

# SUPREME COURT COPY

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DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

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**APPELLANT'S OPENING BRIEF**  
**(Volume Three Of Three, Pages 335-522)**

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## XV.

### **APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE HE WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S DECISION TO SEEK THE DEATH PENALTY.**

#### **A. Introduction.**

Before trial, appellant filed a "Motion to Enforce Equal Protection in Penalty Decisions" pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and "the applicable provisions of the California Constitution and Government Code §§ 12510 et seq." (2 CT 583.) Appellant pointed out that the decision to seek the death penalty was the result of an internal decision by the San Bernardino County District Attorney. Appellant sought to have the District Attorney forego seeking the death penalty because he had cooperated with law enforcement about planned assaults on deputies at the county jail and he had offered to debrief about the Nazi Low Riders prison gang. (2 CT 584; 13 RT 3289-90.) As a result of his efforts, appellant before trial was placed in protective custody in the county jail. However, the San Bernardino District Attorney continued to prosecute the death penalty against him. (*Ibid.*)

In contrast, the San Francisco County District Attorney had not sought the death penalty since 1996. (2 CT 584, 588 [Declaration of Michael N. Burt In Support Of Motion To Bar Death Penalty On Equal Protection Grounds].) This disparity violated the legislative intent to establish a system of uniform enforcement of the laws. (2 CT 585; Gov. Code, §§ 12510; 12524; Cal. Const., Art. V, § 13.) Because similarly situated defendant's in San Francisco would not be subject to the death penalty, appellant had been subject to arbitrary enforcement of the law in violation of his right to due process of law

and he had suffered disparate treatment in violation of his right to equal protection of the law. (2 CT 583, 585-587; cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amends; *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 532; 148 L.Ed.2d 388].)

The prosecution filed a written opposition. (3 CT 618-628.) The prosecution argued that appellant's motion should be denied because this Court in several death penalty cases had rejected similar arguments. (3 CT 620-21; *see, e.g., People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Ray* (1996) 13 Cal.4th 313, 359; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Arias* (1996) 13 Cal.4th 92, 189-90, 192-94 *People v. Crittenden* (1994) 9 Cal.4th 83, 152.) Moreover, this Court and the United States Supreme Court and the California Supreme Court had rejected "intercase proportionality" review. (3 CT 622; *see, e.g., Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S. Ct. 871; 79 L. Ed. 2d 29 ]; *People v. Wright* (1988) 18 Cal.4th 385, 432; *People v. Millwee* (1998) 18 Cal.4th 96, 168; *People v. Mayfield* (1997) 14 Cal.4th 668, 812; *People v. Marshall* (1996) 13 Cal.4th 799, 865-66.)

The prosecution further noted that similar arguments had been rejected in the context of prosecutorial decisions to seek "three strikes" sentences. (3 CT 622-23; *see, e.g., People v. Andrews* (1998) 65 Cal.App.4th 1098, 1102-04.) In addition, the prosecution argued that, even in the context of the death penalty, selective prosecution does not violate equal protection of the laws. (3 CT 626; *see, e.g., People v. Ashmus* (1991) 54 Cal.3d 932, 980; *People v. Keenan* (1988) 46 Cal.3d 478, 505-507, *cert. den.*, (1989) 490 U.S. 1012.)

On March 26, 2001, the trial court without explanation denied the defense motion. (3 CT 743-44; 5 RT 1029-1030 ["The motion is denied."].) The question of whether the trial court properly denied the defense motion is independently reviewed. (*See, e.g., In re Scott, supra*, 29 Cal.4th at p. 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."].)

**B. The Disparity In Decisions To Seek The Death Penalty Violates State And Federal Law.**

Both the state and the federal constitutions recognize fundamental interests in due process of law, equal protection of the law, and the denial of cruel and/or unusual punishments. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) In some cases, these interests may be adequately served. (*See, e.g., People v. Crittenden, supra*, 9 Cal.4th at p. 152.) However, this is not the case where the record shows that the death penalty law has not been uniformly enforced and section 4500 grants unqualified discretion to seek the death penalty against a life prisoner, regardless of the nature of the life sentence or the crime for which it was imposed.

The California Legislature intended to create a system of uniformly enforced death penalty laws. (Penal Code, §§ 190.2, 190.25.) Moreover, the Attorney General is to required supervise the District Attorneys within the state to ensure the "uniform and adequate enforcement of the laws". (Gov. Code, § 12510; *Pitts v. County of Kern* (1998) 17 Cal. 4th 340, 357 ["In California, each county district attorney is supervised by the Attorney General."]; *see also* Cal. Govt. Code. § 12550 ["The Attorney General has direct supervision over the district attorneys of the several counties of the State ...."]; Cal. Const., Art. V, § 13 ["Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."].)

Correspondingly, the United States Supreme Court has recognized that

when fundamental rights are at stake the equal protection clause of the Fourteenth Amendment requires uniformity in the enforcement of the laws affecting those rights. (*Bush v. Gore* (2000) 531 U.S. 98, 104-108 [121 S.Ct. 525; 148 L. Ed. 2d 388] ("*Bush*").) There must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Id.* at p. 109.) Although the *Bush* decision addressed the right to vote, the same principle should apply here because the right to life as the most fundamental right protected by the state and federal constitutions. (Cal. Const., Art. I, § 7, subd. (a) ["A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ...."], § 15 ["Persons may not be ... deprived of life, liberty, or property without due process of law."]; U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amends. [same]; *People v. Olivas* (1976) 17 Cal.3d 236, 251 ["We concluded that personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions."].) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights .... It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86,102 (1958)." (*Commonwealth v. O'Neal* (1975) 367 Mass. 440, 449 [327 N.E. 2d 662, 668].)

Given these standards, it is impermissible for one county to seek to impose the death penalty while another county has suspended its use. A defendant committing a capital crime in San Bernardino County faces the death penalty, while the San Francisco County District Attorney would not even consider seeking the death penalty for a capital offense.<sup>47</sup> (2 CT 584,

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47. Measured by the number of inmates on death row as of January 2004, San Bernardino County was the sixth highest death sentencing county in the state with 34 inmates on death row. (California Commission for the Fair Administration of Justice, "Report And Recommendations On The Administration Of The Death Penalty In California" (June 30, 2008) at p. 97,

589-90.) On its face, this disparity violates the state the state and federal requirement that similarly situated persons must be treated equally where fundamental rights are at stake.

Given these circumstances, the courts must enforce the equal protection guarantees of the constitution and suspend the imposition of the death penalty until there are guarantees that the death penalty is sought in a non-arbitrary fashion. This conclusion is supported by *Bush v. Gore, supra*. There, the United States Supreme Court reviewed the decision by the Florida Supreme Court to proceed with a manual recounts of votes in the presidential election in some counties but not in others. The primary concern identified by the United States Supreme Court was to ensure uniform treatment of each individual's vote because the right to vote was a fundamental interest and, therefore, subject to the safeguards of equal protection of the law. (*Bush v. Gore, supra*, 531 U.S. at p. 104.) The question presented was "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." (*Id.* at p. 105.)

The high court observed that Florida had no constitutional obligation to select its electors by popular vote but, having done so, equal protection principles applied. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (*Id.* at pp. 104-105.) An equal protection violation occurred, even in the absence of discriminatory intent, because the absence of statewide uniformity had a discriminatory impact on the implementation of a fundamental right. (*Id.* at pp. 109-110.)

The issue presented here is analogous. There is no requirement for the State of California to have a death penalty. However, having done so, due

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fn. 129, available at <http://www.ccfaj.org>.)

process and equal protection safeguards apply to the most fundamental right of life itself. In California, the 58 counties through their District Attorneys make their own rules for deciding whether or not to seek the death penalty. As a result, there is no assurance of equal protection of the law. The language of *Bush v. Gore, supra*, is instructive:

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. (*Id.* at p. 109.)

As noted, the State of California by the Government Code and state constitution has adopted a requirement of uniform and equal protection of the laws. (Gov. Code, §§ 12510, 12524; Cal. Const., Art. I., §§ 7, subd. (a), 15; Art. V, § 13.) Moreover, the same criteria for death-eligibility are applicable in all counties. (Penal Code, §§ 190.2, 190.25.) Because a statewide policy exists, the same "rudimentary requirements of equal treatment and fundamental fairness" should apply to the power to seek the death penalty. (*Bush v. Gore, supra*, 531 U.S. at p. 109.)

In connection with the recent hearings on the administration of the death penalty in California, the California Commission for the Fair Administration of Justice ("CCFAJ") examined several aspects of the administration of California's death penalty law, including "geographic disparities in employment of the death penalty, the unavailability of accurate information regarding the administration of the death penalty, [and] the transparency of prosecutorial decision-making ...." (CCFAJ, Report And Recommendations On The Administration Of The Death Penalty In California

(June 30, 2008) at p. 12, <http://www.ccfaj.org>.)

The Commission made a "concerted effort" to survey the District Attorneys about these issues. However, those efforts were "largely unsuccessful" because, of the 58 counties in California, 20 District Attorneys never responded, including the San Bernardino County District Attorney, and 14 refused to participate. (*Id.* at pp. 96-97.) Nevertheless, the Commission observed that "[e]vidence of disparities in the administration of the death penalty undermines public confidence in our criminal justice system generally. It is our duty to ensure that every aspect of the criminal justice system is administered fairly and evenly, and that all residents of the state are accorded equal treatment under the law. This is especially true when the state chooses to take a life in the name of the people." (*Id.* at p. 96.)

Because the death penalty is administered in the name of the state, there should be a uniform statewide standard employed to determine whether or not the death penalty will be sought. (Gov. Code, §§ 12510, 12524; Cal. Const., Art. I., §§ 7, subd. (a), 15; Art. V, § 13.) Accordingly, this Court should intervene to ensure that the principles of due process, fundamental fairness, and equal protection apply in the procedures used for charging a defendant with a capital crime.

**C. A Denial Of Due Process And Equal Protection Also Occurred Because Section 4500 Grants Unqualified Discretion To The Prosecution To Seek The Death Penalty Against A Life Prisoner Regardless Of The Reasons Why The Prisoner Was Undergoing A Life Sentence.**

The arbitrary use of the death penalty and the denial of due process and equal protection in this case was compounded by the fact that the only allegation that made appellant eligible for the death penalty was section 4500. As explained above in Argument Section XIV., section 4500 is overbroad because it treats all life prisoners as fungible, regardless of the nature of the

life sentence or the crime for which it was imposed. This engenders an additional constitutional flaw: it grants unqualified discretion to the District Attorney to choose which life prisoners are eligible for the death penalty in violation of the defendant's rights to due process of law, equal protection of the law, and the arbitrary and capricious enforcement of the death penalty. (Cal. Const., Art., I, §§ 7, subd. (a), 15; U.S. Const. 5<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.)

This Court has rejected claims that "prosecutorial discretion to determine in which cases special circumstances will be charged and the death penalty sought renders the death penalty law unconstitutionally overbroad." (*People v. Stanley* (2006) 39 Cal.4th 913, 967, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 152; *People v. Ashmus* (1991) 54 Cal.3d 932, 980; *People v. Brown* (2004) 33 Cal.4th 382, 403.) However, those cases addressed claims relating to the multiplicity of special circumstance set forth in section 190.2. To appellant's knowledge, no case has addressed a claim that section 4500 grants overbroad charging discretion because it permits the District Attorney to seek the death penalty against a life prisoner regardless of the reasons why he was undergoing a life sentence.<sup>48</sup>

To satisfy due process, a penal statute must, amongst other things, define a criminal offense "in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations]. Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.' *Smith [v. Goguen]*, 415 U.S. [566,] 574. Where the legislature

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48. As discussed above in Argument Section XIII., appellant disputes that he was undergoing a life sentence at the time of the alleged violations of section 4500.

fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows ... prosecutors ... to pursue their personal predilections.' *Id.*, at 575." (*Kolender v. Lawson*, *supra*, 461 U.S. at pp. 357-58.)<sup>49</sup>

"Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. [Citations]." (*Smith v. Goguen* (1974) 415 U.S. 566, 575 [94 S.Ct. 1242; 39 L.Ed.2d 605].) Correspondingly, this Court has recognized the relationship between the Eighth Amendment's narrowing requirement and the due process restraint on prosecutorial charging discretion. "[O]ne sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty. The same reasoning applies to the prosecutor's decision to pursue or withhold capital charges at the outset." (*People v. Keenan*, *supra*, 46 Cal.3d at p. 506, citation omitted, emphasis added; *see also People v. Ashmus*, *supra*, 54 Cal.3d at p. 980 ["[P]rosecutorial policies and practices relating to the death penalty" are not "immune from federal or state constitutional scrutiny."].)

Thus, charging discretion "satisfies the constitutional prohibition against arbitrary and capricious exaction of the death penalty" only if the statute making the death penalty available "acceptably narrow[s] the circumstances under which capital punishment may be sought and imposed ...." (*People v. Keenan*, *supra*, 46 Cal.3d at p. 506.) As previously explained, a life sentence is available under California law for crimes ranging from first degree murder to selling a controlled substance to or through a minor with two

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49. Although this discussion was framed in terms of vagueness, the high court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." (*Kolender v. Lawson*, *supra*, 461 U.S. at p. 358, fn. 8, citing, *inter alia*, *Keyishian v. Board of Regents* (1967) 385 U.S. 589, 609; *NAACP v. Button* (1963) 371 U.S. 415, 433.)

or more prior convictions for the same offense (Penal Code, § 667.75) or, as in appellant's case, for a "three strikes" sentence without no prior convictions for a crime of violence. (Penal Code, § 667, subd. (e); *see* Argument Section XIV.C., above.) Given this reality, section 4500 violated appellant's due process and equal protection rights (Cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amend.) by granting the District Attorney unqualified discretion to decide which life prisoners may be subjected to the death penalty.

## **XVI.**

### **FOR MULTIPLE REASONS, THE TRIAL COURT ERRED IN THE PENALTY PHASE BY ADMITTING EVIDENCE OF THE DETAILS OF APPELLANT'S PRIOR THEFT-RELATED JUVENILE AND ADULT OFFENSES.**

#### **A. Introduction.**

Over appellant's objection that the evidence was irrelevant and inadmissible pursuant to section 190.3, the trial court permitted the prosecution to present evidence of the details of appellant's juvenile adjudications and adult convictions for property-related crimes. This violated appellant's state and federal rights to due process, to a fair trial, to trial by jury, and to reliable capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.)

The issue arose during the defense case in the penalty phase. The defense called as a witness James Cueva, a casework specialist, who functioned as a social worker within the California Youth Authority (hereafter "C.Y.A." or "Youth Authority"). In October of 1987, Cueva was the lead person on an assessment team for appellant at a C.Y.A. reception center diagnostic clinic that included a psychologist, a psychiatrist, a social worker, youth counselors, and youth correctional officers. (12 RT 3016-3025.) Appellant was 19 years-old at the time and he had recently pled guilty to three

counts of first degree burglary, one count of second degree burglary, and one count of grand theft auto. Because of his immaturity and lack of sophistication, the court had sent appellant to C.Y.A. rather than to state prison pursuant to former Welfare and Institutions Code section 1731.5, subdivision (c), which at that time permitted transfer of persons under 21 year of age to the Youth Authority to allow for participation in its programs. (12 RT 3021-22; Exh. No. 42, 4 CT 1104; Exh. No. 95, CT. Suppl. B 10.)

On or about October 28, 1987, Cueva prepared a 90-day evaluation that included an assessment of appellant's mental health status and his professional judgment for purposes of placement and services. (12 RT 3023-25; Exh. No. 95, Suppl.B CT 8-12.) Cueva chronicled appellant's prolonged neglect and abuse by his parents and others that resulted in long-term psychological problems with years of therapy and medication. (12 RT 3025-31, 3037-39.) Given this background, Cueva prepared a long range plan for appellant that included intensive, individual psychotherapy and group therapy. (12 RT 3039.) The treatment plan was admitted in evidence as part of Exhibit No. 95. (CT. Suppl. B 8-12.)

The treatment plan included a brief statement that appellant "was committed to the Youth Authority as a result of sustained convictions, three counts of residential burglary, 1<sup>st</sup> degree, one count of grand theft auto, and one count of commercial burglary, 2<sup>nd</sup> degree. His YA commitment time is 2 years, 7 month. He has had sustained convictions: burglary on two occasions and five non-sustained conviction for grand theft auto and commercial burglary, 2<sup>nd</sup> degree." (Exh. No. 95, CT. Suppl. B 10.) Beyond those facts, Cueva on direct examination did not testify about the nature or details of the crimes. (12 RT 3016-3041.)

After Cueva's direct examination, the prosecution sought to admit evidence of the details of appellant's adult offenses as well as his juvenile

adjudications. Appellant objected that the prior offenses were irrelevant and inadmissible as factor (b) evidence because they did not involve force or violence. In addition, juvenile adjudications were not admissible as factor (c) evidence because they are not criminal convictions. (12 RT 3013-14, 3015.)

The prosecutor argued that factor (b) did not apply because Cueva was not a witness "in my part of the case . . ." (12 RT 3014, 3046 ["This is not the People's case, this is not 190.3"].) In addition, the prosecutor argued that appellant juvenile offense history was relevant to the witness's assessment of the defendant. (12 RT 3014, 3015.)

Without the jury present, the trial court held an Evidence Code section 402 hearing to address the extent to which Cueva could testify about the prior offenses. (12 RT 3041.) In response to questions from the prosecution, Cueva testified that his report about appellant included a "referral document", which summarized appellant's legal background, with additional information about his prior convictions and sustained juvenile offense petitions. (*Ibid.*) Appellant's offense history was a required part of his assessment and "very important" to the analysis and opinions offered by Cueva on direct examination. (12 RT 3042-43, 3044-46.) In response to a question from the court, Cueva explained that appellant's offense history was important in the sense that it was information useful to determining the type of services appellant should receive in order to improve himself. (12 RT 3045.)

Defense counsel asked whether the decision about services was "influenced by whether he stole a thousand dollars versus \$6,000 or how many stereos he stole or is it more concerned with the fact that he was apparently a repeat offender as such? (12 RT 3045.) Cueva responded that "services are provided, you know, on the basis of his need, you know. I mean regardless whether, you know, whether he committed murder or whether he committed theft, you know. In the end, you know, our interest is to give him the

opportunity, you know, to improve himself, you know." (12 RT 3045.)

The court asked Cueva whether he looked at the details of the individual crimes in making his assessment of what would happen to appellant. (12 RT 3047.)

Court: "Do you look at the specificity of whether he took, let's say, \$500 or \$5,000."

Cueva: "Yes, we look at the specificity because, depending on the crime, if it is a violent crime, you know, we look at the specificity because it will yield a particular plan."

Court: "How about if it is a series of theft offenses?"

Cueva: "It may, you know, because we may send him to a placement program where they have a specific program, you know, that will deal with individuals, you know, who are just thieves or murderers. If it is a murderer, we may send them to [Penal Code section] 187 class. If it is a sex offender, we may send him to a sex offender program. So we look at the pattern of behavior." (12 RT 3047-48.)

Appellant reiterated his objection that appellant's prior criminal history did not fall within section 190.3 and it would be inappropriate to document each and every offense, particularly since a number of the incidents did not lead to sustained juvenile petitions or criminal charges. (12 RT 3046.) Based on Cueva's testimony, the trial court overruled the defense objections and permitted the prosecutor to cross-examine Cueva about the details of appellant's offense history from the age of 15-19. (12 RT 3047-48 ["You may go into the area, ma'am."].) In addition, the court admitted in evidence the part of Cueva's October 1987 report that included the details of appellant's prior juvenile and adult criminal history of property crimes.<sup>50</sup> (12 RT 3048-49; Exh.

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50. Appellant did not specifically object to the admission of the additional components of Cueva's report. However, the circumstances show that

No. 96, 5 CT 1270-1273.)

In front of the jury, Cueva on cross-examination testified in detail about appellant's offense history from the age of 15-19. (12 RT 3057-65.) The details of those prior offense were set forth above in Sections III.A. and II.B. of the Statement Of Facts. Briefly, Cueva testified that appellant's juvenile offenses included: a residential burglary in February of 1984 when appellant was 15 years-old where appellant and a friend broke into a neighbor's house because his friend wanted to get some drug money; and burglary of property valued at \$1,000 in September 1984 when appellant was 16 years-old where appellant and a companion took items from the dorm office at a juvenile camp. They escaped from the camp but were arrested a short distance away with most of the property still in their possession. (12 RT 3054, 3058-59; Exh. No. 96, 5 CT 1271-72.)

Cueva also testified about the details of the crimes appellant pled guilty to committing in July of 1987 when he was 19 years-old (three counts of residential burglary, one count grand theft auto, one Count of second degree ("commercial") burglary), as well as six counts that were charged but dismissed as part of the plea.

The crimes of which appellant was convicted included: Count 1, on January 23, 1987, between 11:30 a.m. and 1:20 p.m., appellant and an accomplice broke into a residence and stole a 35 millimeter camera, three rings valued at \$980, and \$100 in cash; Count 2, on January 29, 1987, between 9:45 a.m. and 2:45 p.m., appellant broke into a victim's residence and stole a

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appellant fairly apprised the court that he was objecting to the entire subject area. (*See, e.g., People v. Scott* (1978) 21 Cal.3d 284, 290 [An objection is sufficient if it “fairly apprise[d] the trial court of the issue it is being called upon to decide.”].) In addition, the record shows that any additional objection would have been futile. (*See, e.g., People v. Redmond* (1981) 29 Cal.3d 904, 917 [“An objection would have been futile. Appellant was not required by law

handgun valued at \$350, a gold necklace valued at \$700, and \$100 in currency, and did approximately \$90 in damage by breaking two living room windows; Count 3, on January 29, 1987, between 11:30 a.m., and 5:00 p.m., appellant broke into a residence and stole \$800 in currency and jewelry valued at \$116 and he caused \$175 in damage to a back door; Count 4, on January 24, 1987, between midnight and 3:00 a.m., appellant and two codefendants stole a 1974 Datsun pick-up truck valued at \$6,000, and the police arrested all three a half hour later at 3:30 a.m.; and Count 7, appellant broke into a hobby shop and stole radio controlled cars and equipment valued at \$1,020 and caused \$200 in damage by shattering a glass door. (Exh. No. 96, 5 CT 1270; 12 RT 3055-56; 3059-61.)

The charges that were dismissed included: Count 6, on February 23, 1987, between 5:30 p.m. and 6:30 a.m., appellant and two codefendants smashed the window of a vehicle and stole sheep skin seat covers valued at \$50 and caused \$50 in damage to the window; Count 8, on February 10, 1987, appellant and a codefendant broke into a hobby shop and stole \$100 in currency, a radio controlled car and other items with a total value of \$4,600 and caused \$236 in damage to a window and a security gate; Count 9, on February 11-12, 1987, between 11:30 p.m. and 7:20 a.m., appellant and the same codefendant again broke into the same hobby shop and stole radio controlled cars and related items valued at \$1,992 and caused \$1,500 in damage by breaking a glass door; Count 10, on February 9-10, 1987, between 6:00 p.m. and 11:10 a.m., appellant and the same codefendant stole a vehicle valued at \$600, four speakers valued at \$400, and racket ball equipment valued at \$85; and Count 11, on March 20, 1987, sheriff deputies found appellant prowling in the car port area of an apartment building and later discovered that appellant had taken a vehicle without permission. (Exh. No. 96, 5 CT 1272;

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to make one."].)

12 RT 3062-63.)

Based on his experience as a social worker with the Youth Authority, Cueva concluded that appellant's offense history showed that by the time appellant was 19 years-old he was a "chronic habitual offender." (12 RT 3063-64.)

**B. Under State Law, The Details Of Appellant's Prior Juvenile And Adult Property Offenses Were Inadmissible.**

A court "reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal. 4th 155, 201) "'Abuse of discretion has at least two components: a factual component ... and a legal component.' [Citation.]" (*People v. Jacobs, supra*, 156 Cal.App.4th at pp. 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, supra*, 16 Cal.3d at p. 219.) "A trial court abuses its discretion when the factual findings critical to its decision find insufficient support in the evidence." (*People v. Cluff, supra*, 87 Cal.App.4th at p. 991.) In addition, "an error of law constitutes an abuse of discretion." (*Carillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1523-24; *accord Koon v. United States, supra*, 518 U.S. at p. 100 ["A district court by definition abuses its discretion when it makes an error of law."].)

The trial court erred because the details of appellant's prior theft-related offense were irrelevant and inadmissible as evidence in aggravation. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court "has broad discretion in determining the relevance of evidence but lack lacks discretion to admit irrelevant evidence." (*People v. Carter, supra*, 36 Cal.4th at pp. 1166-1167, citations omitted; Evid. Code, §

350 ["No evidence is admissible except relevant evidence."].)

At the penalty phase in a capital case, relevance is determined by the 11 factors listed in section 190.3.<sup>51</sup> "Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation." (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) "[T]he only circumstances material to the determination of penalty are those defined in Penal Code section 190.3 ...." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1266 [In *People v. Boyd, supra*, "we made it plain that].)

Evidence of other criminal activity is inadmissible unless it involves force or violence. Section 190.3 provides that "no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the

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51. The eleven factors are: "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1. (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (c) The presence or absence of any prior felony conviction. (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. (f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct. (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person. (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication. (i) The age of the defendant at the time of the crime. (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Penal Code, § 190.3.)

use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction." (Penal Code, § 190.3, para, 2.) Correspondingly, subdivision (b) provides: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: ... (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Penal Code, § 190.3, subd. (b).) "The presence or absence of any prior felony conviction" is also admissible. (Penal Code, § 190.3, subd. (c), "factor (c)".)

A juvenile adjudication is not a conviction. (Welf. & Inst. Code, § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."].) Therefore, none of the evidence of appellant's juvenile adjudications was admissible as factor (c) evidence. (*People v. Weidert* (1985) 39 Cal.3d 836, 844-45 [In adopting the prior conviction aggravating circumstance, voters were presumed to know that it did not apply to juvenile adjudications.])

Moreover, none of the prior offense evidence - juvenile or adult - involved "the express or implied threat to use force or violence." (Penal Code, § 190.3, subd. (b); *People v. Lucky* (1988) 45 Cal.3d 259, 294-295 [Unless juvenile conduct or adjudication amounted to the violation of a penal statute reflecting the threat of force or violence, it is inadmissible as factor (b) evidence.].) As set forth above, Cueva's report and testimony showed that all of the prior incidents but one were property offenses. (See Exh. No. 96, 5 CT 1270-1273.) The only exception was the incident in September 1984 when appellant was 16 years-old and he and another boy escaped from a juvenile custody camp after taking some property from the dorm office. (Exh. No. 96,

5 RT 1272.) However, there was no evidence that the escape involved the use of force or violence against anyone. The two boys simply "ran away" while the other boys and staff were at breakfast. (*Ibid.*)

Some of the other theft-related offense involved damage to windows and doors to make entry for a theft-related burglary. (Exh. No. 96, 5 RT 1272.) In *People v. Boyd, supra*, 38 Cal.3d 762, this Court held that evidence of a non-violent escape attempt and damage to property was inadmissible as factor (b) evidence. (*Id.* at p. 776.) This holding reflected the judgment "that nonviolent felonies are entitled to some weight, but only if evidenced by a conviction – otherwise the time and trouble of proving the crime will outweigh its probative value." (*Id.* at p. 774; *accord People v. Huggins* (2006) 38 Cal.4th 175, 239 ["[O]nly violent crimes against people, not property may be introduced in aggravation as evidence of prior violent criminal activity."].) For the same reasons, the trial court erred in admitting evidence of the details of appellant's non-violent juvenile criminal activity and his criminal activity that did not result in a felony conviction.

**C. Cueva's Testimony On Direct Examination Did Not "Open The Door" To Cross-Examination About The Details Of Appellant's Prior Criminal Activity.**

The trial court apparently believed that the details of appellant's prior offense history was admissible because at the Evidence Code section 402 hearing Cueva testified that the offense history was "very important" to the analysis in his treatment plan and the opinion he offered on direct examination. (12 RT 3042-43, 3044-46.) In addition, he said that, in making an assessment of what services to provide at the Youth Authority, staff "may" consider the offense history to determining whether the inmate should be sent to a "specific program, you know, that will deal with individuals, you know, who are just thieves or murderers." (12 RT 3047-48.) There are factual and legal problems

with using this testimony as a basis for admitting all of the details of appellant's offense history from the age of 15-19 years-old.

As matter of fact, Cueva's direct testimony shows that the details of appellant's offense history were not important to his clinical impressions and his long-range custodial plan. Cueva reviewed the history of appellant's abuse and neglect as a child and found that he "had extreme traumatic experiences ...." (Exh. No. 95, CT. Suppl. B 11.) Because of his "serious ... emotional and mental problems", appellant "needed intensive treatment." (12 RT 3039.) The "Recommended Long-Range Plan" called for "[c]omplete intensive individual psychotherapy, group therapy," and a high school and pre-vocational program. (Exh. No. 95; Suppl.B CT 12; 12 RT 3039.)

Neither Mr. Cueva's direct testimony or his report discussed the need for a program related to the theft incidents and there is no evidence that appellant was placed in such a program. The background discussion to the long-range plan did not even mention appellant's offense history apart from noting that appellant had been placed in custody because of his burglary and auto theft convictions. (Exh. No. 95, CT. Suppl. B 5.) Therefore, the trial court erred as a matter of fact because there was no substantial evidence to support its finding that the details of appellant's offense history were important to his placement and treatment.

As a matter of law, calling Mr. Cueva to testify about the treatment necessary for appellant's mental health problems did not "open the door" to the details of the appellant's offense history as rebuttal evidence. This issue was recently addressed in *People v. Loker* (2008) 44 Cal.4th 691. "When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. 'The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his

good character weighs in favor of mercy.'" (*Id.* at p. 709, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) "The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. If the testimony is 'not limited to any singular incident, personality trait, or aspect of [the defendant's] background,' but 'paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character,' rebuttal evidence of similarly broad scope is warranted." (*Ibid.*, citations omitted.)

"On the other hand, we have firmly rejected the notion that 'any evidence introduced by defendant of his 'good character' will open the door to *any and all* 'bad character' evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*Rodriguez, supra*, 42 Cal.3d at p. 792, fn. 24.) In particular, '[e]vidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct.' (*In re Lucas* (2004) 33 Cal.4th 682, 733 [16 Cal. Rptr. 3d 331, 94 P.3d 477].) When a witness does 'not testify generally to defendant's good character or to his general reputation for lawful behaviors, but instead testifie[s] only to a number of adverse circumstances that defendant experienced in his early childhood,' it is error to 'permit[] the prosecution to go beyond these aspects of defendant's background and to introduce evidence of a course of misconduct that defendant had engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination.'" (*Id.* at pp. 709-10, quoting *People v. Ramirez* (1990) 50 Cal.3d 1158, 1193.)

Here, Cueva did not testify to appellant's good character or general reputation for lawful behavior. He testified to appellant's "extreme traumatic

experiences" of childhood neglect and abuse which required "[c]omplete intensive individual psychotherapy" and group therapy. (Exh. No. 95, CT. Suppl. B 11; 12 RT 3039.) Thus, *People v. Loker, supra*, and *People v. Rodriguez, supra*, show that the trial court erred in admitting testimony and Exhibit No. 96 (5 CT 1270-734) addressing the details of appellant's prior criminal activity that did not involve force or violence.

**D. Constitutional Errors.**

**1. Cognizability.**

The erroneous admission of the evidence of appellant's non-violent criminal activity as an adolescent and young adult violated his state and federal rights to a fair trial, to due process, and reliable capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.) In addition, admission of evidence of juvenile offense that were not submitted to a jury and proved beyond a reasonable doubt violated his due process (U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amends.) and Sixth Amendment rights under the *Apprendi* line of cases. (*See Apprendi, supra*, 530 U.S. 466.) Trial counsel for appellant did not object on these constitutional grounds to the admission of the evidence of other criminal activity.

Nevertheless, these constitutional claims are cognizable under the standards previously addressed. (See Argument Sections III.A. & VII.B., above.) Here, appellant emphasizes that the duty to make an additional objection is excused when an "objection would have been futile. Appellant was not required by law to make one." (*People v. Redmond* (1981) 29 Cal.3d 904, 917.) On the same rationale, the United States Supreme Court has addressed constitutional claims where the circumstances show further objection would have been futile. (*See, e.g., Estelle v. Smith, supra*, 451 U.S. at p. 468, fn. 12; *Douglas v. Alabama, supra*, 380 U.S. at pp. 422-23.)

**2. The Admission Of The Evidence Violated Appellant's Rights To Due Process, A Fair Trial, And Reliable Sentencing Proceedings.**

As a matter of due process, criminal defendants are guaranteed a fair trial. (*Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *Strickland*, *supra*, 466 U.S. at pp. 684-685; *People v. Sharp* (1972) 7 Cal.3d 448, 459 ["It is clear that the assurance of a fair trial is constitutionally founded in due process."].) One component of this is "to prevent fundamental unfairness in the use of evidence, whether true or false." (*Lisenba*, *supra*, 314 U.S. at p. 236.) This principle was violated by the admission of evidence that did not comport with the factors both the Legislature and this court have recognized as defining the scope of relevant evidence in capital sentencing proceedings. (Penal Code, § 190.3; *see, e.g., People v. Boyd*, *supra*, 38 Cal.3d at pp. 774-75; *People v. Loker*, *supra*, 44 Cal.4th at pp. 709-710; *People v. Ramirez*, *supra*, 50 Cal.3d at p. 1193; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-47 [100 S. Ct. 2227; 65 L. Ed. 2d 175]; *Fetterly v. Paskett* (9<sup>th</sup> Cir. 1993) 997 F.2d 1295, 1300 ["To paraphrase *Hicks v. Oklahoma*, [*supra*], where a state has provided a specific method for the determination of whether the death penalty shall be imposed, 'it is not correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.' [Citation]."].)

