IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KARL HOLMES, HERBERT McCLAIN, AND LORENZO NEWBORN, Defendants and Appellants.	AUTOMATIC APPEAL Supreme Ct. No. S058734 Los Angeles County Superior Ct. No. BA 092268

APPELLANT McCLAIN'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of Los Angeles County
Hon. J.D. Smith, Judge Presiding

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INTRODUCTION

"[I]t should be axiomatic--at least in capital cases--that 'our collective conscience does not allow punishment where it cannot impose blame.'"[1] Nevertheless, appellant Herbert Charles McClain (hereafter "McClain") sits on death row for a crime he insists he did not commit, for shootings he was never alleged to have perpetrated, and for a conspiracy he could not have joined.

Rather than pursue a careful analysis of the evidence, the prosecution relied on the publicity and community outrage about this case, the inflammatory nature of the crimes, and McClain's gang membership to obtain convictions and death sentences against him. Put simply, McClain sits on death row because of who he is – not what he did.

1993 was a violent year in Pasadena. While in 1992, there were a total of 18 homicides, by the middle of November 1993, there had been 25 murders within city limits. (10 CT 2660.) Police believed at least 12 of those deaths were gang-related. (*Ibid.*)

Pasadena, home of the Norton Simon, Caltech, the Huntington Library, numerous museums and arts programs, and of course, the Rose Parade, saw the draw of its cultural institutions threatened by increased violence and gang activity. (10 CT 2654-2655.)

When three 13 and 14 year old boys were shot and killed Halloween night in a quiet Pasadena neighborhood, hundreds of residents, fearing that

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[1] (Garnett, *Depravity Thrice Removed: Using the Heinous, Cruel, or Depraved Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases* (1994) 103 Yale L.J. 2471, 2494, quoting *Durham v. United States* (D.C. Cir. 1954) 214 F.2d 862, 8876, quoting *Holloway v. United States* (D.C. Cir. 1945) 148 F.2d 665, 666-667.)

their own children were at risk, mobilized to demand answers. (10 CT 2660.) Mayor Rick Cole noted that he had "never seen something come together almost instantaneously with such broad support. But what happened on Halloween is something that touched people in this city as few things have." (*Ibid.*)

Weeks after the murders, the police had failed to identify any suspects. (10 CT 2660.) Despite its lack of progress, Pasadena Police Lieutenant Denis Petersen, mindful of the intense public outcry, assured the people of Pasadena that law enforcement was "ultimately going to get to the bottom of it." (*Ibid.*)

Public pressure continued to mount. (10 CT 2660.) A Coalition for a Non-Violent City formed to seek solutions to persistent violence. (*Ibid.*) The City Council, the Los Angeles County Board of Supervisors, and the Stop the Violence Increase the Peace Foundation created a $40,000 reward fund. (10 CT 2660-2661.) Citizens lobbied for new ammunition and gun control laws. (10 CT 2668-2669.)

Two days before Christmas and 52 days after the homicides, a special police task force identified five suspects and arrested three. (10 CT 2667.) Police told the press that the suspects were all members of the P-9 gang who sought to avenge the murder earlier that night of fellow gang member Fernando Hodges. (*Ibid.*) The Los Angeles Times, citing no sources, described P-9 as "a gang known for its violence." (*Ibid.*)

McClain, one of the five suspects police identified, was out of state when the Los Angeles District Attorney's Office filed murder charges against him. (10 CT 2667.) Pasadena Police Chief Jerry Oliver told media that police asked the FBI to help locate McClain. (*Ibid.*) Instead, McClain turned himself over to authorities. (16 RT 1445; 36 RT 3966.)

Los Angeles District Attorney, Gil Garcetti, along with law enforcement, held a news conference at which he said, "For those who continue to feel the fear, the fear of random violence, we are there." (10 CT 2667.)

Deborah Coats, the mother of victim Stephen Coats and Pasadena Police Department employee, became a frequent public speaker who appeared on television and spoke about the crimes to a range of people including neighbors, the state legislature, and then Governor Pete Wilson. (10 CT 2671.)

In short, the Halloween case was one of the most highly publicized Los Angeles area cases in 1993. (1 CT 220-222, 229, 251; 2 CT 403, 464; 3 CT 626, 688, 690-692, 694, 696-697, 699-700, 702, 704, 706, 708, 710, 712, 714-715; 7 CT 1834-1835, 1837-1838, 1901-1904; 9 CT 2558-2778; 11 CT 3032-3113; 2 RT 26, 31-34, 43-44; 6 RT 181-182, 191; 8 RT 229; 9 RT 272; 11 RT 550; 14 RT 1068-1069; 25 RT 2537-2538.) Indeed, half of the jury pool from McClain's first trial heard about this case in the media. (2 CT 503.)

The prosecution played on the jurors' fear of gang violence. (14 RT 1092-1096, 1100-1101, 1114, 1116-1117, 1119-1120, 1158-1174; 15 RT 1253-1255; 16 RT 1395-1399; 18 RT 1714; 19 RT 1840-1845, 1849-1856, 1891-1897, 1922-1923; 20 RT 2111-2112; 23 RT 2274, 2382, 2385; 25 RT 2546-2548, 2551-2554, 2600-2602, 2610, 2616, 2623, 2626, 2668-2669; 28 RT 2946-2947, 2950, 2952; 29 RT 3026-3029, 3032; 30 RT 3097-3099, 3129; 31 RT 3163-3164, 3172, 3194, 3271-3273, 3280-3281; 32 RT 3299-3301, 3377-3378, 3386-3388, 3403-3406, 3413-3414, 3431; 33 RT 3469, 3508, 3513-3521, 3539-3540, 3574-3577, 3585-3591, 3596; 34 RT 3722; 35 RT 3763; 36 RT 3876-3880, 3981-3987, 3991-3993; 37 RT 4009-4012;

40 RT 4215-4219; 41 RT 4279; 42 RT 4425; 43 RT 4462-4464, 4467-4468; 44 RT 4626-4632, 4662-4663, 4669-4674, 4691-4692, 4696, 4698, 4701-4703; 53 RT 5242, 5349-5350; 57 RT 5566; 58 RT 5645-5646; 65 RT 6359, 6361, 6371, 6347-6349; 66 RT 6444-6445, 6450-6468, 6474-6475; 68 RT 6748-6749; 70 RT 6998; 71 RT 7029-7030; 72 RT 7218-7222; 73 RT 7286-7289; 74 RT 7402.) Further, the prosecution framed the issue before the jury not as whether McClain was guilty of the charged crimes, but as whether, in light of his background, he should be out on the streets. Indeed, the prosecutor argued in closing that it did not matter when McClain used the gun a witness claimed to have seen so long as the jury believed McClain had used it in either the Price case or the Halloween case – even though there was no allegation that McClain used a gun in the Halloween case. (44 RT 4683.)

Against this inflammatory background, the prosecution placed on the jury the heavy burden of fixing rampant, but unrelated violence in society:

> We, as a society, have become a little bit too tolerant of violence. We see it on the television; we see it in television programs, not only on the news; we read about it; we hear it on the radio. And when I say 'tolerant,' maybe a better word I should use is accustomed to. We are not surprised anymore when these horrific things happen. In a sense we have a fascination with horror. And if you look at the movies that we attend, there is this instinct for us to be drawn to horrible things. But reality is far more horrific than anything you can see on the news or in any movie that you could attend. We have sort of lost our innocence.

(43 RT 4466-4467.)

The prosecutor then recounted to the jury a story she heard an elementary teacher tell on the radio. (43 RT 4467-4468.) The teacher said that recently, during show and tell, a young child told her classmates she

had been absent the previous week because her cousin, a student at Howard University, had been killed. (43 RT 4467.)

The teacher recalled that she had walked by the scene of her student's cousin's homicide, but had become so accustomed to violence, that it did not impact her at the time. (43 RT 4468.)

A number of other students in the class also shared with their classmates that they too had lost relatives or acquaintances to murder. (43 RT 4467.) The teacher was struck by the tremendous loss of innocence. (43 RT 4468.)

In its closing rebuttal argument, the prosecutor again urged the jury to find McClain guilty to solve society's gang problems and to protect their own safety, arguing that the fear of gangs "is pervasive, it is invasive, it is wrong, it must stop and it must stop here in this courtroom now." (44 RT 4627.) Gangs, the prosecutor insisted, "feed off each other, they support each other, they encourage each other, they want to kill each other but they kill *your* children instead." (44 RT 4696 (emphasis added).) "These people have the juice to get you. . . . These people have the power and the connections to get you, to make you pay for lying on them." (44 RT 4698.) "You are the only thing between them and their next victims." (44 RT 4701.) "You are the only people now who stand between them and this. And by your verdict you will be sending a message . . ." (44 RT 4703.)

As McClain's trial counsel explained in guilt phase closing argument, the prosecution used these unconscionable arguments to urge the jury to find McClain guilty because of his gang affiliation and his character:

> I think of the McCarthy era, when the question was posed to people, 'are you now or have you ever been a member of the Communist Party?'

> That's what's happening here. 'You are now and you have been a member of P-9; therefore, you have no constitutional rights. You are a gang member; we don't have to treat you like a human being.' A very dangerous thought, ladies and gentlemen. It's a thought that will allow you to convict innocent people. It's a thought that will allow the police to run . . . roughshod over people's rights.

(43 RT 4489.) As counsel cautioned the jury, "Mr. McClain told you he sells drugs, but he is not on trial for being a drug dealer, and you can't use that fact against him." (43 RT 4521.) She reminded the jury, "You're not here to solve the gang problem." (43 RT 4542.)

Despite counsel's warning, the prosecution's tactics worked. As a result, McClain, was unfairly convicted and condemned to death for a crime he has steadfastly vowed he did not commit. As shown in this appeal, the evidence is insufficient to establish McClain's guilt of attempted murder, conspiracy to commit murder, and capital murder and the trial court should have excluded the unreliable identification of Gabriel Pina. Furthermore, the trial court's failure to hold a hearing on whether the prosecutor utilized peremptory challenges in a discriminatory manner, erroneous exclusion of a prospective juror, erroneous admission of McClain's prior gun possession arrest with severed codefendant Solomon Bowen, failure to sever the Price count from the Halloween count, failure to sever McClain from his codefendants, permission of pervasive prosecutorial misconduct, erroneous and extensive admission of improper gang evidence and evidence of threats, instructional errors, and other errors enumerated below require reversal of McClain's convictions and sentence of death. This Court should reverse the judgment below to correct this miscarriage of justice.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code §1239.)[2] The appeal is taken from a judgment which finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On March 15, 1994, the Los Angeles County Grand Jury indicted McClain and codefendants Karl Holmes, Lorenzo Newborn, Solomon Bowen, and Aurelius Bailey for the following offenses:[3]

Count I alleged that on October 31, 1993, defendants wilfully murdered Stephen Coats in violation of section 187(a); that the offense was a serious felony within the meaning of section 1192.7(c)(1); that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a)(1); and that the murder was intentionally committed while lying in wait within the meaning of section 190.2(a)(15). (3 CT 631-632.) Count I also alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (3 CT 632.)

