are Xeroxes because of that."].) This conclusion was not supported by substantial evidence.

The front of the envelope for the first letter (Exhibit No. 66) was date stamped "received" next to the address for Joseph Lowery. (5 CT 1227.) Officer Lacey testified that this stamp was used when a letter had been forwarded up the chain of command to his office. (7 RT 1760.) The fact that the front of the envelope was stamped as received by Lacey's office indicated that it was held rather than forwarded to Lowery. The postage stamp on the envelope was not cancelled (5 CT 1227) and the prosecution presented no evidence of actual mailing.

The second letter (Exhibit No. 67) was attached to a December 22, 1997, fax transmission cover sheet from Ray Harrison of the Investigative Services Unit at Corcoran State Prison to Officer Lacey. (5 CT 1232.) There was no evidence of an addressed or stamped envelope. Mr. Harrison did not testify at trial and the prosecution presented no evidence to show that the original letter was sent to Lowery rather than retained at Corcoran. Because there was no substantial evidence that the letters had been mailed, the trial court erred by permitting the prosecution to present secondary evidence.

"[L]ost documents may be proved by secondary evidence." (*Dart Industries Inc. v. Commercial Union Insurance* (2002) 28 Cal.4th 1059, 1068.) However, this rule is not without limitation. "Evidence Code section 1521, subdivision (a), provides that '[t]he content of a writing may be

proved by otherwise admissible secondary evidence,' excepting when '[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion' or when '[a]dmission of the secondary evidence would be unfair.'" (*Ibid.*)

In this case, there was a genuine dispute about material terms of the letters, especially whether appellant authored either letter and whether they reflected appellant's involvement in the Addis homicide and gang activity. (7 RT 1745, 1746, 1748; 8 RT 1885-86; 1886-87.) As appellant objected and the trial court recognized, there was no evidence that anyone saw appellant write the letters and no testimony or other evidence as to where, when, how, or by whom they were obtained. (8 RT 1885-86, 1887.)

The handwriting of the letters themselves indicated that the were written by different persons. The first letter was written in block print (5 CT 1228) which bears no resemblance to the cursive to script of the second letter 5 CT 1223) and the prosecution presented no other known handwriting exemplars for appellant. The dramatic difference in the handwriting and the lack of any testimony to identify the handwriting as appellant's shows that secondary evidence should not have been admitted in the absence of the originals. As discussed further below, there was also a substantial dispute as to whether the letters were self-authenticating. Even assuming that the letters addressed the Addis homicide and association with gang activity, those subjects were not "unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421.) Thus, there was a "genuine dispute" on material issue of authorship. (Evid. Code, § 1521, subd. (a).)

The prosecution claimed that the letters addressed the circumstances of the Addis homicide. However, there was also a material dispute about

this. (7 RT 1745, 1746, 1748.) The copy of the second letter sent by facsimile from Corcoran State Prison to Officer Lacey on December 12, 1997, offered to "clarify events of the ol' guy" and something done by "Ol' Bull from Mop's hometown ...." (Exh. No. 67, 5 CT 1233.) The prosecution presented no evidence of the identity of the "'ol' guy" or "Ol' Bull" or that those events had anything to do with the Addis homicide or any of the other crimes charged against appellant.

There was also a genuine dispute about whether the first two paragraphs Exhibit No. 66 referred to the charged murder of Addis. The only fact offered by the prosecution to prove that it discussed the Addis homicide was the date on which the letter was received by Lacey's office, which was September 9, 1997. (8 RT 1887-88; 5 CT 1227.) However, that date was more than a month after the Addis homicide, which occurred on August 3, 1997, and the letter did not identify Addis as the person involved. (5 RT 1059.) As the trial court recognized, there was no basis to assume that the "dude" or "punk" referred to in the first paragraph was Addis. (7 RT 1745.) The third paragraph of the letter referred to a stabbing incident involving other persons who were not identified at trial. (5 CT 1228 [First he gets it by Sittin' Bull in Calipat, then Pow!, multiple puncture wounds ...."].)

Thus, the letter itself creates a material dispute about what incident or incidents were being discussed and appellant properly objected that it would be speculation to assume that the letter referred to the murder of Addis. (7 RT 1745, 1746; *People v. Waidla, supra,* 22 Cal.4th at p. 735 ["'But speculation is not evidence, less still substantial evidence.' [Citation.]"]; *People v. Felix* (2001) 92 Cal.App.4th 905, 912 ["But there must be evidence to support an inference and the prosecution may not fill an evidentiary gap with speculation."].)

Given all of these disputed issues, admission of secondary evidence was "unfair" and incompatible with the requirements of "justice". (Evid. Code, § 1521, subds. (a)(1) & (a)(2).) The statute does not define these terms and appellant is unaware of any case law construing them. Appellant submits that they must at least be construed as coincident with the fair trial guarantee mandated by due process. (Cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const., 5th & 14th Amends.)

The right to due process has long been recognized as assuring a fair trial. (*See, e.g., Withrow v. Larkin* (1975) 421 U.S. 35, 46 [95 S.Ct. 1456, 43 L.Ed.2d 712] [A "'fair trial in a fair tribunal is a basic requirement of due process.' [Citation]."].) "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [78 S.Ct. 1332; 2 L.Ed.2d 1460].) For this reason, the high court has recognized that an "important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131 fn 6 [88 S.Ct. 1620; 20 L.Ed.2d 406].) Thus, the requirement of due process "prevent[s] fundamental unfairness in the use of evidence, whether true or false." (*Lisenba v. California* (1941) 314 U.S. 219, 236 [62 S.Ct. 280; 86 L.Ed. 166].)

The right to due process also precludes the admission of unreliable hearsay evidence. (*See, e.g., White v. Illinois* (1992) 502 U.S. 346, 363-364 [112 S. Ct. 736; 116 L. Ed. 2d 848] ["Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them."], Thomas, J., & Scalia, J., concurring.) Given the suspect provenance of the two letters and the speculative inference of a

connection to the charged homicide, both fundamental fairness and justice required exclusion of the proffered secondary evidence of the letters. (Evid. Code, § 1521, subd. (a); Cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const., 5th & 14th Amends.)

D. The Letters Were Not Properly Authenticated.

"Authentication of a writing is required before it may be received in evidence. (Evid. Code, § 1401, subd. (a); *People v. Phillips* (1985) 41 Cal.3d 29, 76 ["The authenticity of a writing is a preliminary fact that must be proven before proffered evidence is admissible. (Evid. Code, § 403, subd. (a)(3).)"].) The definition of a writing includes the letters at issue here. (Evid. Code, § 250 ["'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."].)

Even assuming that the contents of the letters could be proved by secondary evidence, that did not excuse compliance with the requirement of proper authentication. (Evid. Code, § 1401, subd. (b) ["Authentication of a writing is required before secondary evidence of its content may be received in evidence."]; Evid. Code, § 1521, subd. (c) ["Nothing in this section excuses compliance with Section 1401 (authentication)."]; *In re Kirk* (1999) 74 Cal.App.4th 1066, 1074 ["The secondary evidence rule, however, does not 'excuse[] compliance with Section 1401 (authentication).' (Evid. Code, § 1521, subd. (c).).)"].)

Appellant objected that the copies of the letters had not been properly authenticated. (8 RT 1885-87.) The trial court initially reserved

ruling on this issue to consider "whether or not we needed testimony from a person who actually seized them." (8 RT 1888.) However, the court ultimately overruled the defense objections without explanation and admitted both letters in evidence. (8 RT 1949.) This was legal error and, therefore, an abuse of discretion. (*People v. Superior Court (Humberto S.), supra,* 43 Cal.4th at p. 742; *Koon v. United States, supra,* 518 U.S. at p. 100.)

"As the proponent of the document, the prosecution had the burden of showing its authenticity, including the absence of any material alteration. (Evid. Code, §§ 403, subd. (a)(3), 1400-1402.)" (*People v. Morris* (1991) 53 Cal.3d 152, 206, overruled on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *see also Interinsuance Exchange v. Velji* (1975) 44 Cal.App.3d 310, 318 ["Authentication simply requires a party to establish as a preliminary fact the genuineness and authenticity of the writing."].)[17]

When, as here, the relevance of proffered evidence depends upon the existence of a foundational fact, the proffered evidence is inadmissible unless it "is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence ...." (*People v. Marshall* (1996) 13 Cal.4th 799, 832, citations omitted; *see also* Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."]; Evid. Code, § 403, subd. (a).) A preponderance of the evidence means evidence that has more convincing

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17. Evidence Code section 403 in relevant part provides: "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: ... (3) The preliminary fact is the authenticity of a writing ...."

force than the evidence opposed to it. (*People v. Riskin* (2006) 143 Cal.App.4th 234, 239-40; CALJIC No. 2.50.2.)

The relevant statutes show that the letters were not properly authenticated and that there was insufficient evidence for the jury to find their authenticity by a preponderance of the evidence. "Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing." (Evid. Code, § 1411.) However, none of the other recognized means of authentication were present in this case. The prosecution conceded (8 RT 1888) that no witness claimed to have seen appellant write or sign the letters. (Evid. Code, § 1413 ["A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness."].) Nor is there any evidence that appellant admitted the authenticity of the letters or acted upon them. (Evid. Code, § 1414 ["A writing may be authenticated by evidence that: (a) The party against whom it is offered has at any time admitted its authenticity; or (b) The writing has been acted upon as authentic by the party against whom it is offered"].)

A writing may also be authenticated by evidence of the handwriting of the maker, by lay or expert opinion testimony, by a comparison to a known genuine writing, or by proof that it was a responsive communication by the person the proponent claims to be the author. (Evid. Code, § 1415 ["A writing may be authenticated by evidence of the handwriting of the maker."] Evid. Code, § 1416 ["A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer."]; Evid. Code, § 1417 ["The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the

evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court."]; Evid. Code, § 1418 ["The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court."]; Evid. Code, § 1420 ["A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing."].)

However, the prosecution did not avail itself of any of these methods of authentication and the record is devoid of any substantial evidence in their support. The only putative authentication offered by the prosecution - and apparently accepted by the trial court - was the contents of the letters themselves. Evidence Code section 1421 provides: "A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing."

The prosecution argued that both letters were from appellant because they were addressed to Lowery and there was other evidence that appellant and Lowery had been cell mates at Calipatria State Prison. In addition, the second letter was signed "Smurf" and the envelope for the first letter had appellant's name, return address and C.D.C., and it had been received by Lacey's office on September 9, 1997 (8 RT 1886, 1887-88.) For several reasons, this argument was insufficient evidence to meet the standards of Evidence Code section 1421.

First, the prosecution presented no evidence in the guilt phase of a relationship between appellant and Lowery. It presented evidence in the penalty phase that appellant and Lowery had been cell mates at Calipatria

State Prison in September of 1994 and March and April of 1995, more than two years before the August 3, 1997 homicide. (11 2523, 2731-32, 2751-53.) However, a "reviewing court 'focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters .... [Citation.]'" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, *cert. denied, Berryman v. California* (1995) 513 U.S. 1076 [115 S.Ct. 720; 130 L.Ed.2d 626], overruled on another point by *People v. Hill* (1998) 17 Cal.4th 800, 823.) There was no evidence at the time of the ruling itself to support the prosecution's claim. Even if considered, evidence of a relationship between appellant and Lowery was not a matter unlikely to be known to anyone other than appellant. The penalty phase evidence shows that many officers and inmates knew of a prior relationship between appellant and Lowery. (*See, e.g.,* 11 RT 2522-25, 2532-34, 2554-57, 2728, 2731-32, 2745-46, 2751-53.)

Even assuming (for arguments sake only) that the first letter referred to the Addis homicide, there is no basis to claim that that was a matter known only to the author of the letter. At the time of the assault on Addis, there were 12-15 inmates on the yard (5 RT 1074-75) all of whom would then have known of the assault because they saw it occur. In addition, at least 12 prison staff members knew of the assault, including Officers Lacey, Esqueda, Bisares, Maldonado, Ginn, Rounds, McAlmond, Valencia, and Kaffenberger, Medical Technical Assistant Comia, Sergeant Sams, and Correctional Counselor Lorenzen. (5 RT 1085-86 [Officer Esqueda]; 5 RT 1259-61 [Officer Bisares]; 6 RT 1310-13 [Sergeant Sams]; 5 RT 1172-77 [Officers Valencia, Rounds, Maldonado, and McAlmond]; 5 RT 1196-97 [MTA Comia]; 7 RT 1602 [Officer Kaffenberger]; 7 RT 1623-25, 1628-29 [Officer McAlmond]; 7 RT 1660-61, 1672 [Correctional Counselor

Lorenzen]; 7 RT 1683-84 [Officer Lacey]; 8 RT 1780-81 [Officer Ginn]; 8 RT 1822 [Officer Maldonado].)

The prosecutor noted that the envelope for the first letter had the correct C.D.C. number and return address for "Daniel Landry." (Exh. No. 66, 5 CT 1227.) However, it is not the case that those facts were "unlikely to be known to anyone other than the person" who wrote the letter. (Evid. Code, § 1421.) In *Arcaro v. Silver Enterprises* (1999) 77 Cal.App.4th 152, the Court of Appeal addressed and rejected an analogous argument made by the proponent of a writing. There, the plaintiff brought a malicious prosecution claim against a collection agency that sought to recover credit charges. The plaintiff asserted that his signature on a credit card application had been forged. (*Id.* at p. 154-55.)

The defendant collection agency had "verified" that "the address, telephone number and Social Security number on the credit application belonged to Arcaro. However, the fact the application contains personal information about Arcaro is not evidence Arcaro actually signed the application. Furthermore, it is unfortunate but true that personal information such as a person's address, telephone number and Social Security number is *likely* to be known to a great many persons other than the person claimed to have signed the credit application." (*Id.* at p. 157 fn. 4.)

Even more so than a social security number, a prisoner's name, CDC number, and location in prison is know to many persons in addition to the inmate himself as reflected in inmate movement records and other documents presented in evidence by the prosecution. (*See, e.g.,* Exh. No. 42; 4 CT 1103, 1108, 1110-12; Exh. No. 42A, 4 CT 1115-19; Exh. No. 45, 4 CT 1123; Exh. No. 50, 4 CT 1145; Exh. No. 53.) For this additional reason, "[t]he record does not show ... that the contents of the records were

known only to the author, as required by section 1421." (*People v Babbitt* (1988) 45 Cal.3d 660, 685; *Arcaro v. Silver Enterprises, supra,* 77 Cal.App.4th at p. 157 fn. 4.)

For Exhibit No. 67, the prosecution presented even less evidence of proper authentication. On December 22, 1997, one "Ray Harrison" sent the letter by facsimile from Corcoran State Prison to Officer Lacey. (5 CT 1231-32.) Mr. Harrison did not testify at trial, the prosecution conceded, and the trial court found that there was no evidence anyone saw appellant write the letter or where, when, or how it was obtained. (8 RT 1887-88.)

The second letter was signed "Smurf" and the prosecution presented evidence that appellant was known as Smurf. However, the same evidence shows that everybody called appellant Smurf. (5 RT 1225 [Defense counsel: "Did everybody call him Smurf? Former Inmate Richard Allen: "Yes."]; 5 RT 1076 [Officer Esqueda: "They used to call him Smurf."].) Thus, the use of the nickname on the second letter not a matter "unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421; *Arcaro v. Silver Enterprises, supra,* 77 Cal.App.4th 157 fn. 4.)

In sum, because neither letter was properly authenticated, the trial court erred by admitting them in evidence. (Evid. Code, § 1401, subd. (a) ["Authentication of a writing is required before it may be received in evidence."]; *People v. Phillips, supra,* 41 Cal.3d at p. 76; *People v. Babbitt, supra,* 45 Cal.3d at p. 685.)

E. Because The Letters Were Not Properly Authenticated, They Were Irrelevant And Inadmissible Hearsay.

Appellant further objected that because the letters were not properly authenticated they were irrelevant and inadmissible hearsay. (8 RT 1886-87.) The prosecution claimed that the letters were admissible hearsay as

statements by a party opponent. (Evid. Code, § 1220; 8 RT 1887-88.) The applicable law shows that the prosecution was mistaken.

Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." As a foundational fact, the proponent of the statement must show that it was made by the opposing party. (*See, e.g., People v. Lewis* (2008) 43 Cal.4th 415, 497-98 [Drawings inadmissible pursuant to Evidence Code section 1220 when "there was no evidence that defendant made the drawings."]; CALJIC No. 2.71 [To qualify as an admission, the statement must be "made by the defendant ...."].)

The above discussion shows that due to lack of authentication there was insufficient evidence that appellant authored the letters. Therefore, they were inadmissible hearsay. (Evid. Code, § 1200, subd. (b) ["Except as provided by law, hearsay evidence is inadmissible."].) For related reasons, the letters were inadmissible as irrelevant because their relevance depended on proof that appellant was their author. (Evid. Code, § 350 ["No evidence is admissible except relevant evidence."]; *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167 ["The trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence."], citations omitted.)

F. The Erroneous Admission Of The Letters Was Prejudicial At Both The Guilt And Penalty Phases Of The Trial.

Under state law, reversal is required if "'there is a *reasonable chance*, more than an *abstract possibility*'" that the erroneous admission of the evidence adversely affected appellant. (*Richardson v. Superior Court*

(2008) 43 Cal.4th 1040, 1050, original emphasis, citation omitted.) Because of the violation of appellant's federal constitutional rights (*see* Sections B. & C., above), federal law requires reversal unless the error was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824].) The burden is on the beneficiary of the error "'either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.' [Citation.]" (*People v. Louis* (1986) 42 Cal.3d 969, 993.) Measured against either the state or the federal standard, reversal of appellant's murder and capital convictions (Counts 1 & 2) and the death judgment is required.

Prejudice must be assessed with reference to the theory on which the case was tried. (*See, e.g., Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308 [111 S. Ct. 1246; 113 L. Ed. 2d 302]; *People v. Moses* (1990) 217 Cal.App.3d 1245, 1248.) In both the guilt and penalty phases of the trial, a salient component of appellant's defense to the crime was that he acted under duress from a prison gang and that there was prison staff complicity and/or negligence as reflected in the evidence that the staff delivered Addis to the yard upon the demand of the gang's shot-caller knowing that Addis would be assaulted. (*See, e.g.,* 5 RT 1051-57 [defense guilt phase opening statement]; 10 RT 2292-93, 2299-2310 [defense guilt phase closing statement]; 14 RT 3516-17, 3535-36 [defense penalty phase closing argument.].)

This defense was supported by substantial evidence from the prison guards, inmates, and the defense experts. (See Argument Sections I.B.1. & III.D., above; 1 CT 132-33.) Without the letters, there was no foundation for the testimony by the prosecution's expert in the guilt phase that appellant committed the murder to elevate his status in order to get into the AB gang. (7 RT 1735-36.) In the penalty phase, the prosecutor relied on

the first letter to argue that appellant's defense to the circumstances of the crime was contrived. (14 RT 3495-96.) In addition, she contended that the letter showed that appellant had not acted under the influence of extreme mental or emotional disturbance (Penal Code, § 190.3, subd. (d)) or that he was impaired by a mental disease or defect at the time of the crime (Penal Code, § 190.3, subd. (h).) (14 RT 3496-97.)

On the prosecutor's view, the reference to the denial of treatment for bipolar disorder showed that appellant was just using his disorder as an excuse for the crime while bragging about the killing. (14 RT 3497 ["And he is using it as an excuse, which, of course, we have learned is the hallmark of Landry's life. It's never his fault. It's always someone else's fault. And he brags about it and he draws smiley faces."].) The prosecutor also argued that the letter showed appellant had tried to manufacture a defense that Addis had threatened him. (*Ibid.* ["So we have him laughing, crowing, and making up defenses."].)

"There is no reason why the reviewing court should treat this evidence as any less crucial than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.) But for the letters, the other, properly admitted evidence showed that appellant had associated with the NLR gang for protection from the violence. (See Argument Section III.D., above; *see also* 13 RT 3256 [Prison is "a very predatory environment with very dangerous people."].) As to the circumstances of the crime, the record showed that tobacco functioned as currency within prison and that Green, the NLR shot caller, had ordered the hit on Addis because he had stolen tobacco from the gang. (5 RT 1184-85; 7 RT 1593-95.)

If appellant had not carried out the assault, the testimony from the defense experts showed that appellant could "easily get killed. As a matter

of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005; *see also* 8 RT 1942 [If appellant had failed to he carry out the ordered assault, he "would be a walking dead man."].) The prosecution's own gang expert (Mr. Willitt) confirmed that a prison gang would retaliate against an inmate who did not obey an order from the gang. (7 RT 1730.)

Based on how the prison staff had handled Addis, an inmate would conclude that it was useless to rely on the staff for safety, even if he requested protective custody because inmates may be killed in protective custody. (5 RT 1248-49; 8 RT 1945-46, 2010-11.) As former inmate Ricky Rogers explained, if an inmate sought protective custody, there's a good chance they will try to take your life for that." (5 RT 1248-49.) After committing an assault, an inmate would need to adopt a façade to avoid being perceived as weak and disloyal by the gang and putting himself at risk. (8 RT 1957.) Thus, apart from the improperly admitted letters, the evidence strongly supported appellant's position that the Addis homicide was the result of the cruel dilemma forced upon him of assaulting Addis or putting his own life at risk. Accordingly, there is at least a "*reasonable chance*, more than an *abstract possibility*'" (*Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1050) that without the admission of the letters the jury would have found reasonable doubt that appellant acted with malice aforethought of premeditation and deliberation. (*See also* Argument Sections VI.H & VI.,J., below.)

The other evidence also rebuts the prosecution's claim that appellant attempted to use his bipolar disorder as an excuse for the crime. The evidence of appellant's bipolar disorder dated back to his youth where

bipolar disorder may manifest as attention deficit hyperactivity disorder ADHD. (13 RT 3319-20, 3130-31.) Appellant's bipolar disorder was also extensively documented in his records from the Department of Corrections dating back to his first incarceration for burglary at the age of 19. (*See, e.g.,* 13 RT 2121-22, 3134-35, 3148, 3151; Exh. No. 95, CT Suppl B. 14-15, 56, 81, 93-94, 95-96.) After the Addis homicide, the medical staff finally set up a treatment plan for appellant's bipolar disorder. (13 RT 3153; Exh. No. 95, CT. Suppl. B 93, 97-98.)

In addition, appellant suffered from a schizoid personality disorder and post-traumatic stress disorder. (13 RT 3246-49.) Given the nature of these mental health problems, prison posed multiple problems for appellant. (13 RT 3256.) In particular, appellant's schizoid personality disorder made him easily susceptible to being manipulated by other people. (13 RT 3109.) At the time of the Addis homicide, appellant for months had been receiving no care or treatment for any of his mental health problems. (13 RT 3153; Exh. No. 95, CT. Suppl. B 93-94.) Without treatment, the stress of the prison environment can cause someone who is bipolar into acting violently in both the manic and hypomanic phases of the disease. (13 RT 3123, 3157-58.) Thus, appellant's violent activity reflected the "diathesis stress model" of behavior. That meant that if someone with a mental disorder was put in a violent and very stressful environment, the stress will often send the person "over the edge" so that he acts out in a violent way. (13 RT 3257.)

Because of this evidence, the prosecution in closing argument in the penalty phase offered the letters to rebut the otherwise substantial mitigating evidence of appellant's mental health problems and that the denial of treatment and care in prison that led to appellant's downward spiral and involvement in violent criminal activity. (14 RT 3495-97.) The

length of the penalty phase jury deliberations show that this was a close case. The jury deliberated over the course of four days, beginning on the afternoon of May 22, 2001, and continuing until the morning on May 25, 2001, when the jury returned the death verdict. (4 CT 997, 998, 1001, 1048.)

"In a close case, such as this, any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62; *accord People v. Newson* (1951) 37 Cal.2d 34, 46.) Accordingly, the "jury argument of the district attorney tips the scale in favor of finding prejudice." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071.) Accordingly, appellant's conviction for capital/murder (Counts 1 & 2) and the death judgment must be reversed.

V.

THE TRIAL COURT ERRED IN DISMISSING OVER APPELLANT'S OBJECTION A JUROR WHO WAS TEMPORARILY SICK WITH THE FLU AND SUBSTITUTING AN ALTERNATE JUROR JUST BEFORE CLOSING ARGUMENTS AND JURY DELIBERATIONS.

A. Introduction.

Prior to the reading of jury instructions and closing argument in the guilt phase, the trial court over appellant's objection dismissed a juror who had called in sick. The incident occurred on the morning of Wednesday, April 18, 2001, the day scheduled for the guilt phase jury instructions and closing arguments. The trial judge informed counsel that the court had received a telephone call from Juror No. 10. The juror stated that "she was up all night with the flu and continues to have flu symptoms and is unable to be here this date." (9 RT 2209.) The court advised counsel that its "inclination would be to let her go and put in one of the alternates, but I'll

listen to argument before I do anything. The flu that's going around does not seem to be something that will get well in a day or so." (*Ibid.*) The court granted defense counsel a brief recess to review his jury list and to consult with appellant. (*Ibid.*)

When the hearing resumed, defense counsel objected to the discharge of Juror No. 10 and requested a one-day delay to see if she would recover. The defense had tried the case to the 12 jurors it thought would decide it. "[T]o substitute an alternate without at least making an attempt to bring back the other juror I think would be unreasonable, and we are talking about a death penalty case here." (9 RT 2210.) "And it would be our position that the reasonable thing to do would be to at least wait a day and see where the juror is tomorrow morning and availability and re-evaluate the situation at that time. At this point, all we know is apparently she has flu symptoms. She may become available tomorrow. We don't know. And I understand there's problems with some of the other delays that have occurred in the case, but in large part, [the] defense has not been responsible for those delays. And I can only say that I would like to have the 12 jurors that we had up to now decide this part of the case." (9 RT 2210-11.)

The prosecutor suggested that the court contact the juror to determine her prognosis. She agreed that both sides had selected the jurors they wanted hear the case. However, alternates existed because of the possibility of illness and the case was ready for oral argument. "I'll submit to the Court, but we could, if there is a question, call her up and see what she thinks." (9 RT 2211.) The court stated that it intended to call the juror and put her on speakerphone and asked counsel whether they had any particular questions they wanted asked of the juror. Defense counsel

agreed to this procedure and deferred to the court conducting the inquiry of the juror. (*Ibid.*)

Defense counsel also observed that jurors in many cases become temporarily ill and trials are delayed for that reason rather than substitute a selected juror. "Obviously, if we have an impossible situation that makes it unreasonable to continue to wait for that juror, then that's another question." (9 RT 2211-12.) The court noted that they had lost two juror in the early stages of the proceedings as a result of which two alternates had already been seated. (9 RT 2212.) The court's call to the juror on a speakerphone from the courtroom was transcribed on the record:

The Court: "(Juror No. 10), this is Judge Bryant. ... You're in court. Counsel are present along with the defendant and the court reporter. And what I really needed to know is how long have you been ill, what your symptoms are, and given what you know about yourself, how soon do you expect yourself to be well enough to come back to court?

Juror No. 10: "Um, I've been sick all night throwing up. I've got some kind of bug, and I don't anticipate that I'd be well this week.

The Court: "Knowing yourself, you wouldn't expect you'd be available till next Monday; is that what you're telling me?

Juror No. 10: "Yes.

The Court: "Okay. Have you been to the doctor?

Juror No. 10: "No.

The Court: "Okay. We'll call you back in just a few minutes." (9 RT 2212-13.)

The court noted that a delay from Wednesday to Monday would result in the loss of three court days. (9 RT 2213.) Defense counsel argued that it was reasonable to wait until Monday because there was no indication that the juror would be ill for a lengthy period or indefinitely incapacitated.

(*Ibid.*) "[W]e have gone through this trial this way trying the case to these 12 people. I think the defendant's entitled to have that person decide this case, and I think it's reasonable to wait for that person until Monday." (9 RT 2213-14.)

The trial court overruled the defense objection. Juror No. 10 "will be excused. Our next alternate, I believe is (Alt. Juror No. 1). He will be substituted in when the jurors are brought in." (9 RT 2214.) The court then instructed the jury before closing arguments for both sides commenced. (9 RT 2215, foll.)

The trial court's dismissal of Juror No. 10 violated Penal Code section 1089, as well as appellant's rights to a fair and impartial jury trial, and a reliable penalty determination under the state and federal constitutions. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) Defense counsel did not object on constitutional grounds to the dismissal of Juror No. 10. Nevertheless, appellant's constitutional objections are cognizable for the reasons stated above in Argument Section III., A.

B. The Trial Court Erred And The Judgment Must Be Reversed Because The Juror's Inability To Perform Her Duties Was Not A Demonstrable Reality.

Penal Code section 1089 in relevant part provides that a juror may be discharged and replaced by an alternate if the juror "becomes ill, or upon other good cause shown to the court ...." (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)[18] The trial court is required to conduct "'an inquiry

18. Penal Code section 1089 in pertinent part provides: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the

sufficient to determine the facts [when] put on notice that good cause to discharge a juror may exist.'" (*People* v. *Williams* (1997) 16 Cal.4th 153, 231, quoting *People* v. *Burgener* (1986) 41 Cal.3d 505, 519.) A trial court's determination that good cause exists to excuse a juror is reviewed for abuse of discretion. However, the "court's discretion is not unbounded." (*People* v. *Roberts* (1992) 2 Cal.4th 271,325.) The "juror's inability to perform must appear as 'a demonstrable reality' and will not be presumed." (*People* v. *Lucas* (1995) 12 Cal.4th 415, 489.)

The demonstrable reality standard is more "stringent" than the substantial evidence standard. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) "A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.] Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*Ibid.*)

"The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion" that removal of the juror was warranted. (*Id.* at pp. 1052-53.) A reviewing court does not reweigh the evidence. "Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at p. 1053.) Where the trial court improperly discharged a juror, the "defendant is entitled to the benefit of a reversal of

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alternate juror had been selected as one of the original jurors."

his conviction" but he is "not ... immune from reprosecution." (*People v. Hernandez* (2003) 30 Cal.4th 1, 3.)

Several cases show that the discharge of Juror No. 10 was not required as a demonstrable reality because of her temporary illness. The juror called the court on Wednesday morning to report that she had flu symptoms and in response to the court's questions said that she could return to jury duty the following Monday. (9 RT 2209, 2212-13.) Multiple cases show that more than this is required to deprive the defendant of a juror he wanted to deliberate in judgment on the case.

For example, on the second day of jury deliberations on a robbery charge in *People v. Lanigan* (1943) 22 Cal.2d 569, "one of the woman jurors became ill from an intestinal disturbance and continued to be in distress for several hours. She was examined by a physician who reported to the court that he could give no definite assurance as to when she would recover. With the consent of both parties the judge also questioned the juror privately and was told by her that her illness was due in some degree to the nervous strain of the deliberations. After careful inquiry as to her physical condition the court concluded that the juror was ill to the extent that she was unable to perform a juror's duties and that the alternate should be substituted in her place. The jury continued its deliberations on the following morning and at about three o'clock that afternoon reached a verdict finding the defendants guilty as charged [of robbery]." (*Id.* at pp. 577-78.)

The defendant argued, *inter alia*, that the substitution was error "because it was shown at a later time that in a few days she was back at her employment." (*Id.* at p. 578.) However, this Court rejected that evidence because "the 'action of the court must be tested in the light of the evidence before it at the time of the decisions,' which, in this case, unquestionably

warranted the court in discharging the juror." (*Id.* at p. 578, citation omitted.) In the present case, the record showed that Juror No. 10 would be available to deliberate within three court days, not indefinitely unavailable as in *People v. Lanigan, supra.* In addition, the only evidence presented at the hearing showed that Juror No. 10 would be able to resume her duties within three court days. Therefore, the discharge of the juror was unwarranted.

In *People v. Pervoe* (1984) 161 Cal.App.3d 342, a juror ("Mrs. Robinson") one week into a murder trial informed the court that she was ill. "The court stated 'She has arthritis, and she can't raise her left arm. She can't get dressed, and she can't drive a car, so rather than select an alternate immediately, because she is interested in finished [*sic*] the trial, we will go over until tomorrow. If she cannot come in tomorrow, then we'll select one of the alternates to sit in; and that's the request of the defense, and the People are satisfied with that, also.'" (*Id.* at pp. 355-56.)

The next day, "the juror again called in sick informing the court through the court reporter that she was unable to come because 'she had taken medication. She was sick to her stomach and felt faint from taking the medication . . . she advises this office . . . that she thought she probably could get here tomorrow, because then her husband would be off, and he could drive her.' ... The court then found that the juror was unable to attend trial, 'and there is a great deal of doubt in the Court's mind, because she won't even be able to drive tomorrow, that she could get here tomorrow. Therefore, I find good cause for excusing Mrs. Robinson, and we will draw one of the alternates to serve.'" (*Id.* at p. 355.)

On appeal, the defendant argued that the trial court erred because the juror's inability to perform the functions of a juror did not appear in the record as a demonstrable reality. (*Ibid.*) Pursuant to former section 1123,

the predecessor to current section 1089, the Court of Appeal rejected the defendant's argument.[19] "Here, there are ample facts to support the lower court's determination that juror No. 3 was ill and unable to perform the duties of a juror. She had arthritis. She couldn't get dressed. She couldn't drive a car. On the second day of her absence, she suffered side effects from her medication. Although she informed the court that she might have transportation to attend trial on December 8, that information was doubted." (*Id.* at p. 356.)

"Moreover, it can be inferred that her arthritis condition, which had not improved over two days, would still prevent her trial attendance on December 8. Clearly, a person suffering from arthritis to such extent as being unable to dress or who suffers medication side effects has a sufficiently debilitating condition which may excuse her from jury duty." (*Ibid.*) In this case, Juror No. 10 juror informed the court that she had a temporary illness and that she would be available again within three court days. She did not indicate that she would have difficulties in getting to court. (9 RT 2212-13.) Therefore, unlike the juror in *People v. Pervoe, supra,* she did not have a sufficiently debilitating condition to excuse her from jury duty.