"As the Supreme Court has held, aggravating factors in death penalty cases must be '*particularly* relevant to the sentencing decision,' not merely relevant, in some generalized sense, to whether defendant might be considered a bad person. *Gregg*, 428 U.S. at 192 (emphasis added)." (*United States v. Gilbert* (D.Mass. 2000) 120 F.Supp.2d 147, 150-51.) By failing to conform to these principles, the admission of evidence of other criminal activity violated appellant's right to due process and the heightened requirement for reliability in capital sentencing proceedings. (*See, e.g., Oregon v. Guzek* (2006) 546 U.S.

417, 525-26 [126 S. Ct. 1226; 163 L. Ed. 2d 1112] ["The Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.' [Citation.]"].)

**3. Violation of Constitutional Trial Rights By Admission Of Evidence Of Appellant's Juvenile Adjudications.**

The admission of evidence of appellant's juvenile offenses for an additional reason violated appellant's rights to due process of law and to trial by jury. (U.S. Const., 5<sup>th</sup>, 6<sup>th</sup> & 14<sup>th</sup> Amends.) In *Apprendi, supra*, 530 U.S. 466, the high court held generally that any fact other than a prior conviction used to increase the maximum penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. In *Ring v. Arizona, supra*, 536 U.S. 584, it explicitly held that the same principles applied in capital cases. (*Id.* at p. 589 ["Capital defendants, no less than noncapital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."].) These principles show that appellant's jury in the penalty phase should not have been permitted to consider as evidence appellant juvenile adjudications because they did not satisfy the constitutional safeguards for trial by jury.

In *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 ("*Tighe*"), the Ninth Circuit addressed the question of whether "juvenile adjudications, which do not afford the right to a jury trial, fall within the 'prior conviction' exception to Apprendi's general rule that a fact used to increase a defendant's maximum penalty must be submitted to a jury and proved beyond a reasonable doubt?" (*Id.* at p. 1193.) In *Tighe*, the defendant's sentence had been increased 10 years above the statutory maximum by the Armed Career Criminal Act. (18 U.S.C. § 924, subd. (e).) On appeal, he argued that the increased sentence was unconstitutional because it was based on the district court's finding that he had been adjudicated a juvenile delinquent for committing a violent felony when

he was 14 years old. Under *Apprendi*, a juvenile adjudication could not be used to enhance his sentence because it had not been found true by a jury beyond a reasonable doubt. (*Tighe, supra*, 266 F.3d at p. 1191.)

The Ninth Circuit agreed. In *Jones v. United States* (1999) 526 U.S. 227 [143 L.Ed.2d 311; 119 S.Ct. 1215], the high court explained that "[o]ne basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense ...a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." (*Id.* at p. 249.) "Thus, *Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial." (*Tighe, supra*, 266 F.3d at p. 1193.)

One year later, *Apprendi* held that the Due Process Clause of the Fourteenth Amendment the Sixth Amendment require that "any fact (other than [the fact of a] prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 476, citing *Jones, supra*, 526 U.S. at p. 243, n. 6.) In distinguishing the use of prior convictions, *Apprendi* reiterated that "the certainty that procedural safeguards attached to any 'fact' of prior conviction" as essential. (*Apprendi, supra*, 530 U.S. at p. 488.)

This included the procedural safeguards of trial by jury and proof beyond a reasonable doubt. "There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to

prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." (*Apprendi, supra*, 530 U.S. at p. 496; *see also Blakely v. Washington* (2004) 542 U.S. 296, 306 [159 L. Ed. 2d 403, 124 S. Ct. 2531] [*Apprendi* reflected "not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial."].) Thus, *Apprendi's* holding regarding prior convictions "was premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections -- particularly the right to a jury trial and proof beyond a reasonable doubt." (*Tighe, supra*, 266 F.3d at p. 1194.)

On this basis, the Ninth Circuit concluded that "the 'prior conviction' exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi's* 'prior conviction' exception." (*Tighe, supra*, 266 F.3d at p. 1194; *accord Butler v. Curry* (9<sup>th</sup> Cir. 2008) 528 F.3d 624, 645.)

Appellant acknowledges that several other federal circuits have rejected this conclusion on the theory that juveniles are not entitled to a trial by jury and that in their prior adjudications a juvenile presumably received all the due process guarantees to which the juvenile was entitled. (*See, e.g., United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030, *cert. denied*, (2003) 537 U.S. 1114 [123 S. Ct. 870; 154 L. Ed. 2d 790]; *United States v. Jones* (3d Cir. 2003) 332 F.3d 688, *cert. denied*, (2004) 540 U.S. 1150 [124 S. Ct. 1145; 157 L. Ed. 2d 1044]; *United States v. Crowell* (6<sup>th</sup> Cir. 2007) 493 F.3d 744, 750; *United States v. Burge* (11th Cir. 2005) 407 F.3d 1183, *cert. denied* (2005) 546 U.S. 981 [163 L. Ed. 2d 467, 126 S. Ct. 551]; *United States v. Matthews* (1<sup>st</sup> Cir. 2007) 498 F.3d 25, 35 ["For purposes of *Apprendi's* recidivism exception, we

see no distinction between juvenile adjudications and adult convictions; both reflect the sort of proven prior conduct that courts historically have used in sentencing."].)

The California courts have also been divided on the use of juvenile adjudications as sentencing factors.<sup>52</sup> (See *People v. Del Rio* (2008) 165 Cal.App.4th 439 [majority opinion in favor of use of juvenile adjudications to enhance an adults sentence with dissent summarizing cases].) However, this Court's recent decision in *People v. Towne* (2008) 44 Cal.4th 63 ("*Towne*") provides strong support for appellant's position.

For purposes of imposing an upper term sentence under the Determinate Sentencing Law, *Towne* held that the aggravating circumstance that a defendant served a prior prison term or was on probation or parole at the time of the crime could be determined by a judge without violating the defendant's federal due process and Sixth Amendment rights because those factors related to the defendant's prior convictions. In its analysis, the Court relied on the fact that prior convictions result from proceedings that include substantial procedural protections:

"[T]he decision in *Apprendi* noted 'the certainty that procedural safeguards attached to any 'fact' of prior conviction.' [Citation.] Similarly, in *Jones v. United States*[, *supra*,] 526 U.S. [at p. 249], the high court explained that 'unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established

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52 On October 10, 2007, in *People v. Nguyen* (S154847), formerly *People v. Nguyen* (2007) 152 Cal.App.4th 1205, this Court granted review of a related question in a non-capital case: "Can a prior juvenile adjudication of a criminal offense in California constitutionally subject a defendant to the provisions of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) although there is no right to a jury trial in juvenile wardship proceedings in this state?" (*People v. Nguyen* (2007) 169 P.3d 882; 67 Cal. Rptr. 3d 460; 2007 Cal. LEXIS 10885.)

through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.' The circumstance that a defendant was on probation or parole or served a prior prison term arises out of a prior conviction and results from procedures that were conducted in accordance with constitutional requirements designed to ensure a fair and reliable result." (*Id.* at p. 81.)

In contrast, "a finding of poor performance [on probation or parole] based upon evidence other than prior convictions does not necessarily include the procedural safeguards that are associated with prior convictions. Even if the trial court's finding of unsatisfactory performance is based upon a prior *revocation* of probation or parole, the proceedings that result in such revocation do not entail the same procedural safeguards as a criminal trial. ... Accordingly, we doubt that the United States Supreme Court would conclude that a defendant's prior unsatisfactory performance on probation or parole is included within the exception the court has recognized for 'the fact of a prior conviction,' unless that circumstance is established by defendant's history of prior convictions." (*Id.* at p. 83; *see also* Kennard, J., concurring [Where a sentencing court relies on a conviction, "the defendant has already received the right to a jury trial on the underlying factual issues in the earlier proceeding that resulted in the new conviction."].)

In this case, appellant's juvenile adjudications similarly lacked the procedural protections of trial by jury and proof beyond a reasonable doubt. Accordingly, the reasoning of *Towne* confirms that admission of that evidence violated appellant's rights to due process of law and to trial by jury. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16; U.S. Const., 5th, 6th, & 14th Amends.)

**E. Prejudice Is Present Because The Erroneous Admission Of The Evidence Permitted The Prosecution To Present Rebuttal Evidence To Recast Otherwise Mitigating Evidence As Aggravating.**

As a matter of federal law, reversal is required unless Respondent demonstrates that the violation of appellant's federal constitutional rights was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Under state law, the erroneous admission of evidence in the penalty phase "is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the [federal constitutional] harmless beyond a reasonable doubt standard of *Chapman v. California* [, *supra*,] 386 U.S. 18, 24.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 527, quoting *People v. Lancaster* (2007) 41 Cal.4th 50, 94.) Prejudice is present under either standard because the prosecution was permitted to present rebuttal evidence to recast mitigating evidence as aggravating.

Cueva's direct testimony and related written report chronicled appellant's "extreme traumatic experiences" that led to his mental health problems and antisocial activities. (Exh. No. 95, CT. Suppl. B 10-11.) This included sexual abuse by men and women in a "dysfunctional family situation" with parents who were deaf and had emotional problems of their own and engaged in fistfights. (*Id.* at pp. 8, 11.) As a teenager, appellant was "obsessed with the idea of suicide" and had failed only because the sheet ripped when he tried to hang himself. (*Id.* at p. 11.) Because of appellant's extreme traumatic experiences, Cueva recommended a long-range plan that included intensive individual psychotherapy and group therapy. (*Id.* at p. 12.)

The trial court's ruling permitted the prosecution to rebut this mitigating evidence by extensive but irrelevant evidence of appellant's criminal misconduct as a teenager and a young adult. On this basis, the prosecution was permitted to argue that by the time appellant was 19 years-old he was a

"chronic habitual offender" who had stolen a firearm and escaped from a custody placement. (12 RT 3063-64; Exh. No. 96, 5 CT 1270, 1272.)

Moreover, the prosecution argued that appellant's prior offense history showed that he did not deserve sympathy but the death penalty. "As you know, he has a distinguished history of being a criminal and a delinquent. Juvenile delinquent as a juvenile and an adult criminal once he turned 18." (14 RT 3454.) Evidence that appellant committed burglaries after his release from a juvenile residential treatment facility (the Kirby Center) showed that appellant "takes what is given and he throws it out the window." (14 RT 3505.) "We are here because of his choices and his evilness and his criminality and so please don't be swayed. ... There is no reason you should feel sympathy, any shred of sympathy for Daniel Landry." (*Ibid.*)

"There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz, supra*, 61 Cal.2d at p. 868.) The record shows that despite evidence of numerous incidents of adult factor (b) evidence, this was a close case. In the penalty phase, 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, supra*, 20 Cal.2d at p. 62.) 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.)

## XVII.

### **THE ADMISSION IN EVIDENCE OF AN UNATTACHED RAZOR BLADE LEFT IN PLAIN VIEW ON A DESK TOP IN APPELLANT'S CELL AND THE JURY INSTRUCTION THAT THIS WAS EVIDENCE OF THE USE OR THREAT OF FORCE OR VIOLENCE (FACTOR (B)) VIOLATED STATE AND FEDERAL LAW.**

#### **A. Introduction.**

On May 10, 2001, at the end of the prosecution's penalty phase case, the prosecutor e-mailed trial counsel for appellant to inform him that the day before Sergeant Roelle of the San Bernardino County jail had informed her that on April 18, 2001, he found a razor blade in appellant's cell at the county jail. He did not write a report about finding the razor blade and no disciplinary action was taken against appellant. (12 RT 2840.) The prosecutor requested the court to admit the evidence of the razor blade pursuant to factor (b) as evidence in aggravation. (*Ibid.*)

The court held an Evidence Code section 402 hearing without the jury at which Sergeant Roelle testified. He said that on April 18, 2001, someone at the jail got a call "from this court" about "some threats or something made against an officer from maybe the Department of Corrections in a roundabout way and that Landry may have had some weapons in his cell." (12 RT 2843.) On the same day, they searched appellant's cell. (*Ibid.*)

For six months, appellant had been the sole occupant of a cell in the administrative segregation unit at the jail. (12 RT 2844.) Appellant had been housed in the administrative segregation at his own request for protective custody after he had made a proffer to debrief about prison gangs and provided information to law enforcement about planned assaults on deputies at the jail. (12 RT 2831; 14 RT 3527; 2 CT 584.) During the search, Sergeant Roelle found a single razor blade from a plastic "Bic" razor sitting on the top of a

small metal table in appellant's cell. The paint on the front edge of the table had been etched into the shape of a knife without penetrating the metal. The sergeant could not tell whether the razor had been used to do this. (12 RT 2844-45, 2849.) Appellant was not allowed to possess a blade razor and for a year had been given an electric razor to use for shaving. (12 RT 2845-46.)

After appellant returned from court the day of the search, Sergeant Roelle asked him about the razor blade. (12 RT 2846-47.) Appellant said that the razor blade was his and that he used it to sharpen a pencil. As to the etching in the shape of a knife on the edge of the table, appellant said that it was there before he was placed in the cell. (12 RT 2847, 2850.) As to the rumors of a threat to a correctional officer, appellant said that the rumors were false and that he was unaware of any problems. (12 RT 2850.)

Defense counsel objected to admission of the line drawing on the desk because it was "ambiguous." (12 RT 2856.) The trial court agreed and excluded it from evidence. (*Ibid.* ["It would be the Court's intent to exclude the testimony as it relates to the table."].) Defense counsel also objected that a razor blade unattached to anything was not a weapon and, therefore, not factor (b) evidence. (12 RT 2854.) "The mere existence of a razor blade ... is not an offer of violence or a threat of violence by itself, particularly in view of its size, and I again would move to excluded it." (*Ibid.*)

The prosecution argued that the finding of the razor blade was proof a violation of Penal Code section 4502, which proscribes possession, custody or control of a weapon, including "any dirk or dagger or sharp instrument", by a person confined in any penal institution.<sup>53</sup> On the prosecution's view, Penal

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53. Penal Code section 4502 in pertinent part provides: "(a) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind

Code section 4502 "simply requires a sharpened instrument and from the testimony that's what that was. And it can do damage all by itself, even if it isn't anchored into anything. By the defendant not being allowed to possess it for any lawful or proper purpose, and the inference is ... that he could use it as a stabbing instrument ..." (12 RT 2854-55.)

The trial court overruled the defense objections. It found that the unattached razor blade "would appear to be a slashing instrument" and permitted the prosecution to present it as factor (b) evidence in aggravation. (12 RT 2855.)

Sergeant Roelle then testified to the jury that on April 18, 2001, he found a single razor blade on the small table in appellant's cell while appellant was in court for this trial. (12 RT 2879.) The razor blade appeared to be like that from a "Bic razor" which was given out to the general population. The blade was sharp and, if so inclined, a person could use it to hurt someone. Sergeant Roelle seized the razor blade and destroyed it. (12 RT 2882-83.) Appellant would not have been issued a blade razor because of his custody status and he had been given a battery powered razor for shaving. (12 RT 2880.)

Therefore, in the sergeant's opinion, the razor blade had to have been smuggled into appellant's cell. (12 RT 2881.) When appellant returned from court, Sergeant Roelle told him that he had searched his cell and found a razor blade on the desk. Appellant said it was for sharpening his pencil. (12 RT

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commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony and shall be punished by imprisonment in the state prison for two, three, or four years, to be served consecutively. [¶] (b) [addressing manufacture of a weapon]. [¶] (c) For purposes of this section, 'penal institution' means the state prison, a prison road camp, prison forestry camp, or other prison camp or farm, or a county jail or county road camp."

2881-82.) The sergeant explained that inmates may buy pencils. If they need sharpening, they can give them to a staff person. Inmates may also sharpen a pencil by rubbing it against the floor or walls of the cell. (12 RT 2882-83.)

Before jury deliberations, the trial court instructed the jury that it could consider as an aggravating circumstance, *inter alia*, evidence of "possession or manufacture of a weapon" as criminal activity "which involved the express or implied use of force or violence or the threat of force or violence." (4 CT 1023, CALJIC No. 8.87 ["Penalty Trial – Other Criminal Activity –Proof Beyond A Reasonable Doubt"].) It also instructed the jury on the elements of Penal Code section 4502. (4 CT 1033, CALJIC No. 7.38 ["Possession Or Manufacture Of Weapon By A Prisoner"].)

**B. A Comparison Of This Case With Other Cases Shows That The Evidence Of The Razor Blade Was Not Factor (b) Evidence.**

Factor (b) permits the jury at the penalty phase to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Penal Code, § 190.3, subd. (b).) Factor (b) has two requirements. First, there must be sufficient evidence for the jury to find beyond a reasonable doubt that the alleged activity "amount[ed] to an actual violation of a specific penal statute." (*People v. Grant* (1988) 45 Cal.3d 829, 849; *accord People v. Griffin* (2004) 33 Cal.4th 536, 584.)

Second, the alleged criminal activity must involve the use or a threat to use force or violence against a person, although a face-to-face confrontation is not necessary. (*See, e.g., People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629, 676-677 ["Apparently deciding at the last moment not to risk a physical confrontation but to try to lie himself out of trouble, he cast the weapon away [a kitchen knife] before he actually put it to use."]; *People v. Lewis* (2001) 26 C4th 334,

392 [The defendant threw a burning sheet out of his cell.]) "[N]o evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (Penal Code, § 190.3.)

In some circumstances, unlawful possession of a weapon in a custodial setting may be admissible as factor (b) evidence. However, the circumstances of this case show that constructive possession of an unattached razor blade in plain view on a desk top with no one present was not a crime of force or violence. "In a series of cases beginning with *People v. Harris* (1981) 28 Cal. 3d 935, 962-963 [171 Cal. Rptr. 679, 623 P.2d 240], and continuing through *People v. Ramirez* (1990) 50 Cal. 3d 1158, 1186 [270 Cal. Rptr. 286, 791 P.2d 965], *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 589 [842 P.2d 1142, 15 Cal. Rptr. 2d 382], and *People v. Williams* (1997) 16 Cal. 4th 153, 238 [66 Cal. Rptr. 2d 123, 940 P.2d 710], we have held that the possession of a weapon in a custodial setting--where possession of any weapon is illegal -- 'involve[s] an implied threat of violence even when there is no evidence defendant used or displayed it in a provocative or threatening manner.' (*People v. Tuilaepa, supra*, 4 Cal. 4th at p. 589; *People v. Jackson* (1996) 13 Cal. 4th 1164, 1260 [56 Cal. Rptr. 2d 49, 920 P.2d 1254] (conc. opn. of Baxter, J.))" (*People v. Michaels* (2002) 28 Cal.4th 486, 535.)

However, the circumstances of those cases show that this case differs. Evidence of an inmate's possession of a knife or a "shank" (an inmate manufactured knife) is admissible as factor (b) evidence. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 1002-1003 ["possession of a shank in prison"]; *People v. Harris, supra*, 28 Cal. 3d at p. 962 [While in jail awaiting trial, "[p]ossession of the garrote and the knife clearly involved an implied threat to use force or violence."]; *People v. Grant, supra*, 45 Cal.3d at p. 849 ["We

conclude that the evidence of defendant's provocative display of an illicit hand-made lethal weapon in jail was admissible and his threats against Deputy Bosenko relevant under section 190.3, factor (b)."]; *People v. Ramirez, supra*, 50 Cal.3d at p. 1186 [Staff found the defendant in possession of a sharpened eight and one-half inch table knife, concealed under his clothes.].) However, the prosecution presented no evidence that appellant had fashioned the razor blade into a knife or shank.

The prosecution argued that the evidence of the razor showed a violation of Penal Code section 4502 (quoted above in footnote 53) which proscribes possession of "any dirk or dagger or sharp instrument" by a person confined in a county jail. (12 RT 2854-55.) Cases where the defendant contested the sufficiency of the evidence of a violation of section 4502 show that more evidence was required than the prosecution presented here.

In *People v. Brown* (2000) 82 Cal App 4th 736, the defendant was convicted of a violation of Penal Code section 4502. The evidence showed that the defendant "was a prisoner in state prison, housed at the California Substance Abuse Treatment Facility, Corcoran. One day, the lieutenant received information there was going to be gang fighting in one of the yards. He went to the yard and requested that additional officers join him. While he waited for backup, he noticed defendant swaggering in a 'gangster' fashion. He searched defendant and found a razor blade, which had been removed from its plastic casing (having been originally supplied as a disposable shaver) and fashioned into a weapon." (*Id.* at p. 738.) The Court of Appeal concluded that "the nature of a razor blade with an inmate-manufactured holder is also readily apparent. It is a weapon with the sole purpose of inflicting injury on someone else. It cannot be 'innocently' possessed or picked up out of curiosity." (*Id.* at p. 740.) In this case, the razor blade was not fashioned into a weapon or hidden in appellant's clothing. Nor was there any evidence that it was intended

to be used in a gang fight.

A series of cases by this Court applying factor (b) to evidence of a razor blade similarly shows that more was required than the evidence presented here. In *People v. Mason* (1991) 52 Cal.3d 909, deputies three times found weapons in defendant's cell at the county jail. In the first incident, they found a double edged razor blade hidden under his bunk, five days before the defendant murdered an inmate informant. In the second, he was found with a homemade "shank" in his cell. In the third, they found the defendant with a telephone cord and heavy receiver concealed under his clothing as he returned from a jail visiting booth. (*Id.* at p. 931, 956.) The court held that this evidence reflected possession of a deadly weapon and an implied threat of violence. (*Id.* at pp. 956-957.)

In *People v. Tuilaepa, supra*, 4 Cal.4th 569, the defendant's "CYA counselor" found the remains of some broken razors in the defendant's cell or on the floor nearby. A search revealed two razor blades and two other intact razors on defendant's person. The search also found gang-related contraband and several batteries taped together. The counselor explained that a battery pack was typically held in the hand and used as a punching or striking device." (*Id.* at p. 580.) The Court held that this was evidence of possession of a deadly weapon in violation of Penal Code section 4574, subdivision (a)) and an implied threat of violence even though there was no evidence that the defendant used or displayed the items in a provocative or threatening manner.<sup>54</sup>

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54. Penal Code section 4574, subdivision (a) provides: "Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give such authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison or prison road camp or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state prison are located under the custody of prison

(*Id.* at p. 589.)

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, the trial court pursuant to factor (b) admitted evidence of possession of razor blades as reflecting a violation of Penal Code section 4574, subdivision (a). A deputy sheriff from the jail testified that he searched the defendant's cell and found "six loose razor blades, and two additional safety razor heads containing blades ... 'located throughout his cell, randomly placed.' Deputy Shafia testified inmates are allowed to keep up to two safety razors in their cells for shaving, that the jail rules do not allow them to take apart the safety razors or remove the blades, and that homemade 'slashing' weapons are commonly constructed by removing such blades and melting them into a plastic toothbrush handle or similar object. Deputy Shafia testified further that defendant appeared upset that the search was being undertaken, and 'right in the middle of it' defendant stated to him, in an angry voice, 'I'm going to get the gas chamber and before I leave here I'm going to take out a deputy.'" (*Id.* at p. 1152.) Under these circumstances, there was sufficient evidence of a violation of Penal Code section 4574 and an implied threat to use force or violence. (*Id.* at pp. 1152-53.)

In *People v. Pollock* (2004) 32 Cal 4th 1153, while the defendant was awaiting his trial, custodial officers on three separate occasions found razor blades in the defendant's cell at the county jail. "The razor blades were each single-edged, around two and one-half inches in length and one-quarter inch in width. They evidently had been removed from disposable razors that inmates were allowed to use for shaving in designated areas of the jail, but that inmates

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officials, officers or employees, or any jail or any county road camp in this state, or within the grounds belonging or adjacent to any such institution, any firearms, deadly weapons, or explosives, and any person who, while lawfully confined in a jail or county road camp possesses therein any firearm, deadly weapon, explosive, tear gas or tear gas weapon, is guilty of a felony and punishable by imprisonment in the state prison for two, three, or four years."

were not permitted to have in their cells. Jail inmates commonly used razor blades as weapons, generally after fastening them to a handle of some sort, although a blade without a handle also could be used as a weapon." (*Id.* at pp. 1166, 1177.)

On appeal, the defendant argued that possession of the razor blades in jail "did not violate any penal statute unless the blade was fastened to a handle of some sort, and that the evidence thus did not fall within the reach of section 190.3, factor (b)." (*Id.* at p. 1177.) This Court rejected this argument, finding sufficient evidence of a possession of a deadly weapon in violation of Penal Code section 4574 and that "[e]ven without a handle, a razor blade could be used to slice a victim's throat, wrist, or other vital spot, and thus a detached razor blade has a reasonable potential of causing great bodily injury or death." (*Id.* at p. 1178.)

In *People v. Combs* (2004) 34 Cal.4th 821, the prosecution during the penalty phase presented evidence "that, while in custody in county jail on this case, on three separate occasions defendant possessed weapons and used them to threaten deputies." (*Id.* at pp. 857-58.) "During the first jail incident, on February 19, 1992, defendant was yelling angrily and hitting the cell door with his head, feet, and fists. He produced two homemade knives, known as 'shanks.' One was seven inches long and made of metal, while the other one was made from a toothbrush with an attached razor blade. As the deputies stood outside the cell, defendant took a defensive stance. While he made waving and jabbing motions with the shanks, defendant dared the deputies, 'Which one do you want? Come on in and get it.'" (*Id.* at p. 858.)

"During the second jail incident, on August 13, 1992, defendant refused to go to court for a scheduled appearance. He had barricaded himself in his cell by placing a mattress, trash can, and other items against the bars and had

dumped water on the floor to make it slippery. Defendant wore a 'Rambo-type' outfit; he had wrapped torn pieces of a sheet around his arms, apparently to protect himself from stun guns. He held a razor blade in his mouth, while another hung from his clothes. A sharpened broom handle was inside the cell. Defendant's face was smeared with blood, in the manner of war paint. Defendant told the deputies that he would fight them if they came inside and tried to take him to court." (*Ibid.*)

"During the third incident, on December 8, 1992, defendant threatened deputies again with homemade weapons. ... To prevent the deputies from transporting him, defendant blocked off the stairway to the upper cells by wrapping torn bed sheets across the railing. Again wearing a Rambo-type outfit and with blood smeared on his face like war paint, defendant held a razor blade shank and a mace-like weapon made of hard soap wrapped inside strips of a bed sheet. Swinging the mace-like weapon around and making stabbing motions with the shank, defendant stood in an aggressive stance, dared the deputies to come in and get him, and said he was trained in the martial arts and would hurt anyone who came into the area." (*Id.* at pp. 858-59.) The *Combs* court held that three incidents showed violation of section 4574 so that the trial court "was clearly correct" in admitting the evidence as factor (b) evidence. (*Id.* at p. 860.)

In *People v. Thornton* (2007) 41 Cal.4th 391, while the defendant awaited trial, a deputy sheriff on October 6, 1993, searched the defendant's cell "and found a paper clip, a toothbrush, and two razor blades that had been turned into one or more potential weapons. On January 14, 1994, following a search of defendant's cell that again produced contraband, defendant had to be subdued by sheriff's deputies, saying it was lucky there were three of them, because otherwise he would have tried to stab them. As one of the deputies described defendant's threat, he told them, 'I was looking to stick your ass.' On

February 8, 1994, more contraband was discovered in defendant's cell. A blade that had been removed from a disposable razor was found taped underneath his bed." (*Id.* at p. 407.) On appeal, the defendant argued that the trial court erred in instructing the jury on a violation of section 4574, subdivision (a), and on using this as factor (b) evidence without requiring the jury to find that the defendant intended to use the razor blades as a weapon. (*Id.* at p. 465.) This Court rejected that argument because "[p]ossessing a contraband razor in jail (§ 4574, subd. (a)) is a violent offense for purposes of section 190.3, factor (b). (*People v. Pollock, supra*, 32 Cal.4th 1153, 1178.)" (*Id.* at p. 465.)

Most recently, in *People v. Wallace* (2008) 44 Cal.4th 1032, the prosecution presented evidence that while in the county jail awaiting his capital trial, the defendant was involved in "five jailhouse fights", two of which were caught on surveillance tapes. (*Id.* at pp. 1047, 1051.) In addition, a county correctional officer searched the defendant's cell and "found a bare razor blade and a plastic razor that had been altered to expose about half of the blade. These items were considered contraband because of their altered condition, which facilitated their use as weapons. [Officer] Daluz explained that a bare razor blade could be affixed to an object, such as a toothbrush, to create a weapon." (*Id.* at p. 1081.)

The defendant objected that possession of razors in jail did not constitute a violation of the Penal Code. The trial court disagreed, "concluding that a bare razor blade may be considered a deadly weapon within the meaning of section 4574." (*Ibid.*, footnote omitted.) On appeal, this Court affirmed the ruling. It concluded that possession of the contraband razor blades and the altered razor, "particularly when viewed together with his overall conduct while in custody--which included five rules violations for fighting--lead us to conclude that the trial court did not abuse its discretion in admitting the

evidence of defendant's razor possession under section 190.3, factor (b)." (*Id.* at p. 1082.)

The foregoing cases shows that there are several factors which bear upon the admissibility of evidence of a razor blade as factor (b) evidence. The first is that the razor blade was hidden and possession occurred in the context of assaultive behavior by the inmate and possession of unequivocal weapons such as a shank or a taped together battery pack. (*People v. Mason, supra*, 52 Cal.3d at pp. 931; *People v. Tuilaepa, supra*, 4 Cal.4th at pp. 580-89). Alternatively, the defendant possessed multiple razor blades and there was evidence that the razor blades could be fashioned into weapons (*People v. Pollock, supra*, 32 Cal 4th at pp. 1166, 1177-78), or the defendant made a threat of violence and/or he had been involved in attacks on other inmates in the same time period. (*People v. Gutierrez, supra*, 28 Cal.4th at pp. 1152-43; *People v. Combs, supra*, 34 Cal.4th at pp. 857-60; *People v. Thornton, supra*, 41 Cal.4th at pp. 407, 465; *People v. Wallace, supra*, 44 Cal.4th at pp. 1047, 1051, 1081-82.)

None of these factors were present in the this case. For purposes of his capital trial proceedings in this case, appellant on May 1, 1998, was transferred to the San Bernardino County Jail. (Exh. No. 42, 4 CT 1096.) Thereafter, the prosecution presented no evidence that appellant was involved in any assault or attempted assault or the manufacture of any weapons. To the contrary, appellant had debriefed about prison gangs and provided information to law enforcement about planned assaults on deputies at the jail and for that reason he had been placed in protective custody. (12 RT 2831; 14 RT 3527; 2 CT 584.)

Sergeant Roelle found a single razor blade in appellant's cell on April 18, 2001, nearly three years after appellant was transferred to the county jail. The razor blade was not attached to anything or found in association with

anything to indicate an intent to use it as a deadly weapon. The sergeant had searched appellant's cell because of a "roundabout" story of a threat against an officer from the Department of Corrections. (12 RT 2843.) However, the prosecution presented no evidence that this was anything more than a rumor (12 RT 2850), which is not substantial evidence let alone evidence sufficient for proof beyond a reasonable doubt the violation of a specific penal statute. (*People v. Grant, supra*, 45 Cal.3d at p. 849; *People v. Griffin, supra*, 33 Cal.4th at p. 584.)

The razor blade was not hidden or concealed on appellant's person but left in plain view on the desk in appellant's cell, consistent with appellant's statement that he used the razor blade to sharpen a pencil. No other items were found in appellant's cell that could be considered a weapon or indicated that appellant intended to fashion the razor blade into a weapon. Nor is there any evidence that appellant had made any threats of force or violence during his nearly three years at the jail.

In sum, there was insufficient evidence from which the jury could find beyond a reasonable doubt that the razor blade incident reflected the actual, attempted, or threatened use of force or violence against a person. Such an inference would be speculation, which "is not evidence, less still substantial evidence." (*People v. Waidla, supra*, 22 Cal.4th at p. 735, citations omitted; *see also People v. Felix, supra*, 92 Cal.App.4th at p. 912 ["But there must be evidence to support an inference and the prosecution may not fill an evidentiary gap with speculation."].) Accordingly, the trial court erred in admitting evidence of the razor blade as factor (b) evidence.

**C. The Admission of Evidence Of The Razor Blade Was Constitutional Error.**

The erroneous admission of the evidence of the razor blade violated appellant's constitutional rights to due process, to a fair trial, to trial by jury,

and to reliable capital sentencing proceedings under the standards set forth above in Argument Section XVI. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) In particular, a defendant has a due process right under the Fourteenth Amendment of the United States Constitution to have the state follow its own statutory sentencing rules. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346-347; *Fetterly v. Paskett* (9<sup>th</sup> Cir. 1993) 997 F.2d 1295, 1300 ["To paraphrase *Hicks v. Oklahoma*, [*supra*], where a state has provided a specific method for the determination of whether the death penalty shall be imposed, 'it is not correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.' [Citation]."]])

A defendant also has a fundamental right to a fair and reliable determination of the penalty in criminal proceedings that may lead to the imposition of the death penalty. (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S. Ct. 1197; 51 L. Ed. 2d 393] ["[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [108 S. Ct. 1981; 100 L. Ed. 2d 575] [The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.], citation and internal quotation omitted.) The erroneous admission of evidence used as a basis to argue for the imposition of the death penalty (see Section D, below) violated each of these rights.