Count II alleged that on October 31, 1993, defendants wilfully murdered Reggie Crawford in violation of section 187(a); that the offense was a serious felony within the meaning of section 1192.7(c)(1); that in the commission of the offense, a principal was armed with a handgun within

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[2] All statutory references are to the Penal Code unless otherwise indicated.

[3] At an unknown point in time, the prosecution struck the names of Aurelius Bailey and Solomon Bowen from the indictments. (3 CT 631-642.) Count IX applies to McClain only. (3 CT 640.)

the meaning of section 12022(a)(1); and that the murder was intentionally committed while lying in wait within the meaning of section 190.2(a)(15). (3 CT 633.) Count II also alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

Count III alleged that on October 31, 1993, defendants wilfully murdered Edgar Evans in violation of section 187(a); that the offense was a serious felony within the meaning of section 1192.7(c)(1); that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a)(1); and that the murder was intentionally committed while lying in wait within the meaning of section 190.2(a)(15). (3 CT 634.) Count III also alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

The indictment further alleged that Counts I, II, and III, together are a special circumstance (multiple murder) within the meaning of section 190.2(a)(3). (3 CT 634.)

Count IV alleged that on October 31, 1993, defendants wilfully attempted to murder Antwaun Ayers in violation of sections 664 and 187; that the offense was a serious felony within the meaning of section 1192.7(c)(1); and that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a). (3 CT 635.) Count IV alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section

12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

Count V alleged that on October 31, 1993, defendants wilfully attempted to murder Lawrence Ayers in violation of sections 664 and 187; that the offense was a serious felony within the meaning of section 1192.7(c)(1); and that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a). (3 CT 636.) Count V alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

Count VI alleged that on October 31, 1993, defendants wilfully attempted to murder Kenneth Coats in violation of sections 664 and 187; that the offense was a serious felony within the meaning of section 1192.7(c)(1); and that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a). (3 CT 637.) Count VI alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

Count VII alleged that on October 31, 1993, defendants wilfully attempted to murder Antone Prince in violation of sections 664 and 187; that the offense was a serious felony within the meaning of section 1192.7(c)(1); and that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a). (3 CT 638.) Count VII alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section

12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

Count VIII alleged that on October 31, 1993, defendants wilfully attempted to murder Lloyd Summerville in violation of sections 664 and 187; that the offense was a serious felony within the meaning of section 1192.7(c)(1); and that in the commission of the offense, a principal was armed with a handgun within the meaning of section 12022(a). (3 CT 639.) Count VIII alleged that codefendants Newborn, Bailey, and Holmes – but not McClain – personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8). (*Ibid.*)

Count IX applied to McClain only. (3 CT 640.) It alleged that on October 28, 1993, McClain attempted to murder Robert Price in violation of sections 664 and 187 and that the offense was a serious felony within the meaning of section 1192.7(c)(1). (*Ibid.*) Count IX also alleged that in the attempted commission of the offense, McClain personally used a handgun within the meaning of section 12022.5(a), which made the offense a serious felony under section 1192.7(c)(8) and that a principal was armed with a handgun within the meaning of section 12022(a)(1).

Count X alleged that McClain and his codefendants committed the crime of conspiracy to commit murder in violation of sections 182(a) and 187, during which a principal was armed with a handgun within the meaning of section 12022(a)(1). (3 CT 641.) The indictment alleged the following overt acts:

1. Defendants Newborn, Bailey, McClain, Bowen, and Holmes met at Huntington Memorial Hospital and discussed retaliating for the murder of Fernando Hodges. (3 CT 641.)

2. At Huntington Memorial Hospital, an unnamed coconspirator said in the presence of Newborn, Bailey, McClain, Bowen, and Holmes stated "let's go get the guns." (*Ibid.*)

3. At Huntington Memorial Hospital a decision was made among Newborn, Bailey, McClain, Bowen, and Holmes to target Crip gang members. (*Ibid.*)

4. At Pasadena Avenue and Blake Street, on October 31, 1993, unnamed coconspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip. (*Ibid.*)

5. On October 31, 1993 near 10:30 p.m., Newborn, Bailey, McClain, Bowen, and Holmes caravaned in four cars to the area near the intersection of Emerson Street and Wilson Street, and parked their cars in order to ambush numerous individuals whom they believed were Crips. (*Ibid.*)

6. At the time and place referred to in overt act #5, Newborn, Holmes, and Bailey left their cars and positioned themselves in the bushes near 569 Wilson Street to ambush the intended victims. (3 CT 642.)

7. On October 31, 1993, at or near 10:30 p.m., at or near 569 Wilson Street, Newborn, Holmes, and Bailey executed Stephen Coats, Reggie Crawford, and Edgar Evans; shot Antwaun Ayers, Lawrence Ayers, and Antone Prince, and shot at Lloyd Summerville and Kenneth Coats as Bowen and McClain waited in getaway cars parked on Emerson Street. (*Ibid.*)

On November 14, 1995, the prosecutor struck McClain's name from overt acts one and two because there was no evidence that McClain was at the hospital and the trial court struck overt act two from the indictment for

lack of evidence. (3 CT 641 6 CT 1609-1610; 32 RT 3333 41 RT 4310-4311.)

On July 17, 1995, the trial court granted the prosecution's motion to sever codefendants Bailey and Bowen. (4 CT 1124.)

The trial court granted McClain's motion that, for appellate purposes, all objections include federal and state grounds. (14 RT 1053.) The trial court also agreed that it "be deemed all counsel join in any objection, and what the court rules will apply to all defendants." (32 RT 3317.)

Jury selection in this case began on July 20, 1995. (9 RT 258.) The jury's guilt phase deliberations commenced on December 7, 1995. (6 CT 1461) . The jury returned guilty verdicts against codefendant Holmes on December 20, 1995. (6 CT 1476.) On December 22, 1995, after twelve days of deliberations, the jury returned guilty verdicts against McClain and codefendant Newborn. (6 CT 1479.) The jury found McClain guilty of all the murder and attempted murder charges, the multiple-murder and lying-in-wait special circumstances, and the conspiracy charge. (6 CT 1600-1610.) On every count except Count IX, the attempted murder of Robert Price, the jury found that McClain was not a principal armed with a handgun. (*Ibid.*) The jury found true only overt act 3, "That at Pasadena Avenue and Blake Street on October 31st, 1993, at about 9 o'clock p.m., Lorenzo Newborn, Solomon Bowen and unnamed co-conspirators fired numerous rounds from a 9-millimeter gun at or near the residence of an individual believed to be a Crip."[4] (6 CT 1695.)

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[4] This overt act was alleged in the original indictment as overt act 4. (3 CT 641.)

The penalty phase opening statements and evidence commenced on January 22, 1996. (7 CT 1829.) The jury began to deliberate on January 31, 1996. (7 CT 1853.) On February 8, 1996, the jury informed the trial court that it was unable to reach a penalty verdict. (7 CT 1861.) The trial court instructed the jury to continue its deliberations. (7 CT 1862.) On February 9, 1996, the jury announced it was unable to reach a unanimous verdict as to any of the defendants (7 CT 1863), and the trial court declared a mistrial. (7 CT 1888.)

On March 23, 1996, McClain's counsel requested a 60-day continuance to address her health problems. (7 CT 1918-1923.) The trial court denied the motion and relieved counsel of her duties in this case. (7 CT 1924.)

On March 28, 1996, Richard Leonard was appointed to represent McClain at his penalty retrial. (7 CT 1927.) On April 4, 1996, McClain filed a motion to substitute counsel *or* proceed in propria persona. (7 CT 1956-1968, emphasis added.) The trial court granted that motion on April 9, 1996. (7 CT 1981.)

Jury selection for the penalty retrial began on August 13, 1996. (8 CT 2085.) On October 22, 1996, jury deliberations commenced. (8 CT 2275.) The following day, the jury asked the trial court whether it could request testimony or evidence from the guilt phase, including any additional eyewitness testimony. (8 CT 2276.) The trial court denied this request. (8 CT 2277.) However, in June 1995, the trial court granted the prosecution's motion to first try Newborn, McClain and Holmes, with the trial of Bailey and Bowen to follow. (4 CT 999-1000.)

On October 23, 1996, McClain relinquished his pro per status, and the trial court appointed Richard Leonard as his counsel. (*Ibid.*)

On October 29, 1996, the jury reached a verdict as to one defendant. (8 CT 2281.) On October 30, 1996, the jury reached verdicts as to the other two defendants. (8 CT 2284.) On October 31, 1996, the jury announced its death verdicts against all three defendants. (8 CT 2290-2291.)

The trial court denied McClain's motions for new trial and sentence modification on January 27, 1997. (9 CT 2360-2368.) The same day, the trial court sentenced McClain to death. (*Ibid.*)

STATEMENT OF FACTS

A. GUILT PHASE

1. The Price Case

Robert Price, a convicted felon and Crip gang member, was shot at the Community Arms apartments in Pasadena the night of October 28, 1993. (14 RT 1161; 31 RT 3161-3162, 3172-3174, 3216.) At trial, Price identified McClain as the person who shot him. (31 RT 3161.) McClain associated with a Blood gang known as the "P-9s." (37 RT 4070.) Blood and Crip gangs were rivals. (14 RT 1171, 1174; 31 RT 3172, 3186.)

Before the shooting, Price had been visiting his grandmother at the apartments. (31 RT 3162.) As Price left, McClain called him over to the side of the apartments and asked if Price had a cigarette.[6] (*Ibid.*) When Price gave McClain a cigarette, McClain said "thank you Blood," and shot him in the face with a .380 from a distance of two feet. (31 RT 3162-3163, 3168, 3172.) As Price ran away, McClain shot him twice in the buttocks. (31 RT 3162, 3166.) Price was taken to the hospital where he was treated

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[6] Price initially saw someone with McClain, but when Price went over to McClain, McClain was alone. (31 RT 3162-3163.) Price had told police that McClain was with Mahjdi Parrish when he was shot. (31 RT 3201.)

and where his blood alcohol level tested at .11%, which exceeded the legal limit for driving a car. (6 CT 1453; 38 RT 4130.)

Price's trial testimony differed from his prior statements about the shooting. Price told medical staff that a group of men drove by in an automobile and shot him, and he told a hospital social worker he was shot by a group of men in the neighborhood. (31 RT 3177; Defense Exhibit (hereafter "Def. Exh.") L.)[7]

When a Pasadena police detective visited Price in the hospital, Price did not say who shot him. (31 RT 3186, 3205.) The police detective later took a taped statement from Price (35 RT 3763), who was aware of the reward offered in the Halloween case. (31 RT 3205.) Price told the detective that McClain shot him. (31 RT 3186-3187.) According to this account, McClain asked Price for a light from his cigarette; Price gave McClain the light, and McClain said, "thank you Chief." (35 RT 3763-3764.)