In *People v. Tinnin* (1934) 136 Cal. App. 301, a juror in a murder trial became ill before the close of evidence. (*Id.* at p. 318.) The "officers in charge of the jury testified that during court adjournments the juror was afflicted on several occasions with severe attacks of hysteria, during which she waved her arms wildly, screamed and conducted herself generally in an

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19. Former Penal Code section 1123 provided that "'[if] before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order him to be discharged . . . and draw the name of an alternate." (*People v. Pervoe, supra,* 161 Cal.App.3d at p. 355.)

uncontrollable manner; and it was shown by the testimony of her husband and her attending physician that on account of certain major operations she had undergone she was subject to such spells during which she lost self-control, at times threatening self-destruction. And evidently the reason the juror was not called upon to testify was because of her then nervous condition." (*Id.* at p. 319.)

The Court of Appeal concluded that "[u]nder the circumstances stated, to allow or compel her to continue as a juror in the case would have been not only grossly unjust to the juror and to the People and the defendants, but doubtless would have imperiled the verdict. Therefore the court's action in excusing the juror was manifestly proper." (*Id.* at p. 319.) In this case, Juror No. 10 health problems were not of comparable severity. Nor was there any indication that they would be prolonged or impair her ability to deliberate.

In *People v. Von Badenthal* (1935) 8 Cal.App.2d 404, a juror became ill while deliberating on a grand theft charge. The physician who had examined the juror "testified that he had found the juror suffering from a heart attack induced by acute indigestion, and very highly nervous and hysterical. The physician further testified that in his opinion it would be in the best interests of the juror not to continue on the jury; that undue excitement and discussion might prove injurious to her; that her illness was such that she ought not to and was unable to perform the duty of a juror and that the condition of her heart was serious and might prove fatal. The court thereupon declared its finding that the juror was unable to perform her duty by reason of illness, ordered that she be discharged and that the alternate juror duly chosen and sworn at the beginning of the trial should take her place as a member of the jury." (*Id.* at pp. 410-11.)

The Court of Appeal concluded that this procedure was authorized by section 1089 and that the trial court did not error in denying the defense request to have another doctor to examine the juror. (*Id.* at p. 411.) "The evidence of the bailiff and other jurors as to the seizure by the juror with illness and her condition at the hotel, and the testimony of the hotel house physician, presented to the trial court a condition clearly calling for the discharge of the juror and the substitution of the alternate, and the court's action was eminently proper." (*Id.* at p. 412.) Once again, *People v. Von Badenthal, supra,* shows that the record in this case does not contain comparable evidence of a health condition requiring the discharge of Juror No. 10 as a demonstrable reality.

Nor was a three-day recess unreasonable given the time course of the trial and the stakes at issue in a capital case. The court's have repeatedly emphasized that "[u]nder our system of justice expediency is never exalted over the interest of fair trial and due process." (*People v Manson* (1971) 61 Cal. App. 3d 102, 202.) The "goal of expediting the adjudication of cases ..., though laudable, should not blind [a judge] to the fundamental elements of a fair criminal proceeding," and should not be allowed "to outweigh a defendant's right to a fair trial ...." (*McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 195, 196; *see also Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590 [84 S.Ct. 841; 11 L.Ed.2d 921] ["[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."].) "[W]hile trial courts are responsible for managing their cases so as to avoid unnecessary delay, they must not elevate misguided notions of efficiency (*e.g.*, a speeded-up trial ...) over due process." (*Fatica v. Superior Court* (2002) 99 Cal.App.4th 350, 353.)

In this case, trial had been underway for 58 days, from the beginning of voire dire on February 20th to April 18th when Juror No. 10 called in sick. (2 RT 410; 9 RT 2207, 2209.) The trial court identified no reason why a three day delay was unreasonable and the prosecution did not object to the defense request to wait three days so that Juror No. 10 could return to duty. (*See* 9 RT 221, 2213-14.) After the verdict on Friday, April 20, 2001, there was a delay of two weeks to the start of the penalty phase on Wednesday, May 2, 2001, because the prosecution anticipated calling at least 33 and perhaps as many as 50 witnesses in the penalty phase. (4 CT 939, 941, 957; 10 RT 2381, 2382-23.) Given the pace of the proceedings, a three-day delay was reasonable because of the defendant's interests at stake in a capital case.

The court noted that earlier in the proceedings two other jurors had been replaced by alternates. (9 RT 2212.) However, the prior substitutions took place under markedly different circumstances. The original panel of twelve jurors and four alternates was sworn on Monday, March 5, 2001. (4 RT 862, 891.) On Thursday, March 8, 2001, before any evidence had been taken, the bailiff received a note from Juror No. 3 stating that she had vacation plans in May and that she did not recall whether the jury questionnaire had asked about travel plans. The juror enclosed an itinerary showing that she would be out of the country for 16 days on a pre-paid vacation that had cost $5,400. The trial court and counsel for both parties agreed to excuse Juror No. 3 and to substitute Alternate No. 1. (4 RT 988-990.)

On the same day, Juror No. 8 called the bailiff to say that she had a hardship issue. In court, she stated that her employer would pay for only 80 hours of jury duty. She had not filled out a hardship questionnaire because she thought the information should go on the other questionnaire. The

court and counsel for both parties agreed to excuse her and substitute Alternate No. 2. (4 RT 990-993.) The court then advised the jury that there would be a two-week recess before any additional proceedings in the trial because a matter had come to light that required additional discovery. (4 RT 994-95.) This occurred because the prosecution failed to disclose until after the jury was sworn additional documents which the court recognized were directly relevant to the defense claim of breach or duty and/or complicity of correctional officers in the assault on Addis. Accordingly, the court allowed the defense additional time to investigate the newly disclosed evidence. (4 RT 964-66.)

Thus, the record shows that the defense was not responsible for the prior delay in the trial. Moreover, the prior substitutions of jurors occurred at a time when the defense believed that the alternates it agreed to substitute, as well as Juror No. 10, would be deciding the case. By the time the issue of Juror No. 10's temporary illness arose, the defense had been able to observe the reactions to the evidence of all of the seated jurors. Defense counsel emphasized that he wanted those jurors to decide the defendant's fate in a capital case. (9 RT 2210-11, 2213-14.) A three day delay was, therefore, reasonable under the circumstances.

Accordingly, the judgment should be reversed and a new trial granted. (*People v. Hernandez, supra,* 30 Cal.4th at p. 3 [Where the trial court improperly discharged a juror, the "defendant is entitled to the benefit of a reversal of his conviction ...."]; *see also Gray v. Mississippi* (1987) 481 U.S. 648, 665 [107 S. Ct. 2045; 95 L. Ed. 2d 622] [In a capital case, reversal is required where "'the composition of the jury panel as a whole could have been affected by the trial court's error.' [Citation]."]; *United States v. Olano* (1993) 507 U.S. 725, 743 [113 S. Ct. 1770; 123 L. Ed. 2d

508] [The improper dismissal of a juror "'undermine[s] the structural integrity of the criminal tribunal itself.' [Citation]."] Stevens, J., dissenting.)

VI.

THE TRIAL COURT'S REFUSAL TO GIVE INSTRUCTIONS REQUESTED BY THE DEFENSE ON ISSUES RELATED TO THE EVIDENCE OF DURESS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL TRIAL RIGHTS.

A. Introduction.

The trial court refused to give four instructions requested by the defense to address the evidence that appellant acted under the threat or compulsion of death or great bodily injury at the time of the Addis homicide. For brevity, appellant will refer to this circumstance as "duress."

First, with respect to the charge of the murder of Addis (Count 1), appellant requested an instruction that, from evidence the defendant believed that his life was in danger at the time of the alleged crime, the jury could find that the defendant did not act with premeditation and deliberation and reach a verdict of unpremeditated murder in the second degree.

> In this case, you may consider evidence showing the existence of threats, menaces or compulsion that played a part in inducing the unlawful killing of a human being for such bearing as it may have on the question of whether the murder alleged in Count 1 was of the first or second degree. If you find from the evidence that at the time of the alleged crime was committed the defendant honestly and reasonably held a belief that his own life was in danger, you must consider what effect, if any, this belief had on the defendant and whether he formed any of the specific mental states that are essential elements of murder.
>
> Thus, if you find he had an honestly and reasonably held ... belief that his life was in peril and as a result did not maturely and meaningfully premeditate, deliberate and reflect on the

> gravity of his contemplated act or form an intent to kill, you cannot find him guilty of a willful, deliberate, premeditated murder of the first degree.
>
> Also, if you find the defendant did not form the mental state constituting express malice, you cannot find him guilty of murder of either the first or second degree. You may however, find him guilty of the crime of voluntary manslaughter as defined in these instructions. (3 CT 790, citing *People v. Beardlsee* (1991) 53 Cal.3d 68, 85.)

At the outset, appellant acknowledges that two components of this requested instruction were not supported by the law as it existed at the time of the crime in August of 1997. In 1993, after *People v. Beardslee, supra,* was decided, Penal Code section 189 was amended to eliminate the requirement that the defendant maturely and meaningfully reflected upon the gravity of his or her act. (*See* 1993 Cal. ALS 609; 1993 Cal. SB 310; Stats. 1993, ch. 609 ["To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."].) In addition, the last paragraph of the instruction erred by stating that the jury could not convict the defendant of murder unless it found express malice. Malice may also be implied. (Penal Code, § 189 ["Such malice may be express or implied."].)

However, for the reasons explained below in Section H., the instruction otherwise correctly stated that from evidence of duress the jury may find reasonable doubt of premeditation and reach a verdict of second degree murder. Accordingly, the trial court had a *sua sponte* duty to give a correct instruction. (*People v. Stewart* (1976) 16 Cal.3d 133, 140 ["substantial authority exists that the court was under an affirmative duty to give, *sua sponte*, a correctly phrased instruction on defendant's theory"] *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [If a requested instruction is

flawed, the court should "have tailored the instruction to conform to" the requirements of the law, "rather than deny the instruction outright."], citation omitted; *see also Kelly v. South Carolina* (2002) 534 U.S. 246, 256 [122 S.Ct. 726; 151 L.Ed.2d 670] ["'It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not [Citation.]."].)

Second, appellant requested an instruction that from evidence of duress the jury could find reasonable doubt of malice and that the offense was voluntary manslaughter (CALJIC No. 8.40; 3 CT 793) rather than murder:

> The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.
>
> When the act causing death, though unlawful, is done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.
>
> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused death was not done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury. (3 CT 794, citing CALJIC No. 8.50, modified.)

Third, with respect to the capital charge (Count 2), the alleged fatal assault by a life prisoner with malice aforethought (Penal Code, § 4500), appellant requested an instruction that from evidence of duress the jury could find reasonable doubt of malice aforethought:

> With respect to Count 2, the crime of Assault By A Life Prisoner With Malice Aforethought is not committed unless the element of malice aforethought is proved.

> If you find the defendant acted under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury, there is no malice aforethought and the crime alleged in Count 2 is not committed.
>
> As to this alleged offense, the burden is on the People to prove beyond a reasonable doubt each of the elements of the offense and that the act which caused death was not done under the actual an reasonable belief in the necessity to act because of imminent peril to life or great bodily injury. (3 CT 795, citing CALJIC No. 8.50, modified.)

Finally, again with respect to the capital charge (Count 2), appellant requested an instruction that from evidence of duress the jury could find reasonable doubt of malice and reach a verdict of the lesser included offense of assault with a deadly weapon:

> In this case, you may consider evidence showing the existence of threats, menaces or compulsion that played a part in inducing the unlawful assault upon inmate Addis resulting in death of the inmate as alleged in Count 2, for such bearing as it may have on the question of whether the crime was committed. If you find from the evidence that at the time the alleged crime was committed the defendant honestly and reasonably held a belief that his own life was in danger, you must consider what effect, if any, this belief had on the defendant and whether he formed any of the specific mental states that are essential elements of this particular crime.
>
> Thus, if you find he had an honestly and reasonably held belief that his life was in peril and as a result did not form the mental state constituting malice aforethought, which is an essential element of the crime, you may not find him guilty of said crime.
>
> You may however, find him guilty of any lesser included offense such as assault with a deadly weapon as defined in these instructions. (3 CT 791; citing *People v. Beardslee, supra,* 53 Cal.3d at p. 85.)

Appellant filed a trial brief in support of his requested special instructions. (3 CT 796-800.) In essence, appellant argued that he was entitled to the requested instructions because from evidence of duress the jury may find reasonable doubt of premeditation and malice aforethought, the mental states necessary for first degree murder (Penal Code, § 189) murder (Penal Code, § 187, subd. (a)) and section 4500. Therefore, the jury should be permitted to convict appellant of a lesser included offense. (*Ibid.*; *see also* 9 RT 2092-94, 2165-68.)

The prosecutor submitted an e-mail and a trial brief in opposition. (3 CT 801-813). The prosecutor contended that there was insufficient evidence of an imminent threat of harm to the defendant or that he acted in the reasonable belief of such a threat. By statute, duress was not a defense to a crime punishable with death (Penal Code, § 26, subd. 6) and it should not apply to the non-capital charge of murder because there was a reasonable alternative to killing an innocent person. (*Ibid.*)

Without the jury present, the positions of both sides were elaborated in extensive discussions with the trial court about whether to give any of the instructions requested by the defense. (9 RT 2053-64, 2091-2117, 2163-2168.) Defense counsel argued on due process, equal protection, and Eighth Amendment grounds that if duress was a defense to non-capital murder it should also be a defense to capital murder. (9 RT 2060, 2062-63.)

Defense counsel also informed the court and the prosecution that this Court had just granted review of the question of whether duress was a defense to non-capital murder. (9 RT 2054-55; *see People v. Anderson* (March 28, 2001) 20 P.3d 1085; 105 Cal.Rptr.2d 790; 2001 Cal. LEXIS 1564] ["The briefing and argument shall be limited to the issue of to what extent, if any, is duress a defense to a homicide-related crime, and if it is

whether the trial court prejudicially erred in refusing a duress instruction in this case."].)

The trial court accepted the defense argument that the testimony by the defense prison gang experts provided substantial evidence of a threat of imminent harm to appellant. However, it found no substantial evidence that duress played a part in appellant's thinking or that anyone on the yard other than appellant had a weapon. (9 RT 2091-92; 9 RT 2164-65 [The "Court has not seen any circumstantial evidence that, in fact, would indicate that Mr. Landry held the requisite belief personally."]; 9 RT 2098-99.) The court was also concerned that appellant's position would entitle an inmate to a duress instruction any time there was a gang-related killing in a prison. (9 RT 2097.)

The court took the issue under submission and did additional legal research on its own. (9 RT 2101-2102, 2115.) Ultimately, the court ruled as follows: "As I indicated twice before, it's the Court's belief that the accused must entertain a good faith belief that his act was necessary. And the Court recognizes that while as – while Courts, as to sufficiency of the evidence to justify a particular instructions, should be resolved in the defendant's favor, the Court need not give instructions based solely on conjecture and speculation. [¶] And while the Court had indicated previously that it believed that there was evidence that if he actually had such a belief, that it might be reasonable in that there might be sufficient evidence of immediacy of the threat and harm, the Court has not seen any circumstantial evidence that, in fact, would indicate that Mr. Landry held the requisite belief personally. And absent that, I don't believe that the pinpoint instructions as suggested by counsel are appropriate. Therefore, I would deny them." (9 RT 2164-65, 2168.)

Nevertheless, the prosecution asked the court to "say something about" duress because it had been addressed by the witnesses at trial. (9 RT 2056.) Defense counsel argued that even if duress was not a defense to a capital charge, the jury should be able to consider duress for determining the presence or absence of premeditation and malice aforethought. (9 RT 2059-60.) The court decided to give a modified form of CALJIC No. 4.40 ("Threats and Menaces") as follows:

> A person is not guilty of a crime other than Assault By A Life Prisoner as alleged in Count 2 when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:
>
> 1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and
>
> 2. If this person then actually believed that his life was so endangered.
>
> This rule does not apply to threats, menaces, and fear of future danger to his life, nor does it apply to the crime of Assault By A Life Prisoner as alleged in Count 2. (3 CT 871, CALJIC No. 4.40, modified.)

The trial court also instructed the jury on assault with a deadly weapon as a lesser included offense of section 4500, but without any reference to evidence of duress. (9 RT 2170, 3 CT 898-99.)

The issue arose again during the prosecution's guilt phase closing argument. After discussing the elements of willful, deliberate, and premeditated first degree murder (CALJIC No. 8.20), the prosecutor told the juror that CALJIC No. 4.40 was a "very, very important jury instruction ...." (9 RT 2256-57.) It did not apply to Count 2, "under any circumstances. And that is what the law says, under no circumstances,

whether or not there was immediate danger ..., whether or not a reasonable person would fear for his life, it is not available, it is not applicable to Count II." (9 RT 2257.)

Defense counsel requested a sidebar at which he objected that the prosecutor's "argument is improper to the extent it takes the position that duress is not a defense under any circumstances. ... There is no instruction that says that the existence of duress is not available as a defense to the extent that it may implicate malice aforethought or premeditation and deliberation. And so, therefore, I think the argument is improper." (9 RT 2258.) The court overruled the defense objection. "I think within the rulings of the Court that we made the other day that her argument is appropriate or within the guidelines of the law." (9 RT 2259.)

For the fatal assault on Addis, the jury subsequently convicted appellant of first degree murder (Count 1) and the capital offense of a violation of section 4500 (Count 2). (4 CT 916, 918.)

B. There Was Substantial Evidence That Appellant Acted Because Of The Imminent Threat Of Death Or Great Bodily Injury.

At the outset, it is important to address the sufficiency of the evidence of duress. The trial court said that it found no evidence that appellant acted in the belief of an immediate threat of death or serious bodily injury unless he assaulted Addis. (9 RT 2091-92 ["I think the answer is no."]; 9 RT 2164-65 [The "Court has not seen any circumstantial evidence that, in fact, would indicate that Mr. Landry held the requisite belief personally."]) Nevertheless, the court at the request of the prosecution gave a modified form of a duress instruction (CALJIC No. 4.40) as set forth above. (9 RT 2056 [Prosecutor: "I think we have to say something about it."].) Under these circumstances, Respondent may not object on appeal that there was insufficient evidence of a belief in imminent

peril to life or of great bodily injury sufficient to support the requested defense instructions. (*See, e.g., People v. Thornton* (2007) 41 Cal.4th 391, 426 [A party may not challenge an instruction on appeal when it "'made a conscious and deliberate tactical choice to request the instruction.' [Citation.].)

In any event, there was evidence of duress sufficient to require the trial court to give appropriate instructions. "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531, citations omitted.) This includes a duty "to instruct on defenses, ... and on the relationship of these defenses to the elements of the charged offense." (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) "In addition, 'a defendant has a right to an instruction that pinpoints the theory of the defense.'" (*People v. Roldan* (2005) 35 Cal.4th 646, 715, citation omitted.)

In deciding whether to instruct the jury on a defense, the evidence should be "[c]onstrued in the light most favorable to" the defendant. (*United States v. Bailey* (1980) 444 U.S. 394, 398 [100 S. Ct. 624; 62 L. Ed. 2d 575]; *see also Mathews v. United States* (1988) 485 U.S. 58, 63 [108 S.Ct. 883; 99 L.Ed.2d 54] [A "defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."].) "[T]he trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a

reasonable doubt ....'" [Citation.]'" (*People v. Salas* (2006) 37 Cal.4th 967, 982-83.)

The trial judge must accept as true the evidence favorable to the defendant, disregard conflicting evidence, and draw only those inferences from the evidence which are favorable to the defendant. (*People v. Flannel* (1979) 25 Cal.3d 668, 684-85; *see also People v. Breverman* (1988) 19 Cal.4th 142, 162.) Thus, even though a trial judge may find the evidence "less than convincing" it must instruct the jury on the defense theory. (*People v. Turner* (1990) 50 Cal.3d 668, 690.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]" (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) Measured against these settled standards, the record contains sufficient evidence for duress instructions.

Duress has two elements: (1) a threat or menace that would cause a reasonable person to believe that his life was in immediate danger if he did not engage in the charged conduct; and (2) the defendant actually believed that his life was so endangered. (CALJIC No. 4.40; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100 ["The defendant, who must have possessed a reasonable belief that his or her action was justified, bears the burden of proffering evidence of the existence of an emergency situation involving the imminence of greater harm that the illegal act seeks to prevent."].)

A literal fear of death is not required. It is sufficient if the defendant feared imminent great bodily harm. (*People v. Perez* (1973) 9 Cal.3d 651, 657-58 [The "fine distinction between fear of danger to life and fear of great bodily harm is unrealistic."] citing *People v. Otis* (1959) 174 Cal.App.2d 119, 124 [The fine distinction between fear of danger to life and fear of great bodily harm "has become somewhat unrealistic in the light

of recent psychological research."]; 1 *see also* Witkin & Epstein, California Criminal Law, Defenses § 59 (3rd Ed. 2000) ["The more recent cases have concluded that threat of bodily harm is sufficient to raise the defense. [Citations.]"].)

There was circumstantial evidence from several sources that appellant acted under the immediate fear of death or great bodily harm from the NLR/AB gang members on the yard. "Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence" for purposes of proof. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *accord People v. Heard* (2003) 31 Cal.4th 946, 980 ["'Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.' [Citation.]"]; *see also* Penal Code, § 21, subd. (a) ["The intent or intention is manifested by the circumstances connected with the offense."].)

In particular, the courts in the gang context have recognized that expert testimony is circumstantial evidence sufficient to prove the motive and intent for the crime. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-50 [Evidence of gang beliefs and practices "can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 [Expert testimony has been repeatedly offered to show the motivation for a particular crime.]; *United States v. Mills* (11th Cir. 1983) 704 F.2d 1553, 1559-1560 [Testimony of a "quasi expert" on the organization, history, and activities of the Aryan Brotherhood was properly admitted as relevant to the defendant's motive and intent with respect to an alleged AB contract killing.].)

The expert testimony and other evidence provided sufficient evidence that appellant acted under imminent fear of death or great bodily

injury. At the time of the Addis homicide, there were 12-15 inmates on the yard, most of whom were members of the "Nazi Low Riders" ("NLR"), the "Aryan Brotherhood" ("AB"), or the "Skinheads". (5 RT 1067-68, 1182.) This included Gary Green, the NLR/AB shot-caller, who had power over the white inmates. (5 RT 1133.) Former inmate Ricky Rogers explained that the shot caller was the guy with the "keys to the car." That meant that he was "in charge of all the white guys" and made the rules about what was done or not done amongst the white inmates. (6 RT 1275-76.)

The Department of Corrections determined that Green ordered the "hit" on Addis and orchestrated the events on the yard. (Exh. No. 50, 4 CT 1145-46.) At the morning briefing on the day of the assault, the guards told the Sergeant Sams, the officer in charge that Addis would not be safe on the yard. (6 RT 1324, 1333-35, 1337-38.) Nevertheless, when Green demanded that the guards bring Addis to the yard, the sergeant sent guards to Addis's cell and they brought him to the yard. (5 RT 1079-80, 1134-35, 1148, 1164-65.) When Maldonado, told the sergeant "'they're going to take him out'", the sergeant told her to get to work and they both left the entrance to the yard. (8 RT 1815-17; Exh. No. 68, 5 CT 1235.) This evidence showed that the shot-caller rather than the guards controlled the white inmates and that the inmates could not rely on the staff for their safety.

Other evidence showed that appellant acted in reasonable fear of imminent danger to his life or of great bodily harm if had not carried out the assault on Addis. As noted, Anthony L. Casas worked for the Department of Corrections for 22 years and had extensive experience with prison gangs. (8 RT 1992-97; *see* Argument Section III.B., Statement Of Facts, Section II.C., above.) Casas explained that an inmate who was big and strong may be able to avoid a prison gang and tell the gang that he just

wants to do his own time. However, an inmate who was small and inexperienced may need a gang for protection. This would include someone like appellant who did not have a background of violent crime but just a couple of burglaries. (8 RT 2002-03.)

However, when the gang asked the inmate to become involved in dangerous activity, he could not avoid getting involved without putting his own life at risk. (8 RT 2001-03.) "You try to get out or don't do what you are told, you are taken out." (8 RT 2003-04.) If an inmate refused to carry out an order to commit an assault, "[h]e can easily get killed. As a matter of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005.) Based on the evidence of how the prison staff had handled Addis, an inmate in appellant's position would conclude that it would have been useless to turn to the staff for safety. (8 RT 2010-11.)

Steven Rigg had 17 years of experience with the Department of Corrections from a correctional officer at C.I.M. to an acting captain and had dealt with prison gangs, including AB. (8 RT 1911-14, 1938; *see* Argument Section III.B., Statement Of Facts, Section II.B.) Rigg explained that the shot-callers within the gang had the authority to tell others what to do, including whether to commit an assault. (8 RT 1940.) If an inmate did not carry out the assault, he would put himself at risk of being assaulted and even murdered. (8 RT 1941.) Under the circumstances of this case, if appellant had failed to assault Addis, he would have been "a walking dead man" right there on the yard. (8 RT 1942.) "[I]t would have been very difficult for [appellant] to receive assistance from staff, especially knowing how the unit was being operated." (8 RT 1946.)

Prosecution witnesses supported the testimony of the defense experts. Glen Willett, the prosecution's prison gang expert, confirmed that if an inmate did not cooperate with the gang's program, the NLR or AB would retaliate against him. (7 RT 1730.) Former inmate Richard Allen said that if an inmate requested protective custody he was considered a "rat, and there's a good chance they will try to take your life for that." (5 RT 1248-49.)

Taken together, this evidence provided circumstantial evidence from which the jury could find: that the NLR/AB shot caller had ordered the "hit" on Addis; that a person in appellant's position would reasonably believe that the NLR/AB gang members on the yard posed an immediate danger to life or of great bodily injury if he did not act as ordered; that appellant could not turn to the prison guards for safety because they had ceded control over the inmates to the shot-caller; and even if appellant had tried to get protection from the guards he would have been killed as a "rat."

The trial court also questioned the sufficiency of the evidence for duress instructions because there was no evidence that anyone on the yard other than appellant had a weapon. (9 RT 2091-92.) However, the record showed that despite a search of the prison yard, an unclothed search at the cell, a search by a metal detector on the tier, a search of the inmate's clothing and shower towel, and an additional search by a hand held metal detector before release onto the yard, a weapon was available on the yard to assault Addis was on the yard. (5 RT 1069-70; 1115-1118.) Thus, inmates could bring and/or plant weapons on the yard either without detection or with the complicity of the guards. Regardless, a weapon is not necessary to pose a threat of death or serious bodily injury. (*See, e.g., People v. Holmes* (1897) 118 Cal. 444, 460 [death caused by group beating by hands and

fists]; *People v. McManis* (1947) 122 Cal.App.2d 891, 899 [same]; *People v. La Grange* (1958) 163 Cal.App.2d 100, 102-03 [same].)

In sum, when the record is reviewed in the light favorable to the requested instructions, there was sufficient evidence of duress to support the instructions requested by the defense. (*People v. Tufunga, supra,* 21 Cal.4th at p. 944 ["'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]".) As next explained, appellant was entitled to those instructions as a matter of federal, constitutional law.

C. *People v. Anderson, Supra*, Does Not Foreclose The Requested Duress Instructions Because They Were Required As A Matter Of Federal Constitutional Law.

Under California law, "[a]ll persons are capable of committing crimes except ... [p]ersons (unless the crime be punishable with death) who committed the act or made the omission under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (Penal Code, § 26, subd. 6.) In *People v. Anderson* (2002) 28 Cal.4th 767 ("*Anderson*"), this Court held that "section 26 excludes all murder from the duress defense." (*Id.* at p. 775; *see also id.* at p. 780 ["duress is not a defense to any form of murder"]; *accord People v. Vieira* (2005) 35 Cal.4th 264, 289-90.)

Anderson reached this conclusion based on the common law antecedents to section 26, which was enacted in 1872, and its predecessor statute, which was enacted in 1850. (*Id.* at p. 770, citing 2 Jones's Blackstone (1916) p. 2197 ["And, therefore, though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent."] *see also id.* at pp. 732-33.) *Anderson* also applied rules of

statutory interpretation to conclude that section 26 barred duress as a defense to the crime of murder, regardless of whether it was punishable by death. (*Id.* at p. 775 ["We see no suggestion that the 1850, or any, Legislature intended the substantive law of duress to fluctuate with every change in death penalty law. ... The presence or absence of special circumstances has no relationship to whether duress should be a defense to killing an innocent person."].)

Although the murder at issue in *Anderson* did not involve a gang-related homicide, the Court nevertheless identified a policy concern which in its view weighed against recognizing duress as a defense in the gang context. "If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense for any form of murder would thus encourage killing. Absent a stronger indication than the language of section 26, we do not believe the Legislature intended to remove the sanctions of the criminal law from the killing of an innocent even under duress." (*Id.* at p. 777-78; *see also id.* at p. 784 ["[B]ecause duress can often arise in a criminal gang context, the Legislature might be reluctant to do anything to reduce the current law's deterrent effect on gang violence. These policy questions are for the Legislature, not a court, to decide."].)

In addition, *Anderson* concluded that evidence of duress "cannot reduce murder to manslaughter. Although one may debate whether a killing under duress should be manslaughter rather than murder, if a new form of manslaughter is to be created, the Legislature, not this court, should

do it." (*Id.* at p. 770.) "'Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"--the unreasonable but good faith belief in having to act in self-defense.' Neither of these two circumstances describes the killing of an innocent person under duress." (*Id.* at p. 781, citing *People v. Blakeley* (2000) 23 Cal. 4th 82, 87-88, internal citations omitted.)

Moreover, "[n]o California case has recognized the killing of an innocent person under duress as a form of manslaughter." (*Ibid.*) "In contrast to a person killing in imperfect self-defense, a person who kills an innocent believing it necessary to save the killer's own life intends to kill unlawfully, not lawfully. Nothing in ... [sections 26, 187, and 192] negates malice in that situation. Recognizing killing under duress as manslaughter would create a new form of manslaughter, which is for the Legislature, not courts, to do." (*Id.* at p. 783.)

Anderson does not resolve the issues presented here because it did not address a claim that duress instructions were required as a matter of federal constitutional law. (*People v. Heitzman* (1994) 9 Cal.4th 189, 209 ["It is well settled that a decision is not authority for an issue not considered in the court's opinion."].) As explained below, a defendant has a fundamental right to a jury instruction on a defense from which the jury could find reasonable doubt of premeditation and deliberation and malice aforethought. (U.S. Const., 5th, 6th, & 14th Amends.) The denial of an opportunity to argue such a defense violated appellant's Sixth Amendment right to the effective assistance of counsel.

Moreover, the heightened requirement for reliability and evolving standards of decency recognized by the Eighth Amendment required the trial court in a capital case to instruct the jury on appellant's duress defense, regardless of the state of the 19th Century common law from which the California statutes derived. For related reasons, the trial court should have instructed the jury that from evidence of duress it could find reasonable doubt of malice aforethought and reach a verdict of voluntary manslaughter rather than murder (Count 1; Penal Code, § 187, subd. (a)), and assault with a deadly weapon (Penal Code, § 245, subd. (a)(1)) rather than an assault by a life prisoner (Count 2; Penal Code, § 4500). Contrary to the dicta in *Anderson,* a defendant should not be deprived of an opportunity to present a defense because he was an inmate and subjected to the grim realities of a prison where the shot-caller for a gang rather than the guards controlled the decision of whether someone would live or die.

D. Under The Evolving Standards Of Decency And Heightened Requirements For Reliability, The Eighth Amendment Mandated The Requested Duress Instructions.

Anderson "conclude[d] that, as in Blackstone's England, so today in California: fear for one's own life does not justify killing an innocent person." (*People v. Anderson, supra,* 28 Cal.4th at p. 770.) However, the current law of capital cases is animated by the Eighth Amendment, which "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (*Kennedy v. Louisiana* (2008) ___ U.S. ___ [128 S.Ct. 2641; 171 L.Ed.2d 525], quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S. Ct. 590; 2 L. Ed. 2d 630], plurality opinion). "Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the

norms that 'currently prevail." (*Ibid.*, quoting *Atkins v. Virginia* (2002) *536* U.S. 304, 311 [122 S. Ct. 2242; 153 L. Ed. 2d 335].)

Thus, however the august Blackstone may have once inspired the drafters of the California penal statutes, current Eighth Amendment standards must prevail. In the modern era, the high court has repeatedly construed the Eighth Amendment to impose a heightened standard of reliability for factfinding in capital cases. (*See, e.g., Ford v. Wainwright, supra,* 477 U.S. at p. 411 ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."].) This means that where supported by the evidence the defendant is entitled to a jury instruction from which the jury may find reasonable doubt of the mental state necessary for the charged capital/murder. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S. Ct. 2382; 65 L. Ed. 2d 392]; *see also* Section E., below.)

Allowing a defendant to be convicted of capital/murder notwithstanding substantial evidence that he killed only because his own life was threatened by the gang that ordered and orchestrated the crime would violate the heightened need for reliability in capital case proceedings. (*Ibid.* ["To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination."], footnote omitted; *Strickland v. Washington* (1984) 466 U.S. 668, 704 [104 S. Ct. 2052; 80 L. Ed. 2d 674], Brennan, J., concurring in part and dissenting in part ["We 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."].)

The evolution of the law since Blackstone recognizes that the mental state of a defendants who commits a fatal assault under duress is not the same as that of a murderer acting voluntarily. For example, the Model Penal Code allows the defense of duress to be asserted against all criminal charges, including murder. Duress is a defense whenever "a person of reasonable firmness in [the defendant's] situation would have been unable to resist." (Model Pen. Code, § 2.09, subd. (1).) The complete denial of duress as a defense is both hypocritical and ineffective as a deterrent.

The defense of duress "is based upon the incapacity of men in general to resist the coercive pressures to which the individual succumbed. ... This is to say that law is ineffective in the deepest sense, indeed that it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust. Where it would be both 'personally and socially debilitating' to accept the actor's cowardice as a defense, it would be equally debilitating to demand that heroism be the standard of legality." (Model Pen. Code, American Law Institute Commentary 3 to § 209, at pp. 374-75.)