Trial counsel for appellant did not object on constitutional grounds to the erroneous admission of the evidence of the razor blade. However, under standards set forth above in Argument Sections III.A. and VII.B, these claims of error are cognizable because the trial court's ruling shows that any additional objection would have been futile and the question of whether

admission of the evidence was constitutional error is a question of law based on the same facts as the statutory claim of error. (See, e.g., *People v. Redmond*, *supra*, 29 Cal.3d at p. 917; *Estelle v. Smith*, *supra*, 451 U.S. at p. 468, fn. 12; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 117 ["As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal."].)

**D. In A Close Case Such As This, The Error Was Prejudicial Because It Permitted The Prosecution To Improperly Argue That Appellant Posed A Continuing Threat Of Violence While Incarcerated.**

As a matter of federal law, reversal is required unless Respondent demonstrates that the violation of appellant's federal constitutional rights was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Under state law, "error in the admission of evidence under section 190.3, factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Lewis*, *supra*, 43 Cal.4th at p. 527, quoting *People v. Lancaster*, *supra*, 41 Cal.4th at p. 94.)

The admission of the razor blade evidence was reversible error under either standard. The thrust of the defense in the penalty phase was that appellant's life should be spared because his acts of force or violence were limited to a period beginning two years after he had been incarcerated, subjected to prison gangs, and denied care and treatment for his mental health problems. Once appellant was transferred from prison to the county jail in May of 1998, he engaged in no assaultive behavior of any kind and debriefed

about prison gangs. (13 RT 1328-29; Exh. No. 42, 4 CT 1096.) The razor blade incident was a salient fact relied on by the prosecution in its penalty phase closing argument to rebut this defense and to show that appellant would continue to be a danger if he received a prison sentence rather than the death penalty.

The prosecution argued that the defendant "was taken out of the state prison system ... in April [*sic*] of '98 and put in the West Valley Detention Center where he was charged with and awaiting trial on this case, knowing he was facing the death penalty, and yet even with that, even with being in trial, even with being in trial before you, and it was during the guilt phase where he was facing first degree murder, assault by a life prisoner triggering the death penalty, what does Sergeant Roelle find on April 18, 2001? A razor blade in the defendant's cell. ... His answer to that was well, it's mine but I was using it to sharpen pencils. Yet another razor blade on a person like this who is a master at making weapons and it doesn't even stop while he is on trial for his life." (14 RT 3487-88.)

In a handout distributed to the jury during the prosecutor's closing argument (14 RT 3450), the prosecutor, in capital letters and in bold and italics, stated that "while the guilt phase trial is ongoing", appellant was found to have a razor blade on the desk in his cell which he was "never" allowed to have. (4 CT 987.) The significance of this evidence was reinforced by a jury instruction stating that simple possession of the razor blade was evidence of criminal activity "which involved the express or implied use of force or violence or the threat of force or violence." (4 CT 1023, CALJIC No. 8.87.)<sup>55</sup>

But for the razor blade evidence, the record shows that appellant's

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55. In Argument Section XX., below, appellant presents the additional claim that this introduction improperly took from the jury the factual question of whether the proffered factor (b) evidence involved force or violence.

criminal activity involving force and violence had ended more than three and a half years earlier on September 18, 1997, with the assault on inmate Matthews (Count 3). (6 RT 1474-76, 1508-10.) As previously noted, the record shows that despite evidence of numerous incidents of properly admitted factor (b) evidence, this was a close case on the question of penalty because the jury deliberated over the course of four days before returning a death verdict. Given the tone of the prosecution's jury argument and the indication of a close case, the admission of the erroneous factor (b) evidence was prejudicial error. (*People v. Zemavasky, supra*, 20 Cal.2d at p. 62; *People v. Minifie, supra*, 13 Cal.4th at p. 1071.) Accordingly, the death judgment against appellant should be reversed.

## XVIII.

### ADMISSION OF EVIDENCE OF ALLEGED CRIMINAL ACTIVITY BEYOND THE STATUTE OF LIMITATIONS WAS UNCONSTITUTIONAL AND PREJUDICIAL TO THE DEATH JUDGMENT.

#### A. Introduction.

There was an additional flaw with the prosecution's factor (b) evidence: 18 of the proffered incidents fell outside the three year statute of limitations as measured by the date of the filing of the felony information on July 27, 1998. (1 CT 42.) The admission of such evidence violated appellant's rights to due process, to trial by jury, to a fair trial, and the heightened requirement of reliability in capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

Trial counsel for appellant did not make a statute of limitations objection to the admission of the factor (b) evidence. However, the statute of limitations is jurisdictional and not an affirmative defense that a defendant forfeits by failing to raise it in the trial court. (*People v. Williams* (1999) 21

Cal.4th 335, 339-40 [""Commencing in 1934, this court and the Courts of Appeal have repeatedly held that a defendant may assert the statute of limitations at any time."], citation omitted; *People v. Chadd* (1981) 28 Cal.3d 739, 755-757 [A challenge to the statute of limitations for a crime is subject to direct or to collateral attack and may be raised at any time, before or after judgment]; *In re Demillo* (1975) 14 Cal.3d 598, 601 [same].) Alternatively, this claim may be addressed to forestall a later claim of ineffective assistance of counsel. (*People v. Mattson, supra*, 50 Cal.3rd at p. 854; accord *People v. Barber, supra*, 102 Cal.App.4th at p. 150.)

**B. Eighteen Of The Alleged Crimes Of Force Or Violence Offered As Factor (B) Evidence Were Beyond The Statute Of Limitations.**

The other crimes evidence at issue all involve alleged assaults (Penal Code, §§ 240, 245, subd. (a)(1)) 4501, batteries (Penal Code, §§ 242, 4501.5), or weapon possession (Penal Code, § 4502). At the relevant time periods, those crimes were felonies with a three year statute of limitations because they carried a prison term of less than eight years.<sup>56</sup> (Penal Code, § 801 [Except for crimes punishable by death or life with or without possibility of parole (Penal Code, § 799), or by eight years or more (Penal Code, § 800), the prosecution "shall be commenced within three years after the commission of the offense."], § 805 [In determining the applicable statute of limitations, "[a]ny enhancement

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56. Assault upon a peace officer carried a maximum sentence of three years (Penal Code, §§ 18, 241.) Felony assault with a deadly weapon or by means of force likely to cause great bodily injury carried a maximum sentence of four years (Penal Code, § 245, subd. (a)(1).) Assault by a state prisoner not undergoing a life sentence carried a maximum sentence of six years. (Penal Code, § 4501.) Felony battery with serious bodily injury carried a maximum sentence of four years. (Penal Code, § 243 subd. (d).) Battery by a prison inmate upon a person not a prisoner carried a maximum term of four year (Penal Code, § 4501.5) Possession of a weapon by a prison inmate carried a maximum sentence of four years. (Penal Code, § 4502.)

of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense."].)

For a felony, the prosecution commences when "[a]n indictment or information is filed." (Penal Code, § 804, subd. (a).) The prosecution filed the felony information in this case on July 27, 1998. (1 CT 42.) In computing the statute of limitations, the day the crime was committed is exclude, but the day the information was filed is included. (*People v. Twedt* (1934) 1 Cal.2d 392, 399, 1 Witkin & Epstein, California Criminal Law (3<sup>rd</sup> ed. 2000) Defenses, § 221.) Therefore, the statute of limitations barred prosecution for criminal activity committed prior to July 27, 1995. This included the following 18 alleged incidents of criminal activity offered as factor (b) evidence:

The alleged July 22, 1994, weapon possession incident at Calipatria State Prison (10 RT 2475-78.); the alleged August 5, 1994, slashing incident at Calipatria State Prison (11 RT 2545-46.); the alleged August 23, 1994, weapon possession and assault on a prisoner at Calipatria State Prison (11 RT 2556-57, 2717-18); the alleged August 29, 1994, weapon possession incident at Calipatria State Prison (11 RT 2534-36), the alleged August 30, 1994, weapon possession incident at Calipatria State Prison (10 RT 2496-97); the alleged September 11, 1994, weapon possession incident at Calipatria State Prison (11 RT 2731-32, 2736-37); the alleged September 22, 1994, assault at Calipatria State Prison (10 RT 2470-74); the alleged October 21, 1994, battery on staff at Calipatria State Prison (10 RT 2442-2450); the alleged November 27, 1994, weapon possession incident at Calipatria State Prison (11 RT 2695-96); the alleged February 12, 1995, stabbing incident at Calipatria State Prison (11 RT 2582-85); the alleged March 3, 1995, assault on a prisoner at Calipatria State Prison (11 RT 2751-53); the alleged March 23, 1995, weapon possession incident at Calipatria State Prison (11 RT 2623-26); the alleged April 10, 1995, weapon possession incident at Calipatria State Prison (11 RT 2523-2525); the

alleged May 3, 1995, weapon possession incident at Calipatria State Prison. (10 RT 2486-91); the two alleged May 31, 1995, weapon possession incidents at Calipatria State Prison (11 RT 2756-59, 2502-2504); the alleged June 24, 1995, battery on a prisoner at Calipatria State Prison (12 RT 2775-76); the alleged July 14, 1995, assault and weapon possession incident at Calipatria State Prison (11 RT 2565-67); and the alleged July 21, 1995, slashing incident at Calipatria State Prison (12 RT 2784-85).

**C. Evidence Of Criminal Activity Beyond The Statute Of Limitations Is Constitutionally Unreliable And Therefore Inadmissible.**

This Court has held that because there is no statute of limitations for murder, the expiration of the statute of limitations for other criminal activity does not bar admission of evidence of that activity as an aggravating factor at the penalty phase of a capital trial. (*See, e.g., People v. Harris* (2008) 43 Cal.4th 1269, 1316 ["Nor does expiration of the statute of limitations bar the use of such conduct as an aggravating factor."], *People v. Barnwell* (2007) 41 Cal.4th 1038, 1058-59 [citing cases].) Appellant respectfully requests reconsideration of this holding because it conflicts with his rights to due process, to trial by jury, to a fair trial, and the heightened requirement of reliability in capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

A statute of limitations is not a mere technicality. Time bars exist to ensure a level of reliability required in any criminal case and which is heightened in capital proceedings. As this Court has observed, the statute of limitations exist because of the "difficulty faced by both the government and a criminal defendant in obtaining reliable evidence (or any evidence at all) as time passes following the commission of a crime." (*People v. Zamora* (1976) 18 Cal.3d 538, 546.) Correspondingly, the United States Supreme Court has

stated that "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. [Citation.] And that judgment typically rests, in large part, upon evidentiary concerns--for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." (*Stogner v. California* (2003) 593 U.S. 607, 615 [123 S. Ct. 2446; 156 L. Ed. 2d 544].)

Therefore, "[u]nlike the balancing approach utilized for consideration of the admissibility of marginally reliable evidence (Evid. Code, § 352) or on the question of a defendant's constitutional right to a speedy trial [Citation], the government cannot overcome the bar of a statute of limitations by demonstrating a lack of prejudice to the defendant." (*People v. Zamora, supra*, 18 Cal.3d at p. 547; accord *United States v. Marion* (1971) 404 U.S. 307, 322 [92 S. Ct. 455; 30 L. Ed. 2d 468] [Limitation periods "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."].)

In capital sentencing proceedings, the same reasoning should bar the admission of evidence of other criminal activity beyond the statute of limitations in capital sentencing proceedings because of the heightened requirement of reliability and accurate factfinding. (*See, e.g., Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246; 141 L.Ed.2d 615] ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings."], citing, *inter alia*, *Lockett v. Ohio, supra*, 438 U.S. at p. 604 [The "qualitative difference between death and other penalties calls for a greater degree of reliability ...."], and *Strickland, supra*, 466 U.S. at p. 704, 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."].)

For this reason, the Double Jeopardy Clause of the Fifth Amendment applies in the capital sentencing context although it does not extend to noncapital sentencing proceedings. (*Monge v. California, supra*, 524 U.S. at p. 732 ["That need for reliability accords with one of the central concerns animating the constitutional prohibition against double jeopardy."].) "Indeed, ... in a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Id.* at pp. 732-33; quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [101 S. Ct. 1852; 68 L. Ed. 2d 270], internal citation and quotation omitted.)

For analogous reasons, the United States Supreme Court has reversed a death judgment for improper use of other criminal activity as evidence in aggravation. In *Johnson v. Mississippi, supra*, 486 U.S. 578 ("*Johnson*"), the defendant was convicted of a capital murder and sentenced to death. The sentence was predicated, in part, on the fact that in 1963 the defendant had been convicted in New York of felony assault. After the Mississippi Supreme Court affirmed the defendant's death sentence, the New York Court of Appeals in 1987 reversed the assault conviction because the defendant was never advised of his right to appeal and all the records from his trial had been lost. (*Id.* at p. 582 & fn. 3.) The Mississippi Supreme Court denied a motion for post-conviction relief on grounds of use of an invalid prior felony conviction, but the high court reversed the death judgment. (*Id.* at pp. 583-584.)

The *Johnson* court began with the principle that "the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment'" in any capital case." (*Id.* at p. 584, citations and internal quotations omitted.) "Although we have acknowledged that 'there can be no

perfect procedure for deciding in which cases governmental authority should be used to impose death,' we have also made it clear that such decisions cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" (*Id.* at pp. 584-85, quoting *Zant v. Stephens, supra*, 462 U.S. at pp. 884-885.)

The reasoning of the foregoing cases shows that the use of constitutionally impermissible evidence in aggravation violates the defendant's due process and Eighth Amendment rights to reliable sentencing proceedings. The use of evidence of criminal activity for which there is an "irrebutable presumption" of unfairness (*United States v. Marion, supra*, 404 U.S. at p. 322; accord *People v. Zamora, supra*, 18 Cal.3d at p. 547) is no less egregious than use of a prior conviction rendered unreliable because the defendant had been deprived of his right to appeal after conviction. Accordingly, the fact that appellant was charged with a capital crime requires exclusion of evidence in aggravation that was outside the applicable statute of limitations.

**D. Reversal Is Required Because The Prosecution Relied On The Crimes Barred By The Statute Of Limitations In Urging The Jury To Reach A Death Verdict.**

As a matter of federal law, reversal is required unless Respondent demonstrates that the violation of appellant's federal constitutional rights was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Under state law, "error in the admission of evidence under section 190.3, factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Lewis, supra*, 43 Cal.4th at p. 527, quoting *People v. Lancaster, supra*, 41 Cal.4th at p. 94.) Under either standard, reversal of the death judgment is required.

In *Johnson v. Mississippi, supra*, 486 U.S. 578, the United States Supreme Court reversed the death judgment where the prosecutor "repeatedly" urged the jury to give weight to the inadmissible evidence of a single prior violent offense in balancing aggravating and mitigating circumstances. "Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" (*Id.* at p. 586, quoting *Gardner v. Florida, supra*, 430 U.S. at p. 359 (plurality opinion).)

In this case, not just one but 18 alleged incidents of other criminal activity involving force or violence were admitted in evidence. In its closing penalty phase argument, the prosecutor repeatedly referred to those incidents, both verbally and with pages of detailed summary tables and charts. (14 RT 3439-40 [identification of summary materials used by prosecutor in closing penalty phase argument]; 4 CT 983-988 [copy of tables used by prosecution in closing argument]; 14 RT 3470-3483 [References to alleged other criminal activity prior to July 27, 1995, time bar and related tables.]) The written materials were distributed to the jurors during the prosecutor's argument. (14 RT 3450.)

Thus, the prejudice in this case was even more pervasive than the repetition of reference to a single prior crime in *Johnson v. Mississippi, supra*. Any doubt as to prejudice must be resolved in favor because this was a close case with the jury deliberating over the course of four days on the question of penalty. (4 CT 997, 998, 1001, 1048.) Given the prosecution's jury argument and the indication of a close case, the admission of the erroneous factor (b) evidence was prejudicial error. (*People v. Zemavasky, supra*, 20 Cal.2d at p. 62; *People v. Minifie, supra*, 13 Cal.4th at p. 1071.) Accordingly, the death judgment against appellant should be reversed.

## XIX.

### **THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON DEFENSES AND THE APPLICATION OF APPELLANT'S MITIGATING MENTAL HEALTH EVIDENCE TO THE FACTOR (B) EVIDENCE OFFERED IN AGGRAVATION BY THE PROSECUTION.**

#### **A. Introduction.**

The prosecution's penalty case consisted of multiple instances of unadjudicated criminal activity offered as factor (b) evidence. (Penal Code, § 190.3, subd. (b); *see* Statement Of Facts, Section III.; 4 CT 942-952 [Second Amended Notice of Intention To Introduce Evidence In Aggravation (Pursuant To Penal Code Section 190.3).) At the request of the prosecution the trial court instructed the jury on the elements of the proffered factor (b) offenses. (12 RT 2861-62, 2875; 4 CT 1022, CALJIC No. 8.86 ["Penalty Trial – Conviction Of Other Crimes – Proof Beyond A Reasonable Doubt"]; 4 CT 1025-1037.)

However, the court did not instruct the jury on defenses to the alleged criminal activity. The trial court's failure to do so violated appellant's state and federal rights to due process, to a fair trial, and to trial by jury and to capital sentencing proceedings that are reliable and not arbitrary and capricious. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

#### **B. The Trial Court Had A Duty To Instruct On Defenses To The Criminal Activity Offered As Factor (B) Evidence.**

"In a guilt trial, the court must instruct sua sponte on legally available defenses ... when such defenses are supported by substantial evidence. (E.g., *People v. Sedeno* (1974) 10 Cal.3d 703, 716 [112 Cal.Rptr. 1, 518 P.2d 913].) Though there is no sua sponte duty at the penalty phase to instruct on the

elements of 'other crimes' introduced in aggravation (e.g., *People v. Mitcham* (1992) 1 Cal.4th 1027, 1075 [5 Cal.Rptr.2d 230, 824 P.2d 1277]), when such instructions are given, they should be accurate and complete. (See *People v. Malone* (1988) 47 Cal.3d 1, 49 [252 Cal.Rptr. 525, 762 P.2d 1249].)" (*People v. Montiel* (1993) 5 Cal.4th 877, 942, cert. denied, *Montiel v. California* (1994) 512 U.S. 1253 [114 S.Ct. 2782; 129 L.Ed.2d 894].)

Accordingly, this Court has assumed without deciding "that penalty instructions on the elements of aggravating 'other crimes' should include, on the court's own motion if necessary, any justified ... instructions" on a defense supported by the evidence. (*Ibid.* [addressing defense of intoxication to specific intent crimes]; see also *People v. Cain* (1995) 10 Cal.4th 1, 72 [Assuming without deciding that instructions on defenses are required "when they are 'vital to a proper consideration of the evidence.'"], quoting *People v. Davenport* (1985) 41 Cal. 3d 247, 282.)

This assumption is well taken. A penalty jury may not consider uncharged criminal activity as an aggravating factor unless "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Boyd, supra*, 38 Cal.3d at p. 778.) The jury cannot properly perform this function without instructions on defenses to the proffered criminal activity which are supported by the evidence.

In general, instructions on defenses are necessary to hold the prosecution to its burden of proof and to vindicate the presumption of innocence and the defendant's right to due process and to trial by jury. (See, e.g., *People v. Salas, supra*, 37 Cal.4th at pp. 982-83 ["a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any ... defense for which the record contains substantial evidence"]; *People v. Breverman, supra*, 19 Cal.4th at p. 157 [The sua sponte duty to instruct on all material issues presented by the evidence extends to defenses as well as to

lesser included offenses.]; *People v. Rogers* (1961) 56 Cal.2d 301, 306 [The presumption of innocence remains with the defendant throughout the trial.]

The United States Supreme Court is in accord. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter, supra*, 450 U.S. at p. 302.) "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question ... fails to come within the statutory definition of the crime. When, therefore, 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." (*Griffin, supra*, 502 U.S. at p. 59.)

Thus, "[w]hether 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, supra*, 476 U.S. at pp. 690-691, citations omitted.) This includes the right "to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*United States v. Mathews* (1988) 485 U.S. 58, 63 [108 S.Ct. 883, 99 L.Ed.2d 54]; accord *Bradley v. Duncan, supra*, 315 F.3d at p. 1098 [The defendant has a right under the Due Process Clause of the Fourteenth Amendment to an instruction on a defense supported by the evidence].)

These rules apply with particular force in the penalty phase of a capital case. The fact-finding procedure that results in a judgment of death must be based on a heightened standard of reliability because of the severity and irremediable nature of a punishment of death. (*Monge, supra*, 524 U.S. at p. 732 ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing

proceedings."]; accord *People v. Bloom* (1989) 48 Cal.3d 1194, 1228.) To permit the jury to impose a death sentence based on other alleged criminal activity without requiring instructions on defenses to those crimes impairs the reliability of the penalty determination.

It also invites arbitrary and capricious action by the jury in violation of a capital defendant's due process and Eighth Amendment rights. (See, e.g., *Gregg v. Georgia, supra*, 428 U.S. at p. 195 ["[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met" only if "the sentencing authority is given adequate information and guidance."]; *Zant v. Stephens, supra*, 462 U.S. at p. 874 ["A fair statement of the consensus expressed by the Court in *Furman* is that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' [Citation]."]<sup>57</sup>)

"In determining whether the evidence is sufficient to warrant a jury instruction, the 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 ....'" (*People v. Salas, supra*, 37 Cal.4th at p. 983.) The reason for this is that the credibility of evidence "is a question within the exclusive province of the jury." (*People v. Carmen* (1951) 36 Cal.2d 768, 773; see also Penal Code, § 1127 [The jurors "in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."]; *United States v. Scheffer, supra*, 523 U.S. at p. 313 ["The jury's 'core function ... [is] making credibility

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57. If this Court finds that a request for instructions on defenses was required, these claims of instructional error are cognizable for the reasons stated above in Argument Sections III.A and VII.B.

determinations in criminal trials."].)

"'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]" (*People v. Flannel, supra*, 25 Cal. 3d at p. 685; accord *United States v. Bailey, supra*, 444 U.S. at p. 398 [In deciding whether to instruct the jury on a defense theory, the evidence should be "[c]onstrued in the light most favorable to" the defendant.].) Measured against these standards, the trial court had a sua sponte to instruct the jury on defenses to one specific alleged factor (b) incident and also on a defense that applied to all of the factor (b) evidence.

**C. The Trial Court Should Have Instructed The Jury On Self-Defense And Self-Defense To Excessive Force in Connection With The October 21, 1994, Incident At Calipatria State Prison.**

**1. An Inmate Retains The Right Of Self-Defense.**

As an alleged battery on correctional officers, the prosecution presented evidence of an incident at Calipatria State Prison on October 21, 1994. Four inmates, including appellant, were withholding their food trays to protest an unspecified grievance. (10 RT 2442-2445, 2448-49; 11 RT 2636.) This was a concern to correctional staff because inmates may fashion weapons from the plastic trays. (11 RT 2635-36.) Appellant barricaded himself in his cell with his mattress and refused orders to give up his tray. (*Ibid.*) When appellant refused to leave his cell, an officer used a rifle that fired rubber bullets to knock the mattress back from the cell door. (11 RT 2639-40.) Another officer fired a "taser" at appellant through the cell port. (10 RT 2447, 2455-56.) A taser is a gun that shoots pieces of metal hooked to a wire in order to deliver an electric shock to knock someone off balance. (10 RT 2450.) Appellant received puncture wounds to his back and left chest consistent with the use of the taser. (10 RT 2450-51; 11 RT 2640.)

A five man extraction team then entered appellant's cell to recover the

food tray and to remove appellant from the cell. When the officers entered the cell, appellant was standing on the table at the far end of the cell. An officer struck appellant with a shield causing him to fall onto his bunk. (10 RT 2451-52, 2454.) Appellant put his arms under his body and kicked his legs so that the officers could not handcuff and shackle him. An officer was able to put handcuffs on appellant but appellant kept kicking at the man who tried to hold his legs. An officer finally put his whole body on appellant's legs and shackled him. (10 RT 2445-47; 11 RT 2641-42.) Appellant continued to try to kick and swing his hands after he was cuffed and shackled. (11 RT 2642.)

Based on the cell extraction incident, the trial court at the request of the prosecution instructed the jury in the penalty phase on battery by a prisoner on a non-confined person. (Penal Code, § 4501.5 ["Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony ...."]; 14 RT 3410-11.) The instruction provided:

Every person confined in a state prison of this state who willfully and unlawfully uses any force or violence upon the person of any individual not a confined person therein is guilty of the crime of battery by prisoner on non-confined person in violation of Penal Code section 4501.5.

In order to prove this crime, each of the following elements must be proved:

1. A person used force or violence;
2. The use of force or violence was willful and unlawful;
3. The person who used force or violence was at the time confined in a state prison of this state; and
4. The person upon whom the force or violence was inflicted was not at the time confined within that prison.

The use of force or violence is not unlawful when done in lawful self-defense. The burden is on the People to prove that the use of force or violence was not in lawful self-defense. If you have a reasonable doubt that the use of force or violence was unlawful, you must find the defendant not guilty. (CALJIC No. 7.37, modified, 4 CT 1030, emphasis added.)

However, the trial court in neither the guilt phase nor the penalty phase gave any instructions to define lawful force or the law of self-defense. As the Use Note to CALJIC No. 7.37 states, where the evidence raises a question of whether the use of force was lawful, "the court will have to define lawful force and give appropriate self-defense ... instructions ...." (CALJIC No. 7.37 (6<sup>th</sup> Ed. 1996) Use Note at p. 365.) The "Bench Notes" for the current pattern instruction on section 4501.5 similarly states that "[i]f there is sufficient evidence of self-defense ..., the court has a *sua sponte* duty to instruct on the defense." (CALCRIM No. 2723)

Accordingly, the trial court should have instructed the jury on the elements of self-defense pursuant to CALJIC No. 5.30 ("Self-Defense Against Assault"), CALJIC No. 5.50 ("Self-Defense – Assailed Person Need Not Retreat"), and CALJIC No. 5.51 ("Self-Defense – Actual Danger Not Necessary").<sup>58</sup> (*People v. Sedeno, supra*, 10 Cal. 3d at p. 716 [The trial court

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58 CALJIC No. 5.30 provides: "It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, that person may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

CALJIC No. 5.50 provides: "A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable

has a duty to give proper self-defense instructions].) In addition, the court should have instructed the jury that a defendant has the right to use self-defense to resist a battery. (*People v. Meyers* (1998) 61 Cal.App.4th 328, 335 ["[A]n offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances. The same may be said of an assault insofar as it is an attempt to commit such a battery."].)

## 2. The Right To Resist Excessive Force.

The trial court should also have instructed the jury that appellant had a right of self-defense against the use of excessive force by a custodial officer. "Prisoner and ex-felons ordinarily operate under restrictions not imposed on the average person. A prisoner, for example, is subject to the commands of a correctional officer. .... These persons do not, however, forfeit all rights to self-defense. Thus a correctional officer is not entitled to use unreasonable or excessive force while escorting a prisoner. If the officer does, the prisoner is not guilty of violating P.C. 4501.5 (battery by a prisoner on a nonprisoner ...." (1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 67.)

The right to use reasonable force to resist excessive force is recognized

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person in a similar situation and with similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

CALJIC No. 5.51 provides: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

by statute and case law. (Pen. Code, § 692 ["Lawful resistance to the commission of a public offense may be made ... [b]y the party about to be injured."]; Pen. Code, § 693 ["Lawful resistance to the commission of a public offense may be made ... [b]y the party about to be injured."]; *People v. Curtis* (1969) 70 Cal.2d 347, 356-57 ["[T]he rule allowing resistance to excessive force, which applies during a technically lawful *or* unlawful arrest, protects a person's right to bodily integrity and permits resort to self-defense. ... Sections 692 and 693 set forth the basic privilege one has to defend against unlawful force."]; *see also* Civ. Code, § 50 ["Any necessary force may be used to protect from wrongful injury the person ... of oneself ...."].)

"The Eighth Amendment also prohibits those who operate our prisons from using 'excessive physical force against inmates.'" (*Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146, 1245, quoting *Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S. Ct. 1970; 128 L. Ed. 2d 811] ["In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners."].)

Where there is evidence of excessive force, the trial court has a sua sponte duty to give appropriate instructions. (*See, e.g., People v. White* (1980) 101 Cal.App.3d 161, 167-168 [Court had sua sponte duty to instruct that if the jury found that the arrest was made with excessive force, the arrest was unlawful and the defendant was not guilty of an assault of a peace officer]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46-47 [same]; *see also* CALCRIM No. 2671, "Lawful Performance: Custodial Officer", Bench Notes, Instructional Duty ["The court has a sua sponte duty to give this instruction [on self-defense to excessive force] if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense."].)

Accordingly, the trial court should have given an instruction such as the following:

A correctional officer is not permitted to use unreasonable or excessive force in detaining or attempting to detain a prison inmate.

Force is unreasonable or excessive if it is more than a reasonable person would believe was necessary to use under the circumstances.

If a correctional officer does use unreasonable or excessive force in detaining or attempting to detain a prison inmate, the inmate being detained may lawfully use reasonable force to protect himself.

Thus, if you find that the correctional officer used unreasonable or excessive force in restraining or attempting to restrain the defendant while he was a prison inmate, and that the defendant used only reasonable force to protect himself, the defendant is not guilty of a violation of Penal Code section 4501.5 as defined in these instructions. (See CALJIC Nos. 5.30 & 9.28, modified; see also CALCRIM No. 2671; *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022 [Approving instruction that "if you find that the officer used unreasonable or excessive force in making or attempting to make the escort in question, and that the defendant used only reasonable force to protect himself, the defendant is not guilty of the offense charged in the indictment."].)

The record presented substantial evidence of self-defense to excessive force. Appellant was alone in his cell holding a food tray to protest unspecified custody conditions. (10 RT 2442-2445, 2448-49; 11 RT 2636.) The prosecution presented no evidence that appellant was armed or that he threatened harm against the correctional officers. He was simply was unwilling to give up the food tray or to be removed from his locked cell. (11 RT 2635-36.)

Nevertheless, the lieutenant in charge responded by firing a taser at

appellant and sending five officers into his cell. (10 RT 2447, 2455-56.) Appellant received puncture wounds to his back and left chest consistent with the use of the taser. (10 RT 2450-51; 11 RT 2640.) The first officer hit appellant with a shield, knocking appellant onto his bed, and then multiple officers handcuffed appellant and shackled his legs. (10 RT 2451-52, 2454.) In the midst of this, appellant kicked his legs and swung his handcuffed hands in order to avoid being shackled. (10 RT 2445-47; 11 RT 2641-42.)

From this evidence, a juror could find reasonable doubt that appellant committed a battery on the correctional officers because: the officers use of force was excessive; and appellant used only reasonable force to defend himself from the onslaught of officers who had shot him with a taser and knocked him down with a shield. As discussed further below, appellants' mental health problems also provided a basis for the jury to find excessive force and/or that appellant's response was reasonable under the circumstances. Here, appellant emphasizes that at the time of the cell extraction on October 21, 1994, appellant's mental health problems were well documented in records at Calipatria State Prison.

On September 3, 1992, the day after appellant arrived at Calipatria State Prison, appellant reported that he was a manic depressive and that he had been taking Lithium. (Exh. No. 95, CT. Suppl. B 31; 13 RT 3142.) On September 25, 1992, a doctor saw appellant but ordered no medications for him. (Exh. No. 95, CT. Suppl. B 33-34; 13 RT 3143.) Esther Renfro, appellant's grandmother also informed prison officials of appellant's need for a psychiatric evaluation. On September 14, 1992, a state assemblyman at the request of appellant's grandmother wrote James Gomez, the Director of the Department of Corrections, "regarding Daniel's mental health and psychiatric care." (Exh. No. 95, CT. Suppl. B 32.) "According to Mrs. Renfro, Daniel has not been through a psychiatric evaluation and is not in a facility to receive the

appropriate therapy should he need counseling." (*Ibid.*)

On July 6, 1994, Mrs. Renfro wrote directly to Calipatria State Prison stating that she had been trying "for years" to get appellant the "help that he really needs ...." (Exh. No. 95, CT. Suppl. B 36.) On July 19, 1994, Calipatria State Prison received a "to whom it may concern" letter from appellant. Appellant wrote a letter "out of concern for my mental state and future after prison. During my stay here at Calipatria, I have (for some 2 years now) attempted to receive psychological treatment." (Exh. No. 95, CT. Suppl. B 37, original emphasis.) In the past, he had been diagnosed as manic depressive and treated with Lithium, but he had unsuccessfully attempted to get the prison to renew his prescription. "As a plea for help. I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I want help, and someone to talk to ...." (*Ibid.*)

Frank Gawin, M.D., the defense psychiatric expert, testified that the use of a taser on someone with bipolar disorder "would be stressful in the extreme" and could flip him "into mania or into severe depression." (13 RT 3158.) For this reason, a federal court decision (*Coleman v. Wilson* (E.D. Cal. 1995) 912 F.Supp. 1282 ("*Coleman*")) restricted the use of tasers on inmates with mental health problems and tasers are no longer in use in California prisons. (11 RT 2651-53.) In *Coleman*, the United States District Court for the Eastern District of California certified a class of mentally ill state prisoners who had filed suit under 42 U.S.C. § 1893 against the Governor of California and the directors of the state penal system. The inmates claimed that the severe lack of mental health care and several policies and procedures for handling mentally ill inmates, including the use of tasers, violated their rights under the Eighth and Fourteenth Amendments. The District Court referred the matter to a magistrate who made several finding which the District Court affirmed as supported by substantial evidence.