At trial, Price admitted he had prior convictions for burglary, narcotics sales, receiving stolen property, and corporal injury to a cohabitant. (31 RT 3173.) He also acknowledged that he had received financial assistance from the police. (31 RT 3171.) Pasadena police gave him $100 to go to the hospital to determine whether the bullets lodged in his leg could be removed. (31 RT 3190-3191.) Price told the grand jury that the Pasadena police offered to give him $200 if he would make a statement to the grand jury. (31 RT 3188.) At trial, Price explained that the police gave him the $200 for medical reasons, specifically, for bandages, and not

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[7] At trial, Price insisted that these records were inaccurate. (31 RT 3177.)

for his testimony.[8] (31 RT 3187-3189.) In addition, police assured Price that his family would be relocated. (31 RT 3175.)

Shortly after the Halloween killings, Troy Welcome saw McClain in Tulare with a gun that could have been a nine millimeter or a .380, and McClain said he had "put in some work with the gun."[9] (28 RT 2951-2952.)

In his own defense, McClain testified that he, Ishmael Offut, and a person to whom McClain was selling drugs were present at the Community Arms when Price was shot. McClain testified that he did not shoot Price (37 RT 4038-4039), but rather, someone shot Price because Price owed that person money (37 RT 4063).

2. The Halloween Case

a. The shootings

On October 31, 1993, some time before 10:37 p.m., gunfire erupted on Wilson Street between Villa and Emerson in Pasadena. (15 RT 1300-1301; 16 RT 1471-1472, 1493-1495; 18 RT 1759-1760, 1764, 1772-1773; 19 RT 1902-1904, 1906, 1982-1984; 20 RT 2014-2015, 2043-2044; 22 RT 2178, 2231-2232; 25 RT 2630-2631, 2658-2659; 29 RT 3073-3074; 31 RT 3243, 3251.) Edgar Evans, Reggie Crawford, Stephen Coats, Kenny Coats, Robert Nolden, Antwaun Ayers, Lawrence Ayers, Kenneth Coats, Mickey Polk, Lloyd Summerville, and Derieus Halliburton were in the area on their

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[8] When counsel for McClain asked Price whether he still needed bandages when he testified before the grand jury months after the shooting, Price answered, "I needed the money period. You know what I'm saying?" (31 RT 3188.)

[9] The prosecution never alleged that McClain shot anyone during the Halloween incident.

way home from a birthday party held earlier that night at the home of Stephanie Robinson. (15 RT 1236-1238, 1240-1242, 1290-1291; 16 RT 1462; 18 RT 1754; 19 RT 1977; 66 RT 6431.)[10] [11] Evans, Crawford, and Stephen Coats received and died from gunshot wounds. (20 RT 2049-2051, 2118-2123; 23 RT 2361-2367; 27 RT 2881-2895; 28 RT 2900-2901.) Antwaun Ayers, Lawrence Ayers, and Prince were wounded. (15 RT 1303, 1321-1322; 18 RT 1792-1794; 22 RT 2190, 2193, 2215-2216.)

After the boys left the party, but before they arrived at the crime scene, they stopped at George's Market at Villa and Wilson. (15 RT 1291.) At George's Market, some cars passed the boys, one of which came very close to Reggie Crawford.[12] (15 RT 1292-1293; 16 RT 1465; 18 RT 1756; 31 RT 3231, 3233, 3236.) One or more of the people in the cars may have exchanged words, expressions, and/or gestures with Crawford. (15 RT 1292-1294; 16 RT 1465; 18 RT 1756; 19 RT 1979-1980; 20 RT 2023; 31 RT 3231-3233, 3236, 3240-3241, 3261.)

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[10] At trial, Lloyd Summerville did not recall that someone at the party was "strapped," i.e., carried a gun, despite the contents of the report of his interview with police. (15 RT 1330-1333.)

[11] Reggie Crawford had or wore a black bandana. (15 RT 1300, 1306; 16 RT 1466, 1475; 18 RT 1757; 31 RT 3237; 67 RT 6523.) Antwaun Ayers wore a blue bandana. (15 RT 1300; 16 RT 1466, 1475; 67 RT 6523, 6538.) Colored bandanas are significant in Pasadena gang culture. (32 RT 3299-3300.)

[12] Witnesses provided varying descriptions of the number, description, and occupants of cars that passed the boys while they were at George's Market. (15 RT 1292-1294, 1296-1297, 1310-1311, 1325-1326; 16 RT 1465; 18 RT 1756; 19 RT 1979-1980, 1994-1995, 1996-1997; 20 RT 2012-2014, 2023; 31 RT 3231, 3233-3235, 3237-3240.)

After the boys left George's Market, Polk, Nolden, and Halliburton split off from the group.[13] (15 RT 1298; 16 RT 1469; 19 RT 1982-1983; 20 RT 2014; 31 RT 3243.) Kenny and Stephen Coats, Antwaun and Lawrence Ayers, Reggie Crawford, Eddie Evans, Antone Prince, and Lloyd Summerville walked toward the Coats' home. (31 RT 3240-3241, 3243.) As they walked towards the Coats' home, some of the boys were singing a rap song called "Gangsta Lean," whose lyrics are about dead homies. (31 RT 3243, 3261.)

As they continued towards the Coats' home, the group that included the victims saw Deborah Bush-Coats, mother of Stephen and Kenney Coats, driving home with her daughter Stephanie. (31 RT 3243-3244.) Kenny and Stephen went to the car where their mother told them to come home and offered them a ride. (15 RT 1298; 16 RT 1468, 1490; 18 RT 1758; 31 RT 3244-3246.) They declined the ride and continued to walk toward their house. (16 RT 1491; 31 RT 3245.)

Moments later, Kenny Coats heard someone say, "now Blood." (31 RT 3243, 3248-3249.) Witnesses heard gunshots and saw muzzle flashes and sparks.[14] (15 RT 1300-1301; 16 RT 1471-1472, 1493-1495; 18 RT

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[13] One witness believed that Kenny Coats went with Polk, Halliburton, and Nolden. (18 RT 1758.)

[14] Witnesses testified that they saw a variety of cars and people in the area before and after they heard or saw gunfire; these witness accounts were inconsistent with each other and with the witnesses' prior testimony and statements. (16 RT 1487-1488; 18 RT 1762-1763, 1775-1784, 1795, 1798; 19 RT 1905, 1910-1911, 1913-1914, 1917; 20 RT 2001-2006; 22 RT 2181-2188, 2190, 2195-2197, 2199-2202, 2219-2241, 2245-2246, 2248-2257, 2259-2260, 2262-2263, 2265; 23 RT 2286-2289, 2294; 25 RT 2631-2634, 2637-2680; 26 RT 2696-2705, 2709-2791; 29 RT 3074-3076; 31 RT 3264-3266; 35 RT 3743-3761, 3794-3797; 36 RT 3884-3898, 3901-3953; 39 RT

1759-1760, 1764, 1772-1773; 19 RT 1902-1904, 1906, 1982-1984; 20 RT 2014-2015; 22 RT 2178, 2231-2232; 25 RT 2630-2631, 2658-2659; 29 RT 3073-3074; 31 RT 3243, 3251.)

b. The earlier Hodges killing

Earlier that evening, some time before 7:20 p.m., Fernando Hodges, a P-9 Blood gang member, was shot at the Community Arms apartments in Pasadena, California. (14 RT 1138-1139, 1161.) He died later that night at Huntington Memorial Hospital. (14 RT 1141-1145, 1151.) Police suspected that members of Raymond Avenue Crips, a rival gang, were responsible for Hodges's death. (14 RT 1160; 66 RT 6442-6445.)

After Hodges was brought to Huntington Memorial Hospital, a group of people gathered there, primarily in the parking lot. (15 RT 1193-1194.) Holmes, Newborn, and Bowen were at the hospital. (19 RT 1838-1839; 32 RT 3386, 3388, 3410-3412.) Shawntia Blaylock, who testified that she saw numerous people at Huntington Memorial Hospital on Halloween 1993, never saw McClain there that night. (32 RT 3366-3371, 3386-3412.) Latoya Carr and Marie Bonner provided similar testimony. (33 RT 3597-3598, 3641.) The prosecutor conceded to both the trial court and the jury that there was no evidence placing McClain at the hospital.[14] (41 RT 4310; 44 RT 4629.)

4153-4191.)

[14] Because he could not prove that McClain was at the hospital, the prosecutor asked the trial court to delete McClain's name from overt acts 1 and 2. McClain's name was ultimately striken from overt acts one and two. (6 CT 1609-1610.) The trial court struck also overt act two from the indictment for lack of evidence. (3 CT 641; 32 RT 3333.)

Pasadena police officer Luis Banuelos testified that thirteen months before the Halloween killings, McClain and severed codefendant Bowen were arrested together for possession of weapons. (23 RT 2295-2301.) Without this evidence, the prosecution explained, it would be difficult to show that McClain knew the other defendants. (22 RT 2164-2166.)

c. Informant Evidence

i. Mario Stevens

At trial, Mario Stevens, a convicted felon and Pasadena Denver Lanes or "PDL" gang member, initially testified that he spoke with McClain for about two hours at King Manor in Pasadena on November 1, 1993.[15] (25 RT 2543, 2555, 2572.) King Manor is a PDL hangout (25 RT 2572), and PDL is a rival of P-9 (25 RT 2547). During that conversation, McClain told Stevens that he and his "homeys" had "put in some work" down on Wilson Street. (25 RT 2571.) McClain also told Stevens that he believed that Crip gang member Felton Leagons had killed Hodges.[16] (25 RT 2623.)

Stevens's testimony at trial differed from his earlier statements. In December 1993, Stevens told Detectives Robert Uribe and Micahel Korpal that, the day after the Halloween killings, he did not speak with McClain,

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[15] Other people were at King Manor during this conversation, but Stevens does not know any of their names. (25 RT 2588.) Stevens and McClain also talked about a girl for 15 or 20 minutes. (25 RT 2588.) Stevens did not remember what they spoke about during the remaining hour and 45 minutes. (*Ibid.*)

[16] Stevens appears to have made this statement for the first time at trial. (25 RT 2623.) At the lunch break, during the day of Stevens's testimony, the prosecutor asked Stevens why he never told police about Hodges being killed by Leagons. (25 RT 2626.) Stevens testified that he did tell the detectives about this. (*Ibid.*)

but rather he overheard a conversation involving someone else. (25 RT 2570, 2622.)