The *Anderson* Court cited a law review article by Professor Joshua Dressler to note that "'[s]temming from antiquity, the nearly unbroken tradition' of Anglo-American common law is that duress never excuses murder, that the person threatened with his own demise ought rather to die himself, than escape by the murder of an innocent.'" (*People v. Anderson, supra,* 28 Cal.4th at p. 772, quoting Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits (1989) 62

So.Cal. L.Rev. 1331, 1370, internal quotation omitted, hereafter "Exegesis of the Law of Duress".) However, *Anderson* omitted to note that Professor Dressler, despite earlier reservations, concluded "that the American Law Institute was correct in rejecting the common law no-homicide rule." (Dressler, "Exegesis of the Law of Duress", 62 So.Cal. L.Rev. at p. 1371.)

Whether duress is available as a defense is "an issue of just deserts: Does a person always deserve to be punished as a murderer if he kills another innocent individual as the result of coercion?" (*Ibid.*, footnote omitted.) "[S]ince duress is an excuse rather than a justification, the real issue (it bears repeating with some additional emphasis) is whether a coerced person who unjustifiably violates the moral principle *necessarily, unalterably, and unfailingly* deserves to be punished as a murderer, as the common law insists." (*Id.* at p. 1372; *see also* 2 W. LaFave Substantive Criminal Law § 10.1(a) 2d ed. (2003) [A duress defense offers an excuse for acts forced by others.].) The common law view was that "there *always* is a fair opportunity to avoid killing another person, regardless of the coercive circumstances." (*Id.* at p. 1373.) However, such a rule "*demands* our virtual saintliness, which the law has no right to require." (*Ibid.*.)

This is not to suggest "that all coerced homicides should be excused. The desirability of the [Model Penal Code] approach is that the excusing decision is made by the jury on a contextual basis. It is realistic to believe that juries will not excuse all coerced killers. It is not inherently implausible to contend that persons of reasonable moral strength will accede to some, but not all, homicides." (*Id.* at p. 1373.) "Once one realizes ... that the issue with duress is desert of punishment and not justification of the act, the jury is an especially suitable institution to determine whether and when coercion excuses. Justification defenses amend the law; excuses provide justice to the individual who violated it. ... If criminal trials are morality

plays, they are especially so when excuses are pleaded, and perhaps most of all when a claim of duress is raised. Juries should write the final act of such plays." (*Id.* at p. 1374, footnotes omitted.)

Another commentator has similarly recognized that "the criminal law does not require or demand heroism but imposes the reasonable man standard. To demand more and attach liability when such a demand is not met is ludicrous. The rule [prohibiting a duress defense], which an individual is likely to be unaware of or unable to comply with, does not effectively protect against life." (A. Reed, "Duress and Provocation as Excuses to Murder: Salutary Lessons From Recent Anglo-American Jurisprudence" (hereafter " Duress and Provocation as Excuses to Murder") (1996) 6 Transnational Law & Policy 51, 61.) More fundamentally, a "defendant acting under duress cannot be accused of acting under his own intentions because there is no voluntary breaking of the criminal law and no truly evil intent on behalf of the accused." (*Ibid.*; *see also People v. Condley* (1977) 69 Cal.App.3d 999, 1012 [Duress defense proceeds on the theory that that "the coercing party [supplied] the requisite mens rea and is liable for the crime."].)

Appellant is not suggesting that evidence of duress should be a complete defense. "Granting an excuse to an actor who kills under coercion is not tantamount to recognizing that he had a right to kill the victim. In these cases, the harm averted by the actor was not greater than the one produced and, in consequence, his conduct is still considered wrongful." (L. Chiesa, "Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond" (2007 Pace Law Faculty Publications) at p. 21.)[20] Nevertheless, the "state of mind of one who takes an innocent life

20. Available at http://digitalcommons.pace.edu/lawfaculty/404

as the only means of saving his own, while not guiltless, is certainly not malicious." (Perkins on Criminal Law (2d ed. 1969) at p. 951.)

E. Because A Jury May Find Reasonable Doubt Of Malice Aforethought From Evidence Of Duress, Appellant's Federal Constitutional Trial Rights Required The Court To Give The Requested Instructions.

The foregoing discussion shows that a jury may and should be permitted to find that if a defendant committed a killing under duress, his actions were not voluntary or committed with malice aforethought. Under those circumstances, settled principles of federal constitutional law required the trial court to instruct the jury that it could find reasonable doubt of malice aforethought, which is an element of both murder (Penal Code, § 187, subd. (a)) and section 4500. (*People v. St. Martin, supra,* 1 Cal.3d at p. 537 ["'The words malice aforethought in section 4500 have the same meaning as in sections 187 [murder] and 188 [malice definition].' [Citation.]"].)

In other contexts, the courts have recognized that the defense of duress "negates an element of the crime charged--the intent or capacity to commit the crime--and the defendant need raise only a reasonable doubt that he acted in the exercise of his free will. [Citation.]" (*People v. Heath* (1989) 207 Cal. App. 3d 892, 900; *accord People v. Graham* (1976) 57 Cal.App.3d 238, 240.) A defendant's due process and Sixth Amendment rights show that the same principle should apply where the charged crimes required proof of malice aforethought.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S. Ct. 1038; , 35 L. Ed. 2d 297].) Moreover, the defendant's right to due process and to trial by jury (U.S. Const., 5th, 6th & 14th Amends.) "gives a criminal

defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." (*United States v. Gaudin* (1995) 515 U.S. 506, 522-23 [115 S.Ct. 2310; 132 L.Ed.2d 144]; *see also id.* at pp. 518-19; *In re Winship* (1970) 397 U.S. 358, 364 [25 L. Ed. 2d 368; 90 S. Ct. 1068] ["the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"].)

"The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 493 [120 S. Ct. 2348; 147 L. Ed. 2d 435].) Thus, while a state legislature has the authority to identify the elements of the offenses it wishes to punish, it may not by a legislative device deprive the defendant of any opportunity to create reasonable doubt of an element of the charged offense. (*Id.* at pp. 476-77; *see also Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-98 [95 S. Ct. 1881, 44 L. Ed. 2d 508] [Because the "consequences" of a guilty verdict for murder and for manslaughter differ substantially, a State may not circumvent the protections of *Winship* by "redefining the elements that constitute different crimes ...."].)

Therefore, appellant was entitled to jury instructions which permitted the jury to find reasonable doubt of the mental state for the charged capital/murder and the trial court's failure to give the requested instructions lowered the prosecution's burden of proof. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [106 S.Ct. 2142; 90 L.Ed.2d 636], citations omitted.)

This includes the right "to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*United States v. Mathews, supra,* 485 U.S. at p. 63; *accord Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098 ["'It is well established that a criminal defendant is entitled [by due process] to adequate instructions on the defense theory of the case.'"], quoting *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739; *Kornahrens v. Evatt* (4th Cir. 1995) 66 F.3d 1350, 1354 ["if a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it"].) Accordingly, appellant was entitled to jury instructions from which the jury could find reasonable doubt of premeditation and deliberation and malice aforethought from evidence of duress.

F. Evidence Of Duress Also Provided A Basis To Find That The Crime Was Voluntary Manslaughter Rather Than Murder.

Anderson concluded that an unlawful killing under duress was not voluntary manslaughter because it did not fit within the statutory definition of a killing upon "sudden quarrel or heat of passion" (Penal Code, § 192, subd. (a)), or constitute "unreasonable self-defense", *i.e.*, the actual but unreasonable belief in having to act in self-defense. (*People v. Anderson, supra,* 28 Cal.4th at p. 781.) However, a person who kills out of fear of his own death or serious bodily injury is acting in the heat of passion.

The courts have long recognized that the heat of passion that will reduce murder to voluntary manslaughter may result from "fear" or "terror". (*See, e.g., People v. Logan* (1917) 175 Cal. 45, 48-49; *see also* Perkins, Criminal Law (3d ed. 1982) p. 98 ["Terror, for example, is one of the passions which may dethrone judgment and mitigate a killing to the level of voluntary manslaughter."].) A person who acts in the heat of passion out of

fear or terror is not acting with malice aforethought even if he intentionally slays the victim. (*People v. Lasko* (2000) 23 Cal.4th 101, 104 ["When a killer *intentionally* but unlawfully kills in a sudden quarrel or heat of passion, the killer lacks malice and is guilty only of voluntary manslaughter."].) Accordingly, the jury should be permitted to find that the crime committed under those circumstances is voluntary manslaughter rather than murder.

The same conclusion follows from constitutional principles and the recognition of how duress relates to the malice element of both murder and section 4500. As noted, a "defendant acting under duress cannot be accused of acting under his own intentions because there is no voluntary breaking of the criminal law and no truly evil intent on behalf of the accused." (A. Reed, "Duress and Provocation as Excuses to Murder", *supra*, 6 Transnational Law & Policy at p. 61.) Therefore, the "state of mind of one who takes an innocent life as the only means of saving his own, while not guiltless, is certainly not malicious. " (Perkins on Criminal Law (2d ed. 1969) p. 951.)

Accordingly, "whatever else may be the judgment of the law, duress ought to serve at least as a partial excuse to murder. Fear can affect volitional *capacity* as effectively as anger does. If we reduce murder to manslaughter, largely on the ground that a person, when adequately provoked, excusably has less self-control, the same rule ought to apply in cases of duress." (Dressler, "Exegesis of the Law of Duress", *supra*, 62 So.Cal.L.Rev. at fn. 220] *see also* W. La Fave & A. Scott, Criminal Law (2d ed. 1986) § 7.11(c), p. 667 ["[I]t is arguable that his crime should be manslaughter rather than murder, on the theory that the pressure upon him, although not enough to justify his act, should serve at least to mitigate it to something less than murder."].) "A killing in such an extremity (intentional

killing of an innocent person to save oneself from death) is far removed from the cold-blooded murder, and should be held to be manslaughter." (Perkins on Criminal Law (3rd ed. 1982) p. 1058.)

On the same reasoning, courts in several other jurisdictions have held that evidence of duress may negate malice and, therefore, reduce murder to voluntary manslaughter. (*See, e.g., Wentworth v. Maryland* (1975) 29 Md.App.110, 120-121 [349 A.2d 421, 428] [Duress, by analogy to imperfect self-defense, may mitigate murder to manslaughter.]; *Regina v. Hercules* (1954) 3 S. African 826, 832 [Duress, like provocation and imperfect self-defense, operates in mitigation of punishment, reducing murder to "culpable homicide", a category of homicide reserved for killings where there was an intent to kill but not an "unqualified intent."].) The rationale is that "the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely" and, therefore, there should be "a proportional mitigation of the offender's punishment." (*Abbott v. The Queen*, 1977 App.Cas. 755, 768.)

"Any murderer who kills under duress would be less, in many cases far less, blameworthy than another who has killed of his own free will. Should not the law recognize this factor? A verdict of guilty of murder carries with it a mandatory sentence, in this country life imprisonment, in other parts of the Commonwealth death. There is much to be said for the view that on a charge of murder, duress, like provocation, should not entitle the accused to a clean acquittal but should reduce murder to manslaughter and thus give the court power to pass whatever sentence might be appropriate in all the circumstances of the case." (*Ibid.*)

The same conclusion follows from constitutional principles. As noted, where there is evidence that the defendant acted with a mental state that mitigates malice, the right to due process and to trial by jury requires

the prosecution to disprove that mental state beyond a reasonable doubt. (*Mullaney, supra,* 421 U.S. at pp. 697-98 ["[T]he criminal law ... is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."]; *accord Apprendi, supra,* 530 U.S. at pp. 484-85.) Therefore, "if there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder." (*Stevenson v. United States* (1896) 162 U.S. 313, 314 [16 S.Ct. 839, 40 L.Ed. 980].)

The reason for this rule is that, in the absence of a lesser included offense instruction, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (*Keeble v. United States* (1973) 412 U.S. 205, 212-13 [93 S. Ct. 1993; 36 L. Ed. 2d 844].) Accordingly, "a defendant is entitled to a lesser offense instruction -- in this context or any other ...." (*Ibid.*) Subsequently, the high court has reaffirmed that instructions on lesser included offenses are required to protect the defendant's right to proof beyond a reasonable doubt. (*Schmuck v. United States* (1989) 489 U.S. 705, 717 [109 S. Ct. 1443; 103 L. Ed. 2d 734] ["in the absence of a lesser offense instruction, the jury will likely fail to give full effect to the reasonable-doubt standard, resolving its doubts in favor of conviction."]; *see also United States v. Jones* (1999) 526 U.S. 227, 245-46 [119 S.Ct. 1215; 143 L.Ed.2d 311] [The right to trial by jury includes not only acquittals but "what today we would call verdicts of guilty to lesser included offenses."].)

These principles apply with particular force in a capital case because of the heightened requirement for reliability imposed by the Eighth

Amendment. "Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case." (*Beck, supra,* 447 U.S. at p. 638.) For all these reasons, the trial court erred by refusing appellant's requested instruction that the jury could find that the crime was voluntary manslaughter rather than murder because of evidence of duress.

G. From Evidence Of Duress, The Jury Could Also Find Reasonable Doubt Of The Malice Element Of Section 4500 And Reach A Verdict Of The Lesser Included Offense Of Assault With A Deadly Weapon.

As noted, the words malice aforethought in section 4500 have the same meaning as in sections 187 and 188. (*People v. St. Martin, supra,* 1 Cal.3d at p. 537.) Therefore, for the reasons previously explained, the trial court as requested should have instructed the jury that it could find reasonable doubt of the malice element of section 4500. (3 CT 795) Under these circumstances, the jury should also have been permitted to find the absence of malice because of duress and reach a verdict of assault with a deadly weapon as a lesser included offense of section 4500. (3 CT 791.)

The trial court and the parties agreed that assault with a deadly weapon was a lesser included offense of section 4500. (9 RT 2170-71.) This was correct because the prosecution alleged that the violation of section 4500 was committed by an assault "with a deadly weapon ...." (1 CT 44; *see People v. Reed* (2006) 38 Cal.4th 1224, 1227-28 ["Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former."].)

As previously explained, duress provides a partial excuse for a crime which permits a finding that the defendant did not act with malice. (*See,*

e.g., Dressler, "Exegesis of the Law of Duress", 62 So.Cal. L.Rev. at p. 1372; Perkins on Criminal Law (2d ed. 1969) p. 951 [The "state of mind of one who takes an innocent life as the only means of saving his own, while not guiltless, is certainly not malicious. "]; *Wentworth, supra,* 29 Md.App. at pp. 120-121; *Regina v. Hercules, supra,* 3 S. African at p. 832; *Abbott v. The Queen*, 1977 App.Cas. at p. 768.) Therefore, appellant's due process (U.S. Const., 5th & 6th Amends.) Sixth Amendment, and Eighth Amendment rights required a jury instruction that from evidence of duress the jury could find assault with a deadly weapon as a lesser included offense of the alleged capital violation of section 4500. (*Keeble, supra,* 412 U.S. at pp. 212-13; *Beck, supra,* 447 U.S. at p. 638.)

H. The Trial Court Should Also Have Instructed The Jury That Evidence Of Duress May Provide Reasonable Doubt Of Premeditation And Deliberation Because CALJIC No. 8.20 Was Insufficient To Remedy This Omission.

Appellant also requested an instruction that from evidence of duress the jury could find that appellant did not act with premeditation and deliberation convict him of second degree murder rather than first degree murder. (3 CT 790.) *Anderson* agreed with this principle. (*People v. Anderson, supra,* 28 Cal.4th at p. 784 ["Defendant also argues that, at least, duress can negate premeditation and deliberation, thus resulting in second degree and not first degree murder. We agree that a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances."].)

However, *Anderson* concluded that this principle had been adequately conveyed to the jury because the "trial court instructed the jury on the requirements for first degree murder. It specifically instructed that a killing 'upon a sudden heat of passion or *other condition precluding the idea of deliberation*" would not be premeditated first degree murder. (Italics

added.) Here, the jury found premeditation. In some other case, it might not. It is for the jury to decide." (*People v. Anderson, supra,* 28 Cal.4th at p. 784, original emphasis.)

The italicized language is from CALJIC No. 8.20 ("Deliberate And Premeditated Murder"), which was also given in this case. (3 CT 874-75.) In pertinent part, CALJIC No. 8.20 provided that: "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." (*Ibid.*)

CALJIC No. 8.20 was insufficient to cure the failure to give a specific instruction as requested by appellant. First, as discussed more fully below in Argument Section VII., CALJIC No. 8.20 could not cure the error because it required evidence "precluding" premeditation and deliberation whereas only evidence sufficient to find a reasonable doubt is required. (*See, e.g., In re Winship, supra,* 397 U.S. at p. 364; *Mullaney v. Wilbur, supra,* 421 U.S. at pp. 697-98.) Second, in reviewing a jury instructions, "our concern must be what the jury of laymen may have understood [the court] to mean." (*People v. Crossland* (1986) 182 Cal.App.2d 113, 199.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302 [101 S.Ct. 11 12, 67 L.Ed.2d 241].)

CALJIC No. 8.20 identified "heat of passion" as an example of the type of "condition" that may preclude the idea of deliberation. (3 CT 874.) Without instruction from the trial court, a lay juror would have no reason to believe that duress was an analogous condition which would permit the jury to find reasonable doubt of deliberation and require a finding of second

rather than first degree murder. (*Griffin v. United States* (1991) 502 U.S. 46, 59 [116 L.Ed.2d 371; 112 S.Ct. 466] ["When ... jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."].) Under the standards previously discussed, the trial court's failure to make this explicit violated appellant's due process and Sixth Amendment rights, lowered the prosecution burden of proof on first degree murder, and impaired the reliability of the jury's finding of premeditated murder. (*See, e.g., United States v. Gaudin, supra,* 515 U.S. at pp. 522-23; *Keeble, supra,* 412 U.S. at pp. 212-13; *Beck, supra,* 447 U.S. at p. 638.)

I. The Denial Of The Requested Instructions Violated Appellant's Right To A Fair Trial And To The Effective Assistance Of Counsel.

The trial court's refusal to give any of appellant's four requested instructions deprived appellant of his right to a fair trial and the effective assistance of counsel. The Sixth Amendment and the right to due process (U.S. Const., 5th & 14th Amends.) have long been recognized as assuring fairness in criminal proceedings. (*See, e.g., Lisenba v. California, supra,* 314 U.S. at p. 236; *Withrow v. Larkin, supra,* 421 U.S. at p. 46 [A "'fair trial in a fair tribunal is a basic requirement of due process.' [Citation]."]; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 145 [126 S.Ct. 2557; 146 L.Ed.2d 409] ["the purpose of the rights set forth in ... [the Sixth] Amendment is to ensure a fair trial"].)

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations]." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [96 S.Ct. 893].) This includes the right to the effective assistance of counsel in presenting the defense theory of the case to the jury in closing argument. "From counsel's function as assistant to the defendant derives the overarching duty to

advocate the defendant's cause ...." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052; 80 L.Ed.2d 674].)

"There can be no doubt that closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial." (*Herring v. New York* (1975) 422 U.S. 853, 858 [95 S. Ct. 2550, 45 L. Ed. 2d 593]; *accord United States v. Kellington* (9th Cir. 2000) 217 F.3d 1084, 1099-1100 ["Kellington had a fundamental right under the Sixth Amendment to present his theory of the case in closing arguments."].) "[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." (*Id.* at p. 862.)

A court may limit arguments that are unduly time consuming, "stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." (*Ibid.*) However, denying an accused the right to make final arguments on his theory of the case denies him the right to the effective assistance of counsel and to present and defense, and it lowers the prosecution's burden of proof. (*Id.* at pp. 864-65 [Right to counsel violated by denial of opportunity to argue that the facts did not show a robbery.]; *accord Conde v. Henry, supra,* 198 F.3d at p. 739 ["By preventing Conde from arguing that no robbery had occurred and that he lacked the requisite intent to rob, the trial court's order violated the defendant's fundamental right to assistance of counsel and right to present a defense, and it relieved

the prosecution of its burden to prove its case beyond a reasonable doubt."].)

In this case, the trial court's refusal to instruct the jury as requested by appellant deprived his trial counsel of a legal basis for arguing his theory of the case and that appellant was not guilty of first or second degree murder or a violation of section 4500 but of lesser included offenses. The court thereby violated appellant's rights to a fair trial and to the effective assistance of counsel and lowered the prosecution's burden of proof.

J. For Several Reasons, The Denial Of The Requested Instructions Requires Reversal Of Counts One And Two And The Death Judgment.

The jury convicted appellant of first degree premeditated murder (Count 1) and the capital offense of a fatal assault by a life prisoner with malice aforethought (Count 2). (4 CT 916, 918.) In opening statement, appellant conceded that he committed the stabbing. (5 RT 1050.) Duress was the only defense he attempted to present to the jury by means of the four requested instructions at issue here. For several reasons, the trial court's refusal to give any of the requested instructions requires reversal of Counts One and Two and the death judgment.

As explained above in Section I., the denial of the requested instructions violated appellant's right to the effective assistance of counsel by depriving his counsel of a legal basis for arguing the defense theory of the case. This lowered the prosecution's burden of proof and caused a "'breakdown of our adversarial system'" requiring reversal of the judgment. (*Conde v. Henry, supra,* 198 F.3d at p. 739 [Reversal required where the court prevented defense counsel from arguing that the crime was kidnapping for burglary rather than kidnapping for robbery], citation omitted; *accord Herring v. New York, supra,* 422 U.S. at pp. 864-65 [Reversal required where the court denied defense counsel the opportunity

to argue that the facts did not show the defendant was guilty of the charged robbery]; *United States v. Miguel* (9th Cir. 2003) 338 F.3d 995, 1003 [Reversal required where the court prevented defense counsel from arguing a defense supported by reasonable inferences from the evidence.].)

Even if harmless error analysis applies, the errors were not harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) The burden is on the beneficiary of the error "'either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.' [Citation.]" (*People v. Louis, supra,* 42 Cal.3d at p. 993.) In *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827; 144 L.Ed.2d 35], the high court admonished that "safeguarding the jury guarantee" requires a finding of prejudice where an instructional error removes from jury consideration a material issue which was genuinely contested: "If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." (*Id.* at p. 19.)

Applied here, this rule requires reversal. The requested instructions related to the central dispute issue at the guilt phase trial of the intent for the charged capital/murder. As described above in Section B., appellant contested this issue by cross-examination of the prosecution's witnesses, the testimony of Officer Maldonado in the defense case, and the testimony of the defense prison gang experts (Rigg and Casas). By this means, appellant, presented evidence that he did not act voluntarily but out of fear of imminent death or great bodily injury at the hands of prison gang members if he did not carry out the assault ordered by the shot caller.

Because appellant raised evidence to support a finding of reasonable doubt on the element of malice aforethought necessary for the capital offense (Penal Code, § 4500, Count 2), his conviction for that crime and the related death judgment must be reversed. (*Neder, supra,* 527 U.S. at p. 19.) Appellant's conviction for first degree murder (Count 1) must also be reversed. The trial court's modification of CALJIC No. 4.40 instruction implied that duress was a defense to murder (Count One). That instruction did not eliminate the prejudice from the denial of the instructions requested by the defense. As given, CALJIC No. 4.40 created an all or nothing choice between a murder conviction and a acquittal. (3 CT 871 ["A person is not guilty of a crime other than Assault By A Life Prisoner as alleged in Count 2 when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances ...."].)

However, appellant did not claim that he was not guilty of any crime and hence entitled to an outright acquittal. By means of the first two requested jury instructions, defense that appellant attempted to present was that from evidence of duress the jury could find reasonable doubt of first degree premeditated murder and it would therefore be required to convict him of either second degree murder or voluntary manslaughter. (3 CT 790-91; *see People v. Dewberry* (1959) 51 Cal.2d 548, 556 [Where "reasonable doubt exists as between degrees of the same offense or as between the inclusive and included offense, the jury can only convict of the crime whose elements have been proved beyond a reasonable doubt."].)

Without the requested instructions, the jury was deprived of a way to credit the evidence favorable to the defense and left in a posture which favored the prosecution (*Keeble, supra,* 412 U.S. at pp. 212-213 ["Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its

doubts in favor of conviction."]; *Beck, supra,* 447 U.S. at p. 638 ["the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction"].) Accordingly, the denial of the first two requested instructions was prejudicial error with respect to appellant's conviction for first degree murder. (*Neder, supra,* 527 U.S. at p. 19.)

This error requires reversal of the death judgment even if the Court finds no prejudice with respect to appellant's conviction for violating section 4500. That crime requires only a fatal assault with malice aforethought, which is equivalent to second degree murder. (Penal Code, § 4500 ["Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole."]; Penal Code, § 189 [Murder is of the second degree unless it is a willful, deliberate, and premeditated or committed by means of certain felonies not at issue here.].)

As explained below in Argument Section XIV. and for brevity incorporated by reference here, there is no tenable precedent for affirming a death judgment without also finding the equivalent of a willful, deliberate, and premeditated murder. Therefore, the prejudice from the denial of appellant's two requested instructions relating duress to the charge of murder also requires reversal of the death judgment.

VII.

THE TRIAL COURT ERRED BY REQUIRING EVIDENCE "PRECLUDING" DELIBERATION AND PREMEDITATION (CALJIC NO. 8.20) TO ESTABLISH REASONABLE DOUBT OF FIRST DEGREE MURDER.

A. Introduction.

CALJIC No. 8.20 also impaired the jury's ability to find reasonable doubt that appellant committed a willful, deliberate, and premeditated murder. (3 CT 874.) That instruction required evidence "precluding" deliberation, whereas only reasonable doubt is required to find that the crime was less than first degree murder. (*See, e.g., Mullaney v. Wilbur, supra,* 421 U.S. at pp. 697-98 [The due process standard of reasonable doubt applies to facts determining "the degree of culpability attaching to an unlawful homicide."]; *People v. Dewberry, supra,* 51 Cal.2d at p. 556 [Where "reasonable doubt exists as between degrees of the same offense or as between the inclusive and included offense, the jury can only convict of the crime whose elements have been proved beyond a reasonable doubt."].)

This error lowered the prosecution burden of proof, violated appellant rights to due process and to trial by jury, and impaired the reliability of the factfinding in a capital case. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., In re Winship, supra,* 397 U.S. at p. 364 [The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521 [99 S. Ct. 2450; 61 L. Ed. 2d 39] [A defendant is deprived of due process if a jury instruction "had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of

mind."]; *Ford v. Wainwright, supra,* 477 U.S. at p. 411 ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."]; *Beck v. Alabama, supra,* 447 U.S. at p. 638.)

As given in this case, CALJIC No. 8.20 provided:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful," as used in this instruction, means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. (3 CT 874; CALJIC No. 8.20 [emphasis added].)

The jury should have been instructed that, if it found evidence of a sudden heat of passion heat or other condition sufficient to giving rise to a reasonable doubt of deliberation, it must give the defendant the benefit of that doubt and find him not guilty of first degree murder. (*See, e.g., People v. Morse* (1964) 60 Cal.2d 631, 657 [The jury "should give defendant the benefit of any doubt" whether the crime was first or second degree murder.]; *Mullaney v. Wilbur, supra*, 421 U.S. at pp. 697-98.) Because "there is a reasonable likelihood that the jury ... applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally

relevant evidence" the instructional error violated appellant's right to due process of law. (*Boyde v. California* (1990) 494 U.S. 370, 380 [108 L.Ed.2d 316; 110 S.Ct. 1190].)

B. Cognizability.

Without explanation, trial counsel for appellant in a single word agreed that the court should instruct the jury with CALJIC No. 8.20. (9 RT 2066 [The Court: "Next is [CALJIC No.] 8.20." Defense counsel: "Agree."].) Nevertheless, appellant's claims of error are cognizable for several reasons.

First, trial counsel's statement that he agreed to the instruction did not invite the error. The doctrine of invited error applies, "only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness." (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1031, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330.) "The court's duty to apply the correct law in criminal cases can only be negated in those 'special situations' in which defense counsel *deliberately or expressly*, as a matter of trial tactics, caused the error." (*Id.* at p. 1030, quoting *People v. Graham* (1969) 71 Cal.2d 303, 318.) There is nothing on the record to show that trial counsel acted for tactical reasons as opposed to ignorance, mistake, or forgetfulness by not objecting to the language at issue in CALJIC No. 8.20.

Second, an "appellate court may ... review any instruction given, ... even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§1259; *People v. Dennis* (1998) 17 Cal.4th 468, 534-35 ["section 1259 allows us to review--even in the absence of an objection--instructional error that affects substantial rights"].) Appellant's claims is the instructional error impaired the jury's ability to find reasonable doubt of an element of first degree

murder. His claims are therefore cognizable as affecting his substantial, constitutional rights. (*See, e.g., People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7 [A defendant's "claim ... that the instruction is *not* 'correct in law' and that it violated his right to due process of law ... is not of the type that must be preserved by objection."]; *People v. Flood* (1998) 18 Cal. 4th 470, 482, fn. 7 ["Defendant's failure to object to the . . . instruction does not preclude our review for constitutional error."]; *People v. Dunkle* (2005) 36 Cal.4th 861, 929 ["Although defendant did not object to this preinstruction or request clarification, we do not deem forfeited any claim of instructional error affecting a defendant's substantial rights. (§ 1259; [Citations.]"].) .)

Third, the instructional errors violated the trial court's *sua sponte* duty to instruct "the jury correctly." (*People v. Wickersham, supra,* 32 Cal.3d at p. 330; *People v. Malone* (1988) 47 Cal.3d 1, 49 [When the court undertakes to instruct the jury on a legal principle a "'proper consideration of the evidence' [Citation] required that the instructions given be accurate."].) Errors related to sua sponte instructional duties may be raised on appeal regardless of whether there was an objection at trial. (Penal Code, § 1259; *see, e.g., People v. St. Martin, supra,* 1 Cal.3d at p. 531; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20 ["Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty."].)

Fourth, "[a]n appellate court may note errors not raised by the parties if justice requires it." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 152; *People v. Barber* (2002) 102 Cal.App.4th 145, 150 ["constitutional issues may be reviewed on appeal even where defendant did not raise them below"]; *People v. Allen* (1974) 41 Cal.App.3d 196, 202, fn 1 ["the constitutional question can be properly raised for the first time on appeal"].)

Fifth, "[a] matter normally not reviewable upon direct appeal, but which is shown by the appeal record to be vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal." (*People v. Norwood, supra,* 26 Cal.App.3d at p. 153; *accord People v. Mattson, supra,* 50 Cal.3rd at p. 854.)

C. Every Measure Of Current Usage Shows That 'Precluding' Means "Preventing" a Condition, Whereas A Reasonable Doubt Is All That Due Process Requires.

Forty years ago, in *People v. Williams* (1969) 71 Cal.2d 614 ("*Williams*"), this Court recognized that the word "precluding" is inherently ambiguous and may be construed to mean entirely preventing consideration of an issue. In that case, two jurors during voire dire in a death penalty case "were asked whether they had any conscientious scruples that would 'preclude' them from voting for the death penalty in a 'proper case.'" (*Id.* at p. 631.) *Williams* found the ambiguity in the term was prejudicial to the interpretation of the jurors responses during voire dire.

> The word "preclude" can mean "prevent." If the prospective jurors so interpreted the word, then they indicated that in no circumstances could they vote to impose the death penalty in a "proper case." However, we cannot exclude the reasonable possibility that they did not so interpret "preclude;" that word is used to also mean "hinder," "impede," "deter," and "moderate" as well as "prevent," "exclude," "frustrate," and "prohibit." Although the latter group of words appears to be more frequently associated with "preclude," it is clear that people use and understand the word in the former sense as well." (*Id.* at p. 631, footnote omitted.)

Williams granted the defendant a new trial because the "ambiguity inherent" in the word 'preclude' prevented a determination of whether the jurors would automatically vote against the death penalty in a proper case. (Id. at p. 632.) In finding 'preclude' ambiguous, *Williams* noted the definition of that word in a 1961 dictionary. (*Id.* at p. 632, fn. 5 ["It should

be borne in mind that for nontechnical words, such as 'preclude,' dictionaries reflect actual popular usage and not abstractly 'correct' definitions."].)

As explained below, current dictionaries, penal statutes, and decisions by this Court and the United States Supreme Court show that "preclude" is uniformly used today to mean preventing or making impossible a condition or event. Therefore, its use in CALJIC No. 8.20 did not simply create ambiguity; it lowered the prosecution's burden of proof and impaired the jury's ability to find reasonable doubt of first degree murder.

1. Current Dictionary Usage.

Dictionaries of general and legal usage support appellant's position. For example, the Merriam-Webster Online Dictionary defines 'preclude' as: "to make impossible by necessary consequence: rule out in advance." (http://www.m-w.com [emphasis added].)

The American Heritage Dictionary of the English Language (4th ed. 2000) similarly defines 'preclude' as: "1. To make impossible, as by action taken in advance; prevent; See Synonyms at prevent. 2. To exclude or prevent (someone) from a given condition or activity. *Modesty precludes me from accepting the honor.*" (http://www.dictionary.com. [emphasis added].)

Standard legal usage is similarly restrictive. For example, the Merriam-Webster's Dictionary of Law defines 'preclude' as "to prevent or exclude by necessary consequence <the requirement of a marriage ceremony *precludes* the creation of common-law marriages in this jurisdiction>...." (http://www.dictionary.com. [italics in original.)

2. Legislative Usage.

In the California Penal Code, the verb 'preclude' is uniformly used in the preventative sense. (*See, e.g.,* § 70, subd. (c)(1) ["Nothing in this section precludes a peace officer .... from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman for a public entity while off duty from his or her principal employment ...."]; § 423.6, subd. (b) ["This title shall not be construed ... to preclude any county, city, or city and county from passing any law to provide a remedy for the commission of any of the acts prohibited by this title or to make any of those acts a crime."]; § 1319, subd. (b)(2) ["The fact that the court has not received the report required by Section 1318.1, at the time of the hearing to decide whether to release the defendant on his or her own recognizance, shall not preclude that release."]; § 653.23, subd. (d) ["Nothing in this section shall preclude the prosecution of a suspect for a violation of Section 266h or 266i or for any other offense ...."]; § 1326.1, subd. (c) ["Nothing in this section shall preclude the holder of the utility records from notifying a customer of the receipt of the order for production of records unless a court orders the holder of the utility records to withhold notification to the customer upon a finding that this notice would impede the investigation."].) Thus, the Legislature no less than a jury, would understand 'precluding' to refer to preventing something from occurring.