The magistrate "found that 'mentally ill inmates who act out are typically treated with punitive measures without regard to their mental status.' [Citation.] He further found that such treatment was the result of inadequate training of the custodial staff so that they are frequently unable to differentiate between inmates whose conduct is the result of mental illness and inmates whose conduct is unaffected by disease." (*Id.* at p. 1320.) "[I]nmates who act out are also subjected to the use of tasers and 37mm guns, without regard to whether their behavior was caused by a psychiatric condition and without regard to the impact of such measures on such a condition.' [Citation.]" (*Id.* at p. 1321.)

"It is also plain from the undisputed evidence before the court that use of either tasers or 37mm guns on members of the plaintiff class can cause, and has caused, serious and substantial harm to mentally ill inmates, whether or not the inmate is on psychotropic medication. This harm to the inmate can be both immediate and long lasting. Moreover, continuation of the present practices permitting these weapons to be used against inmates with serious mental disorders without regard to the impact on those disorders will cause serious harm to members of the plaintiff class so long as those practices remain in existence." (*Id.* at p. 1322.)

Accordingly, the District Court found that the use of tasers on inmates with serious mental disorders without regard to the impact of those weapons on their psychiatric condition violated the inmates Eighth Amendment right against cruel and unusual punishment. (*Id.* at p. 1323.) For these additional reasons, a reasonable juror could have found that the officers use of a taser against appellant was excessive force and reasonable doubt of a battery because appellant's response was reasonable under the circumstances. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-83 [Although the belief in the need to defend must be objectively reasonable, "a defendant is entitled to have a

jury take into consideration all the elements in the case which might be expected to operate on his mind ....' [Citation.]".)

**D. The Trial Court Should Have Instructed The Jury That It Must Consider The Evidence Of Appellant's Mental Health Problems In Deciding Whether The Evidence Of Other Criminal Activity Justified A Sentence Of Death Rather Than Life Without The Possibility Of Parole.**

All of the factor (b) evidence offered by the prosecution involved general intent crimes of weapon possession, assault, and battery. (Penal Code, §§ 240, 242, 4501.5, 4502, *People v. Valdez* (2002) 27 Cal.4th 778, 786-87 [battery]; *People v. Colantuono* (1994) 7 Cal.4th 206, 210 [assault]; *People v. Strunk* (1995) 31 Cal.4th 265, 272 ["To show a violation of ... [(Penal Code, § 4502)] the prosecution must prove the defendant was confined in a state prison and that he had knowledge of the prohibited object in his possession."]; *see also* 4 CT 1038 [CALJIC No. 3.30; concurrence of act and general criminal intent required for assault, battery, and custodial possession of a weapon].)

In the guilt phase of a trial, evidence of mental illness, disease or defect is not a defense to a general intent crime. (Penal Code, § 28, subd. (a) ["Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."].)

However, "evidence of a mental disorder may be considered by the court ... at the time of sentencing or other disposition or commitment." (Penal Code, § 25, subd. (c).) Where the defendant has invoked his right to trial by

jury in the sentencing phase of a capital case, the jury should also be able to consider evidence of a mental disorder as a defense in mitigation of factor (b) evidence. (Cal. Const., Art. I, § 16; U.S. Const., 6<sup>th</sup> Amend.; Penal Code, § 1127 ["[I]n all cases ... the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."]; *Ring v. Arizona, supra*, 536 U.S. at p. 602 ["If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt."], *id.* at p. 616 ["the jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand"], Breyer, J., concurring.)

The same conclusion follows from the defendant's due process (U.S. Const. 5<sup>th</sup> & 14<sup>th</sup> Amends.) and Eighth Amendment rights in capital sentencing proceedings. As a general rule, the jury must be permitted to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett, supra*, 438 U.S. at p. 604, original emphasis, footnote omitted; *Payne v. Tennessee* (1991) 501 U.S. 808, 822 [111 S. Ct. 2597; 115 L. Ed. 2d 720] ["We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. [Citations]."].)

To vindicate this principle, jury instructions must be given which permit the jury to consider and give effect to such evidence, whether or not it relates to the charged capital offense. (*Tennard v. Dretke* (2004) 542 U.S. 274, 285 [124 S. Ct. 2562; 159 L. Ed. 2d 384] [Rejecting requirement that mitigating evidence of a mental disorder must have a nexus or causal connection to the charged capital offense.]; *Smith v. Texas* (2004) 543 U.S. 37, 45 [125 S. Ct. 400, 160 L. Ed. 2d 303] ["Because petitioner's proffered evidence was

relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence.".)

This includes instructions addressing evidence of the defendant's mental health problems. (*Tennard, supra*, 542 U.S. at p. 284 [Evidence of "impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately" at the time of the capital offense.]; *Smith, supra*, 543 U.S. at p. 45 [That "evidence [of the defendant's troubled childhood and limited mental abilities] was relevant for mitigation purposes is plain under our precedents."]; *see also Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [109 S. Ct. 2934; 106 L. Ed. 2d 256] ["[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." [Citation.]".) Accordingly, the court should have instructed the jury that it must consider the evidence of appellant's mental health problems in evaluating whether the factor (b) evidence justified a sentence of death rather than life without the possibility of parole.

**E. The Failure To Instruct The Jury On Defenses And The Significance Of The Evidence Of Appellant's Mental Health Problems To The Factor (B) Evidence Requires Reversal Of The Death Judgment Under State And Federal Law.**

Whether prejudice is assessed under state or federal law, the judgment must be reversed for the trial court's failure to instruct the jury on defenses to the prosecution's factor (b) evidence in aggravation. The United States Supreme Court has recognized that reversal is required when the consequences of an instructional error are "unquantifiable." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [124 L. Ed. 2d 182; 113 S. Ct. 2078].) It is impossible to know whether the jury would have questioned the factor (b) evidence based on defenses the jury was given no opportunity to consider. Under these circumstances, "[a] failure to instruct a jury upon a legally and factually

cognizable defense is not subject to harmless error analysis." (*United States v. Sarno* (9th Cir. 1995) 73 F.3d 1470, 1485; accord *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 ["[A] failure to instruct the jury on the defendant's theory of the case is reversible *per se*. The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. [Citation]."]).)

Even if harmless error analysis applies, reversal is required because there was substantial evidence from which a properly instructed jury would have found that the factor (b) evidence did not justify a death sentence. As set forth above with respect to the cell extraction incident, the record contains substantial evidence from which the jury could find that appellant acted in self-defense and/or that the correctional officer's use of force was unlawful because it was excessive. In particular, the use of the taser was unjustified and excessive on an inmate with multiple mental health problems including bipolar disorder. There is at least a reasonable possibility that a properly instructed juror would have concluded that appellant's response was not unreasonable because the use of the taser had flipped appellant into mania. (13 RT 3158.)

With respect to all of the factor (b) evidence, there is at least a reasonable possibility that a properly instructed jury would have concluded that appellant's criminal activity was the result of the denial of care and treatment for his multiple, mental health problems. From the age of six, appellant had received professional care for deep rooted psychological problems related to his traumatic childhood experiences. (13 RT 3332-33; Exh. No. 95, CT. Suppl. B 10-11 ["This young man has had extreme traumatic experiences which makes him a high risk individual for perpetuation of his victimization status."].) This included residential treatment in acute care psychiatric facilities when his grandparent's health insurance permitted it. (13

RT 3313-14, 3327-28, 3351-53.)

Following a theft-related burglary adjudications at the age of 16, the juvenile court placed appellant in a closed, residential treatment center where he received psychological counseling and treatment from September 10, 1985, to July 16, 1986. (13 RT 3335-36, 3341.) As a juvenile, appellant had been diagnosed with atypical depression and attention deficit hyperactivity disorder. (13 RT 3319.) Subsequent testing and evaluation showed that this was the harbinger of appellant's adult bipolar disorder. (13 RT 3130-31; *see also* 13 RT 3197-99.) When appellant received regular mental health care, including counseling and medication, he never committed a crime of force or violence. All of appellant's juvenile criminal activity and adult convictions prior to entering prison were for theft offenses without any evidence that he was armed with any type of weapon or that he attempted to hurt anyone. (See Statement Of Facts, Sections III.A. & III.B.) His only violent acts were self-directed attempts at suicide. (13 RT 3320-21, 3332, 3328-29; Exh. No. 95, CT. Suppl. B 11.)

When on July 10, 1987, at the age of 19 appellant pled guilty to a single count of another theft-related burglary, he was sent to the Youth Authority rather than to state prison because of his immaturity. (12 RT 3021-22; Exh. No. 95, CT. Suppl. B 10; Exh. No. 42, 4 CT 1104.) The Youth Authority recognized that appellant had "serious ... emotional and mental problems and he needed intensive treatment." Accordingly, a "specialized counseling program" was set-up for appellant that included intensive individual psychotherapy and group therapy. (12 RT 3068-69, 3072; Suppl.B CT 12.) On March 4, 1988, appellant pled guilty to committing a non-violent escape from the Youth Authority and he was sent to state prison to complete his term. (Welfare & Inst. Code 1768.7; Exh. No. 42, 4 CT 1103, 1106.) While at the Youth Authority and for the several months in prison, appellant received

medications showing that he was being treated as a patient with bipolar disorder. (13 RT 3134-35.) Exh. No. 95, CT. Suppl. B 13-24.) The prosecution presented no evidence that appellant engaged in any criminal activity involving force or violence while at the Youth Authority or during his first incarceration in state prison.

On June 19, 1992, appellant pled guilty to a theft-related burglary and he was sentenced to state prison for eight years. (Exh. No. 42, 4 CT 1108, 1194-95.) The prosecution presented no evidence that appellant was armed during the commission of the burglary or that that he attempted to harm anyone and the information contained no such allegations. (*Ibid.*) Appellant first criminal activity involving force or violence, weapon possession and a stabbing, began two years later in July of 1994. (10 RT 2475-78; Exh. No. 95, CT. Suppl. B 37.) Prior to that time, appellant's records contained reports of a lot of different injuries to him which suggested that he had been the victim of intimidation and violence. (13 RT 3256-57.)

After the first stabbing incident at Calipatria State Prison, appellant wrote a letter to the prison explaining that for two years he had tried to get counseling and medication:

I have filled out the paper work, and have requested interviews with anyone for help. In the past, I was diagnosed as a manic depressive and given the recommended dosage of Lithium, this was in C.M.C. – East. I have attempted (as earlier stated) to renew my prescription with the state, for my medication.

As a plea for help. I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I want help, and someone to talk to, I know programs are available, I've seen them.

I am presently in ad-seg (in Calipatria) for a stabbing assault, in my past I have no prior violence, or such misbehavior. I was found guilty and given a 24 month S.H.U. term. I know I must pay for these crimes I have been accused of, but I would like to

be endorsed (after S.H.U. term) to C.M.C.-East, or any such facility having programs to help, not just punish inmates.

Respectfully[,] Daniel Landry D-62144 (Exh. No. 95, CT. Suppl. B 37)

Other evidence confirmed that appellant had been seeking help for two years prior to the first factor (b) incidents. After his June 1992 plea to the theft-related burglary, appellant was sent to the reception center at the California Correctional Institution. On July 17, 1992, appellant reported that he was a manic depressive and he had previously been prescribed 900 milligrams of Lithium. (CT. Suppl. B 30; 13 RT 3141.) On September 2, 1992, appellant was transferred appellant to Calipatria State Prison. (Exh. No. 42, 4 CT 1101.) The next day, he again reported that he was a manic depressive and that he had been taking Lithium. (13 RT 3142; Exh. No. 95, CT. Suppl. B 31.) On September 25, 1992, a doctor saw appellant who noted that appellant had received "mellaril" and Lithium in the past. (Exh. No. 95, CT. Suppl. B 33.) However, the doctor ordered no treatment or medications for appellant. (13 RT 3143; Exh. No. 95, CT. Suppl. B 34 ["no meds"].)

On September 14, 1992, a state assemblyman at the request of appellant's grandmother wrote James Gomez, the Director of the Department of Corrections, "regarding Daniel's mental health and psychiatric care." (CT. Suppl. B 32.) "According to Mrs. Renfro, Daniel has not been through a psychiatric evaluation and is not in a facility to receive the appropriate therapy should he need counseling." (*Ibid.*) On October 20, 1992, Director Gomez wrote back to the assemblyman. He stated that appellant's records showed "no evidence of any serious mental illness" and there was no need for psychiatric medication. (CT. Suppl. B 35.) Appellant could not, therefore, be placed in a facility "based on psychiatric reasons." (*Ibid.*)

Apparently as a result of the Director's letter, appellant thereafter

received no care or treatment for his mental health problems and he began his downward spiral into the activity that was the basis for the prosecution's factor (b) case. Appellant periodically continued to seek help and prison staff noted that he needed help for psychological problems. For example, on August 19, 1994, appellant had a psychological consultation and asked for counseling and "help to prevent coming back to prison ...." (Exh. No. 95, CT. Suppl. B 38.) However, there is no indication that he received any help at that time. During some classification committee meetings after appellant had engaged in criminal activity, the staff continued to note appellant's "need of psychiatric treatment." (Exh. No. 95, CT. Suppl. B 47 [March 30, 1995, Crime/Incident Report For slashing during "altercation" with cellmate.]; *see also* id. at p. 49 [After October 19, 1995, slashing incident, classification committee recommended keeping appellant in administrative segregation "pending psychiatric review."]; 13 RT 3146.) Nevertheless, on November 2, 1995, while noting that appellant was acting violently, a staff psychologist concluded that appellant did "not meet the criteria for" the inmate mental health population. (Exh. No. 95, CT. Suppl. B 52; 13 RT 3147.)

On February 22, 1997, a lieutenant at C.I.M. ordered appellant placed in administrative segregation because of a stabbing assault and again noted "Medical/Psyche concerns[.]" (Exh. No. 95, CT. Suppl. B 78; 13 RT 3151.) Appellant was transferred to Corcoran State Prison. Finally, on April 4, 1997, C. Davis, M.D., concluded that appellant met the "criteria for inclusion in the "Mental Health Services Delivery System (MHDSS)." (Exh. No. 95, CT. Suppl. B 80.) Dr. Davis issued a prescription for Lithium. However, as of April 25, 1997, appellant had still not received his Lithium, although appellant again said that he would like to have it. (Exh. No. 95, CT. Suppl. B 81-82; 13 RT 3152.)

Dr. Davis instructed the staff to please be sure that appellant got his

Lithium. (Exh. No. 95, CT. Suppl. B 82.) On May 8, 1997, there was another order for Lithium. (Exh. No. 95, CT. Suppl. B 84, 13 RT 3152.) Appellant finally received Lithium for a few days in mid-May. (Exh. No. 95, CT. Suppl. B 85-86.) There is no evidence of any criminal activity during that time period. However, on May 27, 1997, when appellant was transferred to C.I.M., his "Confidential Medical/Mental Health Information Transfer Summary" stated that appellant had no mental health problems ("none") and that he was receiving no medications ("none"). (Exh. No. 95, CT. Suppl. B 87-88; 13 RT 3152.)

On August 3, 1997, appellant stabbed Addis on the prison yard at C.I.M. On August 12, 1997, Carroll Yap, M.D., noted that appellant was "mentally ill" and that Lithium had been ordered for him at Corcoran but that he had not received his medication because his confidential transfer sheet said that he had no diagnosis or prescriptions for mental illness. For the first time since appellant returned to prison in June of 1992, Dr. Yap ordered a mental health treatment plan for appellant. (Exh. No. 95, CT. Suppl. B 93-94; 13 RT 3153.) He also prescribed resuming Lithium for appellant. (*Id.* at pp. 91, 92, 94.)

The unrebutted testimony by the defense experts supported a finding that appellant's criminal activity was directly related to his mental health problems and the denial of adequate care and treatment. Dr. Lantz, a clinical and forensic psychologist, tested appellant and found that, in addition to his bipolar disorder, he had a schizoid personality disorder with attention deficit problems. (13 RT 3108, 3199-3201.) Although the testing that identified this disorder was performed in January and February of 2001 (13 RT 3080), Dr. Lantz explained that appellant's schizoid personality disorder was "very fixed" and "enduring" and defined the "permanent way" in which appellant interacted with the world. (13 RT 3108.)

People with a schizoid personality disorder have difficulty being around other people. They become very anxious when they are forced to do so and they are easily manipulated by others. (13 RT 3108-09.) One of the prison psychologists had diagnosed appellant with an "anti-social personality disorder." Dr. Lantz disagreed with that diagnosis. Moreover, appellant did not have an intermittent explosive personality disorder. Appellant had a schizoid personality disorder with attention problems that manifested with some of the same behavioral problems. (13 RT 3199-3201.) A person of appellant's size and background when placed in the violent setting of prison had committed violent acts. However, considering his entire history, appellant was not "a characterlogically violent person" despite episodes of violence. (13 RT 3201-3202.)

Even assuming that appellant had an anti-social personality disorder, that was also a mitigating factor. (*Smith v. Stewart* (9th Cir. 1998) 140 F.3d 1263, 1270 ["The Arizona Supreme Court has made it clear that an antisocial personality disorder (sociopathic disorder) is a mitigating factor, even if it does not come up to the level of a factor specifically listed in the Arizona sentencing statute."], citing *State v. Thornton* (1996) 187 Ariz. 325 [929 P.2d 676, 685-86 ["Thornton's antisocial personality disorder is a mitigating factor."]; and *State v. Stokley* (1995) 182 Ariz. 505 [898 P.2d 454, 470-71, 473] [Evidence of an antisocial personality disorder is non-statutory mitigating evidence.]; see also *Lambright v. Schriro* (9<sup>th</sup> Cir. 2007) 490 F.3d 1103, 1122 [noting same authority].)

Frank Gawin, M.D., a psychiatrist trained at Stanford Medical School, Yale University, and a Fulbright scholar, reviewed appellant's prison medical records. As previously explained, he concluded that the records showed that appellant was bipolar and he needed treatment and medication. He also explained that appellant's bipolar disorder and the denial of treatment was

related to his criminal activity. (See Statement Of Facts, Section IV.E.2.) The two poles of the disease are extreme activation and extreme depression. In the manic phase, the intense level of energy "often switches to irritability and sometimes to paranoia itself." (13 RT 3122.) The episodes may last a week, but they "usually last several months, if not years, unless they are treated." (*Ibid.*)

When left untreated, someone who is bipolar may act out violently in both manic and depressive phases of the disease when placed in a stressful environment. (13 RT 3123 ["mania is often associated with violence and so is hypomania"].) "The best environment for someone with bipolar disorder, whether or not on medications, is one with minimal stress." (13 RT 3157.) A prison environment would produce "profound stress" and not be therapeutic. People with bipolar disorder normally cycle in regular intervals between the poles of their disease. However, "those intervals can be altered when one superimposes stressors which can ... flip people into mania or into severe depression." (13 RT 3157-58.)

Someone who is bipolar can understand the nature of his acts but be out of control within his disorder. (13 RT 3165.) When hypomanic, individuals can still plan and react, "but they have no capacity to exercise understanding of the consequences of their acts. And that can continue in a chronic manner, during which people could make such mistakes in judgment several times and it could occur repeatedly." (*Ibid.*) Someone who is either hypomanic or manic may enjoy committing crimes and harming others at the time but find those actions "abhorrent" when he is not in those states of his disease. (13 RT 3167-68.)

In Dr. Gawin's opinion, appellant's mental health treatment in prison "was entirely inadequate." (13 RT 3155.) The records in the possession of the Department of Corrections showed that appellant had a mental illness because

of repeated references to suicidal ideation, mood fluctuations, severe depression, and auditory hallucinations. (13 RT 3156.) Those records also showed that there was deficient delivery of mental health treatment. (13 RT 3154-57.) On occasions, appellant had refused medications because of court proceedings or asked to be taken off medication. However, that could be explained by the fact that someone who is hypomanic has poor judgment. (13 RT 3169.) Medication should have continued because bi-polar disorder is a stress-induced or stress-magnified illness. (*Ibid.*) On multiple occasions, doctors had recommended treatment and transfer for that purpose. However, long periods passed without appellant receiving any treatment. In sum, appellant received a "dismal" level of care that, in other contexts, would be a basis for legal action against the physicians. (13 RT 3156-57.)

Dr. Gawin's testimony was supported by Glen Lipson, Ph.D., a diplomat in forensic psychology, who testified as an expert on prison mental health services. (13 RT 3219.) Adequate mental health care for inmates should begin with screening to identify those who are mentally ill. In addition, a file must be created so that after an inmate is diagnosed as mentally ill the information will be available and treatment will continue when the inmates moves between facilities. Finally, the mental health system must be responsive to inmate requests for mental health services and proactively prevent problems. (13 RT 3229.)

Appellant's care had failed in all three components. Appellant's records showed that he had suffered since childhood from a serious mental disorder. (13 RT 3246-47.) This included a schizoid personality disorder, post-traumatic disorder and bipolar disorder with episodes of mania and depression. (13 RT 3248-49.) Given the nature of appellant's mental health problems, prison posed multiple problems because prison is "a very predatory environment with very dangerous people." (13 RT 3256.)

Appellant's subsequent violent behavior reflected the "diathesis stress model" of behavior. That means that when someone with a mental disorder is put in a violent and very stressful environment, the stress will very often send the person "over the edge" so that he acts out more. (13 RT 3257.) Given appellant's history of mental health problems, the proper way to have handled him when he entered the prison system would have been to obtain his mental health records in order to understand his past diagnosis and treatment. (13 RT 3257-58.)

Acting out in violence is very often a sign that someone is mentally ill and is under stress and having problems. After appellant's first violent behavior, there should have been a psychiatric evaluation in order to determine the best way to intervene with an inmate whose behavior was escalating. (13 RT 3257-59.) Once appellant was diagnosed with bipolar disorder, treatment protocols should have been written and meetings held with appellant to explain the nature of the disorder because there is a lot of denial and lack of understanding of bipolar disorder. (13 RT 3259-60.) The only treatment plan in appellant's records was from September 4, 1997, long after his records showed that he was mentally ill. (13 RT 3261-62.)

Given this evidence, there is at least a reasonable possibility that a properly instructed jury would have concluded that appellant's factor (b) criminal activity was the result of the denial of care and treatment for his mental health problems. (*People v. Lewis, supra*, 43 Cal.4th at p. 527.) *A fortiori*, Respondent can not show that the absence of such an instruction was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Accordingly, under either state or federal law, the trial court's failure to instruct the jury on defenses and the application of mitigating mental health evidence to the factor (b) evidence requires reversal of the death judgment.

## XX.

### **CALJIC No. 8.87 ERRED BY FAILING TO REQUIRE JURY UNANIMITY AND BY DIRECTING THE JURY TO FIND THAT "ALL" OF THE FACTOR (B) EVIDENCE INVOLVED THE EXPRESS OR IMPLIED USE OF FORCE OR VIOLENCE OR THE THREAT OF THE SAME.**

#### **A. Introduction.**

Penal Code section 190.3, subdivision (b) ("factor (b)"), allows a jury to consider as an aggravating factor criminal activity involving the actual or attempted use of force or violence or the threat thereof. To explain how to consider such evidence, the trial court instructed the jury with CALJIC No. 8.87 ("Penalty Trial – Other Criminal Activity – Proof Beyond A Reasonable Doubt"). That instruction provided:

Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity: assault by a life prisoner with a deadly weapon; assault by a prisoner with a deadly weapon; battery by state prisoner on non-confined person; battery; assault; and possession or manufacture of weapon by prisoner, all of which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must be satisfied beyond a reasonable doubt that the defendant Daniel Landry did in fact commit the criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If not so convinced, that juror must not consider that evidence for any purpose. (4 CT 1023; CALJIC No. 8.87, emphasis added.)

CALJIC No. 8.87 erred by failing to require unanimity, by creating a

mandatory presumption that the alleged criminal activity involved the use of force or violence, and by directing verdict on the question of force or violence. These errors violated appellant's state and federal constitutional rights to due process of law, to trial by jury, to a fair trial, and reliable capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.)

Trial counsel for appellant did not object to these instructional errors. With regard to the penalty phase jury instructions generally, defense counsel stated that the trial court could "assume as you recite them that unless I say something, I'm agreeing." (14 RT 3411.) Nevertheless, these claims of instructional error are cognizable for multiple reasons.

First, defense counsel's statement 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, supra*, 32 Cal.3d at p. 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. 8.87.

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." (Penal Code, § 1259.) On this basis, claims of legal error of the type at issue here are cognizable without an objection at trial. (*People v. Gray* (2005) 37 Cal.4th 168, 234 ["If, however, defendant is correct that the factor (b) instruction

directed a verdict on a point essential to his death penalty judgment, the instruction would have affected a substantial right of his, and section 1259 would permit him to raise the issue on appeal despite failure to object."].)

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' required that the instructions given be accurate."], citation omitted.) Errors related to *sua sponte* instructional duties may be raised on appeal regardless of whether there was an objection at trial. (Penal Code, § 1259; *People v. St. Martin, supra*, 1 Cal.3d at p. 531.)

Fourth, "[a]n appellate court may note errors not raised by the parties if justice requires it." (*People v. Norwood, supra*, 26 Cal.App.3d at p. 152; *People v. Barber, supra*, 102 Cal.App.4th at p. 150 ["constitutional issues may be reviewed on appeal even where defendant did not raise them below"].)

Finally, "[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; *see also People v. Mattson* (1990) 50 Cal.3rd 826, 854.)

**B. CALJIC No. 8.87 Created An Unconstitutional Mandatory Presumption And Directed A Verdict In Favor Of The Prosecution On The Factor (B) Evidence.**

This Court has previously held that whether the proffered factor (b) evidence involves the express or implied use of force or violence of threat thereof is a question of law. On that basis, it has rejected claims that either jury unanimity is required or that CALJIC No. 8.87 creates an impermissible mandatory presumption or directs a verdict in favor of the prosecution on

factor (b) evidence. (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1034 [rejecting claim that CALJIC No. 8.87 directed a verdict in favor of the prosecution on factor (b) evidence]; *People v. Gray, supra*, 37 Cal.4th at p. 234 [same]; *People v. Lewis* (2008) 43 Cal.4th 415, 530 [CALJIC No. 8.87 did not create an impermissible mandatory presumption that any prior criminal activity involved force or violence or the express or implied threat to use force or violence.]; *People v. Harris* (2008) 43 Cal.4th 1269, 1316 ["Jury unanimity is not required with respect to unadjudicated criminal conduct. [Citations.]".])

However, CALJIC No. 8.87 posed particular problems in this case because the prosecution's case in aggravation consisted entirely of factor (b) evidence. (4 CT 942-952 ["Second Amended Notice of Intention To Introduce Evidence In Aggravation (Pursuant To Penal Code Section 190.3)"].) Moreover, CALJIC No. 8.87 conflicts with the current pattern instructions addressing other criminal activity. (CALCRIM Nos. 763 & 764.) It also conflicts with other precedent, including controlling United States Supreme Court precedent. (*Sims v. Georgia* (1967) 385 U.S. 538, 544 [17 L. Ed. 2d 593, 598, 87 S. Ct. 639] [A ruling on a question of federal constitutional law is "a constitutional rule binding upon the States, and under the Supremacy Clause of Article VI of the Constitution, it must be obeyed."].)

Factor (b) provides that "[i]n determining the penalty, the trier of fact shall take into account any of the following factors if relevant: ... (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Penal Code, § 190.3, subd. (b).) This requires the jury to find beyond a reasonable doubt that the defendant committed a particular act and that the conduct "violate[d] a penal statute." (*People v. Wright* (1990) 52 Cal.3d 367, 425, emphasis omitted; see also *People v. Robertson* (1982) 33 Cal.3d 21, 54.)

The issue of whether the proffered other crime evidence involved the use or attempted use or threat of force or violence is a question of fact rather than of law: “whether a particular instance of criminal activity ‘involved ... the express or implied threat to use force or violence’ (§ 190.3, subd. (b)) can only be determined by looking to the facts of the particular case.” (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Accordingly, the jury must determine both that a particular act occurred and that the act involved force or violence. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724 [“[No] fact, not even an undisputed fact, may be determined by the judge.” [Citation.]”].)

However, CALJIC No. 8.87 dictated the answer to the second factual issue. It told the jury that “all” of the proffered factor (b) evidence “involved the express or implied use of force or violence or the threat of force or violence.” (4 CT 1023.) A reasonable juror would therefore conclude that the only issue he or she was required to determine was whether the defendant had engaged in the alleged “criminal activity” (*ibid.*) and then apply it against the defendant as an aggravating factor.

In contrast, the current pattern instructions properly leave the issues to the jury to decide. CALCRIM No. 763 (“Death Penalty: Factors to Consider--Not Identified as Aggravating or Mitigating (Pen. Code, § 190.3)”) states that violent criminal activity was “alleged” and directs the jury to decide whether or not the defendant engaged in such activity:

Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor. The factors are: ....(b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. Violent criminal activity involves the unlawful use or attempted use of force or violence or the direct or implied threat to use

force or violence. The other violent criminal activity alleged in this case will be described in these instructions. (Emphasis added.)

Correspondingly CALCRIM No. 764 ("Death Penalty: Evidence of Other Violent Crimes"), describes what criminal activity the prosecution has "alleged" as an aggravating circumstance and directs the jurors that they must determine beyond a reasonable doubt whether the defendant committed the alleged crimes.<sup>59</sup>

By taking the question of force and violence from the jury, CALJIC No. 8.87 in several respects violated appellant's constitutional trial rights. It directed a verdict on a fact necessary to make the evidence aggravating under

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59. CALCRIM No. 764 provides: " The People allege as an aggravating circumstance that (the defendant/ \_\_\_\_\_ <insert name of defendant> ) committed \_\_\_\_\_ <insert specific description of alleged offense[s]>. [¶] The People must prove beyond a reasonable doubt that (the defendant/ \_\_\_\_\_ <insert name of defendant> ) committed [each of] the alleged crime[s]. [Consider each of the alleged crimes separately.] If you have a reasonable doubt whether (the defendant/ \_\_\_\_\_ <insert name of defendant> ) committed (the/an) alleged crime, you must completely disregard any evidence of that crime. If the People have proved that (the defendant/ \_\_\_\_\_ <insert name of defendant> ) committed (the/an) alleged crime, you may consider the evidence of that alleged crime as an aggravating circumstance. [¶] [To decide whether the defendant committed \_\_\_\_\_ <insert specific description of alleged offense[s]> , please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].] [¶] Each of you must decide for yourself whether the People have proved that the defendant committed an alleged crime. You do not all need to agree whether an alleged crime has been proved. If any juror individually concludes that an alleged crime has been proved, that juror may give the evidence whatever weight he or she believes is appropriate. On the other hand, if any juror individually concludes that an alleged crime has not been proved, that juror must disregard the evidence completely. [¶] You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [except for the alleged prior felony conviction[s] about which I will now instruct you]." (Italics in original.)

factor (b). In *Ring v. Arizona, supra*, 536 U.S. 584, the high court held that as a matter of due process (U.S. Const., 14<sup>th</sup> Amend.) and the Sixth Amendment right to trial by jury, "[c]apital defendants... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Id.* at p. 589.) This means that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 277, citations omitted.) "The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.' [Citation.]" (*People v. Figueroa, supra*, 41 Cal.3d at p. 724.)

CALJIC No. 8.87 also violated the due process proscription against mandatory presumptions in criminal cases because it told the jury that from the evidence of criminal activity it must find that it "all ... involved the express or implied use of force or violence or the threat of force or violence." (CALJIC No. 8.87; *Francis v. Franklin* (1985) 471 U.S. 307, 314 [85 L. Ed. 2d 344; 105 S. Ct. 1965] ["A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts."]; *Carella v. California* (1989) 491 U.S. 263, 265-266 [109 S.Ct. 2419, 105 L.Ed.2d 218] [An instruction that "could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts" creates a mandatory presumption in violation of due process.]) This "foreclosed independent jury consideration" (*Carella v. California, supra*, 491 U.S. at p. 266) of the facts necessary to determine whether the other criminal activity involved the express or implied use or force or violence. (Factor (b).)

The flaw in a mandatory presumption is that it "is the functional

equivalent of a directed verdict" on the issue it addresses. (*Connecticut v. Johnson* (1983) 460 U.S. 73, 84 [74 L.Ed.2d 823, 832, 103 S.Ct. 969].) In *People v. Richardson, supra*, 43 Cal.4th 959, this Court rejected the claim that the CALJIC No. 8.87 improperly directed a verdict in favor of the prosecution because "the jury could not consider ... [other crime evidence] for purposes of aggravation unless and until the prosecution proved beyond a reasonable doubt that defendant committed the offense. [Citation.] Having so found, it would necessarily have found the force or violence element." (*Id.* at p. 1034.)

However, the high court has held that instructing the jury on the presumption of innocence and standard of proof beyond a reasonable doubt does not cure the error in instructing the jury with a mandatory presumption. In *Francis v. Franklin, supra*, 471 U.S. 307, the defendant was charged in Georgia state court with murder and the court gave conflicting instructions related to the determination of malice aforethought. One stated that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts ... may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act for which the accused is prosecuted." (*Id.* at pp. 311-12.)

Other instructions stated that the defendant was presumed innocent and that the State was required to prove every element of the offense beyond a reasonable doubt. (*Id.* at pp. 318-19.) The high court rejected the argument that those instructions cured the error. "The jury, of course, did not hear only the two challenged sentences. The jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion.