At trial, Stevens's testimony also was inconsistent. (25 RT 2540.) He initially testified that he told detectives while riding with them to Tulare that McClain used the words "put in some work." (25 RT 2571.) After this testimony, Stevens spoke with detectives Korpal and Uribe during the lunch recess, and in the afternoon, Stevens testified that he did not recall whether he mentioned that McClain used the words "put in some work" during the trip with the detectives to Tulare. (25 RT 2623-2625.)

At the grand jury, Stevens testified that McClain said the people he shot were wearing Halloween costumes. (25 RT 2568.) However, at trial, Stevens did not recall telling police, in the December interview, that Stevens said to McClain, "How can you think those was Crips and they had on Halloween costumes?" (25 RT 2570.)

At trial, Stevens also could not remember his statement to police that McClain was smoking PCP the night of the homicides. (25 RT 2604.)

Stevens acknowledged that members of P-9 were blamed for the 1989 death of his close friend. (25 RT 2583.) Although Stevens had conflict with other P-9 members, he denied having any trouble with McClain. (25 RT 2573.) Stevens also denied being part of "Dog Family," a set of PDL members who did not get along with P-9. (25 RT 2600.)

At trial, Stevens admitted three felony convictions, including a robbery and two narcotics cases. (25 RT 2560.) In exchange for his grand jury testimony, one of Stevens's drug sentences was reduced by one year. (25 RT 2548-2549.) After his release, Stevens violated probation and returned to prison. (25 RT 2549.)

Detective Korpal told Stevens that a reward had been established in this case and that Stevens could receive substantial money in exchange for his truthful testimony at trial. (25 RT 2562.) Stevens denied that, on October 31, 1995, at 10:00 a.m., he demanded a contract for money in exchange for his testimony. (25 RT 2603; Def. Exh. G.) In exchange for his guilt phase testimony relocation, Stevens expected help obtaining a job, living expenses, reward money, and help getting into a halfway house upon his release from prison. (25 RT 2549-2550.)

ii. James Carpenter

At trial, Carpenter denied that he ever implicated appellant McClain.[18] (23 RT 2307.) When Detectives Uribe and Korpal spoke with Carpenter in the Tulare jail, Carpenter claimed he did not know anything, although the detective insisted that Carpenter in fact had information. (23 RT 2313.) At trial, Carpenter denied or did not recall the specific statements that police attributed to him. (23 RT 2307-2309, 2314.) Carpenter testified that the detectives told him that if he did not tell them what they wanted to hear, he would go to jail for drug dealing. (23 RT 2322.) Carpenter told the police that McClain did not did not talk to him about the crime, however detectives continued to pressure Carpenter and insist that he knew something. (23 RT 2330-2331.)

Carpenter was interviewed by detectives Uribe and Korpal on December 18, 1995, while he was in custody on a no-bail warrant for a

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[18] Carpenter testified that his mother and appellant McClain's father are twins. (23 RT 2316.) McClain's father, Herbert McClain, Sr., testified that he had no twin sister and no relatives in Tulare. (38 RT 4089-4090.) Nevertheless, Korpal testified that, given Carpenter's "family pedigree," would not have taken kindly to police removing him from county jail to speak with them. (39 RT 4198.)

probation violation. (23 RT 2321, 2333; 31 RT 3277; 39 RT 4197; see also 23 RT 2333-2342, 2357-2360; 31 RT 3277-3284, 3286-3294; 32 RT 3301-3309; 39 RT 4140-4141, 4167, 4170-4180, 4193-4199.) According to detectives, when asked about the Halloween murders, Carpenter said that Laward Looney, Alonzo Hamilton, and McClain were at Carpenter's house in Tulare after the Halloween murders. (23 RT 2335; 31 RT 3278.) Looney and Hamilton were laughing about a massacre and McClain offered, "Boom boom, pow pow, I can still hear the noise." (23 RT 2335; 31 RT 3278.) McClain told Carpenter he shot three Crips in retaliation for the death of Fernando Hodges. (23 RT 2335; 31 RT 3279.) When McClain heard that the victims were children, he became nervous and cut his hair short. (23 RT 2336; 31 RT 3280.) Carpenter told the detectives that McClain sold a .38 handgun to Carpenter's cousin, Michael Thompson. (23 RT 2339; 31 RT 3281.)[19]

Two or three months after Korpal and Uribe interviewed Carpenter in the Tulare County Jail, Michael Thompson told Carpenter that Korpal had come by Carpenter's house when Carpenter was asleep. (23 RT 2317, 2320.) Korpal told Thompson to tell Carpenter he would pay Carpenter $500.00 to testify and left his pager number. (23 RT 2317.) Carpenter paged Korpal who asked Carpenter if he wanted to make some money.

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[19] Uribe and Korpal did not tape record their interview of Carpenter. (23 RT 2340; 31 RT 3283; 39 RT 4175-4176.) Uribe tape recorded his interviews of all other witnesses. (23 RT 2340.) Uribe took notes of the Carpenter interview. (39 RT 4140.) Korpal prepared a typewritten report based on his recollections of the interview. (39 RT 4171.) There is no mention of McClain saying "Boom boom, pow pow, I can still hear the noise," in the police reports. (39 RT 4172-4173.)

(*Ibid.*) Carpenter told Korpal to contact his lawyer and threw away Korpal's pager number. (*Ibid.*)

iii. Troy Welcome

Troy Welcome, who at the time of his testimony was civilly committed for drug treatment to the California Department of Corrections, saw McClain in Tulare within days after the Halloween killings.[20] (28 RT 2949, 2965, 2973.) When Welcome saw McClain, Welcome was concerned about his own safety, because he and McClain were in "opposing cliques" and had problems in the past.[21] (28 RT 2950.)

When Welcome first saw him in Tulare, McClain either was with James Carpenter and a woman or was walking alone out of an apartment in

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[20] On November 29, 1993, Troy Welcome provided Detectives Korpal and Mowery with a tape-recorded statement which did not include all the information to which he testified at trial. (28 RT 2963.) During that interview, Korpal stated that if he had the chance, he would kill McClain. (29 RT 3012-3013.)

During the same interview, Mowery indicated that he was going to release Welcome, Michael Bullock, and John Davis on the same day. (29 RT 3001.) Mowery also said that it would look funny if Welcome, Bullock, and Davis left together because "it's like a A.D.A. reject on this case." (29 RT 2999-3000.) On another day, before Welcome agreed to "do some work" for the Pasadena Police Department, Welcome again spoke with Detective Mowery on tape (29 RT 3000), but at trial, Mowery was unable to find this. (29 RT 3065).

[21] At trial Welcome testified that if he told police that he did not get along with any P-9 members, he was mistaken. (28 RT 2986.) According to the tape of the November 29 police interview, Welcome told Mowery and Korpal, "I don't have a subconscious about telling you guys anything because these motherfuckers are taking over and that's – that's real. And they'll smoke me if they could." (29 RT 3014.)

Tulare.[22] (28 RT 2949-2950; 29 RT 3026.) McClain got into a Lincoln with Welcome and David Morris, who was driving the car. (28 RT 2947-2950.) McClain asked Morris whether he had heard anything on the radio about Halloween. (28 RT 2959.) Morris said he heard the weather was bad. (*Ibid.*)

While in the car, an Ice Cube song with the lyrics "1, 2, 3, I'm a killer as in G, I'm a gorilla" played on the radio." (28 RT 2952-2953.) McClain pulled either a .380 or a 9mm from his waist area and put it in his lap. (28 RT 2951.) McClain said he "put in work" with the gun. (28 RT 2952-2953.) To Welcome, "put in work" meant kill or shoot. (*Ibid.*)

Later that same week, McClain, Laward Looney, Alonzo Hamilton, James Carpenter, David Morris, and Welcome were at the park smoking weed. (28 RT 2954, 2959-2960.) McClain seemed aggravated or agitated, but McClain was always serious, uptight and impatient. (28 RT 2961.) While at the park, McClain again asked about radio broadcasts, although Welcome was not certain that he used the word "Halloween." (28 RT 2959, 2961.) McClain also sang the Ice Cube song that had been playing in the car when Welcome first saw McClain. (28 RT 2954.)

After Welcome was civilly committed for drug treatment, an investigator for McClain visited him. (28 RT 2965, 2973.) The investigator told Welcome that each defendant in the Halloween case had a copy of Welcome's taped statement to police. (28 RT 2965-2966.) Welcome gave the investigator a written statement saying that he had no information, because Welcome felt he had to protect himself. (28 RT 2968-

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[22] According to Troy Welcome, James Carpenter was a drug dealer and that he saw James Carpenter with the same gun he had seen McClain carrying. (29 RT 3017, 3029.)

2969.) The investigator did not tell Welcome that McClain's counsel asked him to visit Welcome to ask what he knew about the Halloween case. (28 RT 2974.)

Welcome's trial testimony differed greatly from his earlier statements to police. During the November 29, 1993, police interview, Welcome did not tell police that he saw McClain with a gun in the car. (29 RT 3009.) Rather, during the interview, he told police he did not know what kind of gun McClain was walking around with. (*Ibid.*) Welcome also told police that the victims were active gangbangers, two of whom had had confrontations with Bloods; at trial he testified he did not recall this statement. (28 RT 2976; see also, section e.iv., *post*, at p. 38.)

At trial, Welcome denied that he heard about the reward in this case on the way to Tulare and did not remember what he told police during that ride. (28 RT 2979-2980.) In contrast, Welcome told police in his recorded statement that he heard about the $250,000 reward in the car on the way to Tulare. (28 RT 2978-2979.)

Although police apprehended Welcome with a .380, at trial he denied that he was in custody for possession of the .380 when he spoke to police on November 29. (28 RT 2975.) At trial, Welcome did not recall police telling him that his name had come up as a suspect in a murder on El Molino. (28 RT 2982.)

At trial Welcome denied that he agreed to speak to police in exchange for being released from custody. (*Ibid.*) He did not remember Korpal telling him that the other detective would decide whether Welcome could leave. (28 RT 2980.) Welcome also did recall asking police if they would let him go. (28 RT 2983.)

Welcome did ask prosecutors to ensure that he not be returned to state prison to serve the remaining 26 days of his civil commitment. (28 RT 2971.) Prosecutor Callahan told him she would see what they could do. (28 RT 2972.)

iv. Derrick Tate

In December 1993, Derrick Tate, a convicted felon, lived out of state and was in Pasadena visiting his relative, Terranius Pitts. (15 RT 1348.) Holmes and four or five other men were on Claremont in Pasadena with Pitts and Tate. (15 RT 1349, 1352.) There, a conversation took place in which Holmes, who was wearing a hat that said "P-9," bragged that on Halloween, he jumped out of the bushes, said "trick or treat," and did a killing to retaliate for the death of his friend Fernando Hodges. (15 RT 1353-1354; 16 RT 1409, 1411.) Holmes also referred to himself as a gangster, a "Rider" and a killer. (15 RT 1350, 1352.) There were others with Holmes on Halloween, but he only mentioned two by name to Tate. (15 RT 1352.) One of them was Ernest Holly or "E-Dog." (16 RT 1426.)