3. California Supreme Court Usage.

The likelihood that jurors understood 'precluding' to mean preventing a condition is also confirmed by this Court's usage of that word. For example, the Court has used 'precluding':

To describe circumstances preventing application of the felony-murder doctrine. (*See, e.g., People v. Lopez* (1971) 6 Cal.3d 45, 53 ["[W]e emphasize that the instant decision, while precluding application of the

felony-murder doctrine to impute malice aforethought to those who kill in the course of an escape, does not hinder the prosecution in showing that the act was done with malice aforethought and was, therefore, murder."]);

To describe circumstances preventing an act from being characterized as a defense or a crime. (*See, e.g., People v. Atkins* (2001) 25 Cal.4th 76, 96 (Brown, J., concurring ["I concur in the determination that arson is a general intent crime precluding a defense of voluntary intoxication."]; *People v. Werner* (1940) 16 Cal.2d 216, 226 ["Under the cited circumstances, the money would have been voluntarily delivered to the appellant with the consent of the owner uninfluenced by artifice, device or false representation, precluding any theft thereof."]);

To describe circumstances preventing presentation of evidence. (*See, e.g., People v. Box* (2000) 23 Cal.4th 1153, 1203 ["Even assuming the trial court erred in precluding the testimony regarding the nature of the charges, it is apparent defendant was not prejudiced at either the guilt or penalty phase."]; *People v. Coleman* (1975) 13 Cal.3d 867, 892 ["Although we have declared a probationer's revocation hearing testimony inadmissible during the prosecution's case in chief, we see no purpose to be served by precluding use of that testimony or its fruits to impeach or rebut clearly inconsistent testimony which the probationer volunteers at his trial."]; *People v. Wells* (1949) 33 Cal.3d 330, 346 ["[T]o construe and apply such legislation as permitting the prosecution to adduce evidence to prove a specific mental state essential to the crime and at the same time precluding the defendant from adducing otherwise competent and material evidence to disprove such particular mental state ... would ... constitute an invalid interference with the trial process."]).

4. United States Supreme Court Usage.

The United States Supreme Court has also uniformly used 'precluding' in the sense of preventing:

To describe circumstances preventing consideration of constitutionally relevant evidence. (*See, e.g., California v. Brown* (1987) 479 U.S. 538, 556 [107 S.Ct. 837; 93 L.Ed.2d 934] ["Experience with the antisympathy instruction therefore reveals that it is often construed as precluding consideration of precisely those factors of character and background this Court has decreed *must* be considered by the sentencer."]; *Fisher v. United States* (1946) 328 U.S. 463, 493 [66 S.Ct. 1318; 90 L.Ed. 1382] ["Precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy."], Murphy, J., dissenting.);

To describe a circumstance preventing jury consideration of a legal issue. (*See, e.g., United States v. United States Gypsum* (1978) 438 U.S. 422, 429 [98 S.Ct. 2864; 57 L.Ed.2d 854] ["These purposes, in defendants' view, brought the disputed communications among competitors within a 'controlling circumstance' exception to Sherman Act liability--at the extreme, precluding, as a matter of law, consideration of verification by the jury in determining defendants' guilt on the price-fixing charge ...."].)

To describe the Fourth Amendment exclusionary rule as preventing consideration of evidence. (*See, e.g., Pennsylvania Board of Probation & Parole v. Scott* (1998) 524 U.S. 357, 357-58 [118 S.Ct. 2014; 141 L.Ed.2d 344] ["[B]ecause the [exclusionary] rule is prudential rather than constitutionally mandated, it applies only where its deterrence benefits outweigh the substantial social costs inherent in precluding consideration of reliable, probative evidence."]);

To describe circumstances preventing liability or legal action. (*See, e.g., Smith v. City of Jackson* (2005) 544 U.S. 228, 239[125 S. Ct. 1536; 161 L. Ed. 2d 410] ["It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"]; *Heck v. Humphrey* (1994) 512 U.S. 477, 498 [114 S.Ct. 2364; 129 L.Ed.2d 383] ["Because allowing a state prisoner to proceed directly with a federal-court § 1983 attack on his conviction or sentence 'would wholly frustrate explicit congressional intent' as declared in the habeas exhaustion requirement, [Citation.], the statutory scheme must be read as precluding such attacks."].).

D. The Use Of 'Precluding' in CALJIC No. 8.20 Was Misleading And Prevented Consideration of Constitutionally Relevant Evidence.

In sum, every measure of current usage demonstrates that 'precluding' means preventing something from occurring, whereas a reasonable doubt of a mental state all that due process requires. (*See, e.g., People v. Morse, supra,* 60 Cal.2d at p. 657; *Mullaney v. Wilbur, supra,* 421 U.S. at pp. 697-98; *Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L. Ed. 2d 182; 113 S. Ct. 2078].) By implying that more than reasonable doubt was required, CALJIC No. 8.20 violated the rule that a jury should not be instructed "in a manner that affirmatively conceals" the true state of the law. (*People v. Arias* (1996) 13 Cal.4th 92, 173.)

In *People v. Nakahara* (2003) 30 Cal.4th 705 ("*Nakahara*"), this Court in a one paragraph discussion addressed the use of "precluding" in CALJIC No. 8.20:

> Finally, defendant challenges an instruction (CALJIC No. 8.20) advising the jury that premeditation and deliberation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding*

> the idea of deliberation...." (Italics added.) Defendant suggests that the word "precluding" is too strong and could be interpreted as requiring him to absolutely preclude the possibility of deliberation, as opposed to merely raising a reasonable doubt on that issue. We have recently approved the foregoing instruction without specifically considering defendant's point. (See *People v. Catlin* (2001) 26 Cal.4th 81, 148, 151, 109 Cal.Rptr.2d 31, 26 P.3d 357.) We think that ... this instruction is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. These instructions make it clear that a defendant is not required to absolutely preclude the element of deliberation. (*Id.* at p. 715.)

Nakahara does not resolve the issues presented here because it did not address the dictionary, statutory, and legal authority discussed above or a claim of the claims of federal constitutional error presented here. *People v. Catlin, supra* ("*Catlin*"), the case relied on by *Nakahara*, also did not discuss these issue. In *Catlin,* the trial court with the agreement of the parties instructed the jury with a modification of CALJIC No. 8.20, "which began: 'All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with *express malice* aforethought is murder of the first degree.' (Italics added.)" (*People v. Catlin, supra,* 26 Cal.4th at p. 148.) Also with the agreement of the parties, the court gave no instruction to define express malice. (*Id.* at p. 149.)

On appeal, the defendant argued in pertinent part that because of these errors the jury could not have properly found him culpable of first degree murder. (*Ibid.* ["As we understand defendant's contention, he claims that a jury that does not know the meaning of the term 'express malice' could not properly have determined that defendant was guilty of first degree murder on a premeditated murder theory, because such a theory requires proof of express malice."].) *Catlin* found that the defendant had

forfeited his claims because the record showed that he had made a conscious, deliberate and tactical choice to request the instructions given. (Id. at p. 150.) On the merits, *Catlin* rejected the defendant's claim because the "evidence was strong that defendant had formed an intent to kill" and the jury's special circumstance finding constituted an express determination that defendant possessed a deliberate intent to kill. (*Id.* at p. 150.) In addition, "the instruction on premeditation adequately informed the jury of the state of mind required for first degree premeditated murder." (Id. at p. 151.)

The issues presented here do not relate to the question of express malice or the definition of premeditation. They address errors in requiring evidence "precluding" deliberation. (3 CT 874.) Thus, *Catlin* does not resolve the issues presented here. (*People v. Scheid* (1997) 16 Cal.4th 1, 17 ["'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. Citation.].'"]; *People v. Heitzman* (1994) 9 Cal.4th 189, 209 ["It is well settled that a decision is not authority for an issue not considered in the court's opinion."].)

The relevant question is what the jury would have understood by the use of 'precluding' in CALJIC No. 8.20. In "'determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine' what a reasonable juror could have understood the charge as meaning.' [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 667; *see also People v. Crossland* (1986) 182 Cal.App.3d 113, 199 ["our concern must be what the jury of laymen may have understood [the court] to mean"].)

Terms used in jury instructions are construed as "commonly understood by those familiar with the English language" (*People v.*

McElleny (1982) 137 Cal.App.3d 399, 403) as reflected in dictionaries. (*People v. Williams, supra,* 71 Cal.2d p. 632, fn. 5 ["It should be borne in mind that for nontechnical words, such as 'preclude,' dictionaries reflect actual popular usage and not abstractly 'correct' definitions."]; *see also* § 7, subd. 16 [Non-technical words and phrases "must be construed according to the context and approved usage of the language …."].) As next explained above, every measure of current usage shows that 'precluding' means preventing a condition. Its use in CALJIC No. 8.20 was constitutional error because reasonable doubt is all that the law requires.

Nakahara found that CALJIC No. 8.20 was "unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof." (*People v. Nakahara, supra,* Cal.4th at p. 715.) Instructions on those issue were given in this case. (3 CT 866, CALJIC No. 2.90 ["Presumption Of Innocence – Reasonable Doubt – Burden Of Proof"].) However, "[i]t has long been held that jury instructions of a specific nature control over instructions containing general provisions." (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) "'It is where the specific instruction is good, and the general one bad, that an error 'is usually held cured.'" (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, quoting 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 329, p. 373)

CALJIC No. 8.20 was the specific instruction addressing the issue of under what circumstances the jury might find that the defendant did not act with deliberation and required evidence "precluding the formation of that mental state. (3 CT 874.) The general instructions on reasonable doubt, the presumption of innocence, and the prosecution's burden of proof applied equally to first and second degree murder. (3 CT 866, CALJIC No. 2.90.) As a result, the jury would have looked to the specific instruction (CALJIC

No. 8.20) to evaluate the question of deliberation. The general instructions, therefore, could not cure the error.

As a result, the use of the term "precluding" in CALJIC No. 8.20 lowered the prosecution's burden of proof by requiring evidence preventing deliberation when reasonable doubt is all that due process required. (*See, e.g., Mullaney v. Wilbur, supra,* 421 U.S. at pp. 697-98; *Sandstrom v. Montana, supra,* 442 U.S. at p. 521 [A defendant is deprived of due process if a jury instruction "had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind."]; *Francis v. Franklin* (1985) 471 U.S. 307, 326 [105 S. Ct. 1965; 85 L. Ed. 2d 344] [reaffirming "the rule of *Sandstrom* and the wellspring due process principle from which it was drawn"].) Accordingly, "there is a reasonable likelihood that the jury ... applied ... [CALJIC No. 8.20] in a way that prevent[ed] the consideration of constitutionally relevant evidence." (*Boyde v. California, supra,* 494 U.S. at p. 380.)

E. The Instructional Error Was Prejudicial To The Jury Finding Of First Degree Of Murder.

Because the instructional error violated appellant's federal constitutional rights to correct instructions on an element of an offense, reversal is required unless Respondent demonstrates that the error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Louis, supra,* 42 Cal.3d at p. 993.) Reversal is required because appellant contested the question of deliberation "and raised evidence sufficient to support a contrary finding ...." (*Neder, supra,* 527 U.S. at p. 19.)

By means of CALJIC No. 8.20, the trial court instructed the jury on one theory of first degree murder, *i.e.*, willful, deliberate, and premeditated murder. (3 CT 874.) "'[D]eliberate' means 'formed or arrived at or

determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, citations omitted.)

As explained above in Argument Sections VI.B. and VI.J. and for brevity incorporated by reference here, appellant contested the issue of whether he acted with deliberation. The record contained substantial evidence from multiple sources (correctional officers, inmate Rogers, and defense experts Rigg and Casas) that appellant acted not with deliberation but in the fear of his own imminent threat of death or great bodily injury if he failed to assault Addis as ordered by the shot-caller for the prison gang. Under those circumstances, a jury could find that even if the evidence did not preclude deliberation there was reason to doubt that mental state.

There was also evidence that appellant acted upon a sudden quarrel or heat of passion sufficient to find reasonable doubt of deliberation even if that evidence did not preclude formation of that mental state. Former inmate Richard Allen testified that he saw appellant and Addis arguing ("having words") although Allen could not hear what they said. (5 RT 1247-48.) In addition, assuming that the first letter admitted in evidence (Exh. No. 66; 5 CT 1227-30) was from appellant and addressed the Addis homicide (*c.f.* Argument Section IV., above), there was also evidence that Addis had threatened "to do me harm" and "to kill me on the yard." (Exh. No. 66; 5 CT 1228.)

"[T]he 'existence of provocation which is not "adequate" to reduce the class of the offense [from murder to manslaughter] may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation' — an inquiry relevant to determining whether the offense is premeditated murder in the first degree, or unpremeditated murder in the second degree." (*People v.*

Carasi (2008) 44 Cal.4th 1263, 1306, citations and internal quotations omitted.) For related reasons, the jury could find that reasonable doubt that appellant acted with deliberation because of evidence that he acted in the heat of passion upon the provocation of a threat to his own life even if that evidence did not preclude the possibility of deliberation. For this additional reason, the use of 'precluding' in CALJIC No. 8.20 was prejudicial error. (*Neder v. United States, supra,* 527 U.S. at p. 19.)

This error also require reversal of the death judgment. As previously explained, the capital crime for which appellant was convicted (Penal Code, § 4500) required the jury to find only what was the equivalent for second degree murder. (See Argument Section VI.J., above.) As discussed further below in Argument Section XIV. and for brevity incorporated by reference here, there is no tenable precedent for affirming a death judgment without a proper finding of the equivalent of a willful, deliberate, and premeditated murder. Accordingly, the prejudicial error in the only instruction given for first degree murder also requires reversal of the death judgment.

VIII.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON IMPLIED MALICE SECOND DEGREE MURDER (CALJIC NO. 8.31)

A. Introduction.

The trial court gave a single instruction to define second degree murder. That instruction defined express malice second degree murder and provided: "Murder of the second degree is also [*sic*] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is sufficient to prove deliberation and premeditation." (3 CT 876; CALJIC No. 8.30 ["Unpremeditated Murder of the Second Degree"].) However, there was

evidence from which a juror could find implied malice rather than express malice and, therefore, that the crime was second degree murder rather than first degree murder.

Accordingly, the trial court should have instructed the jury with CALJIC No. 8.31 ("Second Degree Murder--Killing Resulting From Unlawful Act Dangerous To Life"), as follows:

> Murder of the second degree is also the unlawful killing of a human being when:
>
> 1. The killing resulted from an intentional act,
>
> 2. The natural consequences of the act are dangerous to human life, and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being. (CALJIC No. 8.31.)

"'[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence [and] . . . an erroneous failure to instruct on a lesser included offense constitutes a denial of that right ....' [Citations.] To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Lewis* (2001) 25 Cal.4th 610, 645, citing *People v. Breverman, supra,* 19 Cal. 4th at p. 154; *People v. Barton* (1995) 12 Cal. 4th 186, 196.) In a capital case, the Eighth Amendment and the defendant's right to due process (U.S. Const., 5th & 14th Amends.) also required the trial court to instruct the jury

on lesser included offenses to ensure the reliability of the fact finding by the jury. (*Beck, supra,* 447 U.S. at pp. 637-38.)

"'Substantial evidence is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive." (*People v. Barton, supra,* 12 Cal.4th at p. 201, fn. 8.) The "testimony of a single witness, including the defendant, can constitute substantial evidence." (*People v. Lewis, supra,* 25 Cal.4th at p. 646, citations omitted.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman, supra,* 19 Cal.4th at p. 162; § 1172 ["[T]he jurors are the exclusive judges of all questions of fact submitted to them and the credibility of the witnesses."].) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]" (*People v. Tufunga, supra,* 21 Cal.4th at p. 944.)

B. There Was Substantial Evidence Of Implied Second Degree Murder.

Second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional elements of willfulness, deliberation, and premeditation, or the commission of the enumerated felonies (Penal Code, § 189) that would support a conviction for first degree murder. (*People v. Hansen* (1994) 9 Cal.4th 300, 307.) Malice may be express or implied. "Malice is ... is implied 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' (*Ibid.*) More specifically, 'malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v.*

Robertson (2004) 34 Cal.4th 156, 164, quoting *People v. Lasko* (2000) 23 Cal.4th 101, 107.)

As a form of second degree murder, implied malice murder is a lesser included offense of first degree murder. (*People v. Blair* (2005) 36 Cal.4th 686, 745 ["Second degree murder is a lesser included offense of first degree murder."].) In this case, Officer Esqueda and former inmates Rogers and Allen all testified that the fatal assault was committed by means of an assault with a deadly weapon (a knife) (*See, e.g.,* 5 RT 1085-86, 1100-1101 [Esqueda]; 5 RT 1234-35 [Allen]; 6 RT 1281-82 [Rogers].) Allen also testified that this occurred after he saw appellant and Addis arguing ("having words"), although Allen could not hear what they said. (5 RT 1247-48.) Assuming that the first letter admitted in evidence (Exh. No. 66; 5 CT 1227-30) was from appellant and addressed the Addis homicide (*c.f.* Argument Section IV., above), there was also evidence that Addis had threatened to do harm to appellant on the prison yard." (Exh. No. 66; 5 CT 1228.)

From this, the jury could find reasonable doubt of willful, deliberate, and premeditated murder and that the crime was implied malice second degree murder. In general, an instruction In the Court of Appeal held that it was proper to instruct the jury on implied malice murder because malice could be implied "from the circumstances surrounding the commission of an assault that results in murder ...." (*People v. Goodman* (1970) 8 Cal.App.3d 705, 707, approved on the same ground by *People v. Nieto-Benitez* (1992) 4 Cal.4th 91, 107], disapproved on a different ground by *People v. Beagle* (1972) 6 Cal.3d 441.) Other case law shows that an instruction on implied malice murder is appropriate where a killing occurs by means of a deadly weapon during an argument. (*See, e.g., People v. Love* (1980) 111 Cal.App.3d 98, 104-107 [The trial court properly

instructed the jury on implied malice murder (CALJIC No. 8.31) and that the evidence supported a verdict for that offense where the defendant shot the victim once in the head after they had argued over possession for the keys to a car.].)

Other cases have affirmed findings of implied malice from a stabbing assault with a knife. (*See, e.g., People v. Memro* (1985) 38 Cal.3d 658, 700 [Finding implied malice where the defendant used a knife to cut the victim's throat.]; *People v. Pacheco* (1981) 116 Cal.App.3d 617, 627 [Affirming conviction for second degree murder where the jury could have reasonably found implied malice from a stabbing assault.]; *see also People v. Nieto-Benitez, supra,* 4 Cal.4th at p. 113 [implied malice may be shown by "striking the victim with a knife"].) For analogous reasons, there was sufficient evidence in this case from which the jury could find reasonable doubt of a willful, deliberate, and premeditated murder and therefore be required to reach a verdict of implied malice second degree murder. (*People v. Dewberry, supra,* 51 Cal.2d at p. 556 [Where "reasonable doubt exists as between degrees of the same offense or as between the inclusive and included offense, the jury can only convict of the crime whose elements have been proved beyond a reasonable doubt."].)

C. Reversal Is Required Because Appellant's Conviction For First Degree Murder Is Suspect And The Circumstances Of The Crime At Most Show Implied Malice Rather Than Express Malice.

Because this is a capital case, the trial court's failure to give a lesser included offense instruction supported by the evidence is federal constitutional error. (U.S. Const., 5th, 8th & 14th Amends.; *Beck, supra,* 447 U.S. at pp. 637-38.) Accordingly, reversal is required unless Respondent demonstrates that the error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24.) The omitted instruction

related to the question of whether the crime committed was willful, deliberate, and premeditated murder, which the prosecution was required by proof beyond a reasonable doubt. (*Mullaney, supra,* 421 U.S. at pp. 696-98; *Apprendi, supra,* 530 U.S. at p. 493 ["The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element."].) If "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – [the court] should not find the error harmless. (*Neder v. United States, supra,* 527 U.S. at p. 19.)

The jury convicted appellant of first degree premeditated murder, the only theory of first degree murder presented to the jury. (3 CT 874; 4 CT 916.) In some circumstances, this verdict would be viewed as showing that the failure to instruct the jury on the lesser offense of implied malice murder was not prejudicial. (*See, e.g., People v. Beames* (2007) 40 Cal.4th 907, 928 ["As our decisions explain, '[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.'"], citations and internal quotations omitted.)

However, this rule does not apply because the instructional errors related to the prosecution's theory of first degree murder show that that issue was not properly resolved against appellant. As noted, trial court denied appellant's properly requested instruction that the jury could find reasonable doubt of willful, deliberate, and premeditated murder from evidence of duress. (3 CT 794; see Argument Section VI.H., above; *People v. Anderson, supra,* 28 Cal.4th at p. 784 ["[D]uress can negate premeditation and deliberation, thus resulting in second degree and not first degree murder."].) The court also erroneously instructed the jury that

evidence precluding deliberation was necessary (CALJIC No. 8.20) when only reasonable doubt was required. (See Argument Section VII., above; *see, e.g., Mullaney v. Wilbur, supra,* 421 U.S. at pp. 697-98 [The due process standard of reasonable doubt applies to facts determining "the degree of culpability attaching to an unlawful homicide."].)

The jury was instructed on express malice second degree murder. However, that option did not eliminate the prejudice of the absence of an implied malice murder instruction because it required the specific intent to kill. (3 CT 876, CALJIC No. 8.30 ["Murder of the second degree is also the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation."].) The record shows that appellant struck Addis only once with the knife, a circumstance which typically reflects implied malice rather than express malice. (*People v. Nieto-Benitez, supra,* 4 Cal.4th at p. 113 [implied malice shown by "striking the victim with a knife"]; *People v. Memro, supra,* 38 Cal.3d at p. 700 [Finding implied malice where the defendant used a knife to cut the victim's throat]; *People v. Pacheco, supra,* 116 Cal.App.3d at p. 627 [Affirming conviction for second degree murder where the jury could have reasonably found implied malice from a stabbing assault.].)

Other evidence from multiple witnesses shows that although appellant committed the stabbing he did so without the specific intent to kill but involuntarily and with the intent to avoid death or serious bodily injury at the hands of the many gang members on the prison yard. (See Argument Section VI.B., above.) Accordingly, a properly instructed jury would have found that appellant did not commit a willful, deliberate, and premeditated murder or act with the specific intent to kill Addis. Instead, if the jury found implied malice from the use of the knife with deliberate disregard of

the danger to life (CALJIC No. 8.31) it would have convicted appellant of second degree murder.

Accordingly, the denial of an implied malice instruction was prejudicial to the defense of the case. (*Neder v. United States, supra,* 527 U.S. at p. 19; *Chapman v. California, supra,* 386 U.S. at p. 24.) For the reasons previously explained, this error also requires reversal of the death judgment because there is no tenable precedent for sentencing a defendant to death for a crime less than first degree murder and appellant's conviction for section 4500 did not require proof of first degree murder. (*See* Argument Section VI.J., above; Argument Section XIV., below.)

IX.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THREE FORMS OF THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER SUPPORTED BY THE EVIDENCE.

A. Introduction.

The trial court refused to instruct the jury as requested on voluntary manslaughter on the theory that the jury could find the absence of malice from evidence of duress. (*See* Argument Section VI.F., above; 3 CT 793-94 [requested instructions].) Regardless, under the standards set forth above in Argument Section VIII.A., the trial court had a sua sponte duty to instruct the jury on three theories of voluntary manslaughter: sudden quarrel or heat of passion; imperfect self-defense; and assault with a deadly weapon without malice aforethought. The trial court's failure to do so violated the Eighth Amendment and appellant's rights to due process, to trial by jury, and to a fair trial. (Cal. Const., Art. I, §§ 7, subd. (a), 15, 16; U.S. Const., 5th, 6th & 14th Amends.; *Beck, supra,* 447 U.S. at pp. 637-38; *People v. Lewis, supra,* 25 Cal.4th at p. 645 ["'[A] defendant has a

constitutional right to have the jury determine every material issue presented by the evidence [and] . . . an erroneous failure to instruct on a lesser included offense constitutes a denial of that right ....' [Citations.]'].)

B. There Was Sufficient Evidence To Instruct The Jury On Voluntary Manslaughter Based Upon Sudden Quarrel Or Heat Of Passion.

"Manslaughter, a lesser included offense of murder, is an unlawful killing without malice. (§ 192; *People v. Ochoa* (1998) 19 Cal.4th 353, 422 [79 Cal. Rptr. 2d 408, 966 P.2d 442].) Malice is presumptively absent when a defendant kills 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), provided that the provocation is sufficient to cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) "[A] trial court must instruct on provocation/heat of passion as a theory of manslaughter, if supported by substantial evidence, even when the defendant objects on the basis that the instructions would conflict with his theory of the defense." (*Ibid.*)

For voluntary manslaughter, "there is no specific type of provocation required by section 192 and ... verbal provocation may be sufficient." (*People v. Berry* (1976) 18 Cal.3d 509, 515, citing *People v. Valentine* (1946) 28 Cal.2d 121, 141-44.) The passion aroused "need not mean 'rage' or 'anger' but may be any '[violent], intense, high-wrought or enthusiastic emotion" and may result from "a series of events over a considerable period of time.'" (*Ibid.*, quoting *People v. Borchers* (1958) 50 Cal.2d 321, 328, 329.) Under these standards, sufficient evidence to instruct the jury on sudden quarrel/heat of passion voluntary manslaughter comes from two sources.

As noted, after appellant approached the card table where Addis was playing cards, former inmate Richard Allen testified that he saw appellant

and Addis arguing ("having words"), although Allen could not hear what they said. (5 RT 1247-48.) In addition, assuming for argument's sake only that the trial court properly admitted the first letter proffered by the prosecution as written by appellant as addressing the Addis homicide (*c.f.* Argument Section IV., above), the letter stated that the victim had decided "to disrespect me, and threaten harm to me" and "to kill me on the yard ...." (Exh. No. 66, 5 CT 1228.)

This is evidence from which a jury could find that a reasonable person in the defendant's position would "act rashly and without deliberation, and from passion rather than judgment." (*People v. Cruz, supra,* 44 Cal.4th at p. 664.) Accordingly, the court should have instructed the jury on sudden quarrel/heat of passion voluntary manslaughter. (*People v. Valentine, supra,* 28 Cal.2d at p. 139 ["'[I]it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion.'"], quoting *People v. Logan, supra,* 175 Cal. at p. 48; italics omitted.)

C. The Same Evidence Was Sufficient Evidence To Support An Instruction On Voluntary Manslaughter On A Theory Of Imperfect Self-Defense.

Malice is presumptively absent "when a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury ... [and] the doctrine of 'imperfect self-defense' applies to reduce the killing from murder to voluntary manslaughter." (*People v. Cruz, supra,* 44 Cal.4th at p. 664, citing *People v. Michaels* (2002) 28 Cal.4th 486, 529; *In re Christian S.* (1994) 7 Cal.4th 768, 771, 773.) "'Imperfect self-defense obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was

necessary to avoid one's own death or serious injury at the victim's hand.'" (*People v. Randle* (2005) 35 Cal.4th 987, 995, quoting *People v. Rios* (2000) 23 Cal.4th 450, 461.)

"The same sua sponte instructional obligation applies to unreasonable/imperfect self-defense" as to voluntary manslaughter based upon sudden quarrel or heat of passion. (*Ibid.*) As described above, the record contained evidence from which a jury could find reasonable doubt of malice aforethought and that appellant acted in imperfect self-defense after appellant and Addis had argued and Addis had threatened harm to appellant and to kill him on the yard. Accordingly, the trial court should also have instructed the jury on imperfect self-defense voluntary manslaughter. (*Ibid.*; *People v. Flannel* (1979) 25 Cal.3d 668, 684)

D. The Trial Court Should Also Instructed The Jury On Voluntary Manslaughter Based Upon Evidence Of An Assault With A Deadly Weapon Without Malice Aforethought.

In *People v. Garcia* (2008) 162 Cal.App.4th 18 ("*Garcia*"), Division Seven of the Court of Appeal for the Second Appellate District recently held that a fatal assault with a deadly weapon without malice is voluntary manslaughter. The reasoning of *Garcia* shows that appellant's jury should have been instructed on this additional theory of voluntary manslaughter. In *Garcia*, the defendant "struck Aristeo Gonzalez in the face with the butt of a shotgun, causing Gonzalez to fall, hit his head on the sidewalk and die." (*Id.* at p. 22.) The jury found the defendant not guilty of murder but guilty of voluntary manslaughter with a related firearm enhancement. On appeal, the defendant argued in pertinent part that the trial court erred in refusing his request to instruct the jury on involuntary manslaughter. (*Ibid.*; *see also id.* at pp. 25-26.)

The Court of Appeal rejected this claim and concluded: "An

unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter. Because an assault with a deadly weapon or with a firearm is inherently dangerous, the trial court properly concluded the evidence would not support Garcia's conviction for involuntary manslaughter and, therefore, did not err in declining to instruct the jury on involuntary manslaughter as a lesser included offense of murder." (*Id.* at p. 22.) The *Garcia* court reached this conclusion by addressing the following question: "An unintentional killing, without malice, during the commission of a felony is not murder as defined by Penal Code section 187, subdivision (a), and does not fall within the statutory definition of either voluntary or involuntary manslaughter. What is it?" (*Id.* at p. 28.)

The crime was not second degree felony murder because "[w]hen, as here, the only underlying, inherently dangerous felony committed by the defendant is an aggravated assault, however, the [second degree] felony-murder rule does not apply under the merger doctrine first recognized in *People v. Ireland* (1969) 70 Cal.2d 522 ....." (*Id.* at p. 29.) The crime was not involuntary manslaughter because that crime must be predicated either on the commission of a misdemeanor (§ 192, subd. (b)) or a non-inherently dangerous felony. (*Id.* at pp. 29-30, citing *People v. Burroughs* (1984) 35 Cal.3d 824, 835-836, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) Therefore, the *Garcia* court concluded that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id.* at p. 31.)

In this case, there was evidence from which the jury could find that appellant committed a fatal assault with a deadly weapon (a knife) without malice aforethought. As noted, there was evidence that that although appellant committed the stabbing he did so without malice but involuntarily

and with the intent to avoid death or serious bodily to himself from the many gang members on the prison yard. (See Argument Section VI.B., above; *see, e.g.,* (Perkins on Criminal Law (2d ed. 1969) at p. 951 [The "state of mind of one who takes an innocent life as the only means of saving his own, while not guiltless, is certainly not malicious."].)

In addition, assuming the admissibility of the first letter (*c.f.* Argument Section VI., above), there was evidence that appellant and Addis had argued after Addis had threatened to do him harm and to kill him. (See Section B., above.) This is presumptive evidence of the absence of malice. (*People v. Cruz, supra,* 44 Cal.4th at p. 664; *People v. Randle, supra,* 35 Cal.4th at p. 995; *People v. Rios, supra,* 23 Cal.4th at p. 461.) Accordingly, a reasonable juror could have found that even if appellant knowingly committed an assault with a deadly weapon that caused the death of Addis, the crime was voluntary manslaughter rather than murder. Accordingly, an appropriate instruction was required. (*Ibid.*; *People v. Garcia, supra,* 162 Cal.App.4th at p. 31

E. The Denial Of Voluntary Manslaughter Instructions Was Prejudicial To Appellant's Murder Conviction And The Death Judgment.

In a capital case, the failure to instruct the jury on a lesser included offense in a capital case is federal constitutional error. (*Beck, supra,* 447 U.S. at pp. 637-38.) Accordingly, reversal is required unless Respondent demonstrates that the error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24.) Each of the omitted theories of voluntary manslaughter related to an element of the crime of murder which the prosecution was required by proof beyond a reasonable doubt. (*Mullaney, supra,* 421 U.S. at pp. 696-98; *Apprendi, supra,* 530 U.S. at p. 493 ["The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element."].) If

"the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – [the reviewing court] should not find the error harmless." (*Neder v. United States, supra,* 527 U.S. at p. 19.)

As summarized above, the issue of appellant's mental state at the time of the assault was contested by evidence that the assault occurred when appellant and Addis had argued after Addis had previously threatened to do appellant harm and to kill him. Under those circumstances, malice "is presumptively absent ...." (*People v. Cruz, supra,* 44 Cal.4th at p. 664.) However, the jury received no instruction that permitted it to find a lesser crime. The verdict of first degree murder does not show that the question of malice was properly resolved against appellant because that verdict was flawed by two instructional errors.

As noted, trial court denied appellant's properly requested instruction that the jury could find reasonable doubt of willful, deliberate, and premeditated murder from evidence of duress. (3 CT 794; see Argument Section VI.H., above; *People v. Anderson, supra,* 28 Cal.4th at p. 784 ["[D]uress can negate premeditation and deliberation, thus resulting in second degree and not first degree murder."].) The court also erroneously instructed the jury that evidence precluding deliberation was necessary (CALJIC No. 8.20) when only reasonable doubt was required. (See Argument Section VII., above; *see, e.g., Mullaney v. Wilbur, supra,* 421 U.S. at pp. 697-98 [The due process standard of reasonable doubt applies to facts determining "the degree of culpability attaching to an unlawful homicide."].)

The jury was given the option of finding express malice second degree murder. However, that instruction required a specific intent to kill with malice aforethought. (CALJIC No. 8.30, 3 CT 876.) However, the evidence in three respects showed the absence of malice because of either

heat of passion, imperfect self-defense, and from the circumstances of the use of a deadly weapon. In sum, the record shows multiple respects in which appellant raised sufficient evidence to support a finding contrary to the verdict of first degree murder and reversal is required. (*Neder, supra,* 527 U.S. at p. 19.)