[Citation.] In particular, the State relies on an earlier portion of the charge instructing the jurors that the defendant was presumed innocent and that the State was required to prove every element of the offense beyond a reasonable doubt. The State also points to the sentence immediately following the challenged portion of the charge, which reads: "[a] person will not be presumed to act with criminal intention...." (*Id.* at pp. 318-19, footnote and citation omitted.)

"Even if a reasonable juror could have understood the prohibition of presuming 'criminal intention' as applying to the element of intent, that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could easily have resolved the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Id.* at p. 322.)

The same analysis confirms the error in this case. The jury was instructed that "[b]efore a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must be satisfied beyond a reasonable doubt that the defendant Daniel Landry did in fact commit the criminal activity." (CALJIC No. 8.87, 4 CT 1023.) However, it was also told that "all of" the proffered criminal activity "involved the express or implied use of force or violence or the threat of force or violence. (*Ibid.*) As in *Francis v. Franklin*, *supra*, nothing in those contradictory sentences makes clear to the jury that one carries more weight than the other. To the contrary, a

reasonable juror would conclude that it must find that the criminal activity involved the use of force or violence because the trial court had instructed that it "all" did. (4 CT 1023.) Accordingly, the instruction on the standard of proof beyond a reasonable doubt did not cure the constitutional flaw in CALJIC No. 8.87.

Because a single trial judge rather than 12 jurors determined whether the proffered criminal activity involved the use or threat of force or violence, the instruction violated appellant's Eighth and Fourteenth Amendment rights to a reliable penalty determination. (*Monge, supra*, 524 U.S. at p. 732 ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings."]; *Sawyer v. Smith* (1990) 497 U.S. 227, 243 [110 S. Ct. 2822; 111 L. Ed. 2d 193] ["All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense."].)

**C. CALJIC No. 8.87 Also Erred By Failing To Require Jury Unanimity For The Proffered Criminal Activity.**

CALJIC No. 8.87 also erred by informing the jury that for the criminal activity, "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If not so convinced, that juror must not consider that evidence for any purpose." (4 CT 1023.)

When the defendant has invoked his right to trial by jury, the California Constitution and state statutes require a unanimous jury verdict. (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693.) The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict. (*People v. Thomas* (1977) 19 Cal.3d 630, 644 ["Both the standard of proof and the degree of jury unanimity, of course,

closely affect the reliability of any determination" of fact.]; *see also People v. Superior Court of Orange County* (1967) 67 Cal.2d 929, 932.) This right is protected from infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [Where the defendant has exercised his right to trial by jury, he "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state."].)

Because this is a capital case, a unanimous verdict was also directly required by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*See, e.g., Burch v. Louisiana* (1979) 441 U.S. 130, 136 [99 S. Ct. 1623; 60 L. Ed. 2d 96] ["In *Apodaca v. Oregon*, 406 U.S. 404 (1972), we upheld a state statute providing that only 10 members of a 12-person jury need concur to render a verdict in certain noncapital cases."]; *Johnson v. Louisiana* (1972) 406 U.S. 356 [92 S. Ct. 1620; 32 L. Ed. 2d 152] [distinguishing capital and non-capital cases].)

"Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [110 S.Ct. 1227; 108 L.Ed.2d 369] (conc. opn. of Kennedy, J.)) Indeed, even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334 [100 S.Ct. 2214; 65 L.Ed.2d 159].) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732), the failure of CALJIC No. 8.87 to require unanimity violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

**D. The Instructional Errors Require Reversal As A Matter Of Law And/Or Because The Errors Were Not Harmless Beyond A Reasonable Doubt.**

Reversal is required without an analysis of prejudice because a trial judge "may not direct a verdict for the State, no matter how overwhelming the evidence." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 277; accord *People v. Figueroa, supra*, 41 Cal.3d at p. 724; see also *People v. Hernandez* (1988) 46 Cal.3d 194, 211 [The lack of an instruction requiring the jury to find a "crucial fact cannot be deemed harmless."].) The prosecution penalty phase case consisted almost entirely of factor (b) evidence. (14 RT 3470-3483 [prosecution penalty phase argument based on tables and charts of factor (b) evidence].)

The only other evidence addressed by the prosecution was the circumstances of the capital crime, the violation of section 4500. (Penal Code, § 190.3, subd. (a); 14 RT 3459-60.) For the reasons explained above in Argument Section XIV. and for brevity incorporated by reference here, the circumstances of the crime in this case did not itself rise to the level of a capital offense. Section 4500 required only a finding of the equivalent of second degree murder. The jury also found that the killing was a premeditated, first degree murder. (4 CT 916, 918.) However, the prosecution neither alleged nor proved any of the 21 special circumstances that existed at the time of the crime in 1997 to show that the murder was a capital offense. (*See* Cal. Penal Code, § 190.2, subd. (a) (Deering 1997); 1 CT 42-48 [Information].)

As a result, the prosecution in its penalty phase closing argument relied on a series of tables summarizing the factor (b) evidence to argue that appellant should be sentenced to death. (14 RT 3439-40 [identification of summary materials used by prosecutor in closing penalty phase argument]; 4 CT 983-988 [copy of tables used by prosecution in closing argument]; 14 RT

3470-3483 [prosecution penalty phase argument based on tables of factor (b) evidence].) Accordingly, CALJIC No. 8.87 effectively directed a verdict in favor of the prosecution at the penalty phase and requires reversal of the death judgment. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 277; accord *People v. Figueroa, supra*, 41 Cal.3d at p. 724.) Even assuming that harmless error analysis applies, the instructional errors require reversal. The prosecution's heavy reliance on the factor (b) evidence in closing argument shows that the errors in the instruction governing its use during jury deliberations were not harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

## XXI.

### **EVIDENCE OF DISPARATE TREATMENT OF AN ACCOMPLICE IS CONSTITUTIONALLY RELEVANT EVIDENCE AND THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT IT MUST RETURN A LIFE VERDICT FOR APPELLANT IF IT FOUND THAT DEATH WAS A DISPROPORTIONATE PUNISHMENT IN COMPARISON TO AN ACCOMPLICE WHO WAS PAROLED LESS THAN THREE MONTHS AFTER THE CRIME.**

#### **A. Introduction.**

The Department of Corrections found that the shot-caller Gary Green ordered the "hit" on Addis, demanded that he be brought to the prison yard, put him in place to be assaulted, and that he was guilty of a conspiracy to commit a battery resulting in the death of Addis. (Exh. No. 50, 4 CT 1145-49.) At trial, the prosecution conceded that Green was a "co-principal" in the capital/murder charged against appellant and, therefore, "equally guilty." (10 RT 2315-16.) Nevertheless, Green was not charged with any crime and, on October 30, 1997, the Department of Corrections paroled Green from state prison less than three months after he orchestrated the fatal assault on Addis on August 3, 1997. (6 RT 1419; Exh. No. 53, 4 CT 1157.) In effect, Green received no

punishment for a crime for which he was "equally guilty" as appellant. (*In re Hardy* (2008) 41 Cal.4th 977, 1027, 1029 [Aider and abettors and conspirators as principals are "equally guilty" of the crime committed.]; Penal Code, § 31.)

The trial court should have instructed the jury that it must return a verdict of life without the possibility of parole for appellant if it found that a death sentence for appellant was disproportionate for the crime when compared to the treatment of the accomplice. The trial court's failure to do so violated state and federal law. (U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends; Cal. Const., Art. I, §§ 1, 7, 15, 16, & 17; Penal Code, §§ 190.3, 1122, 1126, 1127.) Because there is at least a reasonable possibility that a jury so instructed would not have returned a death verdict, appellant's death sentence must be reversed. (*People v. Lewis, supra*, 43 Cal.4th at p. 527.)

**B. For Several Reasons, This Claim Is Cognizable.**

Trial counsel for appellant did not object to the trial court's failure to instruct the jury at sentencing that it could consider the disparate treatment of Green as a mitigating circumstance. Nevertheless, this claim of error is cognizable for several reasons. The trial court at the penalty phase in a capital trial, "has a duty to give instructions on the general principles of law governing the case, even though not requested by the parties, ... if it is vital to a proper consideration of the evidence by the jury' or if necessary 'for the jury to be fully and fairly charged upon the relevant law' or if necessary 'for the jury to be fully and fairly charged upon the relevant law.'" (*People v. Stanworth* (1969) 71 Cal.2d 820, 841, citations omitted.)

As explained below in Section C., both the prosecution and the defense presented substantial evidence of Green's role in the Addis homicide and the circumstances of the capital offense is a factor at sentencing. (Penal Code, § 190.3, subd. (a).) Moreover, it was undisputed at trial that Green was not charged but paroled from prison within three months of ordering and

orchestrating the fatal assault on Addis. Accordingly, the disparate treatment of Green was a matter closely and openly connected to the facts of the case and vital to a proper consideration of the evidence by the jury.

Moreover, when a court decides to instruct the jury on an issue, it has a sua sponte duty to ensure that the instructions given are "accurate and complete." (*People v. Prieto* (2003) 30 Cal.4th 226, 268, citation omitted.) The trial court otherwise instructed the jury on some mitigating circumstances. (4 CT 1020-21, CALJIC No. 8.85 ["Penalty Trial – Factors For Consideration"].) Its failure to instruct on the issue of the disparate treatment of Green meant that the instructions given were incomplete. Errors related to the trial court's sua sponte instructional duties may be addressed on appeal without an objection at trial. (§ 1259; *see, e.g., 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."].)

The trial court failure to give an appropriate instruction also affected appellant's substantial rights to due process, a fair trial, and trial by jury, as well as the heightened requirement for reliability in capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) As discussed further below, the high court has emphasized that in capital proceedings "the sentencer must be permitted to consider all mitigating evidence." (*Mills v. Maryland* (1988) 486 U.S. 367, 384 [108 S. Ct. 1860; 100 L. Ed. 2d 384].) Therefore, the jury must receive an instruction that would permit it to give effect to its consideration of that evidence. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [127 S.Ct. 1654, 1668; 167 L.Ed.2d 585] ["Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration."].)

Finally, a reviewing court may consider constitutional issues not raised in the trial court "to forestall a later claim that trial counsel's failure to predicate his motion on those additional grounds reflects constitutionally inadequate representation, and because in the context of this case the new theories raise only issues of law and factual questions that this court decides independently." (*People v. Mattson, supra*, 50 Cal.3rd at p. 854.)

**C. Factual And Procedural Background To Green's Role.**

During the guilt phase, testimony by Sergeant Sams, Officers Esqueda and Maldonado and former inmate Richard Allen showed that Gary Green was the NLR/AB "shot caller" who repeatedly demanded that Addis be brought to the prison yard and positioned him at the card table where he was assaulted. (See Statement of Facts, Section I.A.1 & Section II.A.; *see, e.g.*, 5 RT 5148 ["I want to talk to the f'ing Sergeant, the youngster has to come out."]; 5 RT 1084-85, 1138-40, 1232-35; 6 RT 1341-42; 8 RT 1805-09.) After the assault, Green ordered the other inmates on the yard not to get involved and to say "no comment" when questioned by staff about the incident. (5 RT 1181; 6 RT 1286-87.)

Through Sergeant Sams, evidence was also presented of the investigation and treatment of Green by the Department of Corrections. The assault occurred on August 3, 1997. (6 RT 1304-05.) On September 25, 1997, Sergeant Sams memorialized his interviews with Officers Esqueda and Maldonado and inmate Allen about the Addis homicide. Their interviews provided essentially the same information as their testimony at trial. (Exh. No. 47, 4 CT 1139-41.) Allen informed the sergeant that before the incident he was told that "someone is going to get hit" and that he believed that "Green called the hit (stabbing) on inmate Addis." (4 CT 1139.)

On September 26, 1997, Sergeant Sams charged Green with a rules violation for his role in the in the assault on Addis: "On 08-03-07, you were

involved in a Conspiracy to assault Inmate ADDIS, which resulted in his death. Information received indicates that you ordered the 'hit' on ADDIS, and that you were adamant about his arrival to the yard on that date." (4 CT 1150-51, Exh. No. 51.) A supplemental rules violation report on October 2, 1997, noted that Officer Maldonado stated that Green yelled, "'Bring that wood ADDIS to the yard and bring him now ....'" (4 RT 1145, 1148, Exh. No. 50.) Green yelled at Maldonado several times and was pacing back and forth in the yard as he yelled at Maldonado. (*Ibid.*) Green then demanded to talk to the sergeant or the lieutenant and said "'[t]he youngster has got to come out.'" (4 CT 1147, Exh. No. 50.)

Officer Esqueda overheard the conversation between Green and Maldonado and saw Green "pacing back and forth in a very agitated manner." (*Ibid.*) When Addis entered the yard, neither Green nor any other inmate acknowledged Addis's presence. Towards the end of yard time, Green shook Addis's hand and told him it was "all right" and he should go to the table and play cards. Green then approached the table and appellant assaulted Addis. (*Ibid.*; 6 RT 1412-13.) "It should be noted, GREEN has physically and verbally acknowledged to the Palm Hall Staff that he was, at the time of the ADDIS' assault and subsequent death, the 'shot caller' for the white inmate population within Palm Hall. Furthermore, documentation in GREEN'S C-File confirm[s] that GREEN is a validated member of the white supremacists prison gang NLR (Nazi Low Rider)[.]" (4 CT 1147; Exh. No. 50.)

On October 10, 1997, a hearing was held with Green on the rules violation report. (4 CT 1145; Exh. No. 50.) The lieutenant in charge found that Green "was involved in a conspiracy to assault ADDIS which resulted in his death. Information received indicates that GREEN ordered the 'hit' on ADDIS." (*Ibid.*) Accordingly, the lieutenant found Green 'accountable for violation of CCR 3005(c) Force and Violence, specifically, Conspiracy to

Commit Battery Resulting in the death of Inmate ADDIS, Daniel E-82882." (4 CT 1146; Exh. No. 50.)<sup>60</sup>

Green was given a "warning" and "a reprimand", assessed a 360 day credit forfeiture, and referred to the Institutional Classification Committee for program review and to the Board of Prison Terms for in-custody rule violations. (4 CT 1146, Exh. No. 50; 6 RT 1416.) Sergeant Sams did not recommend that Green receive a Security Housing Unit ("S.H.U.") term or any other form of special confinement. (6 RT 1417.) On October 30, 1997, 20 days after the guilt determination and less than three months after he orchestrated the fatal stabbing on August 3, 1997, the Department of Corrections paroled Green from custody. (6 RT 1419; Exh. No. 53, 4 CT 1157.) It was undisputed that no charges were filed against Green for his role in the Addis homicide. (See 9 RT 2199-2200; 10 RT 2315-16.)

**D. Under State Law, The Circumstances Of This Case Show That The Jury Should Have Been Instructed That It Must Consider The Disparate Treatment Of Green As Mitigating Evidence.**

In its guilt phase closing argument, the prosecution conceded that the evidence showed that Green was a "co-principal" in the crime and, therefore, "equally guilty." (10 RT 2315-16.) This concession was well-made. "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so

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60. Former section 3005(c) of Title 15 of the Code of Regulations (now 3005(d)) provided: "Inmates shall not willfully commit or assist another person in the commission of a violent injury to any person or persons, including self mutilation or attempted suicide, nor attempt or threaten the use of force or violence upon another person. Inmates shall not willfully attempt to incite others, either verbally or in writing, or by other deliberate action, to use force or violence upon another person."

committed." (Penal Code, § 31.) As such, Green was an accomplice as a matter of law and "equally guilty" of the murder of Addis. (*In re Hardy*, *supra*, 41 Cal.4th at pp. 1027, 1029 [Aider and abettors and conspirators as principles are "equally guilty" of the crime committed.]; *People v. Avila* (2006) 38 Cal.4th 491, 562 [A person is an accomplice as a matter of law when the facts establishing his status as an accomplice are "clear and undisputed."], citation omitted.)

Appellant's state right to trial by jury as well as the statute governing penalty determination in a capital case show that the jury should have been instructed to consider the disparate treatment of Green. "Trial by jury is an inviolate right and shall be secured to all ...." (Cal Const., Art. I, § 16.) In general, "[e]xcept as otherwise provided by law, where the trial is by jury: (a) All questions of fact are to be decided by the jury." (Evid. Code, § 312; *see also* Penal Code, § 1126 ["In a trial for any offense, questions of law are to be decided by the court, and questions of fact by the jury."].) Accordingly, the "court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them ...." (Penal Code, § 1127.)

"In a capital case," this means "it is the jury that determines, subject to review, whether the penalty shall be death or imprisonment for life without possibility of parole." (*People v. Thompson* (1988) 45 Cal.3d 86, 144, *cert. denied*, *Thompson v. California* (1988) 488 U.S. 960 [109 S.Ct. 404; 102 L.Ed.2d 392].) Penal Code section 190.3 identifies certain specific factors the jury may consider in mitigation. However, it also recognizes that this is not an exhaustive list. "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of

violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." (Penal Code, § 190.3, para. 1, emphasis added.)

This Court has several times rejected claims that the trial court has a duty to instruct the jury that it may consider lenient treatment of an accomplice as a mitigating circumstance. (*See, e.g., People v. Brown* (2003) 31 Cal.4th 518, 562-63; *People v. McDermott* (2002) 28 Cal.4th 946, 1004-1005; *People v. Cain* (1995) 10 Cal.4th 1, 63.) However, the reasons the Court has offered for denying a right to jury consideration of disparate treatment of an accomplice do not apply here. Distilled to their essence, three justifications have been offered. First, where a defendant was tried separately from an accomplice, the jury would have to engage in improper speculation to consider why another jury reached a different verdict for an accomplice. (*See, e.g., People v. Bemore* (2000) 22 Cal.4th 809, 858-59 [The sentence received by an accomplice "provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate [on the matter]."], quoting *People v. Dyer* (1988) 45 Cal. 3d 26, 70.)

Second, evidence of the disparate treatment of an accomplice is irrelevant at the penalty phase because "it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." (*People v. McDermott, supra*, 28 Cal.4th at pp. 1004-1005, quoting *People v. Cain, supra*, 10 Cal.4th at p., 63; *see also People v. Brown, supra*, 31 Cal.4th at pp. 562-63 [same]; *People v. Bemore, supra*, 22 Cal.4th at pp. 858-59 ["The sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation. Such information does not bear on the circumstances of the capital crime or on the

defendant's own character and record."].)

Third, the presentation of evidence of the disparate treatment of an accomplice may involve the undue consumption of time or confusion of the issues. (*People v. Cain, supra*, 10 Cal.4th at p. 64 ["To the extent the prosecutor's view of defendant and Cerda's relative culpability, and his reasons for making the four-year offer to Cerda, were relevant as mitigation, any conceivable probative value was outweighed by the confusion of issues and consumption of time potentially involved in trying these questions. Determining the prosecutor's view of Cerda's relative culpability and the reasons for that view would involve, as the trial court noted, a monumental trial within a trial."].)

These rationales do not apply to the circumstances of this case. The last factor – undue consumption of time or confusion of the issues – may be quickly set aside. As set forth above, the evidence related to the disparate treatment of Green had been presented to the jury in the guilt phase of the trial. There was no risk of confusion because Green's role in the crime was a central issue in the case, beginning with the first prosecution witness (Officer Esqueda, 5 RT 1079-80), additional officers (Sergeant Sams, 6 RT 1308-08, 1345-54, 1403-1413; Officer Valencia, 5 RT 1180-86, 1189-90; Officer Ginn, 8 RT 1781-83; Officer Kaffenberger, 7 RT 1595-96, ), inmates (Allen, 5 RT 1231-33; Rogers, 6 RT 1275-76, 1286-87), and the prosecution's prison gang expert (Glen Willett; 7 RT 1719, foll.). It continued in the defense case with the testimony of Officer Maldonado (8 RT 1801, foll.) and the defense experts (Steven Rigg and Anthony L. Casas). (8 RT 1911, foll., 8 RT 1922, foll.) For related reasons, the jury would not have been required to engage in speculation to evaluate Green's culpability and disparate treatment because the evidence was already before it.

Finally, the evidence of the disparate treatment of Green was relevant at

the penalty phase. As noted, in the penalty proceedings the defendant is entitled to have the jury consider "any matter relevant to ... mitigation[] and sentence including, but not limited to, the nature and circumstances of the present offense ...." (Penal Code, § 190.3, para. 1, emphasis added.) "Relevant evidence" includes evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The prosecution conceded that Green was a "co-principal" and "equally guilty" for the crime and did not dispute that he was paroled despite an administrative finding of guilt. (10 RT 2315-16; 6 RT 1419; Exh. No. 50, 4 CT 1145-46; Exh. No. 53, 4 CT 1157.)

Thus, undisputed evidence shows that the charged capital/murder was not the type of "extreme" offense for which appellant should not be sentenced to death. (*Gregg v. Georgia, supra*, 428 U.S. at p. 184 [The Eighth Amendment limits the death penalty to "extreme" crimes, *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."]; *accord Kennedy v. Louisiana, supra*, 128 S. Ct. at pp. 2649-50.) Therefore, the disparate treatment of Green was relevant to the question of penalty in this case and the jury should have been instructed that it must return a verdict of life without the possibility of parole for appellant if it found that a death sentence was disproportionate for the crime when compared to the treatment of the accomplice.

**E. Under Federal Law, Disparate Treatment Of An Accomplice Is Constitutionally Relevant Evidence.**

A series of decisions by the United States Supreme Court confirm that disparate treatment of an accomplice is constitutionally relevant mitigating evidence. (U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.) Since *Furman v. Georgia, supra*, 408 U.S. 238, the high court has emphasized that the "the penalty of

death is different in kind from any other punishment imposed under our system of justice." (*Gregg v. Georgia, supra*, 428 U.S. at p. 188.) "From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." (*Gardner v. Florida* (1977) 430 U.S. 349, 357 [97 S. Ct. 1197; 51 L. Ed. 2d 393].)

Because of the qualitative difference of death from all other punishments, there is a correspondingly greater need for reliability, consistency, and fairness in capital sentencing decisions. (*See, e.g., Monge v. California, supra*, 524 U.S. at p. 732 ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings."]; *Mills, supra*, 486 U.S. at pp. 383-384 ["Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."].)

Moreover, capital punishment must "be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.) To meet these standards, the high court cases such as *Parker v. Dugger* (1991) 498 U.S. 308 [111 S. Ct. 731; 112 L. Ed. 2d 812] ("*Parker*"), has recognized that in a capital case the disparate treatment of an accomplice is constitutionally relevant evidence at sentencing. In *People v. Mincey* (1992) 2 Ca1.4th 408, 479 ("*Mincey*"), this Court revisited the disparate treatment issue in light of the decision in *Parker*. In that case, discussed further below, the high court reversed a death judgment because the state court erred in finding no mitigating evidence where the record showed disparate treatment of an accomplice.

*Mincey* concluded that *Parker* did not suggest that that California was

constitutionally required to adopt what it characterized as "the Florida rule" permitting consideration of the sentence of accomplice as mitigating evidence at the penalty phase. (*People v. Mincey, supra*, 2 Cal.4th at pp. 479-480 ["Nothing in *Parker* supports the conclusion that California is constitutionally required to adopt the Florida rule."]; accord *People v. Cain, supra*, 10 Cal.4th at p. 63 [*Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary; we have held such evidence irrelevant because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition. [Citations.]".])

However, *Parker* itself showed that federal constitutional law required reversal of the state court. Moreover, subsequent cases show that that the jury by an appropriate instruction must be permitted to consider nonstatutory mitigating as relevant to the question of whether the defendant should be sentenced to death. In *Parker*, a Florida jury convicted the defendant of two counts of first degree murder. Florida law required the jury to make an initial sentencing recommendation to the trial judge who then decided what sentence to impose. (*Parker, supra*, 498 U.S. at p. 313.)

The prosecution was limited to presenting evidence of the aggravating circumstances described by statute. However, the jury was permitted to consider any mitigating evidence, whether or not it went to a statutory mitigating circumstance. (*Id.* at p. 314.) At the hearing with the jury, the defendant introduced evidence that none of his accomplices had received the death penalty. The jury recommended a sentence of life imprisonment. However, the trial judge, who under Florida law ultimately decided the sentence, overrode the jury's recommendation as to one of the murders and sentenced the defendant to death. (*Id.* at p. 314.)

In support of its ruling, the judge found six statutory aggravating

circumstances but no statutory mitigating circumstances. The judge's sentencing order did not specifically address nonstatutory mitigating evidence. However, it stated "[t]here are no mitigating circumstances that outweigh the aggravating circumstances." (*Id.* at p. 311.) The Florida Supreme Court held that the evidence was insufficient to support two of the aggravating circumstances, but nevertheless affirmed the judgment based on the trial court's statement that there were no mitigating circumstances. (*Ibid.*)

The United States Supreme Court reversed and remanded the case. It framed the issue as follows: "This case requires us to determine precisely what effect the Florida courts gave to the evidence petitioner presented in mitigation of his death sentence, and consequently to determine whether his death sentence meets federal constitutional requirements." (*Id.* at p. 310, emphasis added.) The *Parker* court noted that the defendant had presented nonstatutory mitigating evidence which included evidence of more lenient sentencing for the defendant's accomplices. (*Id.* at pp. 315-316.) Moreover, it stated that "[u]nder both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence." (*Id.* at p. 315, emphasis added.)

In support of this ruling, the high court cited two Florida Supreme Court cases. (*Ibid.*, citing *Jacobs v. State*, 396 So. 2d 713, 718 (Fla. 1981) (*per curiam*); *Songer v. State*, 365 So. 2d 696, 700 (Fla. 1978) (*per curiam*), cert. denied, 441 U.S. 956, 60 L. Ed. 2d 1060, 99 S. Ct. 2185 (1979).) However, it also cited its own federal constitutional precedent, *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S. Ct. 2954; 57 L. Ed. 2d 973] (plurality opinion) ("*Lockett*"), and *Eddings v. Oklahoma, supra*, 455 U.S. 104, confirming that reversal of the judgment was required on federal due process and Eighth Amendment grounds. (*Parker, supra*, 498 U.S. at p. 315.)

In *Lockett*, the female defendant agreed to an armed robbery of a pawn shop but waited outside in a car because she was known to the pawnbroker.

(*Lockett*, 438 U.S. at p. 590.) Her male accomplice shot the pawnbroker after he grabbed the gun when the accomplice "announced the 'stickup.'" (*Ibid.*) Ohio law mandated the death penalty unless the trier of fact "determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency ...." (*Id.* at p. 608.) This did not permit the jury to consider evidence of the defendant's "comparatively minor role in the offense ...." (*Ibid.*) This limitation was unconstitutional.

"The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." (*Id.* at p. 608.) Accordingly, the *Lockett* court reversed the death judgment and remanded the case for further sentencing proceedings. (*Id.* at pp. 608-08.) Thus, *Lockett* supports what *Parker* plainly said, *i.e.*, that the jury may consider as mitigating evidence related to an accomplice.<sup>61</sup>

*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, did not involve joint culpability for a murder. However, *Eddings* followed *Lockett* to reaffirm that in a capital case "any" mitigating evidence must be considered by the

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61. Several state courts have also required reasonable symmetry between the culpability and sentencing of codefendants. (*See, e.g., People v. Kliner* (Ill. 1998) 185 Ill. 2d 81 [705 N.E.2d 850, 897] ["[S]imilarly situated codefendants should not be given arbitrarily or unreasonably disparate sentences."]; *People v. Bean* (Ill. 1990) 137 Ill. 2d 65 [560 N.E.2d 258, 290] ["[I]n reviewing the appropriateness of a death sentence, this court will examine the facts of that particular case and the evidence introduced at the trial and death penalty hearing, and, as a matter of reference, it may consider the sentence imposed on an accomplice or a co-defendant in light of his involvement in the offense."]; *Larzelere v. State* (Fla. 1996) 676 So. 2d 394, 406 ["When a codefendant . . . is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate."].)

sentencer. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (*Id.* at pp. 114-15, original italics; accord *Mills v. Maryland*, *supra*, 486 U.S. at p. 384 ["Under our cases, the sentencer must be permitted to consider all mitigating evidence."]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S. Ct. 1669; 90 L. Ed. 2d 1] [The "sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' [Citation]."].)

Subsequent cases have reaffirmed these principles by holding that constitutional principles of relevance require that the jury be permitted to consider any mitigating evidence regardless of whether it has a nexus or causal connection to the capital crime. Therefore, however Penal Code section 190.3 may be construed, appellant's jury should have been permitted to consider the disparate treatment of Green as showing that the killing of Addis was not the type of crime for which the death penalty should be imposed.

In *Tennard v. Dretke*, *supra*, 542 U.S. 274 ("*Tennard*"), the high court explained that that "[w]hen we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina*, 494 U.S. 433, 440-441, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990), we spoke in the most expansive terms. ... 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value' [Citation]. Thus, a State cannot bar 'the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death.' 494 U.S., at 441 ...." (*Id.* at pp. 284-85, internal quotations omitted.)

"Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." (*Id.* at p. 285, citing *Boyde v. California*

(1990) 494 U.S. 370, 377-378 [110 S. Ct. 1190; 108 L. Ed. 2d 316].) In *Smith v. Texas* (2004) 543 U.S. 37 [125 S.Ct. 400; 160 L.Ed.2d 303], the high court reiterated that it had "rejected the ... 'nexus' requirement in *Tennard*" and characterized the "nexus" test as "a test we never countenanced and now have unequivocally rejected." (*Id.* at p. 45.) Accordingly, where the defendant's "proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence." (*Ibid.*)

Most recently, in *Abdul-Kabir v. Quarterman, supra*, 127 S.Ct. 1654, the high court stated that "the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration." [Citation]." (127 S.Ct. at p. 1668.) "[I]n the absence of an appropriate instruction directing the 'jury to consider fully' mitigating evidence as it bears on the extent to which a defendant is undeserving of a death sentence, 'we cannot be sure' that it did so." (*Id.* at p. 1669, citation omitted.) Applied here, the broad standard of constitutional relevance confirms that the disparate treatment of Green.

**F. Reversal Of The Death Judgment Is Required.**

Because the jury was deprived of an opportunity to consider constitutionally relevant evidence, reversal is required by federal law unless Respondent shows that the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Under state law, reversal is required "only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Lewis, supra*, 43 Cal.4th at p. 527, quoting *People v. Lancaster, supra*, 41 Cal.4th at p. 94.)

There is at least a reasonable possibility that the jury would have found that a death sentence disproportionate for appellant when compared to the fact

that Green was not punished but paroled from prison despite the fact that he was equally guilty of the crime. In making this argument, appellant is not condoning the killing of Addis. The point is that even though appellant was a principal as the direct perpetrator of the crime, the disparate treatment of Green showed that the killing of Addis was not one of the "extreme" crimes for which "the only adequate response may be the penalty of death." (*Gregg v. Georgia, supra*, 428 U.S. at p. 184; *accord Zant v. Stephens, supra*, 462 U.S. at p. 877, fn. 15; *Kennedy v. Louisiana, supra*, 128 S. Ct. at pp. 2649-50; *Baze v. Rees, supra*, 128 S. Ct. at p. 1548, Stevens., J., concurring.)

This conclusion is supported by a recent case involving disparate treatment of the defendant killed an inmate in a federal prison in California and the Aryan Brotherhood ("AB") gang leaders who ordered the killing. In *Littrell v. United States* (2007) 478 F.Supp. 2d 1179, defendant Littrell, upon the orders of the California leaders of AB (the "California Commission"), "entered the cell of Aaron Marsh and choked him to death with his bare hands." (*Id.* at p. 1184.) The federal government indicted Littrell and the California Commission members (Griffin, Stinson, Chance, and Terflinger) for capital murder (18 U.S.C.S. § 3592, subd. (c)) and other crimes. For 12 additional murders and 11 attempted murders the government also indicted many other AB members, including the overall gang leaders in the "Federal Commission" of the AB. (*Id.* at p. 1182.)

The District Court found that the government's decision to seek the death penalty against Littrell was arbitrary and capricious in violation of the Eighth Amendment and Due Process Clause of the Fifth Amendment and struck the death penalty from Littrell's case before trial. (*Id.* at p. 1188.) The salient factor was the disparate treatment of Littrell in comparison with the gang leaders who ordered the killing. "The Government has accused Mr. Littrell of entering the cell of Aaron Marsh and strangling his victim with his

bare hands. Mr. Littrell did this on orders from his superiors in the Aryan Brotherhood. He intended to kill his victim, and acted with substantial planning and premeditation. Mr. Littrell committed this murder after having previously been convicted of a violent felony involving the use of a firearm; namely, an armed robbery. Moreover, Mr. Littrell showed a continuing pattern of violence, a history of institutional misconduct, and low rehabilitative potential, all aggravating factors that would support a finding of death." (*Id.* at pp. 1188-89.)

"These facts portray a brutal crime committed by a dangerous criminal with a history of violence. Were there no mitigating factors present, the decision to seek death would be supported by the facts of Mr. Littrell's crime." (*Id.* at p. 1189, footnote omitted.) However, the court concluded that the disparate treatment of the gang leaders was mitigating evidence. The government had also indicted two AB gang members (Bingham and Mills) who occupied the positions of highest authority within AB "Federal Commission." In separate proceedings, a jury convicted them of ordering multiple murders in multiple prisons but refused to impose the death penalty. (*Id.* at pp. 1189-90.) After that verdict, the government decided not to seek the death penalty against the members of the California Commission (Stinson, Griffin, and Chance) who had ordered Littrell to kill Marsh. (*Id.* at p. 1190.)