Police interviewed Tate at the police station on January 5, 1994, and on January 20, 1994.[23] (15 RT 1343; Def. Exh. B.) Tate also spoke with police more than once while in custody at the county jail. (16 RT 1415-1416.)

During the January 5 interview, Tate identified in a photo lineup Holmes and someone else. (16 RT 1414-1415.) Tate did not identify the second person because he mistook him for Holmes, but for some other reason. (*Ibid.*) Holly's photograph was not included in the lineup; a police

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[23] At the time of his first discussion with police about this case, Tate was in the Pasadena jail for a joyriding arrest. (15 RT 1355.)

detective showed Tate an individual photograph of Holly. (16 RT 1453-1454.)

Tate also identified McClain in a photo lineup. (16 RT 1425; People's Exhibit (hereafter "Peo. Exh.") 17-B.) Tate, in Pitts's presence, had met McClain. (16 RT 1424-1427, 1429-1430.) During that meeting, McClain identified himself as "Darryl" and explained that he was thinking of turning himself in because he was afraid and tired of running. (16 RT 1425-1426, 1429-1430.) McClain also talked about going back east with Tate. (16 RT 1430.)

According to Tate, Holmes did not say that McClain was involved in these shootings. (16 RT 1430-1431.) Rather, Holmes told Tate that McClain was not involved in this case. (16 RT 1425.) Tate testified that he did not tell police that McClain was involved in these shootings. (*Ibid.*)

Tapes of police interviews indicate that Tate told police both that Holmes said he and Herb [McClain] did the crime, and that Holmes told him McClain was not involved in the crime. (16 RT 1429-1431, 1434, 1440; Def. Exh. B.)

In a telephone conversation, Tate told counsel for Holmes that everything he had told the police was a lie. (16 RT 1383.) However, at trial Tate testified that this was not true; Tate made the false statement because his girlfriend was sitting nearby while he was talking and because he was

afraid that what happened to the kids in this case would happen to him.[24] (*Ibid.*)

Tate has been convicted outside of California for forgery, unlawful restraint, and twice for aggravated battery on a police officer, all felonies. (15 RT 1359-1360, 1366.) He was also convicted of first degree theft, a misdemeanor. (15 RT 1366.)

On January 5, 1994, the first time Tate spoke with Detective Korpal, Tate was facing an unlawful restraint charge. (15 RT 1360, 1365-1368.) Initially, Tate provided information about this case because he hoped Korpal could get him out of that case, but Korpal did not do anything for him. (15 RT 1355, 1360; 16 RT 1378-1379.) In addition, Tate potentially could face a second charge, jumping bail, which he knew was serious because he previously had been convicted of the offense in Illinois. (16 RT 1379-1380.) Although Korpal could not help him, Tate decided to testify because of the kids who were killed. (15 RT 1360.) Tate had cousins who were the same age as the kids who were shot. (16 RT 1410.)

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[24] Holmes's counsel cross-examined Tate further about inconsistencies between his testimony and his statements to Holmes's counsel and investigator. (16 RT 1383-1389, 1417-1420.) Tate testified that he did not recall some of the contents of those statements and explained that he made misstatements to Holmes's counsel and investigator because he feared that if he implicated Holmes, his life would be in danger. (16 RT 1381-1389, 1392-1400, 1416-1419.)

During cross-examination, Tate identified a woman in the courtroom as the girlfriend of Pitts. (16 RT 1395.) Tate said her presence in court made him uncomfortable and that he could answer counsels' questions more fully were she removed; the trial court then had her excluded from the courtroom. (16 RT 1396.)

Tate testified alternately that he would or would not have done anything to get out of the unlawful restraint charge. (16 RT 1380.) He would not lie to get out of it. (*Ibid.*)

At trial, Tate did not initially recall that he had discussed with Korpal the reward in this case and maintained that he did not expect to receive any of it. (15 RT 1360; 16 RT 1420.) However, on cross-examination by counsel for Holmes, Tate acknowledged that during the January 5 taped interview with police, he was aware of a $40,000 reward in this case and that he discussed with police the possibility that he could get some or all of it. (16 RT 1419-1420.) Tate had seen a poster about the reward when he first came to California. (15 RT 1360.) Tate knew about the award before he was arrested, but learned the amount after he gave his statement to police. (16RT 1420.)

Tate arrived in California about a week before he testified. (15 RT 1361.) He was provided with lodging and food, for which he did not pay; his girlfriend was moved to a hotel; and he and received about $300 for this case. (15 RT 1361; 16 RT 1419, 1423.)

d. Eyewitness Evidence

i. Gabriel Pina

(a) Trial testimony

Gabriel Pina identified McClain as a person he saw driving a car near the crime scene.[25] (25 RT 2654.) On Halloween 1993, Pina and his girlfriend, Lilian Gonzales, were walking with his dog north on Mentor between Emerson and Orange Grove when four cars turned onto Mentor

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[25] Pina testified before the grand jury, at guilt phase, and at the second penalty phase in this case. (2 CT 429-467; 25 RT 2635-2681; 26 RT 2682-2791; 67 RT 6604-6645; 71 RT 7063-7135.) See Claim II.

and passed Pina and Gonzales at a speed of about 45-50 miles per hour. (25 RT 2636, 2637-2640; 67 RT 6608, 6631; 71 RT 7064.) The cars turned right onto Orange Grove. (25 RT 2643.) Pina and Gonzales also turned right and east on Orange Grove, then right and south on Catalina. (25 RT 2643-2647.) Pina saw approximately four cars parked on Catalina (25 RT 2644-2645) and approximately 10 to 15 men standing near the cars (25 RT 2654). Pina and Gonzales turned the corner onto Emerson. (25 RT 2659.) Two of the cars on Catalina moved onto Emerson in reverse. (25 RT 2656-2658.) After these cars left, as Pina was turning the corner from Catalina to go west on Emerson, Pina heard gunshots. (25 RT 2658.)

Pina saw the driver of the lead car from a distance of approximately 15 or 16 feet. (25 RT 2648, 2675; Peo. Exh. 43.) Pina was directly across from, and a bit north of, the car, which was in the middle of the street underneath a streetlight. (25 RT 2649, 2675.) The car's windows were very darkly tinted, so its occupants could only be seen through the front windshield. (25 RT 2647.) The driver leaned forward over the steering wheel and turned his head toward Pina.[26] (25 RT 2647-2648, 2674-2675.) The driver "had his hair cut – in the front of his head he was losing hair. ¶ It was combed back." (25 RT 2649.) After the cars left, as Pina was turning the corner from Catalina to go west on Emerson, Pina heard gunshots. (25 RT 2658.)

In court, Pina did not initially recognize the person he saw driving the lead car. (25 RT 2649.) However, after the prosecutor spoke with Pina during a recess, Pina testified that McClain looked familiar to him. (25 RT

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[26] Both at the grand jury and at trial, Pina acknowledged "as he was passing me, I did see him but not paid attention too much. [sic]" (26 RT 2730; 71 RT 7084-7085, 7106.)

2666-2667.) McClain looked different at trial than he looked on Halloween night and in the photograph Pina originally identified. (25 RT 2668.) Before the recess, McClain caught Pina's attention, but Pina could not identify him due to the orientation of McClain's face towards Pina. (25 RT 2669.) Pina needed to see more of him. (*Ibid.*) When McClain stood up to leave the courtroom, he turned sideways showing Pina his profile, which helped Pina made the identification. (26 RT 2714.) McClain could have been the person who drove the lead car, but Pina needed to see more of him. (25 RT 2669.)

Pina also identified a photograph of McClain (Peo. Exh. 17B) as the driver of the lead car, which he had selected from a photo spread at the police station in December 1993, and another photograph of McClain (Peo. Exh. 20-E). (25 RT 2653-2654.) Pina spoke with law enforcement and the district attorney about 13 or 14 times before he testified at McClain's guilt phase, but refused to speak with members of McClain's defense team. (26 RT 2695.)

(b) Statements to police and grand jury testimony

Pina's statements to police and his grand jury testimony were inconsistent with his trial testimony and with each other. A couple of hours after the shootings, police detectives spoke with Pina first at his home and then at the police station. (26 RT 2690-2691.) Detective Ireland asked Pina whether he would recognize any of these people if he saw them again. (35 RT 3747.) Pina responded that he had not been paying attention. (26 RT 2713, 2761; 35 RT 3747.) In addition, when Pina made these observations, he was concerned about his safety. (26 RT 2693.)

On November 4, 1993, Pina again went to the police station where Detectives Korpal and Uribe showed him photographs of cars. (36 RT 3901.) He did not identify any of the cars in the photos as the cars he saw the night of the homicides. (26 RT 2711-2712, 2751; 36 RT 3901-3902.) Pina's descriptions of the cars on Catalina and Emerson, including the car he believed McClain was driving, differed as to year, make and color in his statements to police, his grand jury testimony, and his trial testimony. (25 RT 2641, 2646-2647; 26 RT 2710-2712, 2722-2729, 2732-2736, 2738, 2740-2753; 35 RT 3746, 3752-3753, 3761; 36 RT 3885, 3894, 3902-3904, 3920-3921; 67 RT 6607, 6631-6633, 6638-6640; 71 RT 7065-7084, 7092-7093, 7139, 7163, 7168.) Similarly, Pina's estimate of the number of men standing near the cars varied from four in his taped police statement to 15 or 20 in his guilt phase and penalty phase testimony. (26 RT 2705; 67 RT 6614, 6633.)

On December 24, 1993, Pina momentarily saw a photo on television that he recognized as the person who drove the "lead car." (25 RT 2650, 2652; 26 RT 2718, 2783.) Although Pina did not see McClain's photograph on television long enough to recognize him 100 percent, he called the police and said, "I can identify at least one person because I have seen him on television."[27] (26 RT 2791; 71 RT 7096.)