These instructional errors also require reversal of the death judgment. As previously explained (see Argument Section VI.J., above) and discussed in detail below in Argument Section XIV., there is no tenable precedent for affirming a death judgment for an unlawful killing without also finding the equivalent of a willful, deliberate, and premeditated murder. Accordingly, the prejudice from the failure to instruct on any of the theories of voluntary manslaughter also requires reversal of the death judgment.

X.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT WAS ENTITLED TO THE BENEFIT OF THE REASONABLE INTERPRETATION OF EXPERT TESTIMONY AS A FORM OF CIRCUMSTANTIAL EVIDENCE.

A. Introduction.

The trial court gave two instructions to inform the jury on the standards for consideration of circumstantial evidence. CALJIC No. 2.01 ("Sufficiency of Circumstantial Evidence – Generally") in pertinent part provided that "if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that

interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt."[21] (*Ibid.*)

CALJIC No. 2.02 ("Sufficiency of Circumstantial Evidence to Prove Specific Intent") in pertinent part provided: "if the evidence as to specific intent and/or mental state] permits two reasonable interpretations, one of which points to the existence of the specific intent and/or mental state and the other to its absence, you must adopt that interpretation which points to its absence." (3 CT 847.)[22] In the following discussion, appellant will refer to these core concepts as the "benefit of the interpretation rule."

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21. As given here, CALJIC No. 2.01 stated in full: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (3 CT 846.)

22. As give here, CALJIC No. 2.02 stated in full: "The specific intent and/or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in Counts 1, 2, or 2 unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent and/or mental state but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to specific intent and/or mental state] permits two reasonable interpretations, one of which points to the existence of the specific intent

The trial court erred by failing to inform the jury that the benefit of the interpretation rule applied to expert testimony as a from of circumstantial evidence. Trial counsel for appellant did not object to this instructional error. Nevertheless, this claim of error is cognizable under the standards discussed above in Argument Section VII., B. In addition, appellant emphasizes that the "court has a duty to instruct sua sponte on the general principles of law relevant to the evidence. This includes the duty to instruct on those general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885; *accord People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 ["In a criminal case the trial court is required to instruct the jury of its own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence."].)

On this basis, this Court has held that the trial court even in the absence of a request must instruct the jury on the proper scope of the benefit of the interpretation rule. (*People v. Yrigoyen, supra,* 45 Cal.2d at p. 49 [Holding that "in the absence of a request by defendant, the trial court erred in failing to give an instruction that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion."]; *see also People v. Bender* (1945) 27 Cal.2d 164, 176 [Addressing a claim of instructional error related to the benefit of the interpretation rule where the "defendant requested no instructions."].) For all these reasons, appellant's claims related to the benefit of the interpretation rule are cognizable.

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and/or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent and/or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (3 CT 847.)

B. Expert Testimony Is A Form Of Circumstantial Evidence.

Expert testimony was a substantial component of both prosecution case and the defense case in the guilt phase of the trial. The prosecution called Glen Willet, a Senior Special Agent for the Department of Corrections Special Services Unit, as an expert on white prison gangs in support of its view of the evidence related to prison gangs. (7 RT 1701-02, 1719-20, foll.)

The defense called two experts in the guilt phase of the trial: William Steven Rigg, who been a Department of Corrections officer for 17 years and retired with the rank of captain, who testified about the dynamics of prison gangs and the staff's mishandling of the assaults on Addis and Matthews; and Anthony L. Casas, who had been employed by the Department of Corrections for 22 years and retired as an associate warden at San Quentin State Prison, and testified about the control of inmates by prison gangs and the staff's mishandling of the situation on the yard at the time of the Addis homicide. (8 RT 1992-1998, 1999-2016.)

Under settled law, expert testimony is a form of circumstantial evidence. Expert testimony "is testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved." (*People v. Goldstein* (1956) 139 Cal.App.2d 146, 153; *see also Barker v. Gould* (1898) 122 Cal. 240, 243 ["The conclusion of each expert witness was but an opinion formed by him from his knowledge of the science applicable to the subject matter of the investigation ...."]; 1 Witkin, *California Evidence*, Opinion Evidence § 1, p. 528 (4th ed. 2000) ["An opinion is an inference from facts observed."].)

As such, expert opinion testimony is a form of circumstantial evidence. (*See, e.g., People v. Jones* (1954) 42 Cal.2d 219, 222

[Characterizing opinion testimony of a psychiatrist as "indirect evidence."]; *People v. Zerillo* (1950) 36 Cal.2d 222, 233 [opinion of a chemist concerning the purity of a food product was circumstantial evidence]; *People v. Goldstein, supra,* 139 Cal.App.2d at p. 154 ["the testimony of Officer Marshall as an expert was circumstantial evidence"]; *People v. Naumcheff* (1952) 114 Cal.App.2d 278 ["The only circumstantial evidence involved was the testimony of two handwriting experts, one for the People and one for the appellant."].)

Federal law is in accord. (*See, e.g., Hunt v. Cromartie* (1999) 526 U.S. 541, 547 [119 S.Ct. 1545; 143 L.Ed.2d 741] [characterizing expert affidavit as a form of circumstantial evidence]; *Coleman v. Alabama* (1964) 377 U.S. 129, 130 [84 S.Ct. 1152; 12 L.Ed.2d 190] ["[T]he evidence of guilt was circumstantial, based largely upon expert testimony given by the state's toxicologist."].) Accordingly, the trial court should have instructed the jury that expert testimony was a form of circumstantial evidence to which the benefit of the interpretation rule applied. (*People v. Daniels, supra,* 52 Cal.3d at p. 885 [The trial court has a "duty to instruct on those general principles relating to the evaluation of evidence."]; *People v. Yrigoyen, supra,* 45 Cal.2d at p. 49 ["In a criminal case the trial court is required to instruct the jury of its own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence."].)[23]

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23. The same principle is recognized in federal courts where a standard instruction provides generally that, "[i]f the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt - the jury must, of course, adopt the conclusion of innocence." (1 E. Devit & C. Blackmar, *et al.*, Federal Jury Practice and Instructions (4th Ed. 1992) § 12.10, at p. 354; *United States v. Diaz* (2nd Cir. 1999) 176 F.3d 52, 101-102 [approving Devit & Blackmar model instruction § 12.10]; *United States v. Goodlett* (6th Cir. 1993) 3 F.3d 976,

C. The Instructional Error Violated Appellant's Federal Constitutional Rights.

The failure to instruct the jury that the benefit of the interpretation rule applied to expert testimony in several respects violated appellant's federal constitutional rights. First, it impaired the reliability of the jury verdict in violation of appellant's Eighth Amendment rights. (*Ford v. Wainwright, supra,* 477 U.S. at p. 411 ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."]; *Beck, supra,* 447 U.S. at p. 638 [Eighth Amendment rules requiring reliability to the penalty determination also applies to instructional errors "that diminish the reliability of the guilt determination."].)

Second, "[t]he jury's 'core function ... [is] making credibility determinations in criminal trials. ... Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury ....'" (*United States v. Scheffer* (1998) 523 U.S. 303, 313 [118 S. Ct. 1261; 140 L. Ed. 2d 413]; *see also People v. Loop* (1954) 127 Cal.App.2d 786, 802 ["The credibility, weight, and effect of the testimony by the expert were for the jury."].) By limiting the application of the benefit of the interpretation rule, the trial court eliminated factual issues from the jury's consideration and reduced the prosecution's burden of proof in violation of appellant's rights to due process of law, to trial by jury, and to a fair trial. (U.S. Const., 5th, 6th &14th Amends.; *see, e.g., United States v. Gaudin, supra,* 515 U.S. at pp. 514-15 [Jury instructions that undermine the factfinder's responsibility to apply the law to the facts violate the Sixth Amendment and Due Process Clause of the Fourteenth Amendment]; *Sullivan, supra,* 508 U.S. at pp. 277-278 [Jury instruction having the effect

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979 [same].)

of lowering the prosecution's burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution.]; *Sandstrom v. Montana, supra,* 442 U.S. at p. 521 [same].)

Accordingly, appellant had a right to jury instructions to ensure that the jury properly considered the evidence under the applicable law. (*See, e.g., Gaudin, supra,* 515 U.S. at pp. 514-515 ["[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."]; *Martin v. Ohio* (1987) 480 U.S. 228, 234 [107 S.Ct. 1098; 94 L.Ed.2d 267] [Due process requires jury instructions "to convey to the jury that all of the evidence ... must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime."].) For all these reasons, the improper limitation on the benefit of the interpretation rule to circumstantial violated appellant's federal constitutional rights. (U.S. Const., 5th, 6th, 8th & 14th Amends.)

D. The Instructional Errors Were Prejudicial Because A Reasonable Interpretation Of The Evidence Was That The Prosecution Failed To Sustain Its Burden Of Proof.

Because the instructional errors violated appellant's federal constitutional rights, reversal is required unless Respondent demonstrates "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24.) "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884; 114 L.Ed.2d 1432], overruled on another point by *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4. [112 S.Ct. 475; 116 L.Ed.2d 385].)

Even if prejudice is assessed under state law, reversal is required because "'there is a *reasonable chance*, more than an *abstract possibility*'" that the error adversely affected appellant. (*Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1050, citation omitted.) The salient issue at the guilt phase of the trial on the capital/murder charges was appellant's intent with respect to the assault on Addis and the significance of the evidence of the involvement of the NLR prison gang. On the basis of the testimony of Glen Willett, the prosecution's prison gang expert, the prosecutor contended that appellant committed the murder because it would elevate his status as an NLR gang member and showed that he was trying to get into the AB gang.[24] (7 RT 1736-37.)

Apart from Willett's opinion testimony, there was no evidence from percipient witnesses to support these inferences. None of the guards or former inmates who knew and interacted with appellant testified that he was trying to get into the AB gang or that they had any reason to believe that appellant had committed the crime to elevate his status with the NLR gang. More fundamentally, the testimony from the defense experts showed that a reasonable interpretation of the gang evidence was favorable to the defense.

As detailed above in Argument Section VI.B. and for brevity incorporated by reference here, the record shows that the Green the NLR shot caller had ordered the "hit" on Addis, that Green demanded and orchestrated having Addis brought to the yard by the guards, and that at the time the prison yard was dominated by 12-15 NLR/AB gang members. (5

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24. This portion of Willett's testimony was based on the two letters which the prosecution continued were from appellant to Lowery which the trial court admitted over appellant's objection. (See Argument Section IV., above.) For purposes of this argument only, appellant will assume that they could be relied on by the expert. The importance of the letters to Willett's testimony confirms the prejudice from their erroneous admission. (*Ibid.*)

RT 1067-68, 1133, 1182; Exh. No. 50, 4 CT 1145-46.) There was evidence that appellant associated with the NLR gang. However, as the defense expert Anthony L. Casas explained, someone like appellant who was small and inexperienced and without a background in violent criminal activity would need a gang for protection in the prison environment. (8 RT 2002-03.)

When the gang asked the inmate to become involved in dangerous activity, he could not avoid getting involved without putting himself at risk. (8 RT 2001-03.) "You try to get out or don't do what you are told, you are taken out." (8 RT 2003-04.) If an inmate refused to carry out an order to commit an assault, "[h]e can easily get killed. As a matter of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005.) Based on the evidence of how the prison staff had handled Addis, an inmate in appellant's position would conclude that it would have been useless to turn to the staff for safety. (8 RT 2010-11.)

Steve Rigg, the second defense prison gang expert, explained that the "shot callers" within the gang had the authority to tell others what to do, including whether to commit an assault. (8 RT 1940.) If an inmate did not carry out the assault, he would put himself at risk of being assaulted and even murdered. (8 RT 1941.) Under the circumstances of this case, if appellant had failed to assault Addis, he would have been "a walking dead man" right there on the prison yard. (8 RT 1942.) "[I]t would have been very difficult for [appellant] to receive assistance from staff, especially knowing how the unit was being operated." (8 RT 1946.) Even Willett, the prosecution's gang expert, acknowledged that if an inmate did not cooperate

with the gang's program, the NLR or AB would retaliate against him. (7 RT 1730.)

A reasonable interpretation of this evidence was that appellant acted without malice but involuntarily and out of fear of death or serious bodily injury in which case he could not be convicted of murder or the capital offense. (See Argument Section VI.E., above; *see, e.g.,* Perkins on Criminal Law (2d ed. 1969) at p. 951 [The "state of mind of one who takes an innocent life as the only means of saving his own, while not guiltless, is certainly not malicious."].)

At a minimum, a properly instructed jury would have found that a reasonable interpretation of the evidence was that appellant was not guilty of a willful, deliberate, and premeditated murder but a lesser offense. (*People v. Anderson, supra,* 28 Cal.4th at p. 784 ["We agree that a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances."]; *People v. Dewberry, supra,* 51 Cal.2d at p. 556 [Where "reasonable doubt exists as between degrees of the same offense or as between the inclusive and included offense, the jury can only convict of the crime whose elements have been proved beyond a reasonable doubt."].) Accordingly, the instructional error must be considered prejudicial to appellant's capital/murder convictions under state or federal law. (*Chapman v. California, supra,* 386 U.S. at p. 24; *Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1050.)

The instructional error was also prejudicial at the penalty phase of the trial. The same evidentiary principles govern the jury's review of circumstantial evidence at the penalty phase of a trial. (*See, e.g., People v. Carter* (2003) 30 Cal.4th 1166, 1218-19 [In the penalty phase, the trial court should "instruct the jury with applicable evidentiary instructions from CALJIC Nos. 1.00 through 3.31."].) Relying on section 190.3, subdivision

(a), the prosecution contended that the circumstances of the crime showed that death was the appropriate penalty.[25] (*See, e.g.,* 14 RT 3453, 3459-66.)

The testimony of the experts shows that even if appellant committed a violation of the section 4500, and assuming that the prosecutions view of the evidence was reasonable, it was equally reasonable to conclude that the circumstances of capital crime did not support the imposition of the death penalty. This conclusion is confirmed by the expert testimony at the penalty phase which was summarized above in Argument Section VI.B. and for brevity is incorporated by reference here.

Appellant emphasizes that appellant medical records showed that he suffered from substantial mental health problems, including a schizoid personality disorder, post-traumatic stress disorder, and bipolar disorder. (13 RT 3246-49.) Given the nature of those mental health problems, Dr. Lipson testified that prison posed multiple problems for appellant. (13 RT 3256.) Dr. Lantz explained that appellant's schizoid personality disorder made him easily susceptible to manipulation by others. (13 RT 3109.) Dr. Gawin testified that at the time of the Addis homicide appellant was receiving no treatment or medication for his bipolar disorder. Without treatment, the stress of the prison environment can cause someone who is bipolar into acting violently in both the manic and hypomanic phases of the disease. (13 RT 3123, 3157-58.) Dr. Lipson explained that appellant's violent activity reflected the "diathesis stress model" of behavior. That meant that if someone with an untreated mental disorder was put in a violent and very stressful environment, the stress will often send the person "over the edge" so that he acts out in a violent way. (13 RT 3257.)

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25. Section 190.3 in pertinent part provides: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The circumstances of the crime of which the defendant was convicted ...."

Accordingly, a properly instructed jury would have found that a reasonable interpretation of the evidence related to the circumstances of the crime showed that this was not one of the narrow category of cases for which the law's ultimate sanction should be imposed. (*See, e.g., Kennedy v. Louisiana* (2008) ___ U.S. ___ [128 S. Ct. 2641, 2649-50; 171 L. Ed. 2d 525, 538] ["[C]apital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them 'the most deserving of execution.'"], citations and internal quotation omitted]; *see also* Argument Section XIV., below.) Accordingly, the instructional error on the application of the benefit of the interpretation rule to expert testimony also requires reversal of the death judgment.

XI.

AS REQUESTED BY APPELLANT, THE TRIAL COURT SHOULD HAVE MODIFIED CALJIC NO. 2.11.5 TO ADDRESS THE TREATMENT OF THE ACCOMPLICE GREEN BY THE DEPARTMENT OF CORRECTIONS.

A. Introduction.

To address unjoined perpetrators of the capital/murder offense (Counts 1 & 2), the trial court over appellant's objection instructed the jury with CALJIC No. 2.11.5 ("Unjoined Perpetrators Of Same Crime") as follows: "There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial." (3 CT 849.)

Appellant objected that while that instruction was generally a correct statement of the law, "in the context of the evidence that was being offered in this case, it could be a bit confusing ...." (9 RT 2198.) Appellant therefore requested the following modification: "'You may, however, consider the actions taken against Mr. Green by members of the Department of Corrections to the extent same have been proved in this case as they may bear upon issues of fact which you are asked to determine.'" (9 RT 2198-99.) The prosecution objected that this language was confusing. In addition, the prosecution argued that the decision of whether to charge a person with a crime was a matter within the discretion of the District Attorney and that the requested modification would detract from that principle. (9 RT 2199-2200.)

Defense counsel responded that he did not intend to discuss the decision by the District Attorney of whether or not to charge Green. "I am simply asking the Court to clarify the behavior of the Department of Corrections towards Green, independent of any prosecutorial decisions that may be relevant to the facts of the case." (9 RT 2200.) Without explanation, the court denied the modification requested by appellant. (*Ibid.* ["The requested modification of [CALJIC No.] 2.11.5 is denied."].)

Under the standards discussed above in Argument Section VI., the trial court's refusal to instruct the jury as requested violated appellant's state and federal constitutional rights to a fair trial, to trial by jury, to present a defense, and for reliable fact finding in capital case proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., Ford v. Wainwright, supra,* 477 U.S. at p. 411 ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."].) Appellant's

constitutional claims are cognizable under the standards set forth above in Argument Section VII.B.

B. An Appropriate Instruction Was Required Because Green's Role In The Assault On Addis And The Department Of Correction's Treatment Of Green Was Not An Extraneous Factor In The Case.

An instruction violates the federal constitution if there is a "reasonable likelihood" that it prevented jury "consideration of constitutionally relevant evidence." (*Boyde v. California, supra,* 494 U.S. at p. 380.) In general, the "purpose of ... [CALJIC No. 2.11.5] is to focus the jury's attention on an individualized evaluation of the evidence against the person on trial without extraneous concern for the fate of other participants irrespective of their culpability." (*People v. Cox* (1991) 53 Cal. 3d 618, 668; *accord People v. Williams* (1997) 16 Cal.4th 153, 226.) Green's role in the assault on Addis and the Department of Corrections treatment of Green was not an extraneous concern to the circumstances of this case.

To the contrary, jury consideration of this evidence was directly relevant to appellant's defense to the capital/murder charges. As noted, the only defense offered by appellant was that he acted under duress and he had no alternative but to carry out the order to assault Addis because the circumstances showed that the staff was complicit in the assault and/or had ceded control over the white inmates to Green as the shot-caller for the NLR/AB gang. (*See* Argument Section VI.B., above.) The record showed that on August 3, 1997, most of the officers on duty at Palm Hall knew that Addis's safety was at risk because he had been told by other inmates to roll of the tier. This included, Officer Esqueda, the tower officer assigned to monitor yard two, Sergeant Sams, the senior officer on duty at Palm Hall that day, and several other officers on duty that day. (5 RT 1136-37

[Officer Esqueda]; 6 RT 1323-24 [Sergeant Sams]; 5 RT 1182-83 [Officer Valencia]; 8 RT 1784-85 [Officer Ginn].)

In fact, the guards on duty discussed the risk to Addis at the morning briefing before the guards started bringing the inmates to the yard on August 3, 1997. (Exh. No. 52; 4 CT 1152-53; 6 RT 1324, 1333-35, 1337-38.) As Sergeant Sams, the officer in charge testified, "officers or staff were telling me that [Addis] might not be in favorable conditions to go" to the yard. (6 RT 1324.) After all the other white inmates had been put on the yard except Addis, Green demanded that Addis be brought to the yard and demanded to see the sergeant to ensure that this happened. (5 RT 5148 ["'I want to talk to the f'ing Sergeant, the youngster has to come out.'"]; *see also* 5 RT 1079-80; 1134-35, 1164-65.)

Sergeant Sams then sent Officer Ginn to Addis's cell to tell him that he had been cleared to go to the yard. (6 RT 1323-24; 8 RT 1782-83.) Based on a statement taken on March in March 1of 2001, three and a half years after the assault, the prosecution presented evidence that Addis said that he wanted to go to the yard. However, neither the report by Officer Gin or the four reports prepared by Sergeant Sams shortly after the incident documented any such conversation with Addis. (6 RT 1328-1332; 8 RT 1794-95; *see* Suppl. CT 1 [8/03/97 DCD-827-C, Crime Incident Report by Correctional Officer Ginn].)

In any event, when Addis was brought to the yard and released, Officer Maldonado told Sergeant Sams that Addis was going to be killed. (*See, e.g.,* 9 RT 2126-27 ["'[A]n inmate was to be killed. We all knew it. I told the supervisor that he would be killed if we let him out of his cell.'"]; 9 RT 2127 ["'I told my sergeant that they're going to kill him.'"].) After Maldonado told this to Sergeant Sams, he shrugged his shoulders, told Maldonado to get to work and walked away. (*Ibid.* ["'Come on we got a lot

of work to do.'"]; 9 RT 2138-41; Exh. No. 74, 5 CT 1246 ["Interview of Officer R. Maldonado"]; Exh. No. 73, 5 CT 1245 [excerpt of Maldonado interview].) Later, Green told Addis to go ahead and play cards at the table in the yard where he was stabbed by appellant with Green at his side. (9 RT 2127; 5 RT 1084-86, 1100-1101.)

The testimony by the defense experts on procedures for handling inmates showed that Sergeant Sams and the other officers on duty had completely mishandled the situation. Steven Rigg worked for 17 years with the Department of Corrections, including four years at C.I.M., and retired as an acting captain. (8 RT 1911-13.) The record showed that Green never should have been allowed to disrupt the yard by demanding for Addis to be brought there. (8 RT 1925-26.) Green's agitated state and his yelling and demanding for Addis would lead any reasonable officer to conclude that there would be trouble on the yard and that Green was involved. (8 RT 1926-27.)

Once the sergeant was told that Addis was going to be killed, the appropriate action would have been to instruct the tower gunner to put down the yard and to have Addis removed from the yard. (8 RT 1927.) The sequence of events showed that Sergeant Sams "possibly wanted this inmate assaulted" because he failed to take action to protect Addis. (8 RT 1966-67.) Other evidence showed there was reason why the staff failed to protect Addis. In a prison rules violation hearing on July 4, 1997, Addis had been found guilty of assaulting a prison staff member on May 27, 1997, after which he was put in administrative segregation. (Exh. No. 46, 4 CT 1159 [Addis placed in administrative segregation on May 27, 1997 for "battery on staff".]; Exh. No. 65, 5 CT 1225-26 ["Committee notes inmate was found guilty on 7/4/97 and received 150 day BCL."].)

Rigg's testimony was supported by that of Anthony L. Casas, who worked over 22 years for the C.D.C. and retired as a deputy warden at San Quentin State Prison. (8 RT 1992-99.) The events leading up to the Addis homicide were filled with "red flags" any of which "should have alerted staff member that works these kinds of units that there was a problem. Collectively it's hard to describe how screwed up the whole situation was." (8 RT 2009.) A staff member has the authority to deprive an inmate of yard time if the inmate's safety is in jeopardy. This is called a "suspension of privilege pending an investigation to see if the inmate's life is in danger. ... I just don't understand why it wasn't done." (8 RT 2007.) When Officer Maldonado told her sergeant, "'You know what, Sarge, they're going to take him out,'" the appropriate action would have been to immediately take Addis and Green off the yard and conduct an investigation. The sergeant's hands were not tied when he was told that an inmate was going to be assaulted on the yard. (8 RT 2010.)

On October 10, 1997, the Department of Corrections at an administrative hearing found that Green ordered a "hit" on Addis and that he had engaged in a conspiracy to commit battery resulting in death. (Exh. No. 50, 4 CT 1145-46.) The penalty imposed for this offense was a 360 day credit loss without a SHU term. (*Ibid.*) Nevertheless, Green did not serve the time for his credit loss. He was returned to the "main line" tier and then paroled 20 days after the hearing on October 30, 1997. (8 RT 1974-75.) In effect, the C.D.C. "did not punish [Green] for being involved in a conspiracy as charged, yet they found him guilty." (8 RT 1975-76.)

Given these circumstances, the Department of Corrections handing of Green's role in the assault on Addis was not an extraneous concern in assessing appellant's level of culpability for the crime. (*People v. Cox, supra,* 53 Cal. 3d at p. 668.) Accordingly, the trial court should have

modified CALJIC No. 2.11.5 in the manner requested by the defense and informed the jurors that "'[y]ou may, however, consider the actions taken against Mr. Green by members of the Department of Corrections to the extent same have been proved in this case as they may bear upon issues of fact which you are asked to determine.'" (9 RT 2198-99.)

C. Reversal Of Appellant's Capital/Murder Convictions Is Required Because The Denial Of The Requested Instruction Impaired Appellant's Ability To Present A Defense.

The trial court's failure to give the requested instruction in support of appellant's defense was constitutional error under the standards previously discussed. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; Argument Section VI., above; *see, e.g., United States v. Mathews, supra,* 485 U.S. at p. 63 [The defendant has a right "to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."]; *accord Bradley v. Duncan, supra,* 315 F.3d at p. 1098 ["'It is well established that a criminal defendant is entitled [by due process] to adequate instructions on the defense theory of the case.'"], quoting *Conde v. Henry, supra,* 198 F.3d at p. 739; *Kornahrens v. Evatt, supra,* 66 F.3d at p. 1354 ["if a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it"].)

Because of the federal constitutional errors, reversal is required unless Respondent shows that the error was harmless beyond a reasonable doubt. (*Chapman, supra, supra,* 386 U.S. at p. 24.) Respondent can not meet this burden for several reasons. The trial court had previously denied appellant's four requested instructions based on evidence of duress from the prison gang. (*See* Argument Section VI.) The unadorned CALJIC No. 2.11.5 instruction given by the court effectively advised the jury that the

evidence related to the Department of Corrections' handling of the shot-caller Green was irrelevant.

However, that evidence was relevant to show that appellant had no choice but to comply with the order to assault Addis because he had nowhere to turn. The yard was filled with NLR/AB gang members under the authority of Green which meant that appellant could himself have been killed on the yard if he had failed to assault Addis. (8 RT 1941-42, 2003-04.) Moreover, appellant could not turn to the staff for protection because they were either complicit with Green in wanting Addis's assaulted and/or that they had ceded control over the white inmates to the NLR shot caller despite actual knowledge that Addis would be assaulted and all the red flags from Green that it would occur that morning on the yard. (8 RT 1946, 2010-11.) Green's power was confirmed by the fact that the Department of Corrections released Green on parole less than three months after the incident, despite an administrative finding that he was guilt of a conspiracy to commit a battery resulting in death. (Exh. No. 50, 4 CT 1145-46; 8 RT 1974-76.)

From this evidence, a reasonable juror would have found that appellant had no choice but to carry out the assault ordered by Green because he could not expect help or protection from the Department of Corrections and, therefore, that appellant acted without malice aforethought as required by the murder (Count 1) and capital crime (Count 2; Penal Code, § 4500). At a minimum, a properly instructed jury would have found reasonable doubt that appellant committed a willful, deliberate, and premeditated murder. Accordingly, the instructional error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) For the reasons previously explained, this instructional error also requires reversal of the death judgment because there is no tenable

precedent for sentencing a defendant to death for a crime less than first degree murder and appellant's conviction for section 4500 did not require proof of first degree murder. (See Argument Section VI.J., above; Argument Section XIV., below.)

XII.

DUE PROCESS REQUIRES REVERSAL OF THE JUDGMENT FOR COUNTS ONE AND TWO BECAUSE OF THE CUMULATIVE EFFECT OF THE TRIAL ERRORS.

The sections above explain the prejudicial effect of each of the guilt phase trial errors. Their cumulative effect of these errors provides a separate ground for reversal. (*See, e.g., People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Purvis* (1963) 60 Cal.2d 323, 348, 353 ["Although each of the above errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted."], *overruled on another point by People v. Morse* (1964) 60 Cal.2d 631, 648-649.)

The cumulative effect of the errors also violated appellant's right to due process (U.S. Const., 5th & 14th Amends.) to fundamental fairness because they rendered his defense "far less persuasive than it might have been ...." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302-303 [93 S.Ct. 1038; L.Ed.2d 297]; *see also Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [98 S.Ct. 1930; 56 L.Ed.2d 468] ["the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"]; *Burns v. Wilson* (1953) 346 U.S. 137, 142 [73 S.Ct. 1045; 97 L.Ed. 1508] ["Petitioners' applications, as has been noted, set forth serious charges -- allegations which, in their cumulative

effect, were sufficient to depict fundamental unfairness in the process whereby their guilt was determined ...."].)

Prejudice is present if the errors have an "inherently synergistic effect" on the verdict. (*Carlyle v. Mullin* (9th Cir. 2003) 317 F.3d 1196, 1220-21.) The errors in this case synergistically impaired appellant ability to defend against the capital/murder charges. At the outset, the prosecution withheld evidence that Addis had assaulted a correctional officer and also a tape recording showing that Officer Maldonado told Sergeant Sams that Addis would be assaulted. (Argument Section I.; 4 RT 958, 964-965.) This occurred despite the fact that the defense had "made it quite clear that the information would have been relevant ...." (4 RT 966-967.) The trial court denied appellant's motion to sever the charges related to the later, unrelated incidents. (Counts 3 & 4.) This improperly enabled the prosecution to argue to the jury that the other crimes showed that appellant acted with premeditation and deliberation in the assault on Addis. (Counts 1 & 2; Argument Section II.)

The case presented multiple issue related to inmate safety and survival that were central to the defense of the case. However, the trial court refused to permit appellant to include questions about these issues on the jury questionnaire used for voire dire. (Argument Section III.) The admission of hearsay evidence by means of unauthenticated secondary evidence lessened the prosecution's burden of proof and improperly permitted the prosecution to argue that appellant's penalty phase defense was contrived. (Argument Section IV.) Just before closing arguments, the court dismissed a juror who appellant wanted to sit in deliberations. (Argument Section V.)

These errors were compounded by a series of instructional errors, that deprived appellant of a verdict that the Addis homicide was less than

first degree murder and further lowered the prosecution's burden of proof. (Argument Sections VI., VII., VIII., IX., X. & XI.) The result of these errors combined synergistically to deprive appellant of a fair opportunity to defend against the charges as he was entitled to do under state and federal law. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

Accordingly, the cumulative effect of the guilt phase trial errors provides an additional ground for reversal.

PENALTY PHASE ARGUMENTS

XIII.

APPELLANT'S CONVICTIONS FOR TWO COUNTS OF VIOLATING SECTION 4500 MUST BE REVERSED BECAUSE HE WAS NOT "UNDERGOING A LIFE SENTENCE" AT THE TIME OF THE ALLEGED CRIMES.

A. Introduction.

The jury convicted appellant of two counts of violating section 4500: the capital charge (Count 2) of the August 3, 1997, fatal assault on inmate Addis; and the September 18, 1997, non-fatal assault on inmate Matthews (Count 3). (1 CT 44-45; 4 CT 918, 920.) Section 4500 applies only if the defendant was "undergoing a life sentence" at the time of the alleged offense. (Penal Code, § 4500.) The records admitted in evidence from the Department of Corrections showed that appellant's life sentence did not begin until February 10, 2000, more than two years after the alleged assaults at issue in Counts 2 and 3. (Exh. No. 42, 4 CT 1096 ["Life Term Starts 2-10-2000"], 4 CT 1099 ["Life term begins 2/10/2000"].) Accordingly, appellant's state and federal rights to due process of law, to trial by jury, and to reliability in capital proceedings require reversal of his

convictions and death sentence for violating section 4500. (Cal. Const., Art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const. 5th, 6th, 8th & 14th Amends.)

B. The Evidence And Applicable Law Shows That Appellant Was Not Undergoing A Life Sentence At The Time Of The Crimes.

The filing of a notice of appeal is sufficient to present a claim of insufficient evidence. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) Questions of the sufficiency of the evidence and of the construction of a statute are independently reviewed. (*People v. Lewis* (2001) 25 Cal.4th 610, 656 ["The United States Supreme Court has explained [that] 'a criminal defendant ... is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts.'"], quoting *United States v. Powell* (1984) 469 U.S. 57, 67 [105 S.Ct. 471; 83 L.Ed.2d 461]; *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 357 ["Because the issue involves the proper interpretation of a statute and its application to undisputed facts, we do [so] through independent review."].)

The Fourteenth Amendment right to due process of law and the Sixth Amendment right to trial by jury "together ... indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' [Citation.]" (*Apprendi v. New Jersey* (2000) 530 US 466, 476-77 [120 S.Ct. 2348; 147 L.Ed.2d 435].) The same requirement is imposed by the state constitution. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Under both state and federal law, a conviction must be reversed unless there is evidence of reasonable, credible, and solid value of each element of the offense. (*Ibid.*; *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [99 S.Ct. 2781; 61 L.Ed.2d 560].)

Section 4500 in pertinent part provides: "Every person while

undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole." (Penal Code, § 4500, emphasis added.) "It is the prisoner's status on the day of the offense which brings him within this classification." (*Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890; *see also In re Carmichael* (1982) 132 Cal. App. 3d 542, 546 ["That status of lifer at the time of the assault is what the Legislature was focusing on in attaching the severe penalties which flow from a section 4500 conviction."].)