"According to the rules of the Aryan Brotherhood, the only way a member of the gang could be killed is by direct order from the Commission. Thus, the murder of Aaron Marsh would never have occurred had the Commission not ordered Mr. Littrell to commit the crime." (*Id.* at p. 1190.) "The Court is at a complete loss to understand how the Government can in good faith seek death against a low-level member of the Aryan Brotherhood like Mr. Littrell when it does not seek that ultimate punishment against the more culpable Commission leaders like Mr. Stinson, Mr. Griffin, and Mr.

Chance." (*Ibid.*)

If a United States District Court judge could find such disparate treatment persuasive, there is every reason to believe that a reasonable juror in appellant's case would have reached the same conclusion. As in *Littrell*, the record shows that the NLR/AB shot-caller ordered the hit on Addis and personally demanded that Addis be brought to the yard and positioned him on the yard to be killed. In other respects, appellant's case is even more compelling than *Littrell*. The record shows that, although appellant had committed some prior assaults on other prisoners, there was no substantial evidence that he had ever attempted to kill an inmate.

The only time that appellant committed a fatal assault was when he was ordered to do so by the NLR/AB shot-caller and risked his own death if he had not complied. As the defense experts explained, if appellant had failed to he carry out the ordered assault on Addis, he "would be a walking dead man" and he could have been killed right then on the prison yard because it was dominated by gang members. (8 RT 1942; *see also* 8 RT 2005 ["[Y]ou don't ignore orders. You follow or you're gone."].) For this additional reason, there is at least a reasonable possibility that a juror in appellant's case would have reached a more favorable verdict if permitted to consider evidence of disparate treatment like the United States District Court judge in *Littrell*.

## XXII.

### THE USE OF RESTRICTIVE ADJECTIVES IN THE JURY INSTRUCTIONS ON SEVERAL MITIGATING FACTORS AND THE REQUIREMENT OF A NEXUS TO THE CIRCUMSTANCES OF THE CRIME IMPERMISSIBLY ACTED AS BARRIERS TO JURY CONSIDERATION OF MITIGATING EVIDENCE.

#### A. Introduction.

At the request of the prosecution (12 RT 2862), the trial court instructed the jury with CALJIC No. 8.85 ("Penalty Trial--Factors For Consideration") for determining whether to impose a sentence of death or of life without the possibility of parole. This included instructions on how the jury should address evidence of mental health problems and duress or domination by others. In pertinent part, CALJIC No. 8.85 provided:

In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:

\* \* \*

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

\* \* \*

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication. (4 CT 1020.)

Pursuant to section 190.3, subdivision (k) ("factor (k)"), the court also

instructed the jury that it could consider: "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character. (4 CT 1021.)

The instructions related to factors (d), (g), and (h) erred in two respects. First, they required the types of mitigating evidence they addressed to have some nexus or causal connection to the capital offense. The high court has explicitly rejected this requirement and held that requiring such a connection is reversible error. (*Tennard v. Dretke, supra*, 542 U.S. at pp. 284-85, 288-89; *Smith v. Texas, supra*, 543 U.S. at p. 45.) Second, by use of the qualifying adjectives "extreme", "substantial", and "impaired", the instructions on factors (d), (g), and (h) improperly imposed a threshold requirement for consideration of mitigating evidence.

These limitations violated the rule "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." (*Buchanan v. Angelone, supra*, 522 U.S. at p. 275, citing *Penry v. Lynaugh, supra*, 492 U.S. at pp. 317-318; *Eddings v. Oklahoma, supra*, 455 U.S. at pp. 113-114; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.) For both reasons, the instructions related to factors (d), (g), and (h) violated appellant's rights to due process, to trial by jury, to a fair trial, and to reliability in capital sentencing proceedings. (Cal. Const., Art I, §§

7, subd. (a), 15, 16, 17; U.S. Const, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.) These claims of instructional error are cognizable for the reasons stated above in Argument Section XX..

**B. The Instructions Erred By Requiring A Causal Or Explanatory Nexus To The Capital Offense.**

This Court on several occasions has rejected claims that the use of the qualifiers "extreme", "substantial" or "impaired" unconstitutionally limit consideration of mitigating evidence. The rationale for these decisions is that the factor (k) instruction (quoted above), "allows the jury to consider a virtually unlimited range of mitigating circumstances." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1192; *see also People v. Crew* (2003) 31 Cal.4th 822, 860 [The language in section 190.3, factor (d) referring to extreme mental or emotional disturbance and in factor (g) concerning substantial domination by another, "does not preclude full consideration of mitigating evidence."]; *People v. Romero* (2008) 44 Cal.4th 386, 429 ["The use of the adjectives "extreme" and "substantial" do not make the sentencing statute (§ 190.3) or instructions unconstitutional. [Citation.]"]; *People v. Griffin* (2004) 33 Cal.4th 536, 598-99 [same].)

However, the Court has also recognized that the circumstances of a particular case may provide a basis for concluding "that the jury in the present case failed to give proper weight to the mitigating evidence. (*People v. Ghent* (1987) 43 Cal.3d 739, 776.) There are both general and specific reasons for concluding in this case that the jury instructions on factors (d), (g), and (h) created an unconstitutional limitation on jury consideration of the types of mitigating evidence they addressed and that the factor (k) instruction did not cure the errors.

The instructions on factors (d), (g), and (h) required an explanatory nexus to the crime in order to find mitigating the types of evidence identified

by them. Factor (d) told the jury it should determine "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (4 CT 1020.) Factor (g) told the jury it should determine "[w]hether or not the defendant acted under extreme duress or under the substantial domination of another person." (*Ibid.*) Factor (h) told the jury it should determine "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication." (*Ibid.*)

The high court has rejected the requirement that mitigating evidence must have some nexus or causal connection to the capital offense. In *Tennard v. Dretke*, *supra*, 542 U.S. 274 ("*Tennard*"), the defendant was convicted in Texas of capital murder for the robbery and murder of two of his neighbors. During the penalty phase of the trial, the defendant presented evidence of his low intellectual functioning based on a test showing an IQ of 67 when he was 17 years-old. (*Id.* at pp. 276-77.) The jury was instructed to consider the appropriate punishment by answering the two "special issues" used at the time in Texas to establish whether a sentence of life imprisonment or death should be imposed. One asked whether the defendant deliberately caused the death of the deceased, and the other whether there was a probability that the defendant would pose a continuing threat to society.<sup>62</sup>

Unsuccessful on direct appeal, the defendant sought postconviction relief. He argued that, in light of the instructions given to the jury, his death

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62. The special issues question were: "'Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?'" and "'Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?'" (*Id.* at p. 277.)

sentence had been obtained in violation of the Eighth Amendment because "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." (*Id.* at p. 278, quoting *Penry v Lynaugh*, *supra*, 492 U.S. at p. 319.) The state court and the lower federal courts rejected this claim.

In pertinent part, the Court of Appeals for the Fifth Circuit held that "we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury. . . . To be constitutionally relevant, 'the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition.'" (*Id.* at p. 283, citations omitted.) The United States Supreme Court held that this test for "constitutional relevance" had "no foundation in the decisions of this Court." (*Id.* at pp. 283, 284.)

"When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina*, [*supra*,] 494 U.S. [at pp.] 440-441 ..., we spoke in the most expansive terms. ... 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value' [Citation]. Thus, a State cannot bar 'the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death.' 494 U.S., at 441 ...." (*Id.* at pp. 284-85, internal quotations omitted.)

"The Fifth Circuit was ... wrong to have refused to consider ... [Tennard's claim] on the ground that Tennard had not adduced evidence that his [capital] crime was attributable to his low IQ." (*Id.* at p. 287.) Evidence of "impaired intellectual functioning has mitigating dimension beyond the impact

it has on the individual's ability to act deliberately" at the time of the crime. (*Id.* at p. 284.) Because "reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence," the high court reversed the death judgment. (*Id.* at pp. 288-89.)

In *Smith v. Texas*, *supra*, 543 U.S. 37, the Court reiterated that it had "rejected the ... 'nexus' requirement in *Tennard*," and stated that "petitioner's evidence [regarding his troubled childhood and limited mental abilities] was relevant for mitigation purposes is plain under our precedents." (*Id.* at p. 45, citing *Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 319-20; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822; *Boyde v. California*, *supra*, 494 U.S. at pp. 377-78; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 114.) Indeed, the Court characterized the "nexus" test as "a test we never countenanced and now have unequivocally rejected." (*Ibid.*)

"The reason for rejecting a nexus requirement is clear: "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death." *Eddings*, 455 U.S. at 112 (quoting *Woodson v. North Carolina*, [*supra*,] 428 U.S. [at p. 304]. If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant." (*Lambright v. Schriro*, *supra*, 490 F.3d at p. 1115.)

"This is simply unacceptable in any capital sentencing proceeding, given that 'treating each defendant in a capital case with that degree of respect

due the uniqueness of the individual,' and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required. *Lockett v. Ohio*, [supra,] 438 U.S. [at p. 605]." (*Ibid.*; see also *Styers v. Schriro* (9<sup>th</sup> Cir. 2008) 547 F.3d 1026, 1035 ["In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body."].)

Because such evidence is relevant and mitigating, an appropriate jury instruction is required. (*Tennard, supra*, 542 U.S. at p. 285 ["[T]he 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence."], *Smith v. Texas, supra*, 543 U.S. at p. 45 ["Because petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence."]; *Abdul-Kabir v. Quarterman, supra*, 127 S.Ct. at p. 1668 ["Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration."].)

This line of authority shows that evidence of mental or emotional disturbance, duress or domination, and mental disease or defect is constitutionally relevant mitigating evidence regardless of whether or not it has a nexus to the capital offense. Accordingly, the factor (d), (g), and (h) instructions erred by requiring such a connection for deciding whether or not to impose a death sentence.

**C. Imposing A Threshold Requirement Of "Extreme" Or "Substantial" Evidence Created An Unconstitutional Barrier To Proper Consideration Of Mitigating Evidence.**

The instructions also erred by imposing threshold requirements of "extreme mental or emotional disturbance" (factor (d)), "extreme duress" or "substantial" domination of another person (factor (g)), and a level of "mental disease or defect" that "impaired" the defendant's ability "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" (factor (h)). As previously discussed, *Tennard* rejected the requirement that the defendant's evidence of a mental impairment must be "a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own ...." (*Tennard, supra*, 542 U.S. at p. 283.)

To the contrary, "[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' Thus, a State cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." (*Tennard, supra*, 542 U.S. at pp. 284-85, quoting *McKoy v. North Carolina, supra*, 494 U.S. at pp. 440, 441, internal citations and quotations omitted.) "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence." (*Tennard, supra*, 542 U.S. at p 285, quoting *Boyde v. California, supra*, 494 U.S. at pp. 377-378.)

In this case, the use of the threshold requirements of "extreme", "substantial" and "impaired" in factors (d), (g), and (h) were no less limiting than the "uniquely severe" limitation at issue in *Tennard*. This conclusion is consistent with the Model Penal Code, which recognizes as a mitigating circumstance evidence that the "defendant acted under duress or the

domination of another" without imposing the heightened threshold requirements. (Model Penal Code, § 210.6, subd. 4(f).) Accordingly, the use of the threshold requirements for consideration of mitigating evidence by factors (d), (g), and (h) violated the Eighth Amendment standards for relevance.

**D. Under Settled Rules Of Appellate Review, The Factor (k) Instruction Could Not Cure The Errors.**

As noted above, this Court has rejected claims that the factors (d), (g), and (h) instruction limited consideration of mitigating evidence because it has construed the factor (k) instruction to allow "the jury to consider a virtually unlimited range of mitigating circumstances." (*People v. McPeters, supra*, 2 Cal.4th at p. 1192; *see also People v. Crew, supra*, 31 Cal.4th at p. 860.) There are both general and specific reasons for concluding that this was not true in this case. As a general matter, the authority finding the factor (k) instruction curative conflicts with other rules governing the review of jury instructions. In reviewing a jury instructions, "our concern must be what the jury of laymen may have understood [the court] to mean." (*People v. Crossland, supra*, 182 Cal.App.2d at p. 199; *see also Carter, supra*, 450 U.S. at p. 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."].)

Moreover, "[i]t has long been held that jury instructions of a specific nature control over instructions containing general provisions." (*People v. Stewart, supra*, 145 Cal.App.3d at p. 975, citing *Nickell v. Rosenfield* (1927) 82 Cal.App. 369, 377 ["Even in the absence of rules of construction, common experience indicates that the specific declaration of a principle controls over general language."]; *see also Wells v. Lloyd* (1942) 21 Cal.2d 452, 459 ["It is unlikely that the jury followed the general language of the abstract instruction rather than the explicit and emphatic charge applying the law to the facts of the

particular situation."].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is *specific* and the supposedly curative instruction is *general*. It is where the specific instruction is good, and the general one bad, that an error 'is usually cured.'" (*Buzgheia v. Leasco Sierra Grove, supra*, 60 Cal.App.4th at p. 395, quoting 7 Witkin, Cal. Procedure (3<sup>rd</sup> Ed. 1985), Trial, § 319 at p. 364.)

Applied here, these rules show that the factor (k) instruction could not cure the errors. The factor (k) instruction did not address the categories of evidence referred to by factors (d), (g), and (h). To the contrary, it specifically stated that it addressed other types of evidence: it told the jury that it should consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (4 CT 1021, CALJIC No. 8.85, emphasis added.)

As a result, a reasonable juror would have concluded that factor (k) addressed different types of evidence than specifically addressed by factors (d), (g), and (h). Moreover, the jury would not have believed that factor (k) overrode the thresholds they imposed ("extreme", "substantial", "impaired") for consideration of such evidence. To conclude that the factor (k) instruction sufficed would violate the appellate presumption "that jurors, conscious of the gravity of their task, attend closely the particular language of the court's instructions in a criminal case ... and follow the instructions given them." (*United States v. Olano, supra*, 507 U.S. at p. 740.)

**E. There Are Also Specific Reasons To Believe That The Factor (k) Instruction Did Not Cure The Errors In The Other Instructions.**

There are also specific reasons to believe that the jury failed to give proper weight to the categories of evidence identified by factors (d), (g), and (h), even though the court also gave the factor (k) instruction. This is apparent from the prosecution's closing argument in the penalty phase and the trial court's application of the same factors in denying appellant's automatic motion to modify the death verdict. (Penal Code, § 190.4, subd. (e).)

In her penalty phase jury argument, the prosecutor stated that CALJIC No. 8.85 listed all the factors that "would somehow mitigate or lessen the defendant's culpability, and the argument would be that he deserves life in prison instead of death. So let's look at the mitigating factors and discuss whether or not it was present under the facts of this case." (14 RT 3490.) Factor (d) addressed whether "the defendant [was] under the influence of extreme mental or emotional disturbance at the time of the crime?" (*Ibid.*) "And that goes along with factor (h), which ... [asks] whether or not at the time of the offense, was defendant's capacity impaired by mental disease or defect or the effects of intoxication. So let's examine first (d) and (h) since they are fairly similar." (14 RT 3490-91.)

The prosecutor then asked, "[d]id any of the evidence presented by the defense during their lengthy presentation of psychological and psychiatric testimony, did any of that show to you that at the time of the offense, at the time of the murder of Daniel Addis in that yard on August 3<sup>rd</sup>, 1997, was he under the influence of extreme mental or emotional disturbance ...[?]" (14 RT 3491.) The prosecutor proceeded to discuss her view of the evidence as reflecting planning for the murder of Addis and the lack of evidence any substantial evidence that the defendant was "under the influence of extreme

mental or emotional disturbance or disturbance or impaired by mental disease or defect" at the time of that crime. (14 RT 3496.) The prosecutor asserted that in the absence of such evidence, the jury should "cross off [factor] (d), we can cross off [factor] (h)." (14 RT 3497.)

Turning to factor (g), the prosecutor argued that it addressed whether "the defendant act[ed] under extreme duress or under the substantial domination of another person." (14 RT 3498.) The prosecutor recognized that Gary Green was "part of it, I give you that. But there is no evidence that ... [appellant] was under the substantial domination or control of this Gary Green or anyone else. So we can cross off [factor] (g)." (14 RT 3498.)

These arguments show that the prosecutor construed and urged the jury to apply the factors at issue as both requiring a connection to the capital crime and also to find that the evidence was not mitigating if it fell below the stated thresholds of "extreme", "substantial", and "impaired." (4 CT 1020, factors (d), (g), and (h).) The trial court's ruling in denying appellant's automatic motion to modify the death verdict (Penal Code, § 190.4, subd. (e)) showed that it applied those factors in the same way. Moreover, its discussion of factor (k) did not address evidence of duress or domination and showed that the court believed that evidence of mental health problems must have a connection to the capital crime. If the trial court applied the factors in this way, the only reasonable conclusion is that the jury did so as well.<sup>63</sup>

The court prepared a written statement of reasons for denying the automatic motion to modify the death penalty verdict. (See 4 CT 1056-1062.) In ruling on that motion, the trial judge, like the jury, was required to "consider, take into account, and be guided by the aggravating and mitigating

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63. In Argument Section XXV., below, appellant presents the claim that the trial court for the same reasons erred in denying appellant's motion to modify the death verdict.

circumstances referred to in section 190.3 ...." (Penal Code, § 190.4, subd. (e).) The trial judge's statement of reasons shows that the barriers raised to consideration of mitigating evidence by factors (d), (g), and (h) were not alleviated by factor (k).

With regard to factor (d) ("Influence of Extreme Mental or Emotional Disturbance"), and factor (g) ("Extreme Duress or Substantial Domination of Another"), the court found no evidence. (4 CT 1061 ["None was shown."].) It also found no evidence of factor (h), *i.e.*, that appellant's capacity to appreciate the criminality of his conduct was "impaired as a result of mental disease or defect" (4 CT 1020, 1061 ["No evidence was put forth to show that the defendant was unable to appreciate the criminality of his conduct."].)

Turning to factor (k) ("Other Factors Extenuating the Gravity of the Crime"), the court did not address any of the evidence of duress or domination by another person at the time of the crime or at any other time. (4 CT 1061.) The court did address evidence of appellant's bipolar disorder. However, it discounted that evidence because, on the court's view, it did not have a sufficient connection to the capital offense. The court's entire ruling as it related to factor (k) stated:

The defendant was the victim of a traumatic childhood. He was born to youthful parents who were incapable of providing an appropriate home environment. His parents separated when he was still an infant. In each of his parent's homes he was physically, mentally and sexually abused. While still a child his grandparents became his guardian and proceeded to get him appropriate psychological help. In spite of their best efforts, the psychological damage to the defendant had been done. It was difficult to listen to testimony about the defendant's childhood and not feel great sympathy for him as a child.

He has been diagnosed as having a bipolar disorder. This is a serious mental disorder involving substantial mood swing. At various time during his incarceration, he received appropriate medical attention for this disorder, at other times it appeared

quite clearly that he did not.

While it is easy to feel great sympathy for the defendant as a child, and it appears that the defendant should have received better mental health supervision in the prison, it also appears clear that these factors had little to do with his decision to kill. (4 CT 1061-62.)

This discussion of factor (k) shows that the trial court believed, as the jury instructions stated, that unless the type of evidence addressed by factors (d), (g), or (h) had a causal connection to the capital crime, it was not mitigating evidence. The discussion of the specific factors shows that the trial court also believed it was constrained by the qualifying adjectives ("extreme", "substantial", "impaired") because it found no mitigating significance to the types of evidence identified by factors (d), (g), or (h). If the trial court reached these conclusions by applying the same guidelines that the jury was instructed to apply, the only reasonable conclusion is that the jury believed it was similarly constrained. (*See, e.g., United States v. Olano, supra*, 507 U.S. at p. 740 ["jurors, conscious of the gravity of their task, attend closely the particular language of the court's instructions in a criminal case ... and follow the instructions given them"], citation omitted.)

In sum, the record in this case provides a basis for concluding "that the jury in the present case failed to give proper weight to the mitigating evidence. (*People v. Ghent, supra*, 43 Cal.3d at p. 776.) Therefore, the instructions on factors (d), (g), and (h), prevented the jury from being able to properly consider and to give effect to mitigating evidence in violation of appellant's fundamental rights. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

**F. The Errors Were Prejudicial Because Appellant Contested The Issues To Which The Instructions Related And Raised Evidence Sufficient For The Jury To Find That The Mitigating Circumstances Outweighed The Aggravating Circumstances.**

As a matter of federal law, reversal is required unless Respondent demonstrates that the violation of appellant's federal constitutional rights was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Under state law, "error in the admission of evidence under section 190.3, factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Lewis, supra*, 43 Cal.4th at p. 527, quoting *People v. Lancaster, supra*, 41 Cal.4th at p. 94.)

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.) Respondent can not meet this burden because there was significant mitigating evidence of duress, domination, and mental health problems regardless of whether that evidence reached the qualifying thresholds contained in factors (d), (g), and (h) or it had a causal connection to the capital offense.

**1. Evidence Of Duress Or Domination.**

In Argument Section VI.B, above, appellant set forth the evidence of duress and/or domination of the inmates by the prison gang and the shot-caller Green. Here, appellant emphasizes that there is no evidence that appellant had been involved in a gang outside of prison. (13 RT 3313-15; Exh. No. 95, CT. Suppl. B 8-12.) Regardless of whether there was evidence of "extreme" duress or "substantial" domination by others (factor (g), 4 CT 1020), there was evidence from which a properly instructed jury would have found that the

evidence of duress and/or domination by another provided "a basis for a sentence less than death." (*Skipper v. South Carolina, supra*, 476 U.S. at pp. 4-5.)

The prosecution's own witnesses showed that the NLR controlled the white inmate population at C.I.M. and that Green, the NLR gang leader or "shot caller", ordered and orchestrated the hit on Addis. (*See, e.g.*, 5 RT 1084, 1133-35, 5148; 1248-49; Exh. No. 50, 4 CT 1146-47; Exh. No. 51, 4 CT 1150-51.) As former inmate Ricky Rogers succinctly put it, the NLR 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.) Appellant was not a shot caller. (*Ibid.*)

Anthony L. Casas, one of the defense prison gang experts, explained that an inmate like appellant who was small and inexperienced may need a gang for protection. (8 RT 2002-03.) However, having accepted the gang's protection, an inmate cannot refuse to become involved in dangerous activity, 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.) Moreover, based on how the prison staff had handled Addis, an inmate would conclude that it was useless to rely on the staff for safety. (8 RT 2010-11.)

Steven Riggs also testified as a defense expert on inmate security and prison gangs. Riggs explained that the "shot callers" within the gang are the people with authority to tell others what to do, whether to carry or hold contraband or to commit an assault. (8 RT 1940.) If an inmate received an

order to carry out an assault, he would be expected to do so. If he did not carry out the assault, he would put himself at risk of being assaulted and even murdered. (8 RT 1941.) Because the yard was dominated by gang members, appellant "would be a walking dead man" if he had refused to assault Addis. (8 RT 1941-42.) Appellant could not have obtained any assistance from the correctional staff without "fronting himself off" and requesting protective custody. However, there was no guarantee that appellant would have been able to spend the rest of his sentence in protective custody, or that he could be safe there. Inmates have been assaulted and killed while in protective custody. (8 RT 1945-46.)

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

In sum, the record shows that even if appellant was not under "extreme" duress or the "substantial" domination of another person (factor (g)), there was evidence from which the jury could find that appellant got involved with NLR/AB for protection and he felt compelled to assault Addis as ordered because of the power of the gang. Accordingly, there is a reasonable possibility that the limitations on consideration of evidence of duress and/or domination was prejudicial to the penalty determination.

## **2. Evidence Of Mental Or Emotional Disturbance.**

The limitations on the use of evidence of appellant's mental health problems and the requirement that the evidence relate to the commission of the capital crime had a broader prejudicial effect. As previously explained, that

evidence was mitigating evidence with respect to all of the factor (b) evidence which was the evidence in aggravation offered by the prosecution. (*See* Argument Section XIX.D & XIX.E., above.) It was also substantial evidence that appellant should not be sentenced to death even he was not under the influence of "extreme" mental or emotional disturbance (factor (d)), or "impaired" in his ability to conform to the requirements of law as a result of mental disease or defect (factor (h)). (*Ibid.*)

The nature and scope of this evidence was discussed above in Argument Section XIX.D, which for brevity is incorporated by reference here. Appellant emphasizes the following points. His schizoid personality disorder made him "easily manipulated by other people." (13 RT 3109.) Appellant's treatment records from College Hospital when he was 17 years-old showed that this was a long-standing problem for him. (13 RT 3318-19 [Attending psychiatrist Dr. Giem noting that appellant "'is easily lead and influenced by negative peers.'"]) This confirms that whether or not appellant acted under "extreme" duress or "substantial" domination of another at the time of the crime (factor (g)), there was reason to believe that appellant was manipulated by the gang because of his personality disorder.

In addition, the record shows that the denial of adequate care and treatment for appellant's mental health problems was directly related to appellant's involvement in criminal activity after being sent to prison. Prior to entering prison, appellant had received professional care for mental health problems since his grandparents obtained custody over him when he was about six years-old. (13 RT 3332-33; Exh. No. 95, CT. Suppl. B 10-11.) This included residential treatment when his grandparent's health insurance permitted it. (13 RT 3313-14, 3327-28, 3351-53.) As an adolescent and young adult appellant became involved in property crimes. However, while he was receiving regular mental health care, including counseling and

medication, he never committed a crime of force or violence and there is no evidence that appellant was involved with gangs. (*See* Exh. No. 95, CT. Suppl. B 9-11; Exh. No. 96, 5 CT 1271-72.)

In June of 1992, appellant was sent back to state prison for another theft-related burglary where there is no evidence that he was armed or used or attempted to use force or violence. (4 CT 1108, 1194-95.) For a period of two years, appellant personally and by his grandmother and assemblyman informed prison officials that he had mental health problems, including bipolar disorder, that required care, treatment, and medication. (Exh. No. 95, CT. Suppl. B 30-32; 13 RT 3141-42.) However, he received no care or treatment. (13 RT 3143.) Appellant and his grandmother reiterated a plea for help after appellant committed his first stabbing. (Exh. No. 95, 36-37 ["As a plea for help. I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I want help, and someone to talk to, I know programs are available, I've seen them."].)

Thereafter, prison staff disciplined appellant for incidents of weapon possession and assaults, while also periodically noting that he needed psychiatric care. (Exh. No. 95, CT. Suppl. B 47 [Noting "need of psychiatric treatment."]; *id.* at 49 [Placing appellant in administrative segregation "pending psychiatric review."]; *id.* at 78 ["Medical/Psyche concerns"].) At Corcoran State Prison, appellant finally received Lithium for a few days in May of 1997 and there was no evidence of criminal activity in that period. (Exh. No. 95, CT. Suppl. B 85-86.) However, on May 27, 1997, when appellant was transferred to C.I.M., his "Confidential Medical/Mental Health Information Transfer Summary" stated that appellant had no mental health problems ("none") and that he needed no medications ("none"). (CT. Suppl. B 87-88; 13 RT 3152.)

On August 3, 1997, appellant stabbed Addis on the prison yard at

C.I.M. On August 12, 1997, Carroll Yap, M.D., noted that appellant was "mentally ill" and that Lithium had been ordered for him at Corcoran but that he had not received his medication because his confidential transfer sheet said that he had no diagnosis or prescriptions for mental illness. For the first time since appellant returned to prison in June of 1992, Dr. Yap ordered a mental health treatment plan for appellant. (Exh. No. 95, CT. Suppl. B 93-94; 13 RT 3153.) He also prescribed resuming Lithium for appellant. (*Id.* at pp. 91, 92, 94.)

As detailed above in Argument Section XIX.D, the unrebutted testimony by the defense experts (Dr. Lantz, Dr. Gawin, and Dr. Lipton) supported a finding that appellant's violent criminal activity was directly related to his mental health problems and the denial of adequate care and treatment. Nevertheless, despite abundant indications of substantial mental health problems, the Department of Corrections did not develop a treatment plan for appellant until after he fatally stabbed Addis. (CT. Suppl. B 93, 97-98.) Under these circumstances, there is at least a reasonable possibility that a jury not limited by the threshold requirements of factors (d) and (h) would have reached a more favorable outcome. Accordingly, whether assessed under state or federal law, the instructional errors related to those factors, as well as to factor (g), were prejudicial and the death judgment must be reversed.

## XXIII.

### **THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS (CALJIC No. 8.88), VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT.**

#### **A. Introduction.**

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition, or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must

be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may chose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.” (4 CT 1044.)

This instruction formed the core of the trial court’s description of the sentencing process. It was constitutionally flawed because: (1) it failed to inform the jurors that the defendant did not have to persuade them that death was not the appropriate penalty; (2) it used the vague "so substantial" standard for comparing mitigating and aggravating circumstances; (3) it failed to convey that the central question was whether death was the appropriate penalty and not simply warranted; (4) it required the “totality” of the mitigating evidence to outweigh the aggravating evidence where a single mitigating factor was sufficient; (5) it failed to convey that a life sentence was mandatory if the aggravating factors did not outweigh the mitigating ones; and (6) it failed to require juror unanimity on aggravating factors.

Whether considered singly or together, the flaws in CALJIC No. 8.88 violated appellant’s fundamental rights to due process, to a fair trial by jury, and to a reliable penalty determination, and require reversal of his death sentence. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., Sawyer v. Smith, supra*, 497 U.S. at p. 243 [“All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.”].)

Trial counsel for appellant did not object to CALJIC No. 8.88.

However, for the reasons stated above in Argument Section XX.A., these claims of error are cognizable as affecting appellant's substantial rights. (Penal Code, § 1259.) In addition, a reviewing court may consider constitutional issues not raised in the trial court "to forestall a later claim that trial counsel's failure to predicate his motion on those additional grounds reflects constitutionally inadequate representation, and because in the context of this case the new theories raise only issues of law and factual questions that this court decides independently." (*People v. Mattson, supra*, 50 Cal.3rd at p. 854.)

Appellant recognizes that this Court has on several occasions has rejected similar constitutional challenges to CALJIC No. 8.88. (*See, e.g., People v. Lindberg* (2008) 45 Cal.4th 1, 51-53; *People v. Hovarter* (2008) 44 Cal.4th 983, 1028; *People v. Page* (2008) 44 Cal.4th 1, 55; *People v. Harris* (2008) 43 Cal.4th 1269, 1321-22; *People v. Zamudio* (2008) 43 Cal.4th 327, 372-73; *People v. Riggs* (2008) 44 Cal.4th 248, 328.) However, it is important to reconsider them because this was a close case on the question of penalty. (*Mills v. Maryland, supra*, 486 U.S. at pp. 383-384 ["The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing."].) In addition, the United States Supreme Court has yet to address these issues. Appellant therefore raises these issues in order to preserve them, if necessary, for subsequent federal proceedings. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845 [119 S.Ct. 1728; 144 L.Ed.2d 1] ["state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"].)

**B. CALJIC No. 8.88 Failed To Inform The Jurors That The Defendant Did Not Have To Persuade Them That Death Was Not The Appropriate Penalty.**

The California "death penalty law does not provide for any allocation of the burden of proof." (*People v. Medina* (1995) 11 Cal.4th 694, 782.) Therefore, CALJIC No. 8.88 should have explained that the burden of proof burden could not be assigned to the defendant. The failure to do so violated appellant's rights to a fair trial and to trial by jury.<sup>64</sup> (Cal. Const., art. I, §§ 7, subd. (a), 15, 16; U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, & 14<sup>th</sup> Amends.) It also violated the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. (*Godfrey v. Georgia, supra*, 446 U.S. at pp. 427-28 ["If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."].)

*Lockett v. Ohio, supra*, 438 U.S. 586, held that the Eighth Amendment requires a trial court to allow the jury to consider, as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Id.* at p. 604.) Moreover, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8<sup>th</sup> Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds by *Delo v. Lashley* (1993) 501 U.S. 272 [113 S. Ct. 1222; 122 L. Ed. 2d 620].)

However, that concept was never explained to the jury. Without an

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64. For purposes of this discussion, appellant has assumed that California law properly assigns no burden of proof at sentencing. However, as explained below in Section XXIV., federal constitutional law imposes on the prosecution the burden of proof beyond a reasonable doubt.

instruction that the defendant did not bear the burden of show that mitigating evidence outweighed aggravating evidence, there is no assurance that the jurors applied the correct standard. This raises the constitutionally unacceptable possibility that a juror voted for the death penalty because of an erroneous belief that the weighing process in the penalty phase imposed some burden of persuasion on the defendant. Such arbitrary and capricious decision-making in a capital case is contrary to the requirements of due process and Eighth Amendment.

A similar problem is presented by the lack of an instruction that the jury need not unanimously agree on mitigating factors. In the guilt phase, the court told the jury that that unanimity was required in order to convict appellant of any charge. (3 CT 879, CALJIC No. 8.74 ["Unanimous Agreement As To Offense"].) It also instructed that the penalty determination had to be unanimous. (4 CT 1044, CALJIC No. 8.88 ["each of you must be persuaded"].) Therefore, in the absence of an explicit instruction to the contrary, there is a reasonable likelihood that the jurors believed that they must reach unanimity on the existence of mitigating factors in order to reject the death penalty.

Such a belief would limit consideration of mitigating evidence in violation of the Eighth Amendment and the right to due process. (U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amend.; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [Reversal required if the jury believed that unless all 12 jurors agreed that the same mitigating circumstance was present that they could not engage in the weighing process on the appropriateness of the death penalty.]; *McKoy v. North Carolina*, *supra*, 494 U.S. 433 at pp. 442-443 ["*Mills v. Maryland*, *supra*, requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. ... Under *Mills*, such consideration of mitigating evidence

may not be foreclosed by one or more jurors' failure to find a mitigating circumstance ....."].) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, the death penalty should be reversed.