At the police station, Uribe showed Pina two photo spreads, but Pina never attended a live lineup. (25 RT 2653-2655; 36 RT 3909.) When Pina

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[27] There was an inconsistency between Pina and Detective Uribe as to whether Pina saw the photographs in the newspaper or on television. Uribe believed Pina had seen the photographs in the newspaper, however Pina denied having seen them in the newspaper and denied receiving or reading any newspapers. (25 RT 2663; 26 RT 2718-2721, 2754-2755; 36 RT 3907-3908; 39 RT 4164-4167.)

saw a photograph of McClain in the photo spreads, Pina told Uribe or Korpal that he thought McClain was the driver of the lead car, but he was not really sure. (26 RT 2697, 2782-2783; 39 RT 4159; 71 RT 7098, 7149.) Pina told police he needed to see another view of the man in the photograph and wanted to see him looking down; however no police report memorialized this request.[28] (26 RT 2697, 2699, 2715-2716; 36 RT 3953.) Korpal then showed Pina photographs out of a newspaper to give Pina another view. (26 RT 2757-2759; 36 RT 3911-3912; 39 RT 4160; 71 RT 7144-7145, 7153.) Pina told the grand jury that when the detective showed him the photograph of McClain from a newspaper, "There were others next to it but I didn't really pay attention." (26 RT 2760-2761; 71 RT 7105.)

In contrast to Pina's trial testimony that the driver of the lead car had his hair cut and combed back and was losing hair in front (25 RT 2649), Pina told police that the driver of the first car had jheri curl, shoulder-length hair (36 RT 3920). At the grand jury, Pina described the driver's hair as "stringy, kind of lengthy. Maybe up to his shoulders." (2 CT 434.) It was not a jheri curl; it was just straight and "kind of had that wet look, but I can't really tell at that time." (*Ibid.*) Moreover, although Pina at trial testified that the driver of the lead car leaned forward over the steering wheel, he did not mention this in his taped statement to police. (25 RT 2648; 26 RT 2730.)

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[28] In contrast, Pina testified at trial that he was only able to identify McClain in court after he saw his profile. (26 RT 2715.) Pina maintained that this was true, even though he claimed to have seen McClain looking straight at him through the car windshield. (71 RT 7123-7124.)

(c) Reward payment

Pina received about $4,500.00 in reward money for his testimony. (67 RT 6642; 71 RT 7097.) The $40,000.00 in reward money was announced in newspaper three days before Pina called police in December 1993 to say he could identify one or two of the suspects. (26 RT 2718-2720; 71 RT 7097.) Uribe never asked Pina why he waited so long to come forward. (71 RT 7155.)

ii. Lillian Gonzales

Lillian Gonzales was walking the dog with her boyfriend, Gabriel Pina, on Halloween 1993, when she saw a set of small, dark cars speeding up Mentor. (22 RT 2219-2221.)[29] One of the cars had a black passenger whose sex she could not determine. (22 RT 2222-2223.) Minutes later, she was walking on Catalina Street where she saw two cars, which she believed she had seen on Mentor, pull up to the curb on the east side of the street and honk; one of the people in the car called out to a number of African American men who were walking out of a driveway. (22 RT 2224-2226.) One of them was dressed in what looked like a white ghost costume. (22 RT 2229.) The driver got out and said, "Come on, let's go. Hurry up." (22 RT 2225.) Gonzales believed all the people in the driveway got into the cars. (22 RT 2228-2229.)

Seconds later, Gonzales heard gunshots. (22 RT 2232.) Four or five seconds after the gunfire stopped, Gonzales saw an African American man

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[29]Gonzales initially told police she saw four cars on Catalina, but testified at guilt phase that she only noticed two cars on Catalina. (22 RT 2249.) Gonzales believed, but was not positive that the cars she saw on Catalina were two of the four cars she had seen on Mentor. (*Ibid.*)

wearing a trench coat and carrying a gun get into a car that looked like a Nissan Sentra. (22 RT 2232-2234.)

There are numerous inconsistencies between Gonzales's descriptions of people, cars, their positions, and her own positions in her statements to police, grand jury testimony, and trial testimony. (22 RT 2240, 2245, 2249-2256, 2259-2260, 2265.)

In November 1993, Gonzales told police she did not see anybody after the shooting. (22 RT 2240.) At the grand jury, Gonzales recalled seeing two people after the shooting. (22 RT 2241.) At trial, Gonzales for the very first time testified about seeing a person with a gun and a trench coat. (22 RT 2266.)

iii. Kathy Pezdek

Defendant Holmes called Kathy Pezdek, a psychology professor, to speak generally about factors influencing the accuracy of eyewitness identifications. (34 RT 3648-3834.) She did not listen to tapes of interviews with Pina, attempt to learn whether any defendants made statements, determine whether any physical evidence corroborated the identifications in this case, visit the crime scene, or interview any witness in this case. (34 RT 3655, 3669-3674, 3677, 3684, 3694; 35 RT 3827.)

e. Evidence of Flight

i. Tonja Underwood

On November 7, 1993, Underwood flew from Ontario, California to Boston, Massachusetts via Dallas/Fort Worth. (23 RT 2268-2269.) She sat next to McClain who carried conspicuous wads of cash. (23 RT 2269-2270.) Underwood saw McClain's ticket; the first name on it was Robert and the last name started with an M. (23 RT 2271.) McClain told her that

was not his real name. (23 RT 2272.) His hair was short, but not shaved. (23 RT 2271.) He was starting to go bald on top. (23 RT 2283-2284.)

McClain told Underwood he would be in Memphis for about 30 days for business and was not sure whether he would return to Pasadena. (23 RT 2272.) He planned to rent a car to travel from Memphis to Kansas. (23 RT 2273-2274.) Although McClain was from Pasadena, he explained that he always flew out of Ontario because the police always stopped gang members at the airport in Los Angeles. (23 RT 2274.) He admitted to Underwood that he was a drug dealer. (23 RT 2282-2283.)

ii. James J. Thomas

After an event that occurred on September 14, 1993, McClain was obligated to report to Thomas every 30 days. (20 RT 2061-2063.) Thomas saw McClain on September 16, 1993, and again on October 25, 1993. (20 RT 2061-2064.) On November 5, 1993, McClain and Thomas spoke on the telephone; McClain indicated he would arrive at Thomas's office at noon, but failed to do so. (20 RT 2065-2067.) Thomas went to McClain's house a couple of times but did not find him there. (*Ibid.*) On November 16, Thomas and McClain again spoke on the phone; McClain said he would be at Thomas's office at noon the next day, but he failed to appear. (20 RT 2068.) Thomas never saw McClain again. (20 RT 2070.)

iii. Derrick Tate

At some point after the homicides, Tate met McClain, who identified himself as "Darryl" and explained that he was thinking of turning himself in because he was afraid and tired of running. (16 RT 1425-1426, 1429-1430.) McClain also talked about going back east with Tate. (16 RT 1430.)

According to Korpal, when Tate chose McClain's photograph from photo lineup, Tate observed that McClain no longer looked as he did in the photograph, because he had shaved off his hair and mustache. (16 RT 1436.)

iv. Troy Welcome

According to his trial testimony, when Welcome saw McClain in Tulare days after the Halloween killings, McClain's hair fell just above his shoulders. (28 RT 2949, 2962, 2965, 2973.) Later that week, McClain's hair had changed and was now cut close to the head. (28 RT 2962.) However, Welcome initially told police McClain had always worn his hair in a ponytail, but he "now" had it long and combed back without the ponytail. (29 RT 3008.)

At some point in Tulare, Welcome also saw McClain at the home of relatives of Carpenter. (28 RT 2955.) There, McClain told Welcome that he was on the run, but did not say why.[30] (28 RT 2958.) At trial, Welcome said he believed McClain was on the run from the Halloween killings. (29 RT 3004.) In contrast, during the November 29, 1993, police interview, Welcome told police he believed McClain was on the run both from the Robert Lee Price case and from a parole violation. (29 RT 3004.)

f. Physical Evidence

No physical evidence linked McClain to this case.

On November 3, 1993, Los Angeles County Deputy Medical Examiner Stephen Scholtz conducted an autopsy on Stephen Coats. (23 RT 2361.) Stephen received multiple gunshot wounds and died from a gunshot

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[30] Welcome told McClain that he too was on the run. (28 RT 2958.)

wound to the head. (23 RT 2361-2368.) Scholtz removed bullet fragments from Stephen's body. (23 RT 2364-2366.)

Los Angeles County Deputy Medical Examiner Ogbonna Chinwah did an autopsy on victim Edgar Evans. (20 RT 2118.) Chinwah concluded that Evans died from a gunshot wound to the chest. (20 RT 2121.)

James Ribe, a forensic pathologist with the Los Angeles County Medical Examiner, performed an autopsy on victim Edgar Evans. (27 RT 2881.) In Ribe's opinion, Evans, who suffered five gunshot wounds, died from a handgun wound to the chest. (27 RT 2883-2895.)

Pasadena Police evidence identification specialist Kevin Roon collected live .38 ammunition in front of the crime scene. (24 RT 2518.)

Los Angeles County Sheriff's Deputy and firearms examiner Dwight Van Horn examined live rounds, casings, bullet cores, and bullet fragments recovered from the crime scene and from the bodies of Stephen Coats and Reggie Crawford. (26 RT 2802-2830.) He determined that all of these could be or were fired from a .38, .357, or 9mm caliber weapon. (26 RT 2802-2818.)

DeSean Holmes, an informant, told Detective Korpal that a gray Ford Tempo had been used in the Halloween crimes. (31 RT 3276.) The Pasadena Police Department examined a gray Ford Tempo belonging to Enterprise Car Rentals in which they found fingerprints of prosecution witness DeSean Holmes. (28 RT 3154-3155.) None of the fingerprints in the car matched those of any defendant charged in this case. (31 RT 3145-3148.) On November 3, 1993, a Pasadena police officer stopped a silver Ford Tempo. (36 RT 3875.) The car was occupied by two people, neither of whom was a suspect in this case. (36 RT 3876.)

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g. Testimony of Herbert McClain

McClain testifed in his own defense. He did not commit the homicides or the attempted homicides with which he was charged. (36 RT 3963, 3973; 37 RT 4039-4040, 4052-4053.) He was not the driver of a vehicle that was present when the crimes were committed. (*Ibid.*) He had no information about the shooting before it happened and was not involved in it in any way. (36 RT 3974.) McClain would call the Halloween killings a massacre, "mainly because that shit was a tragedy, man." (36 RT 3976.) McClain was a P-9 Blood gang member, but he never has killed anyone. (36 RT 3984, 3991-3992.) McClain would not kill kids. (37 RT 4039, 4062, 4067-4069.)

McClain called police in November because his mother told him the police had been coming to the house and harassing her. (36 RT 3975.) He spoke with Officer Delgado. (*Ibid.*) Delgado asked McClain where he had been on Halloween, but the Halloween case did not come up. (*Ibid.*) McClain cannot remember whether he mentioned anything about the Halloween killings to Delgado. (36 RT 3976.) He assumed police were accusing him in the Price case. (36 RT 3977; 37 RT 4060-4061.) McClain first learned he was a suspect in the Halloween crimes around December. (36 RT 3974; 37 RT 4073-4075.) He thought police wanted to speak to him, but never imagined he would be arrested or tried for this case. (37 RT 4023.)