The prosecution alleged and presented evidence that the assault on inmate Addis (Count 2) occurred on August 3, 1997, and the assault on inmate Matthews (Count 3) occurred on September 17, 1997. (1 CT 44-45; 5 RT 1057; 6 RT 1508.) The prosecutor recognized that "[o]ne of the elements that I need to prove for two charges is that Mr. Landry was, in fact, a life prisoner at the time of the assault on both Mr. Addis and Mr. Matthews ...." (7 RT 1643.) To prove that fact, the prosecution offered in evidence a section 969, subdivision (b), packet for appellant from the Department of Corrections that was marked as Exhibit No. 42. (*Ibid.*)

Defense counsel offered to stipulate that the documents in Exhibit No. 42 were authentic and that they pertained to appellant "without need of further identification." (7 RT 1645, 1646-47.) The prosecution agreed to the stipulation and the trial court instructed the jury that the parties had stipulated to the authenticity of the records in Exhibit No. 42 and that they pertained to appellant. (7 RT 1657-58.) With the agreement of both parties, Exhibit No. 42 was admitted in evidence and it is included in the clerk's transcript. (4 CT 1095; 8 RT 1892, 1985-86.)

In pertinent part, Exhibit 42 showed that on June 19, 1992, appellant pled guilty in Los Angeles County Superior Court (Case No. NA010945) to first degree residential burglary (Penal Code, § 459). (Exh. No. 42; 4 CT 1095, 1108.) The court sentenced appellant to a total term of eight years as follows: the low tern of two years for the burglary, plus five years for a prior first degree burglary conviction (Penal Code, § 667, subd. (a)) and one year for a prison term within the preceding five years (Penal Code, § 667.5, subd. (b).) On June 28, 1995, the Department of Corrections calculated that February 10, 2000, was earliest possible release date ("EPRD") for the sentence on the burglary. (Exh. No. 42, 4 CT 1099; 4 CT 918, 920; *see In Re Tate* (2006) 135 Cal.App.4th 756, 759 [defining "EPRD"].)

On September 11, 1995, appellant pled guilty in Imperial County (Case No. CF0334) to possession of a deadly weapon by a person confined at a penal institution (Penal Code, § 4502). (Exh. No. 42, 4 CT 1110.) The sentence for that felony offense is normally "two, three, or four years, to be served consecutively." (Penal Code, § 4502.) However, because the felony conviction was a third "strike" (after two prior convictions for first degree burglary),[26] the court sentenced appellant to a term of 25 years-to-life with the possibility of parole, consecutive to appellant's pre-existing term for burglary. (Penal Code, § 667, subd. (e)(2)(ii); Exh. No. 42, 4 CT 1099, 1110 ["This term is to be served consecutive with term now serving in #NA010945."];.)

On November 13, 1995, the Department of Corrections noted that in connection with the Imperial County case, appellant had received an "additional commitment ... with a term of 25 years-to-life pursuant to PC

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26. At trial, the parties stipulated that appellant had two prior convictions for first degree burglary. (8 RT 1990.)

667(e)" and that the "[l]ife term begins 2/10/2000." (4 CT 1099.) On December 20, 1997, after the alleged violations of section 4500 at issue in this case, the Department of Corrections again noted that appellant's "Life Term Starts 2-10-2000". (4 CT 1096.)

The determination of the start date for the life term derived from section 1170.1, which in pertinent part provides: "In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceedings." (Penal Code, § 1170.1, subd. (c); emphasis added.)

The court's have uniformly construed and applied section 1170.1(c) according to mean what it plainly states, *i.e.*, that when a consecutive sentence is imposed for an offense committed in prison, the consecutive term for that offense "runs from the time the defendant otherwise would have been released from prison." (*People v. Rosbury* (1997) 15 Cal.4th 206, 211.)

For example, in *People v. McCart* (1982) 32 Cal.3d 338 ("*McCart*"), this Court addressed the predecessor statute (former § 1170.1, subd. (b)),[27]

27. Effective September 30, 1982, former subdivision (b) of section 1170.1, was recodified by statutory amendment as current subdivision (c). (Stats., 1982, ch. 1515, §§ 1, 1.5; *People v. Logsdon* (1987) 191 Cal.App.3d 338, 342.)

which contained the same language as current section 1170.1(c).[28] *McCart* held that, when the defendant inmate committed two violations of section 4502 the sentence on the second offense was subject to the normal rule that one-third of the statutorily prescribed middle term should be imposed. (§ 1170.1, subd. (a).) However, the aggregate term for both violations of section 4502 "must commence at the end of the longest of the prisoner's previously imposed terms." (*People v. McCart, supra,* 32 Cal.3d at p. 343, footnote omitted.)

Many cases construing both the current (§ 1170.1, subd. (c)) and former (§1170.1, subd. (b)) statutes are in accord (*See, e.g., In re Curl* (1983) 149 Cal.App.3d 236, 240 [By section 1170.1, subd. (c), "the Legislature intended that in-prison offenses, *sentenced consecutively*, should begin to run from the expiration of the prior term."], original emphasis; *People v. Tate* (2006) 135 Cal.App.4th 756, 764-65 ["It is well settled that under section 1170.1(c), a term for an in-prison offense or multiple in-prison offenses begins to run at the end of the prison term imposed for the original out-of-prison offenses."]; *In re Thompson* (1985)

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28. "Section 1170.1, subdivision (b) reads as follows: 'In the case of any person convicted of one or more felonies committed while such person is confined in a state prison, or is subject to reimprisonment for escape from such custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all such convictions which such person is required to serve consecutively shall commence from the time such person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a), except that the total of subordinate terms may exceed five years. The provisions of this subdivision shall be applicable in cases of convictions of more than one offense in different proceedings, and convictions of more than one offense in the same or different proceedings." (*People v. McCary, supra,* 32 Cal.3d at p. 341.)

172 Cal.App.3d 256, 260 ["the correctional authorities are required to hold petitioner until he would otherwise have been released from prison and then commence his consecutive term for the in-prison felonies"]; *People v. Galliher* (1981) 120 Cal.App.3d 149, 153 [Former § 1170.1, subd. (b), required "the term for escape [(Penal Code, § 4530, subd. (b))] to be treated as a *separate and additional* term to be served consecutive to the remainder of the term under which the person convicted was already confined."], original emphasis.)

The courts have reached the same conclusion in addressing whether a prior prison term enhancement (Penal Code, § 667.5) may be imposed upon a sentence imposed for a felony committed in prison. They have held that the term for the in-prison offense was separate from the term for the offense that put the defendant in prison and was not part of a continuous term. For example, in *People v. Cardenas* (1987) 192 Cal.App.3d 51 ("*Cardenas*"), the defendant was charged with second degree burglary. He admitted three prior felony convictions, one of which was a violation of section 4502. As in this case, the defendant in *Cardenas* committed the violation of section 4502 while he was serving a prison term for the earlier burglary and, pursuant to section 1170.1, subdivision (c), the defendant received a consecutive sentence for the section 4502 offense. The jury convicted the defendant of the new burglary and the trial court imposed a one-year prior prison term enhancement (§ 667.5, subd. (b)) for each of the three prior convictions, including the section 4502 offense. (*Id.* at p. 55.)

On appeal, the defendant argued that "the prison terms for his 1981 burglary conviction and 1982 in-prison [(§ 4502)] felony were served during a single continuous prison commitment; therefore, only one section 667.5 enhancement should be imposed." (*People v. Cardenas, supra,* 192 Cal.App.3d at p. 55.) The Court of Appeal rejected this argument and held

that the sentence for the violation of section 4502 was a separate prison term and not part of the uncompleted sentence being served for the prior burglary. "Section 667.5, subdivision (g) (subdivision (g)), defines a prior separate prison term as 'a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.'" (*Id.* at pp. 55-56.) "Generally, the number of separate prison terms available for enhancement is determined by identifying the 'continuous completed' terms of prison incarceration served." (*Id.* at p. 56.) "The question here is whether a consecutive term imposed for a felony committed in prison comprises the same continuous prison term as the 'uncompleted' sentence being served." (*Id.* at p. 58.)

The *Cardenas* Court noted that section 1170.1, subdivision (c), provides that "[p]ersons committing in-prison felonies are subject to full-term consecutive sentences and are required to serve their term for such conviction after the completion of their earlier prison commitment." (*Id.* at p. 58, citing, *inter alia*, *People v. McCart, supra,* 32 Cal.3d at pp. 341-343.) "Like the enhancement statute, [section 1170.1] subdivision (c) uses the term 'new offenses,' construed in section 667.5 as referring to current crimes committed by persons previously convicted of felony offenses. This interpretation is equally applicable to prison inmates committing new felony offenses while in custody." (*Ibid.*)

"In addition, the language of [section 1170.1] subdivision (c) requiring the consecutive 'term of imprisonment . . . commence from the time such person would otherwise have been released from prison,' shows the Legislature intended something more than ordinary consecutive

sentencing." (*Id.* at p. 59.) Accordingly, "[t]he required 'continuous completed period of prison incarceration' in [section 667.5] subdivision (g) needed to constitute a separate prison term for purposes of enhancement is equal to the stated prison commitment for the particular offense. [Citation.] Prison commitments commenced after a previous term is 'completed' constitute separate periods of incarceration." (*Ibid.*; emphasis added.)

Multiple cases have reached the same conclusion. (*See, e.g., People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1409-1410 [Where the defendant committed a battery while in prison for his previous conviction of assault, the sentence served for the in-prison battery could be used as a prison prior for enhancement (§ 667.5) because § 1170.1, subd. (c) required the consecutive sentence for the in-prison offense "to commence *after* the completion of the term for which the defendant was originally imprisoned."]; *People v. Carr* (1988) 204 Cal. App. 3d 774, 780-781 [Where the defendant committed a non-violent escape from prison (§4532, subd. (b)) while incarcerated for burglary, the consecutive term for a subsequent in-prison offense was not part of the aggregate sentence for the out-of-prison crime, but a distinct and separate sentence to which additional enhancements may properly be added.]; *People v. White* (1988) 202 Cal. App. 3d 862, 870 [Where the defendant committed an escape from prison with violence (§4531, subd. (b)) while incarcerated for murder, robbery, and kidnapping, the consecutive term for the in-prison offense did "not become part of the aggregate prison term imposed for those offenses which were committed 'on the outside.'"].)

In *People v. Langston* (2004) 33 Cal.4th 1237 ("*Langston*"), this Court granted review in a case where the Court of Appeal reached the contrary conclusion. In *Langston,* the jury convicted the defendant of first degree burglary (§§ 459, 460, subd. (a)) and of receiving stolen property (§

496, subd. (a)). The trial court found that defendant had served three prior prison terms within the meaning of section 667.5(b), one of which included a conviction for an escape from prison (§ 4530, subd. (b)) where the defendant had been reimprisoned with a sentence consecutive to his current term for the burglary and receiving stolen property. The trial court stayed the prior prison term enhancement for the escape because "it was unclear whether the term was separately served under section 667.5(b). The Court of Appeal modified the judgment to strike the enhancement and, as modified, affirmed the judgment." (*Id.* at p. 1241.)

Langston granted the Attorney General's petition for review to address the question whether "the enhancement provision include and apply to a completed, separate prior prison term served for an escape (§ 4530, subd. (b))? In other words, if the defendant is reimprisoned on the term he was serving at the time of the escape, and given an additional, consecutive term for the escape itself, is the entire term of imprisonment, interrupted by the escape, considered *one* separate prison term or *two*?" (*People v. Langston, supra,* 33 Cal.4th at p. 1240.) *Langston* concluded that the answer was two. Accordingly, "a prior separate prison term for escape should be treated no differently than any other prior prison term served for a felony offense, and thus should qualify for the one-year enhancement under section 667.5(b)" (*Ibid.*)

"[W]e discern no legislative intent to include within the original prison term any *additional but separate* term resulting from the escape, as opposed to a continuation of the original term following reimprisonment for escape. In other words, by reason of section 667, subdivision (g), the defendant's original interrupted term is not deemed separate and apart from the *remaining* term that must be completed following his reimprisonment. But the section would not include the consecutive time served for the

escape itself, because new crimes committed while in prison are treated as separate offenses and begin a new aggregate term." (*Id.* at p.1242, emphasis added, citing *People v. Carr, supra,* 204 Cal. App. 3d 774, 780-781; *People v. White, supra,* 202 Cal. App. 3d at pp. 867-871; *People v. Walkkein, supra,* 14 Cal.App.4th at pp. 1409-1410; *People v. Cardenas, supra,* 192 Cal. App. 3d at p. 59.)

"The foregoing construction is consistent with section 1170.1, subdivision (c), stating that consecutive sentences imposed for additional crimes *committed in prison* are deemed to commence when the prisoner would otherwise have been released. That section provides in pertinent part: 'In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, *the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison.*' (*Ibid.*, italics added.)" (*Id.* at pp. 1242-43.) Thus, while the term interrupted by the escape was a continuation of the original term, the sentence for the escape was a separate prison term. (*Ibid.*)

The defendant had relied "on section 1170.1, subdivision (a), requiring imposition of an aggregate term of imprisonment for all consecutive felony convictions, whether in the same proceeding or later, '[e]xcept as otherwise provided by law.' But as the Attorney General observes, this subdivision is inapplicable to in-prison offenses, which are governed by section 1170.1, subdivision (c), requiring the term of imprisonment for such offenses to 'commence from the time the person would otherwise have been released from prison,' *i.e.*, after completion of

the original term." (*Id.* at p. 1246, emphasis added.)

In sum, the plain language of section 1170.1(c) and the forgoing cases show that, at the time of the alleged assaults in this case, appellant was serving a term of years for his burglary conviction and not "undergoing a life sentence" as required by section 4500.

C. *People v. McNabb* Does Not Alter The Conclusion That Appellant Was Not Undergoing A Life Sentence At The Time Of The Alleged Crimes.

In *People v. McNabb* (1935) 3 Cal. 2d 441 ("*McNabb*"), defendant McNabb and four codefendants were convicted of violations of former section 246, the predecessor to section 4500, and received the then-mandatory death sentence.[29] Former section 246 similarly included as an element that the defendant was undergoing a life sentence at the time of the in-prison assault: "'Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death.'" (*People v. McNabb, supra,* 3 Cal.3d at p. 443, quoting former § 246.)

On appeal, defendant McNabb argued that he was not undergoing a life sentence. The record showed that McNabb had been convicted of two separate counts of first degree robbery which at that time carried an indeterminate sentence of "'not less than five years'." (*Id.* at p. 444, citing former Penal Code, § 213.) The sentences on the two robberies were later fixed at fifteen and five years. (*Id.* at p. 452.) After McNabb was released on parole, he was convicted of two additional counts of first degree robbery and sentenced to two indeterminate life sentences to run consecutively to

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29 Former section 246 was repealed in 1941 and replaced with section 4500. (Stats. 1941, ch. 106, § 15, p. 1124.)

the remaining determinate terms for the prior robbery convictions. While serving the remainder of those determinate terms, McNabb and the codefendant prisoners committed the violation of section 246. (*Id.* at pp. 453-454.)

On appeal, McNabb argued that because the trial court pursuant to former section 669 (quoted below) ordered the life sentences for the new robbery convictions to be served consecutive to the uncompleted fixed terms for the prior offenses, he was not undergoing a life sentence at the time of the alleged violation of section 246. (*Id.* at pp. 456-57.) The *McNabb* court rejected this claim for two reasons. First, the fact that the defendant was required to complete the prior terms "did not suspend the force of the commitments upon which he was held. Had he been discharged or released from serving the uncompleted terms by a writ of *habeas corpus* or by pardon he would have still been held as a prisoner serving a life term on said later commitments." (*Id.* at p. 457, emphasis added.)

Second, the *McNabb* Court held that section 669 was not germane to the issue. At the time of the alleged offense in 1934, section 669 provided: "When any person is convicted of two or more crimes, the judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be." (Stats 1931 ch. 481 § 4.)

McNabb concluded that section 669, "is not germane to the subject. It has to do with time served in terms less than life. It does not purport to

say that a person is not undergoing a life sentence when delivered on a certified copy of the judgment of conviction to the warden of the state prison. The prisoner is undergoing a life sentence whatever may happen and he is held as such a prisoner by virtue of said judgment. The lawmakers had no thought of attempting to impose additional time to the longest possible span of time or of supplementing the infinite with the finite. The whole is greater than any of its parts. The proposition contended for reduces itself to an absurdity. The lawmakers had no thought of a life sentence when the section was adopted. It was dealing with consecutive terms of imprisonment for a term of years." (*Id.* at p. 457.)[30]

McNabb does not foreclose appellant's claim for two reasons. First, unlike the defendant in that case, if the judgment was reversed on the burglary that put appellant in state prison, appellant would not have been serving a life sentence for his subsequent violation of section 4502. As noted, the sentence for a violation of section 4502 is normally a consecutive term of two, three, or four years. Appellant received a life term pursuant to the three strikes law (§ 667, subd. (e)(2)(ii)). (Exh. No. 42, 4 CT 1110, ["Additional commitment received for Imperial Co. Case CF0334 with a term of 25 yrs. To life pursuant to P.C. 667(e). Life term."].) If appellants 1992 first degree burglary conviction had been reversed, he would only have had one strike prior for first degree burglary. In that case, appellant's sentence for the violation of section 4502 would have been double the determinate term for that offense, not a life term. (§ 667, subd. (e)(1) ["If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony

30. In *People v. Superior Court (Bell)* (2002) 99 Cal.App.4th 1334, the Court of Appeal for the Sixth District followed *McNabb* in rejecting a similar claim based on the current version of section 669.

conviction."].)

Second, appellant's claim is not based on section 669, but on section 1170.1, subdivision (c). The latter statute specifically addresses when the sentence begins for a felony committed while confined in state prison. The Legislature concluded that the sentence "shall commence from the time the person would otherwise have been released from prison." (§ 1170.1, subd. (c).) Applied here, this means that the Department of Corrections properly determined that appellant was not undergoing a life sentence until February 10, 2000, more than two years after the alleged violations of section 4500. (4 CT 1096, 1099.)

Several rules of statutory construction support this conclusion. When the language of a statute is clear, it is controlling and must be followed. (*See, e.g., People v. King* (2006) 38 Cal.4th 617, 622 ["'If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.' [Citation.]"]; *Connecticut Nat. Bank v. Germain* (1992) 503 U. S. 249, 253-54 [112 S.Ct. 1146; 117 L.Ed.2d 391 ["We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Citations]."].) There is nothing ambiguous about the language of section 1170.1, subdivision (c) and it is, therefore, controlling.

In addition, the Legislature enacted section 1170.1 after the enactment of section 669. The latter, which originates from 1927, addresses the general rules for concurrent and consecutive sentencing. (See Deering's California Penal Code, § 669, History and Amendments.) Section 1170.1 was originally enacted in 1976 and became operative on July 1, 1977, as part of the Determinate Sentencing law to specifically address the commencement of sentences for in-prison felonies. (*People v. McCart, supra,* 32 Cal.3d at p. 340, fn. 1.) "It is an old and well-settled

rule that when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail." (*People v. Dobbins* (1887) 73 Cal. 257, 259; *accord In re McManus* (1954) 123 Cal.App.2d 395, 397 [To the extent that two statutes conflict, "the latest legislative expression on the subject" controls.]; *People v. Bustamante* (1997) 57 Cal.App.4th 693, 701 ["Where two laws on the same subject, passed at different times, are inconsistent with each other, the later act prevails."].)

Moreover, section 1170.1, subdivision (c), unlike section 669 (in both its current and former versions), specifically addresses the subject of the commencement of the term of imprisonment for in-prison felonies. "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed." (*People v. Giordano* (2007) 42 Cal.4th 644, 670, citation and internal quotations omitted.) Thus, however section 669 may be construed, section 1170.1, subdivision (c), shows that appellant was not undergoing a life sentence at the time of the alleged violations of section 4500 in this case.

Even assuming some ambiguity in the law governing when appellant's life term commenced, any ambiguity must be resolved in appellant's favor. Under the rule of lenity, "it is the policy of this state to have courts construe penal laws as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law at issue ...." (*People v. Gardeley* (1996) 14 Cal.4th 605, 622; *accord United States v. Santos* (2008) ___ U.S. ___ [128 S.Ct. 2020, 2026; 170 L.Ed.2d 912, 920 ["The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."].)

A construction favorable to appellant is also mandated by due process. (U.S. Const., 5th & 14th Amends.) The United States Supreme Court has recognized a "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity. [Citations.] This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Citations.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. *United States v. Gradwell*, 243 U.S. 476, 485 (1917)." (*Dunn v. United States* (1979) 442 U.S. 100, 112-113 [99 S.Ct. 2190; 60 L.Ed.2d 743].)

Accordingly, any uncertainty in the law must be resolved in appellant's favor to find that he was not undergoing a life sentence at the time of the alleged violations of section 4500. For all these reasons, appellant's state and federal rights to due process of law, to trial by jury, and to reliability in capital proceedings require reversal of his convictions for violating section 4500 (Counts 2 & 3) and the death sentence imposed for Count 2. (Cal. Const., Art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const. 5th, 6th, 8th & 14th Amends.)

XIV.

SECTION 4500 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT BECAUSE IT DID NOT SUFFICIENTLY NARROW THE CLASS OF LIFE PRISONERS ELIGIBLE FOR THE DEATH PENALTY OR PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING THE EXTREME CASES WHERE DEATH IS THE APPROPRIATE PUNISHMENT.

A. Introduction.

The prosecution by information charged appellant with a single circumstance to make him eligible for the death penalty: a violation of section 4500. (Count 2, 1 CT 44.) Section 4500 in relevant part provides: "Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years." (Penal Code, § 4500.)

On September 25, 1998, appellant demurred to the information on the ground that section 4500 was unconstitutional on its face and as applied to him. (Penal Code, § 1004, subd. 4; 1 CT 54, 57.) First, appellant argued that section 4500 was unconstitutional because it "imposes a disproportional punishment in violation of the Eighth Amendment of the Federal Constitution." (1 CT 56.) Second, section 4500 was "unconstitutionally vague and arbitrary [and], therefore, violates the

defendant's federal and state constitutional right to due process of law and further constitutes cruel and unusual punishment under the Eighth Amendment to the Federal Constitution." (1 CT 56, 61-65.)31

In particular, appellant objected that section 4500 did not require a first degree murder, whereas the other special circumstances defined by section 190.2 all required a conviction for first degree murder. Section 4500 should be reserved for offenders who had committed serious, violent crimes carrying a life sentence. However, appellant's life sentence had been imposed by the "three strikes" law (Penal Code, § 667, subd. (e)) without any prior conviction for a violent felony. His first two prior convictions were for theft-related residential burglaries. (Penal Code, §§ 459, 460.) His third "strike" was a weapon possession offense. (§ 4502; 1 CT 57-61; 1 RT 151-52.)

Based on preliminary research, an inter-jurisdictional comparison showed that section 4500 made the death penalty available for a much broader class of prisoners and under lower standards than in other states. (1 CT 58-59, 61.) In sum, section 4500 failed to meaningfully limit the availability of the death penalty or to make a principled distinction between those who deserve the death penalty and those who do not. Therefore, section 4550 was vague and overbroad and resulted in the arbitrary and disproportionate enforcement of the death penalty in violation of due

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31. On May 27, 1998, appellant demurred to the complaint on similar grounds. (1 CT 17-25.) On June 10, 1998, the court found "a sufficient statement of the law and as such denies the demurrer." (1 RT 11; 1 CT 34.) However, it also found that the demurrer was premature because the prosecution had not yet decided whether it would seek the death penalty. Therefore, there were insufficient facts before the court to rule on the issue. (*Ibid.*; *see* 1 CT 26-27 [Prosecution "Opposition to Demurrer To Felony Complaint" stating "no decision has been made regarding this defendant facing the death penalty."].)

process (U.S. Const., 14th Amend) and the Eighth Amendment. (1 CT 57-58, 61-64; 1 RT 151-52, citing, *inter alia*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed.2d 398, 100 S.Ct. 1759]; *Zant v. Stephens* (1983) 462 U.S. 862, 877 [77 L. Ed. 2d 235, 103 S. Ct. 2733]; *Lewis v. Jeffers* (1990) 497 U.S. 764, 774 [110 S.Ct. 3092; 11 L.Ed.2d 606].)

The prosecution filed a written opposition. (1 CT 67-74.) It contended that section 4500 passed scrutiny because it required proof of a fatal assault with malice aforethought by a life prisoner. (1 CT 70.) The statute in one form or another had been in effect since 1901 and served the purpose of prison discipline and of protecting guards and inmates from life prisoners who may feel that they have nothing left to lose. (*Ibid.*, citing *People v. Wells* (1949) 33 Cal.3d 330; *People v. Gardner* (1976) 56 Cal.App.3d 91.) Moreover, whether or not death would be imposed was determined by the jury after weighing the aggravating and mitigating factors of section 190.3. (1 CT 70-71.) Therefore, on the prosecution's view, there was nothing arbitrary, vague, or disproportional in predicating the availability of the death penalty on status as a life prisoner. (1 CT 72-73; 1 RT 152-53.)

On October 30, 1998, the Hon. J. Michael Welch heard and denied the demurrer.[32] (1 CT 76.) Judge Welch noted that the death penalty was not mandatory for a violation of Penal Code section 4500 but discretionary based on aggravating and mitigating factors. (1 RT 155-56.) Section 4500 required a killing committed with malice aforethought. In *Tison v. Arizona* (1987) 487 U.S. 137 [107 S.Ct. 1676; 95 L.Ed.2d 127], the United States Supreme Court held that death could be imposed upon a defendant who was a major participant in felony murder and acted with reckless indifference to

32. On August 21, 2000, the case was transferred from Judge Welch to the Hon. Paul M. Bryant, who presided over the guilt and penalty phase trials and sentencing. (1 CT 115.)

human life. Therefore, imposing a death sentence on a life prisoner who committed a fatal assault with malice aforethought passed scrutiny when coupled with the protections of a jury evaluation of evidence in aggravation and mitigation pursuant to section 190.3 at the penalty phase. "So I am going to respectfully deny the demurrer." (1 RT 155-56.)

Assuming that appellant was undergoing a life sentence at the time of the crime (*c.f.* Argument Section XIII., above), the trial court erred in overruling appellant's constitutional objections to section 4500. First, section 4500 is arbitrary, vague and overbroad because it does not sufficiently narrow the class of those eligible for the death penalty or provide a meaningful basis for distinguishing the extreme cases for which death may be the appropriate punishment. Second, the prior cases upholding section 4500 and its predecessor (former Penal Code, § 246) fail to pass scrutiny in the light of current, constitutional standards. In particular, the proffered rationales for predicating death eligibility on life prisoner status (deterrence, retribution, and prison safety) conflict with more recent authority. Third, an interjurisdictional comparison shows that the vast majority of American jurisdictions would not made appellant eligible for the death penalty under the circumstances of this case. Finally, section 4500 may not be applied to appellant because there is no tenable precedent for permitting the imposition of the death penalty on a person serving a "three strikes" life sentence with no prior convictions for a crime of violence.

These flaws violated appellant's state and federal rights to due process, to a fair trial, to trial by jury, and the proscription against cruel and/or unusual punishments. (Cal. Const., Art. I., §§ 7 subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th, & 14th Amends.) The issues presented are questions of law and/or mixed questions of fact and law which this Court

independently reviews. (*In re Scott* (2003) 29 Cal.4th 783, 812 ["'Any conclusions of law, or of mixed questions of law and fact, are subject to independent review.' [Citation.]"]; *Smith v. Rae-Venter Law Group, supra,* 29 Cal.4th at p. 357 [The interpretation and application of a statute is subject to "independent review."]; *Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 928-29 [A court independently reviews the denial of a demurrer to determine whether the moving party was entitled to judgment as a matter of law.].)

B. Applicable Law.

The high court has "distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California,* 512 U.S. 967, 971, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Id.,* at 971. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.,* at 972." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275 [118 S. Ct. 757; 139 L. Ed. 2d 702].)

The eligibility phase is at issue in this argument. "It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition." (*Id.* at pp. 275-76; *see also Zant v. Stephens* (1983) 462 U.S. 862, 878 [103 S. Ct. 2733; 77 L. Ed. 2d 235] ["Our cases indicate ... 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."].)

"The fact that the sentencing jury is also required [at the penalty phase] to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process ...." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 [108 S. Ct. 546; 98 L. Ed. 2d 568]) "A State's definitions of its aggravating circumstances -- those circumstances that make a criminal defendant 'eligible' for the death penalty -- therefore play a significant role in channeling the sentencer's discretion." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774 [110 S.Ct. 3092; 11 L.Ed.2d 606].) For this reason, the trial court erred in rejecting appellant's claim because section 190.3 applied at the penalty selection phase. (1 RT 155-56.)

The narrowing of the class of persons eligible for the death penalty is necessary for several reasons. First, a capital sentencing scheme 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, 313 [92 S. Ct. 2726; 33 L. Ed. 2d 346], White., J., concurring; *Gregg v. Georgia* (1976) 428 U.S. 153, 188 [96 S. Ct. 2909; 49 L. Ed. 2d 859] [same]; *accord People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [" To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' [Citations.]"].)

Second, "because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Zant v. Stephens, supra,* 462 U.S. at pp. 884-85, quoting, *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S. Ct. 2978; 49 L. Ed. 2d 944].)

Third, the death penalty must be reserved for "extreme cases", *i.e.*, those killings which society views as "so grievous an affront to humanity that the only adequate response may be the penalty of death." (*Gregg* v. *Georgia, supra,* 428 U.S. at p. 184, *Zant v. Stephens, supra,* 462 U.S. at p. 877, fn. 15 [same]; *accord Kennedy v. Louisiana* (2008) ___ U.S. ___ [128 S. Ct. 2641, 2649-50; 171 L. Ed. 2d 525, 538] ["[C]apital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them 'the most deserving of execution.'"], citations and internal quotation omitted]; *Baze v. Rees* (2008) ___ U.S. ___ [128 S. Ct. 1520, 1548; 170 L. Ed. 2d 420, 451] ["Our Eighth Amendment jurisprudence has narrowed the class of offenders eligible for the death penalty to include only those who have committed outrageous crimes defined by specific aggravating factors."], Stevens., J., concurring.)

Fourth, the death penalty must "be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S. Ct. 869; 71 L. Ed. 2d 1]; *accord Kennedy v. Louisiana, supra,* 128 S. Ct. at p. 2659 [In construing the Eighth Amendment, the high court has "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence."].) "[A] consistency produced by ignoring individual differences is a false consistency." (*Ibid.*)

Therefore, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (*Lowenfield v. Phelps, supra,* 484 U.S. at p. 244, quoting *Zant v. Stephens, supra,* 462 U.S. at p. 877.)

A death eligibility statute that fails to meet these standards is vague and overbroad in violation of the due process and Eighth Amendment proscriptions against "the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia, supra,* 446 U.S. at pp. 427-28; *accord Maynard v. Cartwright* (1988) 486 U.S. 356, 362 [100 L.Ed.2d 372, 108 S.Ct. 1853] ["The channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."].)

Where, as here, the prosecution alleged a single circumstance to make the defendant eligible for the death penalty and that circumstance is invalid, the death penalty must be reversed. (*Godfrey v. Georgia, supra,* 446 U.S. at pp. 432-33; *accord Brown v Sanders* (2006) 546 U.S. 212, 217-18 [126 S.Ct. 884, 891; 163 L.Ed.2d 723, 733]; *People v. Ledesma* (2006) 39 Cal.4th 641, 716-717.)

C. Life Prisoner Status Fails To Genuinely Narrow The Class Of Persons Eligible For The Death Penalty To The Extreme Case Where The Defendant Committed An Outrageous Crime.

Measured against the foregoing standards, section 4500 does not pass scrutiny and appellant's death sentence must be reversed. In essence, Section 4500 imposes two requirements for death eligibility. First, it requires a fatal assault with malice aforethought by means of a deadly weapon or by force likely to produce great bodily injury. For brevity, appellant will refer to this as an "aggravated assault." Second, it requires the crime to have been committed by a life prisoner. Those requirements are insufficient to narrow eligibility for the death penalty to the extreme case where the defendant committed an outrageous crime.

In general, California law requires a conviction for first degree

murder before a special circumstances must be found to make the defendant eligible for the death penalty.[33] (Penal Code, § 190.2, subd. (a) ["The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true ...."].) In contrast, Section 4500 requires only a fatal assault with malice aforethought, a crime which would otherwise be second degree murder. (Penal Code, § 189 ["All other kinds of murder are of the second degree."].)

In denying appellant's demurrer, the trial court noted that in *Tison, supra,* 487 U.S. 137 ("*Tison*"), the high court permitted the imposition of the death penalty upon a defendant who was a major participant in felony murder and acted with reckless indifference to human life. Therefore, the court concluded that that appellant could properly be made eligible for the death penalty by a violation of section 4500 which required proof of malice aforethought. (1 RT 155-56.) This was a *non sequitor.*

The petitioners in *Tison* became eligible for the death penalty "based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnapping is capital murder, Ariz. Rev. Stat. Ann. § 13-452 (1956) (repealed 1978), and that each participant in the kidnapping or robbery is legally responsible for the acts of his accomplices.

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33. The death penalty is also available for treason against the state (Penal Code, § 37), perjury or subordination of perjury resulting in the execution of an innocent person (Penal Code, § 128), derailing or blowing up a train (Penal Code, § 219), and sabotage causing death or great bodily injury (Mil & Vet. Code, § 1672, subd. (a)). However, those statutes require a mental state comparable to first degree premeditated murder and/or define crimes that pose a threat to the state or public as a whole. (*See, e.g., Kennedy v. Louisiana, supra,* 128 S.Ct. at p. 2659] [Distinguishing "treason, espionage, terrorism, and drug kingpin activity" as "offenses against the state."].)

Ariz. Rev. Stat. Ann. § 13-139 (1956) (repealed 1978). Each of the petitioners was convicted of the four murders under these accomplice liability and felony-murder statutes." (*Tison, supra,* 487 U.S. at pp. 141-42.)

The issue presented did not relate to the question of eligibility but to the selection of the death penalty. In relevant part, the trial judge at the penalty selection phase "specifically found that the crime was *not* mitigated by the fact that each of the petitioners' 'participation was relatively minor.' [Citation.]" (*Id.* at p. 142.)[34] The question before the United States Supreme Court was "whether the petitioners' participation in the events leading up to and following the murder of four members of a family makes the sentences of death imposed by the Arizona courts constitutionally permissible although neither petitioner specifically intended to kill the victims and neither inflicted the fatal gunshot wounds." (*Id.* at p. 138.)