**C. The Use Of The "So Substantial" Standard To Return A Death Judgment Was Impermissibly Vague And Ambiguous And Failed To Provide Adequate Guidance To The Jury During Deliberations.**

The determinative sentence in CALJIC No. 8.88 for the penalty decision provided: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it [*sic*] warrants death instead of life without parole." (4 CT 1044.) The use of the term "so substantial" was unconstitutionally vague, open-ended, and subjective in violation of appellant's due process and Eighth Amendment rights.

To meet constitutional scrutiny, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright, supra*, 486 U.S. at p. 362.) In order to fulfill that requirement, the jurors must be adequately informed of "what they must find to impose the death penalty. . . ." (*Id.* at pp. 361-62.) A death-penalty sentencing scheme which fails to accomplish those objectives is unconstitutionally vague in violation of due process and Eighth Amendment standards. (*Ibid.*) The phrase "so substantial" is also vague because it fails to explain what quantum of evidence is sufficient to decide between life and death. Instead, it offers a purely subjective standard, and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia. . . .*" (*Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

In *Arnold v. State* (Ga. 1976) 236 Ga. 534 [224 S.E.2d 386] ("*Arnold*"),

the Georgia Supreme Court addressed a statutory aggravating circumstance which asked the sentencer to consider whether the accused had “a substantial history of serious assaultive criminal convictions.” The Court held that the term “substantial” did “not provide the sufficiently ‘clear and objective standards’ necessary to control the jury’s discretion in imposing the death penalty. [Citations.]” (*Id.* at p. 391.)

“Black’s Law Dictionary defines ‘substantial’ as ‘of real worth and importance’; ‘valuable.’ Whether the defendant’s prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.” (224 S.E.2d at p. 392.)

In *Zant v. Stephens*, *supra*, 462 U.S. 862, the United States Supreme Court cited with approval the *Arnold* Court’s finding “that the statutory language was too vague and nonspecific to be applied evenhandedly by a jury.” (*Id.* at p. 867, fn. 5.)

In *People v. Breaux* (1991) 1 Cal.4th 281 (“*Breaux*”), this Court discussed the “so substantial” standard in the former penalty-phase concluding instruction (CALJIC No. 8.84.2; 1986 revision). It stated that “the differences between [*Arnold*] and this case are obvious.” (*Id.* at p. 316, fn. 14; *see also* *People v. Jackson* (1996) 13 Cal.4th 1164, 1242-43 and *People v. McPeters* (1992) 2 Cal.4th 1148, 1192-1193 [rejecting claim that “so substantial” standard provides insufficient guidance].) However, *Breaux*’s cursory rejection of *Arnold* did not specify what those “differences” were, or how they affected the validity of *Arnold*’s analysis.

In *People v. Page* (2008) 44 Cal.4th 1, this Court attempted to address those differences. “The jurors in *Arnold* were called upon to decide, in isolation and without further guidance, whether a defendant’s prior criminal record was ‘substantial,’ whereas the jurors in the present case were instructed

extensively with respect to the manner of performing their task and were called upon to compare the totality of the aggravating circumstances with the totality of the mitigating circumstances. The instructions adequately explained that the jurors 'could return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict." (Id. at p. 56, citing *People v. Breaux, supra*, 1 Cal.4th at p. 316.)

However, the paragraph of CALJIC No. 8.88 to which the *Page* court referred concluded with the sentence at issue: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (4 CT 1044.) The jury could only conclude that "so substantial" was the standard of proof that governed the weighing process. The fact that the jurors were required to weigh the aggravating and mitigating evidence was preliminary to the application of the vague and uncertain standard of proof.

In sum, there is nothing about the use of the "so substantial" standard that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra*, 446 U.S. at p. 428.) In *Stringer v. Black, supra*, 503 U.S. 222, the court explained that "[b]ecause the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, ... the death sentence must be invalidated." (Id. at pp. 235-36.) *A fortiori*, a vague standard that governed the entire weighing process requires reversal of the death sentence in this case.

**D. CALJIC No. 8.88 Failed To Convey That The Central Question Was Whether Death Was The Appropriate Penalty And Not Simply Warranted.**

The ultimate question in the penalty phase was whether death was the "proportionate and appropriate punishment" for appellant. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037 [The jury "has ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender."].) For this reasons, it would mislead jurors to say that the deliberative process was merely a weighing aggravating and mitigating circumstances rather than a question of deciding "between life and death." (*People v. Brown* (1985) 40 Cal.3d 512, 541, fn. 13 ["[T]he weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; the balance is not between good and bad but between life and death."]; reversed on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538 [93 L. Ed. 2d 934, 107 S. Ct. 837].)

Accordingly, Penal Code section 190.3 "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brown, supra*, 40 Cal.3d at p. 541; accord *People v. Boyde* (1988) 46 Cal.3d 212, 253 [The "weighing process" involves a "qualitative judgment" in determining "whether death is the appropriate judgment."]; *People v. Milner* (1988) 45 Cal.3d 227, 256-57 [The defendant is entitled to "' each juror's *personal* conclusion from the evidence, about whether a sentence of death was appropriate under the circumstances for the offense and offender.' [Citation.]".])

However, CALJIC No. 8.88 informed the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating

circumstances are so substantial in comparison with the mitigating circumstances that it [*sic*] warrants death instead of life without parole." (4 CT 1023, emphasis added.) The determination of whether death is warranted is not the same as determining whether death is appropriate for the defendant. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." To say that something is "warranted" is to say that it is authorized. (American Heritage Dictionary (2006) [To "warrant" is to "grant authorization or sanction to (someone); authorize or empower."].)<sup>65</sup>

The question of whether death was "warranted" was decided in the guilt phase when the jury found a violation of section 4500. In contrast, the question of whether death is the "appropriate" punishment addresses whether death is "suitable or fitting for a particular purpose, person, occasion, etc." (American Heritage Dictionary (2006).) Thus, requiring a finding that death was warranted was far different from requiring a finding that death was the appropriate punishment for appellant under the circumstances.

This conclusion is confirmed by long-standing high court precedent addressing the requirements of the Eighth Amendment. To satisfy the requirement of individualized sentencing in capital cases, the question for the jury is "whether the death penalty is appropriate in a particular case." (*Shuman, supra*, 483 U.S. at p. 72 ; *see also Woodson v. North Carolina, supra*, 428 U.S. at p. 305 [there is a "need for reliability in the determination that death is the appropriate punishment in a specific case"]; *Gregg v. Georgia, supra*, 428 U.S. at p. 184 ["Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."].)

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65. The America Heritage Dictionary is on line at [www.dictionary.com](http://www.dictionary.com).

Consistent with this authority, the current pattern instruction on the weighing process, provides that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified." (CALCRIM No. 766, emphasis added.) To say that death must be warranted is essentially to return to the standards in effect prior to *Furman v. Georgia, supra*, 408 U.S. 238. Accordingly, CALJIC No. 8.88 erred by lowering the standards for determination of whether the death penalty should be imposed.

**E. The Use of the Term "Totality" in CALJIC No. 8.88 Is Misleading Because One Mitigating Factor May Outweigh All Factors In Aggravation.**

CALJIC No. 8.88 stated: "In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (4 CT 1044, emphasis added.) The underscored language was misleading because this Court for many years has recognized that one mitigating factor is sufficient to outweigh all the evidence offered as aggravating.

For example, *People v. Grant, supra*, 45 Cal.3d 829, approved an instruction stating, *inter alia*, that "'one mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment in this case.'" (*Id.* at p. 857, fn. 5.) *People v. Cooper* (1991) 53 Cal.3d 771, approved an instruction that "'various factors in aggravation and mitigation may be assigned different weights by you. Thus, it is not the number of factors, necessarily, but also the weight you assign to them which should control. For instance, you could find that one specific factor on one side weighs so heavily in your consideration that it outweighs all of the determined factors on the

other side.'" (*Id.* at p. 845.)

Many other cases are in accord. (*People v. Visciotti* (1992) 2 Cal.4th 1, 64 [Claim that the weighing process was mechanical was negated by the fact that the "jury was told that one factor alone could save defendant's life even though all of the others were 'overwhelmingly aggravated,' if by itself it weighed more than the other factors."]; *People v. Sanders* (1995) 11 Cal.4th 475, 557 [Approving instruction that "'[y]ou may return a verdict of life imprisonment without possibility of parole even though you should find the presence of one or more aggravating circumstances. One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without possibility of parole."]) *People v. Hinton* (2006) 37 Cal.4th 839, 912 [Approving instruction "that any one mitigating circumstance 'may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case" and that "[a]ny mitigating circumstance presented to you may outweigh all the aggravating factors."].)

However, the use of the phrase "the totality of the mitigating circumstances totality" (CALJIC No. 8.88) conveyed that more than one factor in mitigation was required to avoid a verdict of death whereas the authority cited above shows that a single mitigating factor may be sufficient to outweigh all the evidence in aggravation others. In common parlance, a "total" refers to adding of quantities to arrive at a sum as on a list of charges on a credit card statement. The word "totality" similarly conveys a counting mechanism for adding or aggregating multiple items. (America Heritage Dictionary (2006) [Defining "totality" as, *inter alia*, an "[a]ggregate amount or sum."].) As a result, CALJIC No. 8.88 is death oriented and violates the rule that a jury should not be instructed "in a manner that affirmatively conceals" the true state of the law. (*People v. Arias, supra*, 13 Cal.4th at p. 173.)

In *People v. Berryman, supra*, 6 Cal.4th 1100, this Court addressed a

similar challenge to the defect in CALJIC No. 8.88. The Court acknowledged that an instruction containing an implication that more than one factor in mitigation was required "would obviously be improper." (*Id.* at p. 1099.) However, *Berryman* concluded that there was no reasonable likelihood that the jury misconstrued or misapplied the instruction in violation of the Eighth or Fourteenth Amendment to the United States Constitution or any other legal provision or principle. (*Id.* at p. 1100.)

The Court believed that a juror would not have interpreted or used the language referring to the "totality" of the aggravating and mitigating circumstances to entail a mere mechanical counting of factors on each side of the imaginary scale. (*Id.* at p. 1099.) However, that is not appellant's claim. His claim is that directing the jury to weigh the "totality of mitigating circumstances" and the repetition of the plural ("mitigating circumstances") created the inference that more than one circumstance in mitigation was required to return a life verdict. Thus, there is a reasonable likelihood that the jury believed that, while the quality of the factors was important, more than one factor in mitigation was required. Accordingly, the use of the term "totality" violated constitutional norms. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

**F. CALJIC No. 8.88 Failed To Convey That A Life Sentence Is Mandatory If The Aggravating Factors Do Not Outweigh The Mitigating Circumstances And That The Jury May Return A Life Verdict If The Evidence Is In Equipose Or Even If The Evidence In Aggravation Outweighs The Evidence In Mitigation.**

After considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Penal Code, § 190.3; *People v. Brown, supra*, 40 Cal.3d at

pp. 540-541, and fn. 13.) The jury is also required to return a life verdict if it finds that the evidence in aggravation did not outweigh the evidence in mitigation. (Penal Code, § 190.3; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) The jury may also return life verdict even if it finds that aggravating circumstances outweigh mitigating circumstances (*People v. Sakarias* (2000) 22 Cal.4th 596, 637), and the jury must do so if aggravating and mitigating circumstances are in equipoise (*People v. Demetrulias* (2006) 39 Cal.4th 1, 39).

However, no such language was included in CALJIC No. 8.88. In contrast, the current pattern instruction on the weighing process expressly informs the jury that "[e]ven without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death." (CALCRIM No. 766.) Instead, CALJIC No. 8.88 told the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (4 CT 1044.) That language permitted the imposition of a death penalty when the aggravating circumstances were substantial, even if outweighed by mitigating circumstances or the jury otherwise believed that a life verdict was appropriate.

This Court has rejected the claim that the trial court should expressly instruct the jury that a life verdict is mandatory if the aggravating circumstances do not outweigh those in mitigation. (*People v. Kipp* (1998) 18 Cal.4th 349, 381 ["We have determined that the trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation."], citing *People v. Duncan, supra*, 53 Cal. 3d at p. 978 ("*Duncan*").) Appellant asks the Court to reconsider this holding. *Duncan*

reasoned (1) that the instruction directs the jurors to impose the death penalty only if they find that the aggravating circumstances outweigh the mitigating circumstances, and (2) that it is therefore unnecessary "to additionally advise [them] of the converse (*i.e.*, that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.)

However, CALJIC No. 8.88 never explicitly states that aggravating circumstances must outweigh mitigating circumstances before the death penalty is imposed, only that the aggravating circumstances must be "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (4 CT 1044.) Moreover, *Duncan* cites no authority for its conclusion that it is unnecessary to advise the jury of the converse. That conclusion conflicts with numerous opinions disapproving instructions which emphasize the prosecution theory of the case while minimizing or ignoring the defense theory.

For example, in *People v. Moore* (1954) 43 Cal.2d 517, this Court explained the distinction between a negative and a positive statement of a rule of law:

It is true that the . . . instructions . . . do not incorrectly state the law..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite.

Even assuming CALJIC No. 8.88 contained a correct statement of the law, it stated only the conditions under which a death verdict could be returned, but not the conditions under which a verdict of life was required.

This flaw violated appellant's right to due process, to trial by jury, to a fair trial, and to reliable capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) As a general matter, the high court has warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 473, fn. 6; *see also Washington v. Texas* (1967) 388 U.S. 14, 22 [87 S. Ct. 1920; 18 L. Ed. 2d 1019] [reciprocal rules required to allow consideration of defense evidence]; *Evitts v. Lucey* (1985) 469 U.S. 387, 401 [105 S.Ct. 830; 83 L.Ed.2d 821] ["In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause."].)

Moreover, the rights to due process and to trial by jury (U.S. Const. 6<sup>th</sup> & 14<sup>th</sup> Amends.) require courts in criminal trials to instruct the jury on any defense theory supported by substantial evidence. (*See, e.g., United States v. Matthews*, *supra*, 485 U.S. at p. 63 ["As a general proposition 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."]; *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"].) For all these reasons, the omission from CALJIC No. 8.88 of the corollary principles identified above violated appellant's constitutional trial rights. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S.

Const., 5th, 6th, 8th & 14th Amends.)

**G. CALJIC No. 8.88 Was Unconstitutional For Failing To Require Juror Unanimity on Aggravating Factors.**

CALJIC No. 8.88 also erred by failing to require jury unanimity on aggravating circumstances. Indeed, the instruction failed to require the agreement of a majority of the jurors agree on any particular aggravating factor, or that any particular combination of aggravating factors made a death sentence appropriate. As a result, an individual juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to the arbitrary and capricious infliction of the death penalty in violation of the defendant's due process (U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amends.) and Eighth Amendment rights. (*See, e.g., Gregg v. Georgia, supra*, 428 U.S. at p. 188.)

This Court has held that when the defendant's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147 ("*Bacigalupo*"); *see also People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Appellant respectfully submits that the reasoning and decision in *Bacigalupo* should be reconsidered because of its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S. Ct. 2055; 104 L. Ed. 2d 728] ("*Hildwin*").

In *Hildwin*, the United States Supreme Court held that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' [Citation.] Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) The *Bacigalupo* Court relied on this

holding to conclude that "[b]ecause the Sixth Amendment provides no right to jury sentencing in death penalty cases (*Hildwin v. Florida* [, *supra*,] 490 U.S. [ at p. 640]), it does not require jury unanimity." *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147.)

There are two problems with this reasoning. First, since *Hildwin* was decided, the high court has held that "[c]apital defendants, no less than non-capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.) This means that a fact that increases the penalty for an offense is the "functional equivalent" of an element of a single "greater" crime and the fact must be not only submitted to the jury and proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at pp. 490-495 & fn. 19.) These developments of the law call into question the reasoning of *Hildwin* questionable and undercut the constitutional validity of this Court's ruling in *Bacigalupo*.

Second, *Hildwin* did not address the question of jury unanimity. The high court has otherwise recognized that "[j]ury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 452, conc. opn. of Kennedy, J.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. at p. 732), the Fifth, Sixth, and Eighth Amendments similarly are not satisfied by anything less than unanimity on the factors resulting in a death sentence.

Consistent with these principles, the federal death penalty statute requires that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).) In addition, the overwhelming majority of the states that vest the jury with the responsibility for deciding

whether to impose the death penalty require unanimous agreement on the aggravating factors. (*See, e.g.*, Ark. Code Ann. § 5-4-603(a); Colo. Rev. Stat. Ann. § 16-11-103(2); Ill. Ann. Stat. ch. 38, para. 9-1(g); La. Code Crim. Proc. Ann. art. 905.6; Md. Ann. Code art. 27, § 413(i); Miss. Code Ann. § 99-19-103; N.H. Rev. Stat. Ann. § 630:5(IV); N.M. Stat. Ann. § 31-20A-3; Okla. Stat. Ann. tit. 21, § 701.11; 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g); Tex. Crim. Proc. Code Ann. § 37.071.) Given this fact and the evolution of the high court's reasoning as reflected in *Ring* and *Apprendi*, the failure of CALJIC No. 8.88 to require unanimity on aggravating circumstances fails to pass scrutiny under current due process and Eighth Amendment standards.

Finally, the California Constitution generally requires unanimity in criminal cases. (Cal. Const., Art. I, § 16 ["Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."]; *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [affirming inviolability of unanimity requirement in criminal trials].) Correspondingly, where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (Pen. Code, §1158 [requiring unanimous verdict on prior conviction allegations used for sentencing]; § 1158a [requiring unanimous verdict on arming allegations used for sentencing], § 1163 [authorizing jury polling to ensure unanimity].)

In sentencing proceedings, capital defendants are entitled to more rigorous protections than those afforded noncapital defendants. (*See, e.g.*, *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680; 115 L.Ed.2d 836] [Because death is different, the high court has construed the Eighth Amendment to provide "protections that the Constitution nowhere else

provides."].) To require unanimity for a sentencing enhancement that may carry only a one-year prison term (*see, e.g.*, Penal Code, § 12022), but not for a finding that has "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina, supra*, 11 Cal.4th at pp 763-764) violates the defendant's rights to due process, equal protection, and the Cruel and Unusual Punishment Clauses of the state and federal Constitutions. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

#### **H. Conclusion.**

The Eighth Amendment requires capital-sentencing juries to be properly instructed to avoid arbitrary and capricious application of the death penalty. Because CALJIC No. 8.88 failed to comply with that requirement, appellant's death sentence must be reversed.

### **XXIV.**

#### **SEVERAL ASPECTS OF CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL VIOLATED THE UNITED STATES CONSTITUTION.**

##### **A. Introduction.**

Appellant addresses below additional errors in California's death penalty statute (Penal Code, § 190.3) that violated appellant's rights to due process, to trial by jury, to a fair trial, and to reliability in capital sentencing proceedings. (Cal. Const., Art I, §§ 7, subd. (a), 15, 16, 17; U.S. Const, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> & 14<sup>th</sup> Amends.) This claims are cognizable for the reasons previously stated. (See Argument Section XX.A.) Appellant recognizes that this Court has previously rejected similar claims. Nevertheless, appellant requests the court to re-consider these issues under the circumstances of this case. In addition, appellant has an obligation to present these claims in the event of

subsequent federal litigation. (*O'Sullivan v. Boerckel*, *supra*, 526 U.S. at p. 845.)

**B. Appellant's Death Sentence Is Invalid Because The Jury Was Not Required To Unanimously Find The Existence Of Aggravating Factors Beyond A Reasonable Doubt.**

This Court has said that “neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . . .” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) However, this pronouncement is contrary to the teaching of the United States Supreme Court. (*Apprendi*, *supra*, 530 U.S. 466; *Ring*, *supra*, 536 U.S.; *Blakely v. Washington*, *supra*, 542 U.S. 296 (“*Blakely*”); and *Cunningham v. California* (2007) 549 U.S. 270 [127 S. Ct. 856; 166 L. Ed. 2d 856 (“*Cunningham*”).) It also conflicts with the authority previously discussed requiring jury unanimity. (See Argument Section XX.C., above; see, e.g., *McKoy v. North Carolina*, *supra*, 494 U.S. at p. 452 [“Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community.”], Kennedy, J. concurring.)

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury’s simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 466.)

In *Ring*, the high court struck down Arizona’s death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring*, *supra*, 536

U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) In light of *Apprendi*, the high court overruled *Walton* and held that "any fact" which increased the penalty for the crime is the functional equivalent of an element of the offense and must be found by a jury beyond a reasonable doubt. (*Ring, supra*, 536 U.S. at p. 589.)

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely, supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances. One of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court held that a procedure permitting the court to make such a finding was invalid because it did not comply with the right to trial by jury. (*Id.* at 313.)

In reaching this holding, *Blakely* reiterated that in light of the principles established by *Apprendi*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304.)

Most recently, in *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") required a jury to find beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham, supra*, 549 U.S. at p. 860 [The "DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth

Amendments."].) In reaching this conclusion, *Cunningham* explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (See, e.g., *People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.)

In sum, the line of cases extending from *Apprendi* to *Cunningham* shows that the only relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. In this case, the jury was called on to make a factual finding of whether aggravating circumstances outweighed mitigating circumstances in order to impose a judgment of death. (4 CT 1044, CALJIC No. 8.88 ["To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."].)

By failing to require a unanimous jury finding by proof beyond a reasonable doubt, the trial court violated appellant's constitutional trial rights in the penalty phase of a capital case. (U.S. Const., 5th, 6th, 8th & 14th Amends.) This error "cannot be overcome by employing 'harmless error'" analysis. (*Esparza v. Mitchell* (6<sup>th</sup> Cir. 2002) 310 F.3d 414, 421 ["To allow a state to construct a constitutionally valid death penalty statute that establishes a fact to be proved to the jury beyond a reasonable doubt but permits judges to ignore the statute in order to impose the death penalty is the same as dispensing with the reasonable doubt requirement deemed not subject to harmless error analysis in *Sullivan v. Louisiana*, [supra,] 508 U.S. [at p. 280] ...."], cert. denied, (2003) 540 U.S. 826 [124 S.Ct. 47; 157 L.Ed.2d 263]; see also *Johnson v. State* (Nev. 2002) 118 Nev. 787, 802-03 [59 P.3d 450, 460-61].) For analogous reasons, appellant's death sentence must be reversed.

**C. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Written Findings Of Aggravating Factors.**

The trial court did not require the jury to make written or other specific findings regarding aggravating factors. There can be no meaningful appellate review without written findings because it will otherwise be impossible to “reconstruct the findings of the state trier of fact.” (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct. 745; 9 L.Ed.2d 70].) The failure to require factual findings deprived appellant of his due process (U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amends.) and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195; *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15 [Noting importance of special verdict form in determining whether the jury properly weighed aggravating and mitigating evidence.])

This Court has held that the absence of written findings by the sentencer does not render the California death penalty scheme unconstitutional. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Fauber* (1992) 2 Cal.4th 792, 859.) However, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

For example, a determination of parole suitability requires a weighing process similar to that involved in the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider issues such as the nature and circumstances of the offense, social history, past and present mental state, criminal history, and behavior before, during and after the crime. (Penal Code, § 190.2, Title 15, California Code of Regulations, §§ 2280, 2281 [“A parole date set under this article shall be set in a manner that provides uniform terms

for offenses of similar gravity and magnitude in respect to the threat to the public."].)

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

A statement of reasons on the record is also required at sentencing in non-capital cases. (Penal Code, § 1170, subd. (c) ["The court shall state the reasons for its sentence choice on the record at the time of sentencing."].) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994 [Because "'death is different,'" the high court has "imposed protections that the Constitution nowhere else provides."].) Therefore, the failure to provide comparable protections to the defendant in a capital violates the equal protection clause of the Fourteenth Amendment. (*See, e.g., Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 [The Equal Protection Clause prohibits the state from affording one defendant the benefit of a rule affecting the right to trial by jury while denying it to another].)

Written findings are also required to ensure a reliable verdict as required by the Eighth Amendment. (*See, e.g., Monge v. California, supra*, 524 U.S. at p. 732 ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital

sentencing proceedings."].) For all these reasons, appellant jury should have been required to identify on the record what aggravating circumstances it found and the reasons for the penalty chosen.

**D. The Denial Of Inter-Case Proportionality Review Violates The Eighth Amendment's Proscription Against The Arbitrary, Discriminatory, Or Disproportionate Imposition Of The Death Penalty.**

The Eighth Amendment proscription against cruel and unusual punishment requires that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review. In *Pulley v. Harris, supra*, 465 U.S. 37, the high court declined to hold that comparative proportionality review was an essential component of every constitutional capital sentencing scheme. However, it cautioned that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.)

The California death penalty sentencing lacks sufficient checks on arbitrariness and, therefore, the Eighth Amendment requires comparative proportionality review, *i.e.*, a comparison of this case with other and cases to assess the relative proportionality of the death sentence. This Court has rejected this claim. (*See, e.g., People v. Fierro* (1991) 1 Cal.4th 173, 253 ["Defendant contends that he should be given proportionality review on both an intracase and intercase basis. We have held in numerous cases that intercase proportionality review is not required. [Citations.]"].)

However, neither section 190.3 nor 190.4 forbid it. The denial of intercase proportionality review is a judicial creation. (*See, e.g., People v. Marshall* (1990) 50 Cal.3d 907, 938, 946-947.) However, the high court has

stated that the death penalty must "be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112; *see also 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."].) Without a comparative review, there is no assurance that this mandate has been fulfilled. As previously explained, in this case no special circumstance applied apart from the putative fact that appellant was undergoing a life sentence at the time of the crime. The circumstances of the crime showed a fatal stabbing no different from countless, non-capital murders. Accordingly, the denial of inter-case proportionality in this case violates the Eighth Amendment and requires reversal of appellant's death sentence. (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112; *Kennedy v. Louisiana, supra*, 128 S. Ct. at p. 2659.)

**E. The Failure to Instruct The Jury That Statutory Mitigating Factors Were Relevant Solely as Potentially Mitigating Evidence Precluded a Fair And Reliable Determination Of Whether Death Was The Appropriate Punishment.**

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 ["The parties agree that factors (d), (e), (f), (g), (h), and (j) can only mitigate ...."]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 ["[T]he factors in section 190.3 are to be considered only if relevant, and a mitigating factor such as duress or moral justification is irrelevant and should be disregarded when there is no evidence of its existence."].)

Nevertheless, the jury was left free to conclude that answering "no" as to "whether or not" any of those factors were present could be an aggravating circumstance. As a result, appellant was deprived of the individualized sentencing determination required by the Eighth and Fourteenth Amendments

in a capital case. (See, e.g., *Sawyer v. Smith*, *supra*, 497 U.S. at p. 243 ["All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense."]; *Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-84 ["The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."].) Moreover, if the jury answered "yes" to "whether or not" one of those factors was present", it could convert mitigating evidence (for example, evidence of domination by others or a personality disorder) into a reason to aggravate a sentence in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has previously rejected similar arguments. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079 ["The trial court was not constitutionally required to inform the jury that certain sentencing factors are relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation. [Citation.]"]; *People v. Memro*, *supra*, 11 Cal.4th at pp. 886-887; *People v. Cruz*, *supra*, 44 Cal.4th at pp. 681-82.) It has also stated that "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Morrison* (2004) 34 Cal.4th 698, 730 ("*Morrison*"), quoting *People v. Arias* (1996) 13 Cal.4th 92, 188)

*Morrison* itself demonstrates the contrary. In that case, the trial judge mistakenly believed that section 190.3, factors (e) and (j) were aggravating rather than mitigating. (*Morrison*, *supra*, 34 Cal.4th at pp. 727-729.) The

*Morrison* Court recognized that the trial court erred, although it found the error to be harmless. (*Ibid.*) If a trial judge was misled by the language at issue, how can jurors unschooled in the law be expected to avoid making this same mistake? (*Carter v. Kentucky, supra*, 450 U.S. at p. 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."].) Other trial judges and prosecutors have been misled in the same way. (*See, e.g., People v. Montiel, supra*, 5 Cal.4th at pp. 936, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

Appellant had the right to be sentenced to death upon the basis of valid, statutory aggravating factors. (*People v. Boyd, supra*, 38 Cal.3d at pp. 772-775.) Because there is a reasonable possibility that appellant's jury sentenced him to death on the basis of nonstatutory aggravating factors, appellant was deprived of an important state created liberty interest in violation of his Fourteenth Amendment right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. 343; *Fetterly v. Paskett, supra*, 997 F.2d at p. 1300 [Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]); *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to State of Washington capital sentencing law].)

The likelihood that appellant's jury was misled was heightened by the prosecutor's penalty phase closing argument. For example, the prosecutor argued that because (on her view) there was no evidence of "extreme" mental or emotional disturbance at the time of the crime (factor (d)), that the mental health evidence was not mitigating. (14 RT 3490-91.) She also argued that absence of evidence that appellant reasonably believed that there was a moral justification for his actions (factor (f)), the circumstance was aggravating. (14 RT 3497-98.) As to extreme duress or substantial domination by another (factor (d)), the prosecutor contended that this was "hogwash" and thereby

confirmed an aggravated killing. (14 RT 3498.)

Given the tenor of these arguments, there is a reasonable possibility that the jury concluded that the absence of a mitigator was an aggravating circumstance. This violated not only state law, but the Eighth Amendment because the jury was likely to have treated appellant “as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s].” (*Stringer v. Black, supra*, 503 U.S. at p. 235.)

**F. The California Sentencing Scheme Violates The Equal Protection Clause Of The Fourteenth Amendment By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants.**

The United States Supreme Court has repeatedly recognized that the Eighth Amendment require a greater degree of reliability when a death sentence may be imposed and, therefore, that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (*See, e.g., Monge v. California, supra*, 524 U.S. at pp. 731-732; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994 [Because death is different, the high court has construed the Eighth Amendment to provide "protections that the Constitution nowhere else provides."].) Despite this directive, the California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than to those charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. “Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions.” (*People v. Olivas, supra*, 17 Cal.3d at p. 251.) To protect a “fundamental” interest, the courts have “adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny.” (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785, citing, *inter alia, Shapiro v. Thompson*

(1969) 394 U.S. 618, 638 [89 S.Ct. 1322; 22 L.Ed.2d 600]; *Sherbert v. Verner* (1963) 374 U.S. 398, 406 [83 S.Ct. 1790; 10 L.Ed.2d 965]; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [62 S.Ct. 1110; 86 L.Ed. 1655].) The state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*Ibid.*)

Because life is the most fundamental interest of all, scrutiny of unequal treatment must be stricter and any purported justification offered by the State even more compelling than in the usual case. The process of determining whether or not to impose a death sentence as analogous to a sentencing court's discretionary decision to impose one prison sentence rather than another. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41 ["The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another."]; *People v. Prieto* (2003) 30 Cal.4th 226, 275 ["[T]he penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another."].)

However, California law provides fewer procedural protections in a capital case than where a defendant is being sentenced to prison, *e.g.*, for receiving stolen property. In a non-capital case, an enhancing allegation must be found true unanimously and beyond a reasonable doubt. (Penal Code, §§ 1158, 1158a; *People v. Paul* (1998) 18 Cal.4th 698, 705-06.) Consideration of which sentence is appropriate in a non-capital case is governed by court rules. California Rules of Court, Rule 4.420, subd. (e) provides: "The reasons for selecting one of the three authorized prison terms referred to in section 1170(b)

[upper, middle, or lower term] must be stated orally on the record."

However, in a capital case, there is no burden of proof except as to other criminal activity (factor (b)), and there is no requirement that the jurors agree on what facts are true, or important, or what aggravating circumstances apply. (See Argument Sections XXIII. & XXIV., above.) Moreover, the death sentence may be imposed without stating any reasons, unlike in case where the defendant is sentenced to a term of years. (See Argument Section XXIV.C, above.) To provide greater protection to non-capital defendants than to capital defendants violated appellant's rights to due process of law, equal protection of the law, and the proscription against cruel and unusual punishment and the arbitrary and capricious imposition of the death penalty. (U.S. Const., 8<sup>th</sup> & 14<sup>th</sup> Amends.; *see, e.g., Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d 417, 421.)

## XXV.

### **IN DENYING APPELLANT'S AUTOMATIC MOTION TO MODIFY THE DEATH VERDICT, THE TRIAL COURT FAILED PROPERLY TO GIVE WEIGHT AND CONSIDERATION TO STATUTORY AND NON-STATUTORY MITIGATING EVIDENCE.**

#### **A. Introduction.**

On September 11, 2001, defense counsel made an oral motion to modify the death verdict, while recognizing that such a motion was automatic. (Penal Code, § 190.4, subd. (e); 14 RT 3583.) The trial judge read into the record its written ruling denying the motion and found "that the weight of the evidence supports the jury's verdict of death." (14 RT 3584-92; 4 CT 1056-1062 ["Statement Of Reasons For Denial Of Automatic Motion To Modify Sentence (P.C. 190.4)"].) Even assuming no instructional errors related to factors (d), (g), and (h) (*c.f.* Argument Section XX., above), the death

judgment must be reversed and remanded. As previously explained, the record shows that the trial judge erred by giving no mitigating weight to evidence of duress and/or domination by others and found that the substantial evidence of appellant's mental health problems was not mitigating because it did not have a causal connection to the capital offense. (4 CT 1061-62; see Argument Sections XXII. & XXV., above.)