In January 1994, McClain voluntarily surrendered himself to police. (36 RT 3966-3967.) When McClain turned himself in, he told police he was not involved in this matter. (16 RT 1445; 36 RT 3967.) McClain was not completely truthful with police when he told them where he was the evening of these crimes. (36 RT 3968; 37 RT 4024, 4030-4032, 4039,

4042, 4051.) However, it is true that he was passing out candy at the home of his friend, Kathy Brown in Altadena. (36 RT 3969, 3973, 3977, 3979-3980; 37 RT 4021, 4026-4029, 4055-4056, 4058-4059.) He thought he was there until about midnight, but told police he could not be sure of the time. (36 RT 3968.) He went there late afternoon, before dark and left well after it became dark. (36 RT 3977, 3979-3980.) McClain was not sure where he went after he left Kathy Brown's house. (36 RT 3973, 3980.)

While at Brown's house, McClain got a page from Kim Smith, who lived at Community Arms. (36 RT 3977, 3987-3988.) When he returned her call, she was crying and said that some Crips had killed his homeboy, Fernando. (36 RT 3977, 3987-3989.) As a friend of Fernando's, McClain was upset by his death. (36 RT 3973.) McClain tried to call his homeboys to see what they were thinking or whether they had any leads, but he could not get anybody. (36 RT 3978, 3988-3989, 3991.) McClain then went to a few spots where his homeboys or Crips hang out, but did not find anybody. (36 RT 3978, 3980-3982, 3987, 3993.) He was angry and was thinking about retaliating, so he carried a .44. (36 RT 3990-3991.) McClain did not want his homeboys to help him kill Crips. (36 RT 3991.) Although he is a gang member, McClain prefers to do things by himself. (36 RT 3992.)

McClain was looking for O.G.s, not for kids.[31] (37 RT 4011-4012, 4054.) He found Rickey Lacey, the one O.G. whose name he knew. (37 RT 4012.) About two hours after McClain heard about Hodges's murder, he drove a Chevy Monte Carlo to Villa and Morengo, where he saw Ricky Lacey with whom he wanted to talk about Hodges. (36 RT 3978-3979.) McClain went into Lacey's apartment to try to get Lacey to go with him

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[31] O.G. is a commonly used abbreviation for "original gangster."

somewhere so he could kill him. (36 RT 3979, 3994; 37 RT 4071-4072.) An hour and a half or two hours later, McClain gave up on Lacey, because there were witnesses. (36 RT 3979, 3994, 3996-3998; 37 RT 4009.) The area was hot; there were police everywhere. (37 RT 4015.) When his plan to kill Lacey failed, McClain gave up on trying to retaliate. (37 RT 4013-4015.) McClain then "hit a few spots." (36 RT 3979-3982, 3993.)

McClain lied when he told Detective Delgado that he went to the Community Arms the night Hodges was killed, because he was trying to throw Deglado off and perhaps learn from him why the police were harassing his family. (37 RT 4006-4007.) At the time, McClain believed the only motive police had to look for him at his mother's place was in relation to the Price case. (37 RT 4007-4008.) McClain never told police he had gone to see Lacey because he did not know how to approach police with the fact that he was plotting some dirt. (37 RT 4022.)

McClain never told Mario Stevens that he and his homeboys had put in some work. (36 RT 3966.) McClain would not speak with Stevens. (36 RT 3967.) Kings Manor is a hangout for McClain's enemies, members of Pasadena Denver Lane, so he would not hang out there. (*Ibid.*)

McClain never has had any dealings with Troy Welcome. (36 RT 3972.) McClain never uttered the words, "Boom boom, pow pow." (36 RT 3973.)

Since about 1986, McClain wore his hair long with a processed chemical in it. (36 RT 3965, 3970.) Darrell Johnson and Ishmael Offutt also wore their hair long. (*Ibid.*) McClain cut his hair no more than a week after the Halloween killings. (36 RT 3999.) On October 30, McClain was arrested for the Price incident. (*Ibid.*) They let him go and told him not to

leave town. (*Ibid.*) McClain stomped out and cut his hair. (36 RT 3999; 37 RT 4050, 4057-4059.)

McClain went to Tulare frequently to sell dope and because he had two or three girlfriends there; he also went there shortly after Halloween 1993. (36 RT 3964; 37 RT 4032-4038, 4078.) In addition, he often traveled to Kansas City to sell drugs and was on his way there when he met Tonja Underwood on the airplane. (36 RT 3965-3966; 37 RT 4079.) McClain did see Carpenter in Tulare after Halloween 1993. (36 RT 3963-3964; 37 RT 4037.) However, he did not make the statements that James Carpenter claims he made. (36 RT 3963; 37 RT 4037.)

McClain was present when Robert Price was shot on October 28, 1993, but did not himself shoot Price. (36 RT 3970.) Price was a basehead who McClain heard was a Crip.[32] (37 RT 4009-4010.) Price was shot because he owed a homeboy some money. (36 RT 3971; 37 RT 4063.) McClain knows who shot Price. (*Ibid.*) McClain, Ishmael Offut, and a person to whom McClain was selling drugs were present when Price was shot. (36 RT 3972.) Whoever shot Price is responsible in part for the death of Fernando Hodges. (37 RT 4063-4065, 4071-4073.)

McClain has been convicted three times of being a felon in possession of a gun. (36 RT 3971.) McClain's first felony conviction was for grand theft auto. (36 RT 3971-3972.)

On cross-examination, McClain provided the prosecution with a list of P-9 members whom he knew. (36 RT 3982-3986.) Aurelius Bailey, a co-defendant in this case, was not a member of P-9. (36 RT 3985.)

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[32] Basehead is a term commonly used to refer to people who use cocaine in a certain form.

McClain only knows Crips by sight from being in jail with them. (37 RT 4010-4011.) The only Crips he knows by name, other than the witnesses whose names he heard over the course of this trial, are Michael Ray Fulton, Price, and Lacey. (37 RT 4009-4011.)

B. PENALTY RETRIAL

1. Evidence in Aggravation.

At a second joint penalty phase, following the hung jury at the first penalty trial, the prosecution introduced extensive aggravating evidence against McClain's co-defendants, Newborn and Holmes. (67 RT 6559-6579, 6586-6590; 68 RT 6662-6679, 6695-6714, 6718-6721, 6768-6812; 69 RT 6822-6828, 6856-6860, 6891-6900, 6934-6964.) The prosecution also introduced evidence of the crimes of which McClain had been convicted at the guilt phase in addition to evidence of his prior convictions, evidence of his prior criminal acts, and victim impact evidence.

a. Evidence Related to the Halloween Crime

Senior Deputy Medical Examiner James Ribe testified, based upon his autopsy, that Reggie Crawford received five gunshot wounds; the wound that entered his right breast and exited through his right shoulder was fatal. (68 RT 6737.) Normally, that type of chest wound causes a person to drop "just like that." (68 RT 6743.) If Crawford was conscious for any time after the bullet entered his chest, he could not have breathed and would have been aware he was dying. (*Ibid.*)

Stephen Scholtz, a pathologist with the Los Angeles County Coroner opined, based on his autopsy, that Stephen Coats died instantaneously from a gunshot wound to the head. (69 RT 6913, 6917-6918.) Coats was also shot in the hip. (69 RT 6913.)

Ogbonna Chinwah, also a pathologist with the Los Angeles County Coroner, testified that Eddie Evans died from a gunshot wound to the chest. (67 RT 6553.) Evans was conscious and in agony from the moment the bullet entered until his death. (67 RT 6556-6558.)

Kenneth Coats, brother of Stephen Coats, testified to events that occurred prior to the homicides.[33] (68 RT 6745-6766.) His described the incident at George's Market during which four cars drove by, and the second, a reddish car, swerved toward Reggie Crawford. (68 RT 6747-6750.) The people in the car were throwing gang signs out the window, and Kenneth saw a P-9 sign.[34] (68 RT 6749-6750.)

After the shooting, Kenneth saw at least two people run from the scene. (68 RT 6763.) Kenneth told police the first was a black male between 18 and 24 with his hair slicked back in a ponytail below the neck. (68 RT 6764.) Kenneth believed, at the time of his testimony, that he told police that the second person was between 18 and 24 years old, short, and stocky. (*Ibid.*) He might have described that person as flabby. (68 RT 6765.)

Firearms examiner Dwight Van Horn testified that 9mm and 357 or 38. caliber bullets and casings were found at the Halloween crime scene and in the victims' bodies. (69 RT 6865-6889.) He showed examples of the kinds of guns that might hold those kinds of ammunition and explained how the weapons function. (69 RT 6868-6876, 6881, 6884; Peo. Exhs. 65A-E.)

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[33] Kenneth Coats also provided victim impact testimony which is described below.

[34] At the guilt phase, Kenneth Coats testified that he could not remember whether he told police he had seen a P-9 sign or simply a gang sign. (31 RT 3262.)

The court reporter read to the jury portions of McClain's guilt phase testimony. (70 RT 7017-7026.) McClain was paged by Kim Smith who told him that Fernando Hodges had been shot by Crips at the the Community Arms. (70 RT 7020-7021.) McClain was angry and wanted to retaliate. (70 RT 7022-7023.) He tried to page his homeboys but no one returned his page. (70 RT 7018-7019-7021-7022.) McClain was armed with a .44 and went out intending to retaliate by killing a Crip. (70 RT 7023-7024.) McClain belongs to a gang, but prefers to do things himself. (70 RT 7024-7025.) McClain went out and went every where he knew of looking for Crips to kill and for his homeys. (70 RT 7026.)

Both the prosecution and defendant Holmes called Gabriel Pina to testify.[35] (67 RT 6604; 71 RT 7063.) On Halloween 1993, Pina and his girlfriend were walking a dog on Orange Grove when they saw four speeding cars going about 45 or 50 miles per hour on Mentor.[36] (67 RT 6605-6608; 71 RT 7064.)

Pina, his girlfriend, and the dog, turned south onto Catalina and saw the same cars Pina had seen on Mentor. (67 RT 6610-6612.) The first car twice went up the street towards them, passed them, stopped, then went back to the other cars in reverse. (67 RT 6612-6613.)

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[35] McClain has omitted facts which do not pertain specifically to him.

[36] Pina's descriptions of the cars to police, the grand jury, at trial, and at the second penalty phase were inconsistent. (67 RT 6631-6633, 6638-6639; 71 RT 7065, 7067-7083, 7090-7092.)

His accounts of where he was standing when he saw the cars and people were also inconsistent. (67 RT 6614-6619, 6621-6622, 6634, 6636, 6638-6641; 71 RT 7107-7112, 7114-7115.)

The car had tinted windows, so Pina could not really see. (67 RT 6612.) The driver of that car looked through the windshield at Pina who was standing about 15 feet from the car. (67 RT 6613.) The car then went back to join the other three cars.[37] (67 RT 6613-6614.)