The high court concluded that, properly circumscribed, the death penalty could be selected for an accomplice who participated in a capital crime. "[T]he Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Id.* at pp. 157-58.) Thus, *Tison* addressed penalty selection after a proper determination of death eligibility and it does not resolve the issues presented here.

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34. Since Tison was decided, the high court has held a capital defendant is entitled to have a jury weigh aggravating and mitigating circumstances. (*Ring v. Arizona* (2002) 536 U.S. 584 [122 S. Ct. 2428; 153 L. Ed. 2d 556.)

For the fatal stabbing of Addis, the jury found appellant guilty of first degree murder (Count 1) in addition to the violation of section 4500 (Count 2). (4 CT 916, 918.) However, the prosecution alleged none of the 21 special circumstances that existed at the time of the crime in 1997. (*See* Cal. Penal Code, § 190.2, subd. (a) (Deering 1997).) The determination of death eligibility was reduced to a single, specific question: was the defendant undergoing a life sentence at the time of the crime? (Penal Code, § 4500.)

Reducing death eligibility to such a simple and specific question requiring a yes or no answer is precisely the type of sentencing consideration which the high court has found suspect. "In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (*e. g.*, whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia,* [*supra*,] 408 U.S. 238 .... See *Stringer v. Black*, 503 U.S. 222, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). Those concerns are mitigated when a factor does <u>not</u> require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter." (*Tuilaepa v. California, supra,* 512 U.S. at p. 974, emphasis added.)

Tuilaepa v. California, supra, addressed a vagueness challenge to sentencing factors at the penalty selection phase. However, *Stringer v. Black, supra*, explained that the same analysis applies to factors at issue in the eligibility phase of capital sentencing. (*Stringer v. Black, supra*, 503 U.S. at p. 235 ["[I]f a State uses aggravating factors in deciding who shall

be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion."].) Moreover, whether a challenge to a statute is construed as a question of vagueness or overbreadth, the high court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8 [103 S. Ct. 1855; 75 L. Ed. 2d 903].)

Thus, for example, *Godfrey v. Georgia, supra*, 446 U.S. 420, the defendant became eligible for the death penalty upon a finding of the aggravation circumstance that he committed an "'outrageously or wantonly vile, horrible, and inhuman'" murder. The high court reversed the death judgment because the state courts had failed to meaningfully limit the application of the aggravating circumstance. Under Georgia law, an aggravating circumstance is akin to a factor which determines death eligibility under California law because it "does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at p. 874.)

The high court reversed the death judgment because there was "nothing" in the words "'outrageously or wantonly vile, horrible and inhuman.' ... standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" (*Godfrey v. Georgia, supra*, 446 U.S. at pp. 428-29; *accord Maynard v. Cartwright, supra,* 486 U.S. 356 [Affirming reversal of death sentence where the Oklahoma courts had not applied a restricting construction to the "especially heinous, atrocious, or cruel" aggravating circumstance].)

The defect in section 4500 is analogous. There is nothing in the words "undergoing a life sentence" that imposes any inherent restraint on the determination of death eligibility. All life prisoners, regardless of the nature of the life sentence and the crime for which it was imposed, are treated the same for purposes of determining death eligibility. The only other factual consideration the jury was asked to determine was whether the fatal assault was committed with malice aforethought, which is part of the definition of every murder . (Penal Code, § 187, subd. (a) ["Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."].) However, a factor which is common to every murder fails to satisfy the Eighth Amendment's narrowing requirement. (*See, e.g., Godfrey v. Georgia, supra,* 446 U.S. at pp. 428-29 ["A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'].)

As next explained, the California courts have not provided a narrowing construction to section 4500. To the contrary, the courts have expansively construed it to apply to any life prisoner, even a defendant serving an indeterminate sentence of five years-to-life for the sale of marijuana. (*See, e.g., People v. Dorado* (1965) 62 Cal.2d 338, overruled on another point by *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.) Under current authority, the prior case law does not pass scrutiny. (See Section E., below.)

D. The Prior Cases Rejecting Constitutional Challenges To Section 4500 And Its Predecessor Statute.

From 1908-1969, this Court rejected a variety of constitutional challenges under the state and federal constitutions to earlier versions of section 4500 and its predecessor statute (former Penal Code, § 246), both of which provided for a mandatory death penalty, even for a non-fatal assault

by a life prisoner. All of those decisions preceded the beginning of modern death penalty jurisprudence with the high court's decisions in *Furman v. Georgia, supra,* 408 U.S. 238, and *Gregg v. Georgia, supra,* 428 U.S. 153.

As a result, none of the prior decisions addressed current constitutional standards and should not be followed. (*See, e.g., People v. Heitzman* (1994) 9 Cal.4th 189, 209 ["It is well settled that a decision is not authority for an issue not considered in the court's opinion."].) Appellant has detailed these cases below because this Court's decisions must be acknowledged and distinguished. In addition, several of them were relied on by the prosecution in its opposition to appellant's demurrer. (See 1 CT 67-74.) As explained below, the life prisoner circumstance for death eligibility has not been interpreted to narrow its application to the extreme case that is the Eighth Amendment's threshold for death eligibility. Moreover, the reasons offered to justify life-prisoner status as dispositive of death eligibility no longer pass scrutiny.

In 1901, the Legislature adopted a mandatory death penalty for life prisoners who committed an aggravated assault, regardless of whether the assault was fatal. Former section 246 provided: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death." (Stats 1901, ch. 12, § 1 p 6.) In *People v. Finley* (1908) 153 Cal. 59 ("*Finley*"), this Court affirmed the death sentence for a non-fatal assault on two correctional officers committed by a group of inmates at Folsom State Prison.

Defendant Finley attempted three times to get the courts to declare unconstitutional his mandatory death sentence. None of the published opinions identified the crime for which Finley was serving a life sentence.

Before trial, Finley filed a petition for a writ of habeas corpus in the Court of Appeal. (*In re Finley* (1905) 1 Cal.App. 198.) He argued that "the indictment is void and the restraint under it illegal" because former section 246 contravened "the fifth, eighth, and fourteenth amendments to the constitution of the United States" and the then-analogous sections of the California Constitution, former sections 6, 11, and 13 of article I and subdivision 2 of section 25 of article IV. (*Id.* at p. 199.) The Court of Appeal rejected each argument.

As to the claim of "cruel or unusual punishment",[35] the Court of Appeal construed this as an argument that the death penalty for the crime was "*excessive in degree,* and therefore inhibited." (*Id.* at p. 202, original emphasis.) On its view, a life prisoner had already "forfeited his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached; and if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution." (*Id.* at p. 202.)

Therefore, the Court of Appeal concluded, "[t]he necessity for such punishment cannot be questioned." (*Ibid.*) "[I]n view of the necessity for some adequate punishment, and the extraordinary circumstances surrounding the commission of this grave offense, the legislative discretion has not been abused, for the reason that within the domain of logic and law we can conceive of no other adequate penalty which could be inflicted." (*Id.* at p. 203.) The Court of Appeal also rejected Finley's claim that

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35. The high court did not decide until 1962 that the Eighth Amendment applied to state criminal proceedings. (*Robinson v. California* (1962) 370 U.S. 660 [82 S. Ct. 1417; 8 L. Ed. 2d 758].) The use of the state constitutional standard - "cruel or unusual punishment" (former Cal. Const. Art. I., § 6, current Art. I. § 17) - shows that the Court of Appeal in *In re Finley, supra,* did not reach the defendant's premature Eighth Amendment claim.

imposing the death penalty based on life-prisoner status deprived him of the equal protection of the laws. In its view, life prisoners differ from other felons "based on the hopeless and desperate situation in which such convicts are placed, and the utter inability to inflict other adequate punishment upon them." (*Id.* at pp. 207-08.)

"If classification of crimes and penalties may properly be based on terms of three, five, ten, or any definite number of years, there can be no logical reason why it may not be based on a life term, nor why *life* as well as *liberty* may not be the forfeit." (*Id.* at p. 209.) Therefore, "the classification is in no sense arbitrary or capricious. It is based on natural, palpable, substantial, and inherent distinctions too plainly marked to be ignored." (*Ibid.*) For related reasons, the Court of Appeal rejected the claim that former section 246 was arbitrary and deprived the defendant of due process of law. (*Id.* at p. 211 ["In the case at bar, all convicts imprisoned for life are treated alike, under a statute applying to them only."].)

After Finley was convicted and sentenced to death, he appealed to this Court. (*People v. Finley, supra,* 153 Cal. 59.) Finley, did not argue that imposition of the death penalty would be cruel or unusual punishment. He asserted that there was no justification for imposing such a severe penalty on life prisoners when others who committed the same offense were treated more leniently. On this basis, Finley argued first that section 246 "denies to the defendant the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States. Second, that it contravenes the provisions of section 11 of article I of the constitution of this state declaring that all laws of a general nature shall have a uniform operation." (*Id.* at p. 60.)

Although this Court did not cite the earlier decision by the Court of Appeal, it essentially followed its reasoning. As to the state constitutional claim, defendant's "contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The 'life-termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good-conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence." (*Id.* at p. 62.)

"Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the law applicable to convicts other than 'life-termers,' the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the 'life-termer' and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions." (*Id.* at p. 62.)

The Court also rejected the defendant's equal protection claim based on the Fourteenth Amendment. "This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. ... [W]e cannot perceive that appellant was

denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment." (*Id.* at p. 62, citations omitted.)

Finley then sought a writ of error from the United States Supreme Court. (*Finley v. California* (1911) 222 U.S. 28 [32 S. Ct. 13; 56 L. Ed. 75].) He argued that former section 246 was "repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to him the equal protection of the laws because it provides an exceptional punishment for life prisoners." (*Id.* at p. 31.) The high court defined the issue as "whether there is a basis for the classification made by the statute." (*Ibid.*) It agreed with this Court that life termers constituted a distinct class whose "'situation is legally different. Their civic death is perpetual.' Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine. The power of classification which the law-making power possesses has been illustrated by many cases which need not be cited. They demonstrate that the legislature of California did not transcend its power in the enactment of § 246." (*Id.* at p. 31.)

Two other inmates (Quijada and Carson) who participated with Finley in the non-fatal assault on the correctional officers also appealed to this Court after they were sentenced to death. The decisions did not identify the crime for which the inmates were serving a life sentence. The defendants made constitutional objections to former section 246. Based on *People v. Finley, supra,* 153 Cal. 59, their claims were rejected without providing any details of the arguments offered in support of their claims. (*See People v. Quijada* (1908) 154 Cal. 243, 246 ["The last point urged by appellant is that section 246 of the Penal Code is unconstitutional. The

arguments advanced in support of this proposition received due consideration by this court in *People v. Finley* [*supra,*] 153 Cal. 59, and it was there decided that the law is constitutional. We perceive no reason to change our views upon this question."]; *see also People v. Carson* (1910) 155 Cal. 164, 169 ["As to the constitutional objections made by appellant to the code section on the ground that it is violative of certain provisions of the federal and state constitutions, they are no broader in their scope than those which were urged against this same section in the case of the *People v. Finley* [*supra,*] 153 Cal. 59, and *People v. Quijada* [*supra,*] 153 Cal. 59. ... No additional grounds are presented by the present appellant which, in our judgment, disturb the correctness of that conclusion."].)

In *People v. Oppenheimer* (1909) 156 Cal 733 ("*Oppenheimer*"), an inmate at San Quentin State Prison serving a life term for second degree murder committed a non-fatal stabbing of another inmate and received a mandatory death sentence pursuant to former section 246. Based on *People v. Finley, supra,* 153 Cal. 58, the court rejected the defendant's claim that imposing the death penalty based on status as a life prisoner deprived him of the equal protection of the law. (*Id.* at p. 737 ["The reasons for the previous rulings that persons undergoing life sentence constitute a class as to which the legislature is authorized to make this particular provision are fully stated in *People v. Finley*, [*supra,*] 153 Cal. 58."].)

The *Oppenheimer* Court also rejected the claim, "urged here for the first time", that imposition of the death penalty pursuant to former section 246 violated the "'cruel or unusual punishments'" clause of former Article I, section 6, of the California Constitution. (*Ibid.*) "Whatever may be our views as to the policy of this section of the Penal Code, we are not warranted in saying as [a] matter of law that the punishment of death for an assault with a deadly weapon with malice aforethought by one undergoing

a life sentence in a state prison is either 'cruel' or 'unusual' within the meaning of those terms as used in our constitution. The infliction of the death penalty by any of the methods ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment [Citation], unless perhaps it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally, 'as to shock the moral sense of the people.' [Citation.]" (*People v. Oppenheimer, supra,* 156 Cal. at p. 737.) Without an opinion, the United States Supreme Court dismissed a petition for a writ of error by Oppenheimer. *Oppenheimer v. California* (1912) 225 U.S. 718 [32 S. Ct. 838; 56 L. Ed. 1271].)

In 1941, former section 246 was repealed and re-codified as section 4500. (Stats. 1941, ch. 106, §§ 15, 16.) At that time, section 4500 provided "in material part, that 'Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another . . . by any means of force likely to produce great bodily injury, is punishable with death.'" (*People v. Wells* (1949) 33 Cal.2d 330 ("*Wells*"), *cert. denied, Wells v. California* (1949) 338 U.S. 836 [70 S.Ct. 43; 94 L.Ed. 510], overruled on another point by *People v. Wetmore* (1978) 22 Cal.3d 318, 324.)

In *Wells,* the defendant was serving an indeterminate sentence of five years to life for possession of a weapon by an inmate (Penal Code, § 4502). (*Id.* at pp. 334-35.) Pursuant to section 4500, he was convicted and sentenced to death for a non-fatal assault committed by throwing a "crockery cuspidor" at a prison guard and "injuring him severely." (*Id.* at pp. 338, 334-35.) On appeal, the defendant argued that he was denied equal protection of the law because when former section 246 was adopted, a violation of section 4502 carried a fixed term. He became subject to the

death penalty because, after the adoption of the indeterminate sentencing law in 1917, section 4502 carried an indeterminate term of 5 years to life unless the term was fixed by the Adult Authority. (*Id.* at p. 334-35.)

Relying on *People v. Finley, supra,* 153 Cal. 59, and *Finley v. California, supra,* 222 U.S. 28, the *Wells* court rejected the equal protection claim and held that "the Legislature could fix death as appropriate additional punishment for" life prisoners who violate section 4500. (*People v. Wells, supra,* 33 Cal.2d at p. 335.) It was immaterial that the indeterminate sentencing law made every indeterminate sentence a life term. "No longer, defendant says, is the class composed of the hopeless and therefore dangerous men to whom the Finley opinions refer and whom the Legislature had in mind when it enacted section 246." (*Id.* at p. 336.)

"It is true that inclusion in the life-term class of those whose terms are in maxima life imprisonment but which terms the Adult Authority has power to ultimately fix in spans of years, means that the class must be regarded as containing at least some persons who will have the incentive of hope for reward of good conduct, as well as the fear of death as punishment, to deter them from committing the offense defined in section 4500. But we cannot agree that enactment of the indeterminate sentence law, as construed and applied, destroys the rationality of the classification originally made by section 246 and continued by reenactment as section 4500. The purpose of that section -- prison discipline and protection of guards and inmates -- still constitutes a cogent reason for its enactment. Adding the hope of reward for good conduct to the fear of punishment for evil, does not destroy the cogency of the reason for the legislation." (*Ibid.*, footnote omitted.)

By a petition for a writ of habeas corpus, defendant Wells raised additional claims under the state and federal constitutions. (*In re Wells*

(1950) 35 Cal.2d 889.) This included the claim that the former Adult Authority had deprived him of due process and equal protection by failing to reduce his sentence of 5 years-to-life to a fixed term so as to make it possible to impose the death penalty if he violated section 4500. (*Id.* at pp. 891-92.) The Court rejected this claim because "it is well settled that the nondiscretionary death penalty applies to a felon who, while serving an indeterminate sentence with no fixed maximum term of years, commits an assault of the sort described in section 4500." (*Id.* at p. 892, citing *People v. Finley, supra,* 153 Cal. at p. 62; *Finley v. California, supra,* 222 U.S. at p. 31)

The Court also rejected the defendant's claim that imposition of the death penalty would be cruel or unusual punishment under former section 6 of article I of the California Constitution.[36] *People v. Oppenheimer, supra,* 156 Cal. 733, upheld the imposition of the death penalty on a prisoner who committed a non-fatal battery "against the objection that it amounted to cruel and unusual punishment. We are convinced that that case was correctly decided." (*People v. Wells, supra,* 35 Cal.2d at p. 895.)

Subsequent decisions rejected constitutional challenges to section 4500 without significant additional analysis. This included cases where the defendant was serving a life term for murder. (*People v. Berry* (1955) 44 Cal.2d 426, 429-30 [Where the defendant, who was "in for murder", committed a fatal assault upon another inmate, rejecting claim "that the failure of the Legislature to define the term 'malice aforethought' [in § 4500] renders the statute unconstitutional for uncertainty, and the courts

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36. The defendant also made an Eighth Amendment claim. However, this Court noted that the high court had not yet decided whether the Eighth Amendment applied to state proceedings. (*People v. Wells, supra,* 35 Cal.2d at p. 895, fn. 1, citing *Louisiana v. Resweber* (1947) 329 U.S. 459, 462, 463, 470 [67 S.Ct. 374, 91 L.Ed. 422].)

may not supply the meaning without violating the principle of the separation of powers. (Const., art. III, § 1.)"]; *People v. Jefferson* (1956) 47 Cal.2d 438, 442 [Affirming mandatory death penalty for a defendant who committed a non-fatal stabbing of another inmate while serving a life term for second degree murder and noting that "[t]his court has upheld the constitutionality of the statute in *People v. Berry,* [*supra,*] 44 Cal.2d [at p. 430] ..., and *People v. Wells,* 33 Cal.2d 330, 335 et seq. ...."].)

The Court also affirmed the death penalty where the defendant committed a fatal stabbing of an inmate with a knife while serving an indeterminate sentence of five years to life for the sale of marijuana in violation of former Health & Safety Code, § 11500. (*People v. Dorado, supra,* 62 Cal.2d at p. 358.) The defendant argued that there was insufficient evidence that he was serving a life term because his sentence had originally been fixed at five years. However, the defendant committed the violation of section 4500 after he had been sent back to prison for a violation of parole. Under the indeterminate sentence law then in effect, his sentence reverted to the maximum term of five years to life when he was sent back to prison. (*Id.* at p. 358-59.)

In another case, the Court affirmed the mandatory death penalty for a codefendant ("Allen") who aided and abetted the fatal stabbing of an inmate while serving "an indeterminate sentence of from five years to life for burglary, and the length of his sentence had not yet been fixed by the Adult Authority. It is settled that section 4500 is applicable to a prisoner serving such a sentence until there is a remission of part of the life term. " (*People v. Smith* (1950) 36 Cal.2d 444, 445, citing *In re Wells, supra,* 35 Cal.2d 889, and *People v. Wells, supra,* 33 Cal.2d 330.) The Court did not identify the target felony of the burglary or whether it was first or second degree burglary. (*Ibid.*)

In *People v. Vaughn* (1969) 71 Cal.2d 406 ("*Vaughn*"), the inmate was convicted and sentenced to death pursuant to section 4500 for a non-fatal assault with a sharpened stick on a correctional officer at Folsom State Prison. (*Id.* at p. 411.) The Court rejected the inmate's claim "that to subject him to the death penalty for an assault which did not result in the death of the victim is to inflict cruel and unusual punishment upon him. We have long upheld section 4500 against this and related challenges to the penalty which it imposes." (*Id.* at p. 418, citing *In re Wells, supra,* 35 Cal.2d at p. 895; *People v. Oppenheimer, supra,* 156 Cal. at p. 737; *People v. Jefferson, supra,* 47 Cal.2d at p. 444; *People v. Wells, supra,* 33 Cal.2d at p. 335.)

"These decisions do not necessarily settle the question for all time, however, since in applying the Eighth Amendment's ban on cruel and unusual punishment we must reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (*People v. Vaughn, supra,* 71 Cal.2d at p. 418, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S.Ct. 590; 2 L.Ed.2d 630, 642].) "Defendant further argues that attacks by prisoners on guards or other prisoners are common, and that section 4500 lacks any substantial deterrent effect. These arguments might lead the Legislature to call into question the wisdom of section 4500, but we do not in this case hold the section unconstitutional. [Citation.]" (*Id.* at pp. 418-19.)

However, the *Vaughn* Court reversed the death penalty because the trial court had excused two prospective jurors in violation of *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 783, 88 S.Ct. 1770].). (*People v. Vaughn, supra,* 71 Cal.2d 412-416.) After remand and a new penalty trial, a jury again fixed the penalty at death. (*People v. Vaughn* (1973) 9 Cal.3d 321, 323.) On appeal, the death penalty was reversed

because by that time both this Court and the United States Supreme Court had held unconstitutional the imposition of the death penalty under the death penalty statutes in effect at the time. (*Id.* at p. 324, citing *People v. Anderson* (1972) 6 Cal.3d 628, *cert. denied, California v. Anderson* (1972) 406 U.S. 958 [92 S.Ct. 2060; 32 L.Ed.2d 344] and *Furman v. Georgia, supra,* 408 U.S. 238.)

By urgency legislation, effective August 11, 1977, the Legislature amended section 4500 to eliminate the mandatory death penalty. Otherwise the amended statute was essentially equivalent to the statute in effect currently and for appellant's case. For a fatal assault by a life prisoner with malice aforethought, it provided for an alternative penalty of life without the possibility of parole, with the penalty to be determined pursuant to the provisions of Section 190.3 and 190.4.[37] (Stats. 1977, ch. 316, § 21.) Since the 1977 amendment, no cases to appellant's knowledge have addressed constitutional challenges to section 4500 as it exists today.

E. The Prior Cases Do Not Pass Scrutiny Under Modern Death Penalty Standards.

As this Court observed in *People v. Vaughn, supra,* prior "decisions do not necessarily settle the question for all time, however, since in applying the Eighth Amendment's ban on cruel and unusual punishment we

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37. In pertinent part, the 1977 amendment provided: "Every person undergoing a life sentence in a state prison of this state who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment in the state prison without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years." (Stats 1977 ch 316 § 21.)

must reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (*People v. Vaughn, supra,* 71 Cal.2d at p. 418, quoting *Trop v. Dulles, supra,* 356 U.S. at p. 101; *accord Kennedy v. Louisiana, supra,* 128 S. Ct. at p. 2649 ["Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."], citing *Trop v. Dulles, supra.*].)

None of the foregoing cases pass scrutiny under the standards that have evolved since the high court's decisions in *Furman v. Georgia, supra,* 408 U.S. 238, and *Gregg v. Georgia, supra,* 428 U.S. 153. The foundational decisions rejecting constitutional claims to section 4500 and former section 246 all affirmed mandatory death sentences for non-fatal assaults by life prisoners. (*See People v. Finley, supra,* 153 Cal. 59; *People v. Quijada, supra,* 154 Cal. 243; *People v. Carson, supra,* 155 Cal. 164; *People v. Oppenheimer, supra,* 156 Cal 733; *People v. Wells, supra,* 33 Cal.2d 330; *see also People v. Vaughn, supra,* 71 Cal.2d 406.)

Under current law, the Eighth and Fourteenth Amendments prohibit the death penalty for non-fatal, assaultive crimes, even for a crime as deplorable as rape. (*Kennedy v. Louisiana, supra,* 128 S. Ct. at pp. 2650-51 ["a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments."]; *Coker v. Georgia* (1977) 433 U.S. 584 [97 S. Ct. 2861; 53 L. Ed. 2d 982] ["We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' *Gregg v. Georgia,* 428 U.S., at 187, is an excessive penalty for the rapist who, as such, does not take human life."].)

The Eighth and Fourteenth Amendments now also prohibit a mandatory penalty. Under existing law, "a mandatory death penalty for a broad category of homicidal offenses constitutes cruel and unusual

punishment within the meaning of the Eighth and Fourteenth Amendments." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 287; *accord Roberts v. Louisiana* (1976) 428 U.S. 325, 333 [96 S. Ct. 3001; 49 L. Ed. 2d 974] ["The constitutional vice of mandatory death sentence statutes -- lack of focus on the circumstances of the particular offense and the character and propensities of the offender -- is not resolved by Louisiana's limitation of first-degree murder to various categories of killings."]; *Washington v. Louisiana* (1976) 428 U.S. 906 [96 S.Ct. 3214; 49 L.Ed.2d 1212]; *Roberts v. Louisiana* (1977) 431 U.S. 633 [97 S. Ct. 1993; 52 L. Ed. 2d 637].)

For that reason, the Court of Appeal in 1979 declared unconstitutional the mandatory death penalty provision that existed as part of section 4500 prior to the 1977 amendment. (*Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 888 ["It is concluded that the classification of persons subject to a mandatory death penalty in former section 4500 is not sufficiently narrow to encompass a consideration of mitigating factors required for a finding of constitutionality ...."]; *see also Rockwell v. Superior Court* (1976) 18 Cal.3d 420 [declaring unconstitutional the 1973 statutes that made the death penalty mandatory upon the finding of a special circumstance].) These developments show that the prior cases were decided in a legal context that is no longer viable.

More fundamentally, section 4500 does not pass scrutiny because life prisoner status converts a crime that is the equivalent of second degree murder (a fatal assault with malice aforethought) into a capital offense. All life prisoners are treated as part of a single homogenous class without consideration of the nature and circumstances of the offense which resulted in the life term. No distinction is made between those undergoing a life sentence for commission of violent crimes and those, such as appellant,

who receive a "three strikes" life sentence (Penal Code, § 667, subd. (e)) because of two prior convictions for theft-related, residential burglaries. Instead, Section 4500 gives all life terms the same weight for purpose of determining death eligibility.

Reduced to their essence, the prior cases offered three justifications for making life prisoner status dispositive of death eligibility. It was said that the death penalty was necessary as retribution because there was no further punishment for an inmate already serving a life term. (*In re Finley, supra,* 1 Cal. App. at p. 202 ["such convict stands immune from further retribution"]; *see also People v. Oppenheimer, supra,* 156 Cal. at p. 737.) Alternatively, death was considered necessary as a deterrent because life prisoners constituted a unique class not subject to any other restraint because their "civic death is perpetual" and good conduct rules did not apply to reduce the length of their term. (*In re Finley, supra,* 1 Cal. App. at p. 202; *People v. Finley, supra,* 153 Cal. at p. 62 ["The good-conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application here."]; *People v. Wells, supra,* 33 Cal.2d at p. 335.) Relatedly, the death penalty was justified as necessary to ensure "prison discipline and protection of guards and inmates ...." (*People v. Wells, supra,* 33 Cal.3d at p. 336.)

In *People v. Vaughn, supra,* this Court indicated that whether or not such factors justified the death penalty was for the Legislature to decide. (*People v. Vaughn, supra,* 71 Cal.2d at pp. 418-19 ["These arguments might lead the Legislature to call into question the wisdom of section 4500, but we do not in this case hold the section unconstitutional. [Citation.]"].) However, the United States Supreme Court has subsequently incorporated those factors into its due process and Eighth Amendment analysis and relied on them to invalidate a legislatively authorized death penalty.

The high court has "identified 'retribution and deterrence of capital crimes by prospective offenders'" as the two constitutionally-legitimate purposes served by the death penalty. (*Atkins v. Virginia* (2002) 536 U.S. 304, 319 [536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335], quoting *Gregg v Georgia, supra,* 428 U.S. at p. 183; *accord Roper v. Simmons* (2005) 543 U.S. 551, 571 [125 S. Ct. 1183, 1190; 161 L. Ed. 2d 1].) "Unless the imposition of the death penalty ... 'measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Ibid.*; quoting *Enmund v. Florida* (1982) 458 U.S. 782, 798, [102 S. Ct. 3368; 73 L. Ed. 2d 1140].)[38]

Developments since the decisions upholding section 4500 and its predecessor statute have undermined the retribution, deterrence, and safety rationales offered to justify death eligibility on life prisoner status. In 1987, the United States Supreme Court held unconstitutional a Nevada statute making the death penalty mandatory for prisoners who commit murder while undergoing a sentence of life without the possibility of parole.[39] (*Sumner v. Shuman* (1987) 483 U.S. 66 [107 S. Ct. 2716; 97 L. Ed. 2d 56] ("*Shuman*").) Although *Shuman* addressed a mandatory death penalty

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38. *See also Furman v. Georgia, supra,* 408 U.S. at p. 280 [The death penalty is excessive if it "serves no penal purpose more effectively than a less severe punishment."], Brennan, J., concurring; *id.* at pp. 312-13 [The death penalty is cruel and unusual punishment if it makes "only marginal contributions to any discernible social or public purposes."], White, J., concurring.)

39. The statute in pertinent part provided: "'1. Capital murder is murder which is perpetrated by: ... (b) A person who is under sentence of life imprisonment without possibility of parole. ... 5. Every person convicted of capital murder shall be punished by death.' 1973 Nev. Stats., ch. 798, § 5, pp. 1803-1804." (*Shuman, supra,* 483 U.S. at p. 68, fn. 1.)

statute, the considerations driving its analysis show why section 4500 no longer passes scrutiny.

Shuman explained that neither the extreme narrowness of the Nevada statute nor the state's concern for deterrence and retribution were sufficient justifications. (*Id.* at p. 78.) The Nevada statute "revealed only two facts about [the defendant] -- (1) that he had been convicted of murder while in prison, and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole. ... These two elements of capital murder do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case." (*Id.* at p. 78.)

"The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death. It does not specify for what offense the inmate received a life sentence nor does it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation. At the time respondent Shuman was sentenced to death, Nevada law authorized imposition of a life sentence without possibility of parole [("LWOP")] as a sanction for offenders convicted of a number of offenses other than murder. See, *e. g.*, 1973 Nev. Stats., ch. 798, §§ 6-8, pp. 1804-1805 (authorizing sentence of life without possibility of parole for kidnapping, rape, and battery with substantial bodily harm)." (*Shuman, supra,* 483 U.S. at pp. 80-81.) "Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label 'life-term inmate' reveals little about the inmate's record or character." (*Id.* at p. 81.)

As to the deterrence rationale, "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." (*Id.* at p. 83.) The high court also "reject[ed] the proposition that a mandatory death penalty for life-term inmates convicted of murder is justified because of the State's retribution interests." (*Ibid.*) "[T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization." (*Id.* at p. 84.)

1. Under California Law, Life Prisoner Status Does Not Contribute Significantly To The Profile Of The Defendant For Determining Death Eligibility.

The factors considered by *Shuman* further demonstrate the flaws in the reasons offered by the California courts to justify life prisoner status as determinative of death eligibility. Section 4500 treats all life prisoners as fungible despite the fact that even an LWOP sentence "does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death." (*Shuman, supra,* 483 U.S. at p. 81.) Shuman noted that Nevada law at that time imposed an LWOP sentence for a number of crimes other than murder, including kidnapping, rape, and battery with substantial bodily harm. (*Ibid.*)

Under California law, a life sentence is much more broadly available and any type of life sentence makes the defendant eligible for the death penalty. A life term may be imposed for a wide variety of offenses other than murder. These include kidnapping for ransom where "no ... person suffers death or bodily harm" (Penal Code, § 209, subd. (a)), kidnapping a person for oral copulation (Penal Code, § 209, subd. (b)(1)), kidnapping in

the commission of a carjacking (Penal Code, § 209.5, subd. (a)), derailing a train without causing personal injury (Penal Code, §218), burglary with the intent to commit rape, sodomy, or oral copulation (Penal Code, § 220, subd. (b)), sexual intercourse with a child under the age of 10 (Penal Code, § 288.7), attempted murder (Penal Code, § 664, subd. (a)), and using a minor to sell a controlled substance with two prior convictions for the same offense (Penal Code, § 667.75.)

Under the "three strikes" law, any third felony carries a life sentence if the defendant had two prior "violent" or "serious" felony convictions as defined by subdivision (c) of section 667.5 and subdivision (c) of section 1192.7. (Penal Code, § 667, subds. (d)(1) & (e)(2)(A)(ii); § 1170.12, subds. (b)(1) & (c)(2)(A); *People v Superior Court (Romero)* (1996) 13 Cal 4th 497.) Murder is included amongst the qualifying felonies. (Penal Code, §§ 667.5, subd. (c)(1), 1192.7, subd. (c)(1).) However, they also include such crimes as "any burglary of the first degree" regardless of the target felony (Penal Code, § 1192.7, subd. (c)(18)), furnishing cocaine to a minor (Penal Code, § 1192.7, subd. (c)(24)), dissuading a witness from testifying (Penal Code, § 1192.7, subd. (c)(37)), making a criminal threat (Penal Code, § 1192.7, subd. (c)(38)), or "any conspiracy to commit" one of the 41 felonies listed in section 1192.7, subdivision (c). (Penal Code, § 1192.7, subd. (c)(42).)

Moreover, there is no limitation on the nature of the third felony which requires imposition of a life term. For example, a life sentence may be imposed where the third felony was as minor as the theft of five videotapes or three golf clubs with a prior theft conviction. (Penal Code, § 666; *see, e.g., Ewing v. California* (2003) 538 U.S. 11, 17 [123 S.Ct. 1179; 155 L.Ed.2d 108] ["On parole from a 9-year prison term, petitioner Gary Ewing walked into the pro shop of the El Segundo Golf Course in Los

Angeles County on March 12, 2000. He walked out with three golf clubs, priced at $ 399 apiece, concealed in his pants leg."]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 66 [123 S.Ct. 1166; 155 L.Ed.2d 144] ["On November 4, 1995, Leandro Andrade stole five videotapes worth $ 84.70 from a Kmart store in Ontario, California."].)