These errors violated section 190.4, subdivision (e), appellant's due process liberty interest in the correct application of sentencing procedures mandated by that statute, his right to reliable sentencing proceedings, and the prohibition against the arbitrary and capricious imposition of the death penalty. (Cal. Const., art. I, §§ 7, subd. (a), 15, 17; U.S. Const., 5th, 8th & 14th Amendments; see, e.g., *Furman v. Georgia*, *supra*, 408 U.S. 238, *Gregg v. Georgia*, *supra*, 428 U.S. 153; *Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346-47; *Fetterly v. Paskett*, *supra*, 997 F.2d at p. 1300 [A sentencing judge's failure to follow the state's capital sentencing procedures for weighing mitigating evidence against aggravating evidence implicated "a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."]; *Campbell v. Blodgett*, *supra*, 997 F.2d at p. 522 [same].)

Trial counsel for appellant did not object to the rulings made by the court on the motion to modify the death verdict. Since *People v. Hill* (1992) 3 Cal.4th 959, 1013, this Court has stated that a defendant must object to rulings made on an automatic motion to modify a death verdict. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1316.) Nevertheless, this claim of error may be considered because it addresses the denial of appellant's fundamental right to life protected by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. (See, e.g., *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [Claim for deprivation of fundamental rights are not forfeited by the failure to object in the trial court.]; *People v. Norwood* (1972) 26 Cal.App.3d

148, 152 ["An appellate court may note errors not raised by the parties if justice requires it."].) In addition, "[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.3d at p. 854.)

**B. The Errors.**

When ruling on an automatic motion to modify a death verdict, the trial judge "shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to the law or the evidence presented. The judge shall state on the record the reasons for his findings." (Penal Code, § 190.4, subd. (e).) "That is to say, he must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. And he must make that determination independently, *i.e.*, in accordance with the weight he himself believes the evidence deserves.' Obviously, the evidence that he considers is that which was properly presented to the jury --no more, no less." (*People v. Ashmus* (1991) 54 Cal. 3d 932, 1006-1007, citations and internal quotations omitted.)

"On appeal, we subject a ruling on a verdict-modification application to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined *de novo*." (*People v. Ashmus* (1991) 54 Cal. 3d 932, 1006-1007, citations and internal quotations omitted.) "When, from the trial court's statement in ruling on the modification motion, it is apparent the court misunderstood the law, we will nevertheless affirm the judgment if we can conclude 'any misunderstanding [on the trial judge's part]

'had no impact on the court's decision to deny the motion.'" (*People v. Holt* (1997) 15 Cal.4th 619, 710-11, quoting *People v. Cooper* (1991) 53 Cal. 3d 771, 848, Werdegar, J., concurring.)

As explained above in Argument Section XX.E., and for brevity incorporated by reference here, the trial court made several errors in denying the motion to modify the death verdict. The trial court found no mitigating factor (d) evidence (commission of the capital offense "under the influence of extreme mental or emotional disturbance), no mitigating factor (g) evidence (commission of the offense "under extreme duress or under the substantial domination of another person"), and no mitigating factor (h) evidence (at the time of the offense unable to conform to the law because "impaired as a result of mental disease or defect evidence"). (4 CT 1061.)

Even assuming that that the restrictive adjectives in factors (d), (g), and (h) pass scrutiny (*c.f.* Argument Section XX, above), the trial court's analysis under factor (k) shows that it failed to give any weight to the types of evidence they addressed, despite the fact that factor (k) is supposed to allow consideration of "a virtually unlimited range of mitigating circumstances." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1192.) This includes evidence of a "mental or emotional disturbance *of any degree whatever* in mitigation of penalty."; *People v. Benson* (1990) 52 Cal.3d 754, 804, italics in original; *People v. Ghent, supra*, 43 Cal.3d at p. 776 [Under factor (k), evidence of "a mental condition of the defendant which, though perhaps not deemed 'extreme,' nonetheless mitigates the seriousness of the offense."].)

With regard to factor (d) ("Influence of Extreme Mental or Emotional Disturbance"), and factor (g) ("Extreme Duress or Substantial Domination of Another"), the court found no evidence. (4 CT 1061 ["None was shown."].) However, the record shows that the prison gang had the power of life or death over other inmates (see Argument Section VI.B., above) and the court ignored

the un rebutted evidence that appellant's schizoid personality disorder made him easily manipulated by others and therefore particularly susceptible to the powers of the prison gang. (13 RT 3108-09.)

The court also found no evidence of factor (h), which addressed whether the defendant's capacity to appreciate the criminality of his conduct was "impaired as a result of mental disease or defect" (Penal Code, § 190.3, subd. (h); 4 CT 1020). (4 CT 1061 ["No evidence was put forth to show that the defendant was unable to appreciate the criminality of his conduct."].) However, the record shows that appellant was receiving no care, treatment, or medications for his bipolar disorder at the time of the crime. (13 RT 3153; Exh. No. 95, CT. Suppl. B 93-94.) Dr. Gawin explained that, when untreated, acting out in violence "often" occurs in both the manic and hypomanic phases of the disease. (13 RT 3123 ["mania is often associated with violence and so is hypomania"].)

Moreover, during hypomania, a persons judgment "is profoundly impaired." (13 RT 3166.) People in that state can still plan and react, "but they have no capacity to exercise understanding of the consequences of their acts." (*Ibid.*) Dr. Lipson concurred that appellant's acting out in violence was the result of the stress imposed by putting someone mentally ill in "a very predatory environment with very dangerous people" and then depriving him of care. (13 RT 3256-57, 3263-64.)

Turning to factor (k) ("Other Factors Extenuating the Gravity of the Crime"), the court did not credit any of the evidence of duress or domination by another person at the time of the crime or at any other time. (4 CT 1061.) The court did address evidence of appellant's bipolar disorder but discounted it, because on the court's view, it "had little to do with his decision to kill." (4 CT 1062.) As discussed above, the ruling was contrary to the un rebutted evidence of the defense mental health. Even assuming the contrary, the trial

court violated the high court's unequivocal statement that it had "rejected the ... 'nexus' requirement" and characterized the "nexus" test as "a test we never countenanced and now have unequivocally rejected." (*Smith v. Texas, supra*, 543 U.S. at p. 45; *Tennard v. Dretke, supra*, 542 U.S. at pp. 284-85.)

These multiple errors of law had a direct impact on the trial court's decision to deny the motion to modify the verdict and the death judgment must, therefore, be reversed. (*People v. Holt, supra*, 15 Cal.4th at pp. 710-11; *People v. Cooper, supra*, 53 Cal. 3d at p. 848.) The same conclusion follows as a matter of federal law. In *Pulley v. Harris, supra*, 465 U.S. 37, the high court held that California capital sentencing procedures did not violate the Eighth Amendment for failing to require intercase proportionality review. (*Id.* at pp. 50-51.) In reaching this decision, the court relied in part on the inclusion of the automatic motion for modification of sentence, which is supposed to serve as a critical check on the arbitrary and capricious imposition of the death penalty. (*Id.* at pp. 51-52.) Where, as here, the trial court's ruling on the motion for modification of the death sentence was flawed, the reliability of the death verdict is called into question and the Eighth Amendment requires reversal of the death judgment.

## XXVI.

### **IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATED INTERNATIONAL NORMS OF LAW, HUMANITY, AND DECENCY AND, THEREFORE, THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

International standards of law, humanity, and decency provide an additional basis for concluding that the death penalty as applied in this case is unlawful. Appellant acknowledges that this Court has rejected related claims. (*See, e.g., People v. Hovarter* (2008) 44 Cal.4th 983, 1029 [Rejecting claim that article 6 of the International Covenant on Civil and Political Rights and the laws of the nations of Western Europe show that the death penalty violates international norms of humanity and decency.]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1071-72 [Rejecting claim that near-consensus amongst nations demonstrates evolving standards of decency and humanity that should be deemed to bar use of execution as a regular form of punishment under the Eighth Amendment to the United States Constitution.]; *People v. Perry* (2006) 38 Cal.4th 302, 322 [Rejecting claim that the International Covenant of Civil and Political Rights prohibition of the "arbitrary" deprivation of life (art. VI, § 1) and "cruel, inhuman or degrading treatment or punishment" (art. VII) precludes imposition of the death penalty].)

Nevertheless, the high court has recognized that international norms inform the Eighth Amendment which applies in this case as a matter of due process pursuant to the Fourteenth Amendment. (*See, e.g., Roper v. Simmons, supra*, 543 U.S. at p. 575 ["[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"]; *Atkins v. Virginia, supra*, 536 U.S. at p. 321, fn. 21 [noting the abolition of the

juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," has "relevance ... in determining whether a punishment is cruel and unusual", quoting *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-31 & fn. 31[108 S. Ct. 2687; 101 L. Ed. 2d 702].)

Moreover, under the Supremacy Clause of the United States Constitution (Art. VI., para. 2) treaties ratified by the United States are paramount law. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441 [88 S.Ct. 664; 19 L.Ed.2d 683] [Where the laws of a state "conflict with a treaty, they must bow to the superior federal policy."]; *Kolovrat v. Oregon* (1961) 366 U.S. 187, 190-91 [81 S. Ct. 922; 6 L. Ed. 2d 218] [Under the Supremacy Clause, state law "must give way" to "'overriding' federal treaties and conflicting arrangements ...."].) For both reasons, appellant requests this Court to find under the circumstances of this case that appellant's death sentence violates international norms and is, therefore, cruel and unusual punishment.

The United States has ratified the International Covenant of Civil and Political Rights ("ICCPR").<sup>66</sup> The ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (Art. VI., § 1) The ICCPR also bars "cruel, inhuman or degrading treatment or punishment." (Art. VII). In countries that have not abolished the death penalty, the ICCPR permits the use of the death penalty if "imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant ...." (Art. VI, § 2.) The

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66. The Senate ratified the ICCPR on December 19, 1966, and it entered in force on March 23, 1976. (*Roper v. Simmons, supra*, 543 U.S. at p. 567.)

United Nations Human Rights Committee established under this treaty states that this section must be "read restrictively to mean that the death penalty should be a quite exceptional measure." (See General Comment 6 on Article 6 of the International Covenant on Civil and Political Rights, adopted on 27 July 1982, para. 7.)<sup>67</sup>

Under the United States Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U.S. Const., Art. VI, para. 2.) Thus, the ICCPR is constitutionally binding authority on this Court. (See *Zschernig v. Miller*, *supra*, 389 U.S. at pp. 440-441; *Kolovrat v. Oregon*, *supra*, 366 U.S. at pp. 190-91.) Assuming for arguments sake that appellant was properly convicted of first degree murder, the murder was committed by a single blow of a knife without any special circumstance. (Penal Code, § 190.2.). Moreover, it was committed by someone who was mentally ill and who had for years been denied adequate care and treatment by prison staff. This is not the type of serious or exceptional crime to which the death penalty should apply. (See Argument Sections XIV. & XIX.D., above.)

This Court has noted that "when the United States ratified the ... [ICCPR] treaty, it specially reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under laws permitting the imposition of capital punishment." (*People v. Perry* (2006) 38 Cal.4th 302, 322, citing 138 Cong. Rec. S-4718-01, S4783 (1992) and *People v. Brown*

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67. The American Convention on Human Rights similarly states, "[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes ...." (Art. IV, § 2; see "International Standards on the Death Penalty" (Amnesty International 2006) AI Index: ACT 50/001/2006, Appendix 3.) The high court has recognized this as one of several "significant international covenants." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 576.)

(2004) 33 Cal.4th 382, 403-404.) In *Roper v. Simmons*, *supra*, 543 U.S. 551, the high court rejected the same type of argument when made to justify execution of a defendant who was under 18 years-old at the time of the capital crime.

The government observed "that when the Senate ratified the ... [ICCPR] it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles." (*Id.* at p. 567.) The high court did not find this persuasive in light of the fact that since the President's reservation in 1992, six states and the federal government had decided not to extend the death penalty to juveniles. Therefore, the "reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions." (*Ibid.*)

As explained above in Argument Section XIV.F., a survey of the 52 United States jurisdictions, shows that 75% of those jurisdictions do not use custody status for determining death eligibility. This weighs substantially in support of the conclusion that appellant should not have been eligible for the death penalty under the circumstances of this case. (*See, e.g., Enmund, supra*, 458 U.S. at p. 792; *Atkins, supra*, 536 U.S. at pp. 313-16; *Roper, supra*, 543 U.S. at p. 567.) This conclusion is further supported by the internationally developing consensus against the death penalty. As of 2007, 70% (137 of 197) of the nations in the world have in law or practice abolished the death penalty.<sup>68</sup> Just five nations (China, Iran, Saudi Arabia, Pakistan, and the United States) were responsible for 88% of all known executions in 2007.

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68. <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

(Amnesty International 2008 Report, "Global Themes", "Death Penalty".)<sup>69</sup> To date, 104 countries have voted for a global moratorium on the death penalty. (*Id.* at "Facts and Figures".) Of particular note, all of the Western European countries have outlawed the death penalty. (See Footnote 68, above.)

Although jurisdictions in the United States are not bound by the laws of other nations for administration of their criminal justice system, the uniformity of view among Western European nations is especially important because the Founding Fathers looked to those countries as models of the laws of civilized nations and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1871) 78 U.S. 268, 315 [11 Wall. 268; 20 L.Ed. 135], dis. opn. of Field, J., quoting 1 Kent's Commentaries 1.)<sup>70</sup>

Moreover, in evaluating whether imposition of the death penalty violates the Eighth Amendment, the high court has found international law persuasive. For example, in *Roper v. Simmons*, *supra*, the court's rejection of the death penalty for offenders under 18 found confirmation in the stark reality

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69. This report is available at: <http://thereport.amnesty.org/global-themes/death-penalty>

70. See also *Sabariago v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461; 31 L.Ed. 430] [In an action for trespass to try title, applying presumption "not peculiar to any system of law. It is found in the law of all civilized States, and the phrases in which the maxim is expressed are taken from the civil law, the basis of the jurisprudence of Spain as of all other European states, and imported into the common law of England as adopted by us."]; *Martin v. Waddell's Lessee* (1842) 41 U.S. 367, 409 [10 L.Ed. 997] [applying principles of European international law to resolve property claim to land under navigable waters].)

that the United States was "the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" (*Id.* at p. 575, quoting *Trop v Dulles* (1958) 356 U.S. 86, 102-103 [78 S. Ct. 590; 2 L. Ed. 2d 630], plurality opinion.)

Several cases are in accord. (*Atkins v. Virginia, supra*, 536 U.S. at p. 321, fn. 21 [recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"]; *Thompson v Oklahoma, supra*, 487 U.S. at p. 831, fn. 31 [noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"], plurality opinion; *Enmund v. Florida, supra*, 458 U.S. at pp. 796-97 [observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"]; *Coker v. Georgia, supra*, 438 U.S. at p. 596, n. 10 ["It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue"]).

In sum, under the treaty commitment to the ICCPR, the predominant international rejection of the death penalty, and the high court acceptance of international norms as persuasive authority, imposition of the death penalty in this case would be cruel and unusual punishment.

## XXVII.

### **THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE EXECUTION OF APPELLANT WOULD BE CRUEL AND/OR UNUSUAL PUNISHMENT.**

#### **A. Introduction.**

"Upon request," this Court on appeal will "review the facts of a case to determine whether a death sentence is so disproportionate to a defendant's culpability as to violate the California Constitution's prohibition against cruel or unusual punishment." (*People v. Howard* (2008) 42 Cal.4th 1000, 1032, Cal. Const. Art. I, § 17.)<sup>71</sup> Appellant requests the Court to conduct such a review because there are multiple reasons why the death sentence for Daniel Landry is disproportionate. "The Court ... fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of the 'sober second thought.'" (Stone, "The Common Law in the United States", 50 Harv. L. Rev. 4, 25 (1936).)

"To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1426-1427, citing *People v. Dillon, supra*, 34 Cal.3d at p. 479.)

In addition, "a capital defendant is entitled under the California

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71. This Court also has authority under Penal Code sections 1181, subdivision 7, and 1260 to reduce a sentence from death to life imprisonment without possibility of parole. (*People v. Hines* (1997) 15 Cal.4th 997, 1081, conc. opn.

Constitution to *intracase* proportionality review to determine whether the penalty of death is disproportionate to the defendant's culpability." (*People v. Rogers* (2006) 39 Cal.4th 826, 894, citations omitted.) "If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability', or, stated another way, that the punishment 'shocks the conscience and offends fundamental notions of human dignity', the court must invalidate the sentence as unconstitutional." (*People v. Leonard, supra*, 40 Cal.4th at p. 1427, citing *People v. Hines, supra*, 15 Cal.4th at p. 1078, internal citations and quotations omitted.)

The Eighth Amendment similarly permits a reviewing court to find that a sentence authorized by the Legislature is cruel and unusual punishment. "The Cruel and Unusual Punishment Clause of the Eighth Amendment is directed, in part, 'against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged.' [Citations.]" (*Enmund v. Florida, supra*, 458 U.S. at p. 788; *People v. Dillon* (1983) 34 Cal.3d 441, 478.) The protection against excessive sanctions "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' [Citation.] By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (*Roper v. Simmons, supra*, 543 U.S. at p. 560.)

**B. The Death Penalty Is Disproportionate To The Offense And To The Offender.**

At the outset, it is important to recall that "the penalty of death is different in kind from any other punishment imposed under our system of justice." (*Gregg v. Georgia, supra*, 423 U.S. at p. 188.) "From the point of view of the defendant, it is different both in its severity and its finality. From

the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." (*Gardner v. Florida, supra*, 430 U.S. at p. 357.)

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner, supra*, 430 U.S. at p. 358.) Accordingly, the courts must "carefully scrutinize" sentencing decisions "to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460 n.7 [104 S.Ct. 3154; 82 L.Ed.2d 340].) Moreover, the death penalty must "be imposed fairly, and with reasonable consistency, or not at all." (*Eddings, supra*, 455 U.S. at p. 112.)

A child was subjected to a "toxic" environment of physical, sexual, and emotional abuse by men and women and denied such basic care and nurturing that he was at times reduced to scavenging from garbage cans for food and sleeping under a car for shelter. (12 RT 2946; 13 RT 3102, 3255, 3320, 3336, 3339-40; Exh. No. 95, Suppl.B CT 8, 11.) As a result he developed a schizoid personality disorder, compounded by post-traumatic stress disorder and bipolar disorder. (13 RT 3108, 3121-22, 3130-31, 3248.)

His grandparents tried to save him, but by the time they gained custody, the damage had been done. (13 RT 3107-08, 3111-12, 3246-48, 3332-33 [He had "some deep-rooted psychological problems that affect the manner in which ... [he] functions."].) He became a special education student and made multiple suicide attempts. (13 RT 3320-21, 3332, 3348-49, Exh. No. 95, Suppl.B CT 11, 13.) When his grandparents could afford it, they placed him in residential mental health treatment facilities. (13 RT 3353.) However, because of the profound psychological damage he suffered as a child, he was never

able to function in society outside of his grandparent's home. (13 RT 3103-05 [ "[T]hose early years of damage .... It's something that you don't recover from." ].)

As a teenager and a young adult, he committed some property crimes, but there is no evidence that he was ever armed or that he tried to hurt anyone. (Exh. No. 95, Suppl.B CT 10; Exh. No. 96, 5 CT 1270-71.) This did not occur until two years after he had been placed in state prison for another theft-related burglary. By that time, he had been denied care and treatment despite repeated pleas by himself, his grandmother and his assemblyman. (Exh. No. 95, CT. Suppl. B 31, 32, 3-34.) When the "three strikes" law passed, he and his grandmother renewed their pleas for help, but still he received no help. (Exh. No. 95, CT. Suppl. B 36, 37 [ "As a plea for help. I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I want help, and someone to talk to ...." ]; CT. Suppl. B 39, 40.)

The unrebutted testimony from three, highly qualified mental health professional (Dr. Lantz, Dr. Gawin, Dr. Lipson) showed that appellant's criminal activity in state prison resulted from the denial of treatment for long-standing mental health problems. (13 RT 3201-3202 [Appellant was not "a characterlogically violent person" despite episodes of violence.]; 13 RT 3123, 3157-58, 3166-68; 13 RT 3259-66.) His schizoid personality disorder made him "easily manipulated by other people." (13 RT 3109.)

Finally, he succumbed to the manipulation of the shot-caller for a prison gang who ordered him to commit a "hit" on another inmate who had broken the gang's code, apparently by stealing from it. With knowledge that Addis would be assaulted, the guards put him on the prison yard after demands by the shot-caller. (5 RT 1148 [ "Bring him out. ... I want to talk to the f ing Sergeant, the youngster has to come out." ]; 8 RT 1815-17 [ "You know, Sarge, they're going to take him out." ]; 8 RT 1856 [ "[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."").)

Three months later, the shot-caller walked free with the apparent blessing of the Department of Corrections, although even the prosecution agreed that he was equally guilty for the death of Addis. (6 RT 1419; Exh. No. 53, 4 CT 1157; 8 RT 1836 [The Addis homicide "'could open up a big can of worms.'"]; 10 RT 2315-16.) For three years, while awaiting and during trial, Danny Landry never committed an act of violence, but he debriefed and provided information to law enforcement about planned assaults on deputies at the county jail. (13 RT 3289-92, 3295-96; 2 CT 484.)

What good would be served by killing Danny Landry?

Prisoners are wards of the state, therefore, "'it is but just that the public be required to care for the prisoner, who cannot by reasons of the deprivation of his liberty, care for himself.'" (*Estelle v. Gamble* (1976) 429 U.S. 97, 104 [97 S. Ct. 285; 50 L. Ed. 2d 251].) This common law principle is incorporated into the Eighth Amendment. (*Ibid.*) The protection against cruel and unusual punishment "proscribes more than physically barbarous punishments. The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency..., against which we must evaluate penal measures.'" (*Id.* at p. 102, citations omitted.)

"These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." (*Id.* at p. 103; *accord West v. Atkins* (1988) 487 U.S. 42, 54 [108 S.Ct. 2250; 101 L.Ed.2d 40] [The "State has a constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated."].)

"[M]ental health needs are no less serious than physical needs." (*Gates*

*v. Cook* (5<sup>th</sup> Cir. 2004) 376 F.3d 323, 332-33.) Therefore, "[u]nder the Eighth Amendment, prisoners have a right to receive medical treatment for illness and injuries, which encompasses a right to psychiatric and mental health care . . ." (*Belcher v. City of Foley, Alabama* (11<sup>th</sup> Cir. 2004) 30 F.3d 1390, 1396, citing *Estelle v. Gamble, supra*, 429 U.S. at pp. 103-05, and *Rogers v. Evans* (11th Cir.1986) 792 F.2d 1052, 1058.) An Eighth Amendment violation occurs when correctional staff with knowledge of a mental illness deprive the inmate of care. (*See, e.g., A.M. v. Luzerne County Juvenile Detention Center* (3<sup>rd</sup> Cir. 2004) 372 F.3d 572, 584 ["A.M. presented evidence that the Center's administrators were aware, upon his admission, that he had serious mental health and behavioral problems, which required medication and psychiatric care."]; *Madrid v. Gomez, supra*, 889 F.Supp. 1146; *Coleman v. Wilson, supra*, 912 F.Supp. 1282.)

The unrebutted testimony from Dr. Gawin and Dr. Lantz showed that the Department of Corrections violated appellant's Eighth Amendment rights by knowingly depriving him of mental health treatment for years until after he had killed Addis. (13 RT 3154-54; 13 RT 3156-57 [Appellant received a "dismal" level of care that, in other contexts, would be a basis for legal action against the physicians.]; 13 RT 3263-64 [The Department of Corrections failed to provide the basic requirements for inmate mental health care.]; Exh. No. 95, CT. Suppl. B 93, 95-96;.)

What is more, Addis would not have been killed but for the actions of the prison staff in placing him on the yard knowing that he would be assaulted. To execute Danny Landry for this crime would violate his Eighth Amendment rights a second time.

## XXVIII.

**ON COUNT 3, THE TRIAL COURT ERRED BY IMPOSING THE WEAPON ENHANCEMENT (PENAL CODE, § 12022, SUBD. (B)(1)) BECAUSE THE PROSECUTION PLED AND THE JURY FOUND USE OF A WEAPON AS AN ELEMENT OF THE VIOLATION OF SECTION 4500.**

### **A. Introduction.**

For Count 3, the information alleged that "the crime of assault by a life prisoner, in violation of Penal Code section 4500, a felony was committed by Daniel Landry, who did unlawfully and with malice aforethought, assault Joseph Matthews with a deadly weapon and by means of force likely to produce great bodily injury while undergoing a life sentence in the California State Prison, San Bernardino County ...." (1 CT 45.) With respect to Count 3, the information further alleged that appellant "personally used a deadly and dangerous weapon, to wit, knife, said use not being an element of the above offense, within the meaning of Penal Code section 12022(b)(1) ...." (1 CT 43.)

The jury convicted appellant of Count 3 (4 CT 920) and found true the sentencing allegation that he "personally used a deadly and dangerous weapon, to wit, a knife, said use not being an element of the above offense, to be true, as to Count III." (4 CT 921.) At sentencing, the trial court imposed a one-year consecutive term for the section 12022, subdivision (b)(1) enhancement.<sup>72</sup> (14 RT 3596-97.) The trial court erred in imposing a term for the enhancement

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<sup>72</sup> The court pronounced sentence as follows: "As to Count 3, assault by a life prisoner, violation of Section 4500, with special allegation of two prior serious felony convictions, pursuant to Penal Code section 1170.12(c)(2)(i) having been found true, the sentence on this is 27 years to life [three times the 9 year term for Penal Code, § 4500]. Plus the use of the weapon [(Penal Code, § 12022, subd. (b)(1))] for a total of 28 years to life to run consecutive." (14 RT 3596-97.)

because under the accusatory pleading test the use of a weapon was an element of the charged violation of section 4500. (Penal Code, § 12022, subd. (b)(1) [A consecutive one-year term shall be impose, "unless use of a deadly or dangerous weapon is an element of that offense."].)

Trial counsel for appellant did not object to this error. This claim is nevertheless cognizable because the imposition of the enhancement was an unlawful sentence and a jurisdictional error that may be corrected on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 235.) Moreover, even without an objection in the trial court, a court may review a sentencing claim such as this one because it does not involve the admission or exclusion of evidence. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

**B. Use Of A Deadly Weapon Was An Element Of The Offense So The Enhancement May Not Be Imposed.**

"Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense." (Penal Code section 12022, subd. (b)(1), emphasis added.) Here, the use of a deadly or dangerous weapon was an element of the alleged violation of section 4500.

That statute proscribes an assault by a life prisoner "upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury ...." (Penal Code, § 4500.) In theory, the crime may be committed without a weapon, *i.e.*, by means of force likely to produce great bodily injury ...." (*Ibid.*) However, the prosecution in Count 3 pled that appellant violated the statute "with a deadly weapon and by means of force likely to produce great bodily injury while undergoing a life sentence in the California State Prison, San Bernardino County ...." (1 CT 45.) Therefore, the use of a deadly weapon was an element of the offense under the accusatory

pleading rule. (*People v. Reed, supra*, 38 Cal.4th at pp. 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."].)

Moreover, for the violation of section 4500 the trial court instructed the jury on the theory that "[t]he assault was committed with a deadly weapon or instrument." (3 CT 884-85, CALJIC No. 7.35.) On that basis, the jury for Count 3 found a violation of section 4500, as well as the use of a deadly weapon as an enhancement. (4 CT 920, 921.) Accordingly, the exception to section 12022, subdivision (b), applies and the trial court erred by imposing the one-year weapon enhancement. (*See People v. McGee* (1993) 15 Cal.App.4th 107 [The prosecution may not circumvent the exception to section 12022, subd. (b), by pleading only an assault by means of force likely to cause great bodily injury (Penal Code, § 245, subd. (a)(1)) where a knife was used to commit the crime.])

## **XXIX.**

### **THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS PROVIDES AN ADDITIONAL GROUND FOR REVERSING THE JUDGMENT.**

The sections above explain the prejudicial effect of each of the errors. The cumulative effect of these errors provides a separate ground for reversal. (*See, e.g., People v. Hill, supra*, 17 Cal.4th at p. 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, supra*, 60 Cal.2d at pp. 348, 353 [A combination of even relatively minor misstatements of fact or law may require reversal when considered on the total record.])

Moreover, the cumulative effect of the errors rendered appellant's trial fundamentally unfair in violation of his right to a fair trial and to due process

of law. (Cal. Const., Art. I, §§ 15, U.S. Const., 5<sup>th</sup>, 6<sup>th</sup>, & 14<sup>th</sup> Amends.; *see, e.g., Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn. 15 ["the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"]; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795 ["while neither error is reversible per se, we conclude the cumulative effect of the errors violated defendant's due process right to a fair trial."]; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-88 [State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."].)

When errors of federal constitutional errors combine with errors of state law, reversal is required unless the errors were harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *United States v Rivera* (10<sup>th</sup> Cir. 1990) 900 F.2d 1462, 1470, fn. 6 ["if any of the errors being aggregated are constitutional in nature, then the harmless beyond a reasonable doubt standard announced in *Chapman* should be used in determining whether the defendant's substantial rights were being affected. Any lesser standard would potentially denigrate the protection against constitutional error announced in *Chapman*."].)

Prejudice is present if the errors have an "inherently synergistic effect" on the verdict. (*Carlyle v. Mullin* (9<sup>th</sup> Cir. 2003) 317 F.3d 1196, 1220-21; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), *cert. den.* (1979) 440 U.S. 974 ["prejudice may result from the cumulative impact of multiple deficiencies"].) A synergistic effect is apparent here. Assuming that section 4500 could be constitutionally applied in this case (*c.f.* Argument Sections XIII., XIV., & XV., above), a series of evidentiary and instructional errors ramified through the penalty trial in this case.

As a matter of law, the jury should not have been permitted to consider

as evidence in aggravation the details of appellant's juvenile and adult property-related offenses. However, the prosecutor was permitted to present this evidence and argue that appellant was an incorrigible criminal who deserved the death penalty because of his property crimes. (See Argument Section XVI.) The prosecution relied on factor (b) evidence of crimes outside the statute of limitations to argue that appellant should be sentenced to death, but the trial court failed to instruct the jury on defenses to the factor (b) evidence. (See Argument Sections XVIII. & XIX., above.) Other instructions created insurmountable hurdles to the consideration of substantial, mitigating evidence, and lowered the prosecution's burden of proof. (Argument Sections XX., XXI., XXII., XXIII., XXIV.)

The prosecution contended that the crime demanded the death penalty. However, the Department of Corrections set free the man who it found had ordered and orchestrated the crime and the prosecution conceded was "equally guilty" of the crime. (10 RT 2315-16.) Nevertheless, the jury was not allowed to consider this evidence to find that the crime was not the type for which the death penalty should be imposed. (See Argument Section XXI.)

After appellant was transferred out of the prison system to the county jail he never again committed a criminal act involving force or violence. Indeed, he debriefed about prison gangs and provide assistance to law enforcement. (13 RT 3289-90.) However, the prosecution was permitted to present evidence and the specious argument to the jury that appellant continued to pose a threat of harm because a razor blade was found lying in plain view on the desk in appellant's cell during trial. (Argument Section XVII.)

Taken together, these errors show that appellant was deprived of a fair opportunity to defend himself and show that he should not be sentenced to death. Accordingly, the cumulative effect of the errors require reversal

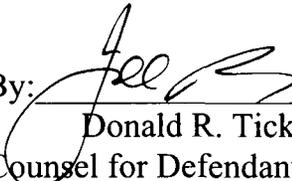
whether assessed under state or federal law. (*Andres v. United States* (1948) 333 U.S. 740, 752 [68 S.Ct. 880; 92 L.Ed. 1055] ["In death cases doubts such as those presented here should be resolved in favor of the accused."].)

### **CONCLUSION**

For all of the foregoing reasons, appellant's convictions and his judgment of death must be reversed.

Dated: January 29, 2008.

Respectfully submitted,

By:   
\_\_\_\_\_  
Donald R. Tickle  
Counsel for Defendant-Appellant  
DANIEL GARY LANDRY

## **WORD COUNT CERTIFICATE**

I have been appointed by this Court as the attorney for appellant Daniel Gary Landry. Pursuant to California Rules of Court, Rule 8.360, subdivision (b)(1), I hereby certify, based upon the word-count feature of the "Word" word processing program, that the length of this opening brief, including footnotes but not including the tables and this certificate, is 161,441 words. A request for leave to file an oversize brief has been submitted in conjunction with this opening brief.

Executed this 29 day of January 2009 at Jackson, California.

  
\_\_\_\_\_  
Donald R. Tickle

**PROOF OF SERVICE**  
**(People v. Daniel Gary Landry, S100735)**

I declare that I am over the age of 18, not a party to this action and my business address is P.O. Box 400, Volcano, CA, 95689-0400. On the date shown below, I served VOLUMES ONE, TWO, AND THREE OF APPELLANT'S OPENING BRIEF to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Jackson, California, addressed as follows:

Daniel Gary Landry (D-62144)

Clerk, Criminal Division  
San Bernardino County Superior Court  
Rancho Cucamonga District  
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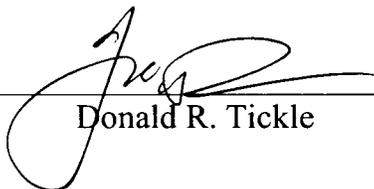
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28 day of January 2009 at Jackson, California.

  
\_\_\_\_\_  
Donald R. Tickle