A life sentence may also be imposed, as in appellant's case, on a defendant with two prior convictions for theft related residential burglaries (Penal Code, § 459), where there was no evidence that he was armed or caused any injury, followed by a guilty plea to a weapon possession offense (Penal Code, § 4502). (*See* Exh. No. 42, 4 CT 1104, 1108, 1110.) The latter is not a "serious felony" unless the defendant personally used the weapon. (Penal Code, § 1192.7, subd. (c)(23) ["As used in this section, 'serious felony means ... any felony in which the defendant used a dangerous and deadly weapon ...."].) At the plea to a violation of section 4502, the prosecution did not present evidence of use of the weapon and appellant admitted only the fact of possession.[40] (Exh. No. 64; 5 CT 1213, 1224.)

In sum, the fact that the defendant was "undergoing a life sentence" in California contributes even less than the Nevada statute "for purposes of determining whether he should be sentenced to death." (*Shuman, supra,* 483 U.S. at p. 81.) Nevertheless, under section 4500 "all predicate life-term offenses are given the same weight." (*Shuman, supra,* 483 U.S. at p. 81.) Given this reality, section 4500 fails to "genuinely narrow the class of persons eligible for the death penalty" (*Zant, supra,* 462 U.S. at p. 877) or

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40. At the plea colloquy, the court asked appellant, "I assume at some point during this date in question, you had a dirk or dagger or stabbing instrument in your possession; is that correct?" (Exh. No. 64; 5 CT 1213.) Appellant responded, "Yeah." (*Ibid.*)

ensure that the death penalty is reserved for the "extreme" case of a killing that is "so grievous an affront to humanity that the only adequate response may be the penalty of death." (*Gregg, supra,* 428 U.S. at p. 184; *Zant, supra,* 462 U.S. at p. 877, fn. 15.)

2. The Death Penalty Is Not A Deterrent For Prison Homicides.

The principal justification offered for section 4500 and former section 246 was that the death penalty was necessary as a deterrent because it was the only remaining punishment that could be inflicted on a defendant already serving a life sentence. (*See, e.g., In re Finley, supra,* 1 Cal. App. at p. 202 ["such convict stands immune from further retribution"]; *People v. Oppenheimer, supra,* 156 Cal. at p. 737.) However, *Shuman* recognized that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." (*Shuman, supra,* 483 U.S. at p. 83.)

Moreover, statistical studies show that the death penalty does not measurably contribute to the deterrence of prison homicides. In fact, the homicide rate is greater in the general population as well as in the inmate population in states with the death penalty. To implement the Death in Custody Reporting Act of 2000 (PL 106-297), the Bureau of Justice Statistics of the United States Department of Justice in 2001 began collecting inmate homicide records from all state prisons. (U.S. Dept. Of Justice, Bureau of Justice Statistics, Special Report, "Suicide and Homicide in State Prisons and Local Jails" (2005) at p. 1 (hereafter "Inmate Homicide Special Report".)[41]

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41. This report is available on-line at http://www.ojp.usdoj.gov/bjs/ (Report NCJ 210036, August 2005).

The death penalty was re-instituted in 1976 when the states adopted new statutory schemes after the high court affirmed the death penalty in *Gregg v. Georgia, supra,* 428 U.S. 153. A study published in 2005 showed that "[s]tate prison homicide rates dipped sharply from 1980 (54 per 100,000) to 1990 (8 per 100,000). By 2002 prison homicide rates had declined further, down to 4 per 100,000." (Inmate Homicide Special Report at p. 1.) This was less than the homicide rate in the general population of the United States of 6 per 100,000. (*Id.* at p. 11, Table 9.) When the statistics were standardized to account for the demographic factors of age, race, and gender, the homicide rate in the general population was nearly 9 times that of the prison population (35 per 100,000 vs. 4 per 100,000). (*Ibid.*)

Moreover, on a state-by-state comparison, the inmate homicide rate was higher in the states with the death penalty. Currently, 36 states, including California, have the death penalty and 14 do not.[42] In 2001-2002, there were 87 inmate homicides. (*Id.* at p. 3, Table 1.) Of those, 83 occurred in states with the death penalty; and only 4 occurred in states without the death penalty. (*Ibid.* [Michigan (1); New York (3)].) California, with 21 inmate homicides, was by far the leading state for inmate homicides, followed by Texas with 10. (*Ibid.*)

An earlier study addressed data for inmate and staff murders committed by inmates in 1964, 1965 and 1973. (Wolfson, "The Deterrent Effect of the Death Penalty Upon Prison Murder", in The Death Penalty in America (H. Bedau (ed) 3rd Ed. 1982) at p. 165.) In 1973, with 52 jurisdictions reporting (the 50 states, the federal government, and the District of Columbia), there were 124 prison homicides, 94% of which (117 of 124) occurred in states with the death penalty for murder. In 1965, with

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42. See www.deathpenaltyinfo.org

47 jurisdictions reporting, there were 61 prison murders, 87% of which (53 of 61) occurred in states with the death penalty for murder. In 1964, with 42 jurisdictions reporting, there were 31 prison murders, 94 % of which (29 of 31) occurred in states with the death penalty for murder. (*Id.* at pp. 165-66 & Table 4-4-2.)

The data from 1973 also addressed murders committed by inmates imprisoned for murder. The results showed the "irrelevance of the death penalty threat to the imprisoned murderer ...." (*Id.* at p. 167.) In jurisdictions retaining the death penalty, .21% of the imprisoned murderers (36 out of 16,269) committed murder. In jurisdictions that had abolished the death penalty, a statistically equivalent number (.19%) of the imprisoned murderers (4 out of 2,120) committed murder. (*Id.* at p. 168, Table 4-43.) Thus, "[t]he threat of the death penalty ... does not even exert an *incremental* deterrent effect over the threat of a lesser punishment in the abolitionist state. (*Id.* at p. 167.) "Given that the deterrent effect of the death penalty for prison homicide is to be seriously doubted, it is clear that management and physical changes in prison would do more than any legislated legal sanction to reduce the number of prison murders." (*Id.* at p. 172.)

Related to deterrence is the notion that the death penalty is necessary to incapacitate a defendant to prevent him from committing additional crimes. (*Gregg v. Georgia, supra,* 428 U.S. at p. 183, fn. 28, citing, *inter alia, People v. Anderson, supra,* 6 Cal. 3d at p. 651.) In *Ring v. Arizona, supra,* 536 U.S. 584, Justice Breyer addressed this rationale in a concurring opinion. "As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes. See, *e.g.*, Sorensen & Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J. Crim. L. & C. 1251, 1256 (2000) (studies

find average repeat murder rate of .002% among murderers whose death sentences were commuted); Marquart & Sorensen, A National Study of the *Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loyola (LA) L. Rev. 5, 26 (1989) (98% did not kill again either in prison or in free society)." (*Ring v. Arizona, supra,* 536 U.S. at p. 615, Breyer, J., concurring.) In sum, the statistical data shows that the death penalty does not have a deterrent effect on prison homicides, even when the death penalty was permitted as a mandatory punishment.

3. The Death Penalty Is Not Justified As Retribution And Other Means Are Available To Punish A Life Prisoner And To Protect Others.

The prior decisions also asserted that the death penalty was necessary as retribution because no other penalty was available for a prisoner serving a life term. (*In re Finley, supra,* 1 Cal.App. at p. 202 ["The limit of ordinary punishment has been reached; and if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution."]; *see also People v. Oppenheimer, supra,* 156 Cal. at p. 737.) This assertion does not withstand scrutiny under current standards. Retribution may be a legitimate purposes served by the death penalty. (*Atkins v. Virginia, supra,* 536 U.S. at p. 319, *Roper v. Simmons, supra,* 543 U.S. at p. 571; *Gregg v Georgia, supra,* 428 U.S. at p. 183.)

However, the high court recently cautioned that of all the rationales offered for punishment, it is retribution "that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana, supra,* 128 S.Ct. at p. 2650.) For this reason,

"capital punishment must 'be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Ibid.*, quoting *Roper, supra,* 543 U.S. at p. 568, internal citation and quotation omitted.)

The theory is that "'some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.' [Citation.]" (*Gregg* v. *Georgia, supra,* 428 U.S. at p. 184, fn. 30; *accord Zant v. Stephens, supra,* 462 U.S. at p. 877, fn. 15; *Baze v. Rees, supra,* 128 S. Ct. at p. 1548, Stevens., J., concurring.) However, section 4500 simply requires a fatal assault with malice aforethought. The fact that the crime was committed by a life prisoner, does not make it so outrageous that the death penalty must be permitted regardless whether or not it is a deterrent.

In *Shuman,* the United States Supreme Court explicitly "reject[ed] the proposition that a mandatory death penalty for life-term inmates convicted of murder is justified because of the State's retribution interests." (*Shuman, supra,* 483 U.S. at p. 81.) "[T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization." (*Id.* at p. 84.) Use of these methods also serve to protect inmates and correctional staff.

Thus, for example, the high court has held that consistent with due process an inmate who poses a threat to others may be isolated from the rest of the prison population and denied the various forms of social contact which are normally available within prison. (*See United States v. Gouveia* (1984) 467 U.S. 180, 182-83 [104 S. Ct. 2292; 81 L. Ed. 2d 146] [After committing the murder of another inmate at a federal prison, the defendants

were placed in the "Administrative Detention Unit" ("ADU"), where they "were separated from the general prison population and confined to individual cells."].)

Similar forms of restrictive custody exist in California state prisons. These include the Security Housing Unit ("SHU") and other types of special confinement. (6 RT 1417.) For example, the prosecution's gang expert testified that the Department of Corrections had dealt with the problems posed by the Aryan Brotherhood prison gang by placing its members in SHUs so that they no longer had the run of the prison yards. (7 RT 1725-26.) For a period before the Addis homicide appellant was placed in the Corcoran SHU. During that time, appellant committed no assaults. (14 RT 3510.) In 2000, appellant was placed in protective custody at the county jail because he had debriefed about prison gangs and provided information to law enforcement about planned assaults on deputies at the county jail. (13 RT 3289-90; *see also* 2 CT 584.) Appellant remained in protective custody through the trial and there is no evidence that he committed any assaults while in protective custody or at any time after he was transferred to the county jail on May 1, 1998. (Exh. No. 42, 4 CT 1096.)

Transfer to a higher security and more punitive facility is also permissible. (*See, e.g., Wilkinson v. Austin* (2005) 545 U.S. 209 [125 S. Ct. 2384; 162 L. Ed. 2d 174] [Placement in a "supermax" prison with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population, permitted after notice and opportunity for rebuttal]; *Sandin v. Conner* (1995) 515 U.S. 472, 486 [115 S. Ct. 2293; 132 L. Ed. 2d 418] ["We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."]; *Montanye v.*

Haymes (1976) 427 U.S. 236, 243 [96 S. Ct. 2543; 49 L. Ed. 2d 466] [For a rules violation and without violating due process, a prisoner may be transferred to another institution without a guilt determination of misconduct.]; *Meachum v. Fano* (1976) 427 U.S. 215, 217, fn. 1 [96 S. Ct. 2532; 49 L. Ed. 2d 451] [Inmates transferred from medium to maximum security facility with less desirable living conditions, after authorities received information that inmates were "'were in possession of instruments that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.' [Citation.]"].)

In addition, a "troublemaker" and "maximum security risk" may be transferred to a prison in another state. (*See, e.g., Olim v. Wakinekona* (1983) 461 U.S. 238 [103 S. Ct. 1741; 75 L. Ed. 2d 813] [An interstate transfer of a "troublemaker" and " maximum security risk" from a prison in Hawaii to a prison in California did not violate a liberty interest protected by due process.].) Thus, as a matter of fact and law, neither the state's legitimate retribution interests nor interest in prison safety justify making a defendant eligible for the death penalty solely because of life prisoner status.

F. An Interjurisdictional Comparison Demonstrates A Lack Of Societal Consensus That A Murder By A Life Prisoner Is An Extreme Crime For Which The Only Adequate Response May Be The Penalty Of Death.

As noted, modern death penalty jurisprudence began with the recognition that the death penalty must be reserved for "extreme cases", *i.e.*, those killings which society views as "so grievous an affront to humanity that the only adequate response may be the penalty of death." (*Gregg* v. *Georgia, supra,* 428 U.S. at p. 184; *accord Kennedy v. Louisiana, supra,* 128 S. Ct. at pp. 2649-50.) An additional consideration for evaluating whether a statute defining a capital offense passes scrutiny is an

interjurisdictional comparison. (*Kennedy v. Louisiana, supra,* 128 S. Ct. at p. 2650 [The "Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'"], quoting *Roper v. Simmons, supra,* 543 U.S. 551, 563 [125 S. Ct. 1183, 1190; 161 L. Ed. 2d 1].)

Currently, 14 fourteen states and the District of Columbia do not have the death penalty.[43] Of the jurisdictions with the death penalty, two states and the federal government do not use custody status as a factor for determining either death eligibility or penalty selection. In 21 states, it is merely one factor to be considered at the penalty selection phase. In just 13 states, including California, custody status at the time of a murder is a death eligibility factor. However, only eight states in addition to California, authorize the death penalty for an inmate who commits what is effectively second degree murder as authorized by section 4500. (See Section 3., below.)

In sum, of the 52 American jurisdictions (the 50 states, plus the District of Columbia and the federal government) 75% (39 of 52) of them do not use custody status for determining death eligibility, comprising 15 that have rejected the death penalty altogether and 24 that maintain it but do use custody status to determine death eligibility. This weighs heavily on the side of rejecting life prisoner status as dispositive for determining death eligibility. (*See* Section 4., below.)

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43. See www.deathpenaltyinfo.org. The states without the death penalty are: Alaska, Hawaii, Iowa, Maine, Michigan, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. (*Ibid.*)

1. Two States With The Death Penalty And The Federal Government Do Not Use Inmate Status As An Eligibility Factor Or A Selection Factor.

Nebraska does not use prisoner status as a factor for determining death eligibility or as an aggravating circumstance at the penalty selection phase. (*See* Neb. Rev. Stat, § 28-303 ["Murder in the first degree; penalty."], § 29-2523 ["Aggravating and mitigating circumstances."].)

South Carolina is similar, although murder of a correctional officer is one of several aggravating circumstances at the penalty phase regardless of the custody status of the defendant. (*See* S.C. Code, § 16-3-10 [murder defined]; § 16-3-20, subd. (C)(a)(7) ["(a) Statutory aggravating circumstances: ... (7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties."].)

Under federal law, a prior conviction of an offense for which a sentence of life imprisonment was authorized is a factor in aggravation at the penalty selection phase. (18 U.S.C. § 3592, subd. (c)(3) ["(c) In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: ... (3) The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute."].) However, custody status at

the time of the offense is not a factor in aggravation. (18 U.S. C. § 3592.)

2. 21 States Use Inmate And/Or Custody Status As A Selection Factor At The Penalty Phase.

In Arizona, upon a finding of first degree murder, custody status is one of several aggravating circumstance at the penalty selection phase. (Ariz. Rev. Stat., § 13-703, subd. F. ["The trier of fact shall consider the following aggravating circumstances in determining whether to impose a sentence of death: 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable. ... 7. The defendant committed the offense while: (a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail. (b) On probation for a felony offense."].)

In Colorado, upon a finding of first degree murder, status as a prisoner for a felony conviction is an "aggravating factor" at the penalty selection phase. (Colo. Rev. Stat., § 18-1.3-1201, subd. (5) ["For purposes of this section, aggravating factors shall be the following factors: (a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law ...."].)

In Delaware, upon a finding of first degree murder, custody status at the time of the offense is one of several aggravating circumstances at the penalty selection phase. (Del. Code, Title 11, § 4209 subd. (e)(1)(a) ["(1) In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating

circumstances which shall apply with equal force to accomplices convicted of such murder: a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement."

In Florida, upon a finding of the commission of a "capital felony", such as murder with premeditation or in the course of certain felonies, being in custody for a felony or on probation for a felony is one of several aggravating circumstances at the penalty selection phase. (Fla. Stat., § 921.141, subd. (5)(a) ["Aggravating circumstances shall be limited to the following: (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation."].)

In Georgia, being in a place of lawful confinement at the time of a murder is one of several aggravating circumstances at the penalty selection phase. (Ga. Code Ann., § 17-10-30, subd. (b)(9) [(b) "In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: ... (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement ...."].)

In Illinois, upon a finding of first degree murder, being incarcerated by the Department of Corrections at the time of the offense is one of several aggravating circumstances at the penalty selection phase. (Ill. Rev. Stat., Ch. 38, para. 9-1, subd. (b)(10) ["A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if: ...

(10) the defendant was incarcerated in an institution or facility of the Department of Corrections at the time of the murder, and while committing an offense punishable as a felony under Illinois law, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual ...."].)

In Indiana, upon a conviction for murder, being in the custody of the department of correction is one of several aggravating circumstances at the penalty selection phase. (Ind. Code, § 35-50-2-9, subd. (b)(9) ["(b) The aggravating circumstances are as follows: ... (9) The defendant was: (A) under the custody of the department of correction; (B) under the custody of a county sheriff; on probation after receiving a sentence for the commission of a felony; or (D) on parole; at the time the murder was committed.")

In Kentucky, being a prisoner at the time of the murder of a prison employee is one of several aggravating circumstances at the penalty selection phase. (Ky. Rev. Stat., § 532.025, subd. (2)(a)(5) ["The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties ...."].)

In Louisiana, being imprisoned for an unrelated forcible felony is one of several aggravating circumstances at the penalty selection phase. (La. Rev. Stat., art. 905.4, subd. (A) ["A. The following shall be considered aggravating circumstances: ... (6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony."].)

In Maryland, being imprisoned under a sentence of death or for life at the time of a murder is one of several aggravating circumstances at the

penalty selection phase.[44] (Md. Crim Law Code, § 2-3-3, subd. (g)(1)(viii) ["(1) In determining a sentence under subsection (b) of this section, the court or jury first shall consider whether any of the following aggravating circumstances exists beyond a reasonable doubt: ... (viii) the defendant committed the murder while under a sentence of death or imprisonment for life ...."].)

In Missouri, committing the murder of an employee of a custodial facility while an inmate is one of several aggravating circumstances at the penalty selection phase. (Mo. Rev. Stat, § 565.032, subd. 2(13) ["2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following: ... (13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility ...."].)

In Montana, being in "official detention" at the time of a deliberate homicide is one of several aggravating circumstances at the penalty selection phase. (Mont. Code, § 46-18-303, subd. (1)(a)(i) ["Aggravating circumstances are any of the following: (1) (a) The offense was deliberate homicide and was committed: (i) by an offender while in official detention, as defined in 45-2-101 ...."]; § 45-2-101, subd. (50(a) ["Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for

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44. On November 12, 2008, the Maryland Commission on Capital Punishment voted 13-9 to recommend abolition of the death penalty. For the commission report see: http://www.goccp.org/capital-punishment/documents/death-penalty-commission-final-report.pdf. The matter is now before the Legislature. (*Ibid.*)

extradition or deportation, or lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. (b) Official detention does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape."].)

In Nevada, being under a sentence of imprisonment at the time of a first degree murder is one of several aggravating circumstances at the penalty selection factor phase. (Nev. Rev. Stat., §§ 200.030, subd. 4; § 200.033, subd. 1 ["The only circumstances by which murder of the first degree may be aggravated are: 1. The murder was committed by a person under sentence of imprisonment."].)

In New Mexico, upon a finding of first degree murder, being lawfully incarcerated at a penal institution is one of several aggravating circumstances at the penalty selection phase. (N.M. Stat. Ann., § 30-2-1 ["Whoever commits murder in the first degree is guilty of a capital felony."]; § 31-20A-5, subd. D. ["The aggravating circumstances to be considered by the sentencing court or jury ... are limited to the following: while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico. As used in this subsection 'penal institution' includes facilities under the jurisdiction of the corrections and criminal rehabilitation department and county and municipal jails."].)

In North Carolina, upon a finding of first degree murder, being lawfully incarcerated at the time of the crime is one of several aggravating circumstances at the penalty selection phase. As to eligibility, all first degree murder may be a capital offense. (N.C. Gen. Stat., § 14-17 ["[A]ny

person who commits ... [first degree] murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole."]; § 15-A-2000, subd. (e)(1) ["Aggravating circumstances which may be considered shall be limited to the following: (1) The capital felony was committed by a person lawfully incarcerated."]

In Ohio, upon a finding of an aggravated murder, being under detention at the time of the commission of the crime is one of several aggravating circumstances at the penalty selection phase. (Ohio Rev. Code, § 2929.02, subd. (A) ["Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death."]; § 2929.04, subd. (A)(4) ["Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt: ... (4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code ...."], § 2921.01, subd. E. ["'Detention' means arrest; confinement in any vehicle subsequent to an arrest; confinement in any public or private facility for custody of persons charged with or

convicted of crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States ...."].)

In Oklahoma, upon a finding of the commission of first degree murder, serving a sentence of imprisonment for a felony at the time of the crime is one of several aggravating circumstances at the penalty selection phase. (Okla. Stat., Title 21, § 701, subd. A. ["Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment."] § 701.12, subd. 6 ["Aggravating circumstances shall be: ... 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony ....].)

In Pennsylvania, upon a conviction of first degree murder, undergoing a life sentence at the time of the crime is one of several aggravating circumstances at penalty selection phase. (Pa. Cons. Stat., § 1102 [Authorizing life imprisonment or a death sentence for first degree murder], § 9711, subd. (d)(10) ["Aggravating circumstances shall be limited to the following: ... (10) ... the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense."].)

In South Dakota, upon a finding of first degree murder, being in a place of lawful confinement at the time of the crime is one of several aggravating circumstances at the penalty selection phase. (S.D. Codified Laws, § 22-16-12 [defining first degree murder as a Class A felony], § 23A-27A-1, subd. (8) [In all cases for which the death penalty may be authorized, aggravating circumstances include "(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a

law enforcement officer or place of lawful confinement ...."]; § 23A-27A-4 [authorizing death penalty for Class A felony].)

In Tennessee, upon a finding of first degree murder, being in lawful custody or in a place of lawful confinement at the time of the crime is one of several aggravating circumstances at the penalty selection phase. (Tenn. Code, § 39-13-202, subd. (c) ["A person convicted of first degree murder shall be punished by: (1) Death; (2) Imprisonment for life without possibility of parole; or (3) Imprisonment for life."], § 39-13-204, subd. (i) [Statutory aggravating circumstances "are limited to the following ... (8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement ...."].)

In Wyoming, upon a finding of first degree murder, being confined in a jail or correctional facility at the time of the crime is one of several aggravating circumstances at the penalty selection phase. (Wyo. Stat., § 6-2-102, subd. (h)(i)(A) ["(h) Aggravating circumstances are limited to the following: (i) The murder was committed by a person: (A) Confined in a jail or correctional facility ...."].)

3. 13 States, Including California, Use Inmate Status As A Death Eligibility Factor.

In addition to California (Penal Code, § 4500), 12 states use inmate status as a factor for determining eligibility for the death penalty. However, only eight states in addition to California (Alabama, Connecticut, Idaho, Mississippi, New Hampshire,[45] Oregon, Texas, and Utah) authorize the

45. Although New Hampshire permits the death penalty, there have been no executions since the death penalty was reenacted in 1974 after *Furman, supra,* 408 U.S. 238. The last execution in New Hampshire occurred in 1939. (Kenneth C. Haas, "The Emerging Death Penalty Jurisprudence of the Roberts Court" (2008) 6 PierceL.Rv. 387, 429 & fn 299.)

death penalty for an inmate who commits what is effectively equivalent to second degree murder as authorized by section 4500.

In Alabama, capital murder is defined to include, "[m]urder committed while the defendant is under sentence of life imprisonment." (Ala. Code, § 13A-5-40, subd. 6.) Murder includes what under California law would be second degree express or implied malice murder. (Ala. Code, § 13A-6-2 ["(a) A person commits the crime of murder if he or she does any of the following: (1) With intent to cause the death of another person, he or she causes the death of that person or of another person. (2) Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person."].)

In Arkansas, capital murder is defined to include the commission of an unlawful killing with premeditation and deliberation while incarcerated. (Ark. Stat., § 5-10-101, subd. (a) ["A person commits capital murder if ... (6) While incarcerated in the Department of Correction or the Department of Community Correction, the person purposely causes the death of another person after premeditation and deliberation ...."].)

In Connecticut, a capital felony is defined to include murder, which includes an intentional killing, while under sentence of life imprisonment. (Conn. Gen. Stat., § 53a-54a, subd. (a) ["A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person ...."], § 53a-54b ["A person is guilty of a capital felony who is convicted of any of the following: ... (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment ...."].)

In Idaho, the capital offense of first degree murder is defined to

include the commission of first or second degree murder by a person under a sentence for first or second degree murder. (Idaho Code, § 18-4003, subd. (c) ["Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree."].) Murder is defined as an unlawful killing with malice aforethought or by torture, which is deemed the equivalent of an intent to kill. (Idaho Code, § 18-4001 ["Murder is the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture ... torture causing death shall be deemed the equivalent of intent to kill."].)

In Kansas, capital murder is defined to include, the "intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail ...." (Kan. Stat., § 21-2439, subd. 3.)

In Mississippi, capital murder is defined to include the commission of express or implied malice murder while under a sentence of life imprisonment. (Miss. Code, § 97-3-19, subd. (2) ["(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: ... (b) Murder which is perpetrated by a person who is under sentence of life imprisonment ...."].) Murder is defined to as an unlawful killing with deliberate intent, "in the commission of an act eminently dangerous to others and evincing a depraved heart," or in the commission of certain felonies. (Miss. Code, § 97-3-19, subd. (1).)

In New Hampshire, capital murder is defined to include knowingly causing the death of another person while under a sentence of life with or without parole. (N.H. Rev. Stat., § 630:1, subd. I.A(d) ["I. A person is guilty of capital murder if he knowingly causes the death of: ... (d) Another after being sentenced to life imprisonment without parole pursuant to RSA 630:1-a, III ...."].)

In Oregon, the capital crime of "aggravated murder" is defined to include an intentional killing while confined in a correctional facility. (Or. Rev. Stat., § 163.095, subd. (2)(b) ["As used in ORS 163.105 and this section, "aggravated murder" means murder as defined in ORS 163.115 which is committed under, or accompanied by, any of the following circumstances: ... (2)(b) The defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody when the murder occurred."]; § 163.105, subd. (1)(a) ["Except as otherwise provided in ORS 137.700, when a defendant is convicted of aggravated murder as defined by ORS 163.095, the defendant shall be sentenced, pursuant to ORS 163.150, to death, life imprisonment without the possibility of release or parole or life imprisonment."]; Or. Rev. Stat., § 163.115, subd. (a) & (b) [Murder defined as an intentional killing or a killing during the commission of certain felonies.].)

In Texas, capital murder is defined to include the commission of an intentional killing while incarcerated in a penal institution. (Tex. Penal Code, § 19.03, subd. (a)(5) ["CAPITAL MURDER. (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and: ... (5) the person, while incarcerated in a penal institution, murders another: (A) who is employed in the operation of the penal institution; ... (6) the person: (A) while incarcerated for an offense under this section or Section 19.02, murders another; or (B) while serving a

sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another ....") Murder is defined as an intentional or knowing killing. (Tex. Penal Code, § 19.02, subd. (b)(1) ["Murder ... (b)(1) ["A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual ...."]

In Utah, the capital offense of aggravated murder is defined to include an intentional or knowing killing while confined in a jail or other correctional institution. (Utah Code, § 76-5-202, subd. (1)(1) ["(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances: (a) the homicide was committed by a person who is confined in a jail or other correctional institution ...."].)

In Virginia, capital murder is defined to include the willful, deliberate, premeditated killing by a prisoner confined in a state or local correctional facility. (Va. Code, § 18.2-31, subd. 3 ["The following offenses shall constitute capital murder, punishable as a Class 1 felony: ... 3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof ...."].)

In Washington, the capital offense of aggravated first degree murder is defined to include first degree murder by a person while serving a term of imprisonment. (Wash. Rev. Code, § 10.95.020, subd. 2 ["A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder ... and one or more of the following aggravating circumstances exist: At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes ...."], §

10.95.030, subd. 2 [death penalty for aggravated murder].) First degree murder is a killing with a premeditated intent to cause death, or under circumstances manifesting an extreme indifference to human life, or in the commission of certain felonies. (Wash. Rev. Code, § 9A.32.030, subd. 1.)

4. The Fact That 75% Of The American Jurisdictions Have Rejected Using Prisoner Status To Determine Death Eligibility Weighs Against It.

The foregoing summary shows that of the 52 American jurisdictions (the 50 states, plus the District of Columbia and the federal government) 75% (39 of 52) of them do not use custody status for determining death eligibility, comprising 15 that have rejected the death penalty altogether and 24 that maintain it but do use custody status to determine death eligibility.

A series of high court decisions show that this disparity weighs heavily against using custody status to determine death eligibility. For purposes of this argument, appellant is not claiming that a life prisoner who commits special circumstance murder (Penal Code, § 190.2, subd. (a)) may not be subjected to the death penalty. The point is that the weight of authority shows that prisoner status should not make the defendant eligible for the death penalty where the crime committed would not otherwise be considered a capital offense.

In *Coker v. Georgia* (1977) 433 U.S. 584 [97 S. Ct. 2861; 53 L. Ed. 2d 982] ("*Coker*"), the high court invalidated the death penalty for rape of an adult woman. (*Id.* at p. 592.) This conclusion was supported by the fact that only three states authorized the death penalty for rape. "The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." (*Id.* at p. 596.)

In *Enmund v. Florida, supra,* 458 U.S. 782, the court undertook a similar analysis to reverse a death sentence imposed on a defendant who was an accomplice to a robbery. It noted that "only a small minority of jurisdictions -- eight -- allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. Even if the nine States are included where such a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances -- which often include the defendant's minimal participation in the murder -- only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die." (*Id.* at p. 792.) Although the "current legislative judgment" was less clear than in *Coker*, it nevertheless, "weigh[ed] on the side of rejecting capital punishment for the crime." (*Id.* at p. 793.)

In *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S. Ct. 2242; 153 L. Ed. 2d 335] ("*Atkins*"), the court conducted an interjurisdictional review to hold that the Virginia statute permitting the death penalty for the mentally retarded was excessive in violation of the Eighth Amendment. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. (*Id.* at pp. 313-315.) These facts supported a conclusion that a national consensus had developed against the execution of the mentally retarded. (*Id.* at pp. 315-316, footnotes omitted.)

In *Roper v. Simmons, supra,* 543 U.S. 551, the court again made an interjurisdictional review to find that there was no consensus for imposing the death penalty for crimes committed when the offender was under 18

years of age. It noted that "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach." (*Id.* at p. 564, citation omitted.) The rejection of the death penalty for those under the age of 18 by the majority of jurisdictions provided an objective indication of a consensus against it. (*Id.* at p. 567.)

Most recently, in *Kennedy v. Louisiana, supra,* 128 S. Ct. 2641, the court held that a statute that imposed the death penalty for the non-fatal rape of a child was unconstitutional under the Eighth and Fourteenth Amendments. In reviewing the issue, the court was guided by an interjurisdictional comparison as well as its own judgment. (*Id.* at pp. 2650-51.) An interjurisdictional comparison showed a "divided opinion but, on balance, an opinion against it." (*Id.* at p. 2653.) Of the 36 states and the federal government with the death penalty, only six authorized the death penalty for the rape of a child.[46] (*Ibid.*) "The small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime." (*Id.* at p. 2656.)

The line of authority from *Coker* through *Kennedy* supports the conclusion that, although there is some division, the majority opinion is heavily on balance against using prisoner status to determine death eligibility. As noted, 75% (39 of 52) of the American jurisdictions do use custody status to determine death eligibility. This number falls within the

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46. In connection with a federal military court martial, the death penalty may be imposed for rape. However, "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context." (*Kennedy v. Louisiana* (2008) ___ U.S. ___ [129 S.Ct. 1, 3; 171 L.Ed.2d 932] [denying petition for rehearing].)

range the high court has identified as significant for evaluating whether the death penalty is the appropriate penalty for an offense. The *Enmund*, the court found it significant that "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die." (*Enmund, supra,* 458 U.S. at p. 792.) In *Atkins* and *Roper*, the fact that only 60% of the states (30 of 50) permitted the death penalty for the mentally retarded and persons under the age of 18 was significant. (*Atkins, supra,* 536 U.S. at pp. 313-16; *Roper, supra,* 543 U.S. at p. 567.) Therefore, the fact that appellant would not have been eligible for the death penalty in 75% of the American jurisdictions weighs heavily against the use of section 4500 in this case.

G. Conclusion: Appellant Should Not Have Been Eligible For The Death Penalty.

But for section 4500, appellant was not eligible for the death penalty because none of the 21 special circumstance available in 1997 applied to the circumstances of the charged murder of Addis. The determination of death eligibility reduced to a single issue: whether appellant was "undergoing a life sentence" at the time of what otherwise would not be a capital offense. (Penal Code, § 4500.) Assuming for arguments sake only that appellant was undergoing a life sentence at the time of the crime (*c.f.* Argument Section XIII., above), appellant had been sentence to a three strikes life sentence without any prior conviction for a crime of violence.

The developments in the high court's due process and Eighth Amendment standards since the cases upholding section 4500 and/or former section 246 show that the fact that appellant was serving such a three strikes life does not mean that his case is one of the "extreme cases" reflecting "so grievous an affront to humanity that the only adequate response may be the penalty of death." (*Gregg* v. *Georgia, supra,* 428 U.S.

at p. 184.) Stated simply, evidence that appellant was a life prisoner "does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death." (*Shuman, supra,* 483 U.S. at p. 81.) *A fortiori*, appellant should not have been eligible for the death penalty on such a slender premise where appellant would not have been eligible for the death penalty in 75% of the American jurisdictions.

The high court's discussion of the proffered rationales offered to justify death eligibility on life prisoner status (deterrence, retribution, and prison safety) show that the death penalty is arbitrary and disproportionate when no other circumstances makes the crime a capital offense. (*Shuman, supra,* 483 U.S. at p. 84 ["[T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization."].) For all these reasons, Section 4500 on its face and as applied here fails to pass constitutional scrutiny.