Pina heard gunfire. (67 RT 6620.) He sent his girlfriend home and ran east on Emerson where he ran behind a tree. (67 RT 6620-6621.) There he saw two people run around the corner and get in the two parked cars. (67 RT 6621.)

Pina went home, put the dog away, and he and his girlfriend went to the crime scene. (67 RT 6622-6629; 71 RT 7070.) He spoke with three or four officers, including Officer Chavira, who asked him to describe the shooters and the vehicles. (*Ibid.*) Pina was not thinking straight when he spoke with them. (67 RT 6641-6643.) Most, but not all of what Pina told Officer Chavira at the scene was correct.[38] (71 RT 7072.) Pina gave

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[37] Pina could not, during his penalty retrial testimony, describe the first vehicle; he paid more attention to the driver than the vehicle. (67 RT 6613-6614.) Pina was also unable to describe the driver of the first car, a compact import that could have been green. (71 RT 7065-7066.) Pina did not really pay attention to the driver; he was black and about twenty to twenty five. (71 RT 7066.) His hair was thin, close to the head, and short. (*Ibid.*)

Pina also could not recall telling the grand jury the first car was occupied by a black male, age twenty to twenty-five, with long, straight hair to his shoulders that appeared wet. (71 RT 7086.) He did recall saying that the second car was occupied by one black male, probably in his 20s, with very short, clean cut, curly or nappy hair. (71 RT 7088.)

[38] Defendant Holmes called Pasadena Police Officer Ruben Chavira, to testify about the interview he conducted with Gabriel Pina at the crime scene in this case. (71 RT 7157-7161.) Pina's description of cars and people to Chavira were inconsistent with Pina's descriptions to other law enforcement, the grand jury, and in the guilt and penalty phases of this case.

officers a vague description of one or two cars. (71 RT 7070.) The only thing he could remember about the shooters was that they were black men. (71 RT 7071.) It is possible Pina told officers he could not identify any of the individuals because he was not paying attention. (67 RT 6640; 71 RT 7106.)

Pasadena Police Officer W.R. Ireland conducted a taped interview of Pina on November 1, 1993. (71 RT 7162-7173.) Ireland got Pina out of bed early in the morning and took him to the police station. (71 RT 7170.) Pina's descriptions of the cars, and his locations when he viewed both cars and people were inconsistent with his descriptions of them in testimony and other interviews. (71 RT 7163-7169.) Pina gave confused answers during the entire interview. (71 RT 7168-7173.)

In the interview, Pina did not describe the people in the cars he saw. (71 RT 7164.) Pina said he did not pay particular attention to the people in the cars. (71 RT 7164, 7167.) After gunshots were fired, Pina saw three people running to a car. (71 RT 7167.) However, Pina had not been paying attention and was not sure whether he could identify them. (*Ibid.*) Pina gave Ireland a description of a person, but Ireland did not know whether the person Pina described was a driver of any of the cars. (71 RT 7171.)

At another time, Pina looked at car brochures but did not identify any of the vehicles in the brochures. (71 RT 7076-7077.)

Initially, Pina did not go to the police, because he did not want to get involved. (67 RT 6644.) His recollections of the commotion and the yelling at the crime scene made him want to get involved. (*Ibid.*)

(*Ibid.*)

About a month and a half after the homicides, Pina called Detective Uribe to say he might be able to describe two of the individuals.[39] (71 RT 7093.) Based on Uribe's notes, Pina acknowledged that he saw photographs of the two people in the newspaper before he called police in December. (71 RT 7094.) A co-worker told Pina that police had caught some of the guys in the murder Pina witnessed and held up the paper. (71 RT 7095.) However, Pina denied that he saw McClain's photo in the paper. (71 RT 7124.) Pina saw the paper, but not the people pictured in it. (71 RT 7095.)

The day before detectives showed him the newspaper photograph, Pina saw an advertisement on television which sought help in identifying five suspects whose photos were displayed. (71 RT 7095-7096.) He recognized McClain's photograph on television but not Holmes's. (71 RT 7096, 7131.) Nevertheless, because he saw two people at the scene, Pina told police that might be able to identify two people. (71 RT 7133.)

At the police station, Pina looked at a series of six-pack photo arrays. (71 RT 7097.) At first, Pina thought one person looked familiar. (71 RT 7098.) Then, Pina looked at the newspaper with photographs of the defendants in this case. (*Ibid.*) It was folded so that Pina could not see all of the photographs. (71 RT 7099.)

Pina identified a photograph of McClain who was in court. (71 RT 7118-7120.) Initially, Pina did not identify McClain in court because he was intimidated. (71 RT 7122.) On Halloween, Pina saw McClain tilt his

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[39] Uribe's memorialization of his interactions with Pina, including Pina's descriptions of cars and people and the events that prompted Pina to call him were inconsistent with Pina's testimony on the same subjects. (71 RT 7136-7155.)

head over the steering wheel at an angle. (71 RT 7123-7124.) Pina also identified a photograph of Holmes. (71 RT 7121.)

Pina did not read the paper three days before he spoke to Uribe and did not realize there was a reward. (67 RT 6642; 71 RT 7097.) Pina found out about the reward when a public defender asked him about it. (71 RT 7096.) Pina received $4500.00. (67 RT 6642; 71 RT 7097.) Uribe never asked Pina why it took him two months to come forward with the information. (71 RT 7155.)

b. Robert Price Crime Evidence

Pasadena Police Officer Derrick Carter interviewed Robert Price on October 29, 1993, at Huntington Memorial Hospital. (71 RT 7029-7030.) Price said he was shot at the Community Arms housing project and showed Carter the bullet wound through his face; he also said he was shot twice in the right thigh. (71 RT 7030-7031.) This interview was not Carter's first contact with Price who was affiliated with Raymond Avenue Crips. (*Ibid.*)

The prosecutor read to the jury People's Exhibit 133, a verdict form indicating that McClain was found guilty of the attempted murder of Robert Lee Price. (71 RT 7033.)

c. Graffiti

During his opening statement, the prosecutor showed the jury photographs of graffiti found in the court's holding cell during the course of the trial. (65 RT 6371; Peo. Exh. 116.) The first graffiti read "P-9" with the word "Monsta" written on top of it. (65 RT 6320.) "Parke Street" was written within the "P" and "nine lives" was written within the "9." (*Ibid.*) The graffiti read "P-9" with "Blood Gang" written next to it, and "Boom 1," "Sunday Shoes 1," and "Monsta Herb 1" written under it. (*Ibid.*) The prosecutor told the jury that, in the first trial, evidence was presented that

those were the defendants' nicknames. (*Ibid.*) Beneath the nicknames, the graffiti stated "Anybody Killa," "Shireff [sic] Killa," with the words "Sherrif" and "police" crossed off. (65 RT 6320.)

d. Prior Felony Convictions

At the prosecution's request, with no objection from McClain, the trial court took judicial notice of McClain's single conviction for grand theft auto on April 24, 1989, and of his three convictions for being a felon in possession of a firearm on January 8, 1990, November 8, 1990, and September 28, 1992. (69 RT 6850.)

e. Car Robbery Allegation

On August 9, 1990, a car belonging to Bryant Cook was taken at gunpoint. (68 RT 6729, 69 RT 6829.) Cook testified that a couple of guys came down the street and that he "didn't really remember seeing things. It was like a gesture, that, you know, was thrown under a coat." (69 RT 6829-6831.) He felt threatened so he ran from his yard and didn't see anything after that. (69 RT 6830-6831.) Cook heard someone say, "Don't run." (69 RT 6831.) Rowe testified that he was inside his house getting a beer when the car was taken. (68 RT 6723-6724.) When Rowe returned outside, Bryant Cook told Rowe that somebody had robbed him. (68 RT 6724.) Rowe denied having identified anyone or having made statements attributed to him by the police. (68 RT 6726.)

Thereafter, police officers testified to statements Rowe and Cook made when they investigated the theft. According to police, Rowe and Bryant Cook were in Rowe's front yard talking when two men approached them and pulled handguns from their pockets and told them to back up against the garage. (68 RT 6730; 69 RT 6845-6846.) Cook was afraid and immediately ran to the back of the house. (69 RT 6846.) One of the

suspects ordered Rowe up against the garage door while the second suspect looked in the Mustang parked in the driveway and saw that there were keys in it. (68 RT 6730.) Both suspects got into the car and drove off. (*Ibid.*)

About ten minutes later, police stopped the car and arrested the driver. (68 RT 6731; 69 RT 6848.) In a Pic 'N Save parking lot, Rowe stated that the car belonged to Cook and identified McClain as the person who ordered him up against the garage. (68 RT 6731-6732.) Cook said he recognized McClain as the driver of the car. (69 RT 6847-6848.) McClain had a handgun. (*Ibid.*)

f. Felon in Possession of a Firearm Allegation

On November 8, 1989, at about 1:00am, Los Angeles County Sheriff's Deputy Ron Blankenbaker and a partner were in a marked car near Charles White Park in Altadena. (69 RT 6815-6816.) Blankenbaker saw two men standing near the park bathroom. (69 RT 6816.) When the men saw the car, they ran into the bathroom. (*Ibid.*) Then Blankenbaker heard a shot from the bathroom. (*Ibid.*)

Blankenbaker and his partner ordered the people in the bathroom to come out. (69 RT 6817.) Blankenbaker went into the bathroom to look for weapons and found one, a .25 caliber Raven Arms model P-25. (69 RT 6818-6819.) Blankenbaker found no weapons on either of the men and never saw anyone with a gun on them. (69 RT 6819, 6821.) McClain was one of the men who had been in the bathroom; police found live .25 caliber rounds on him. (69 RT 6821.) McClain, who said he shot himself, had an injured finger. (69 RT 6817-6818, 6821.)

Blankenbaker did not recall whether detectives had the gun he found fingerprinted. (69 RT 6821.)

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g. Chain Snatching Allegation

One night in July 1989, Raquel Flores was driving into the parking lot at her home when she saw three dark-skinned men crossing the street and walking a single bicycle with a baby seat. (69 RT 6835-6836, 6841.)

As Flores got out of her car, one of the men approached her and asked whether a certain person lived there. (69 RT 6836.) Flores said, "no." (*Ibid.*) When the man asked whether she was sure that the person did not live there, Flores said she was not. (*Ibid.*) The man then grabbed the chains she was wearing, leaving marks on her neck. (69 RT 6837.) The man ran off, and she did not see the other two people. (*Ibid.*)

Flores contacted the police and they questioned her. (69 RT 6837, 6841.) Flores made a field identification about one half hour after the crime. (69 RT 6842.) Based on his clothes, she identified McClain, who was standing next to two other people, as the person who took her chains. (69 RT 6837- 6839, 6842.) Police arrested McClain (69 RT 6841), but Flores did not press charges. (69 RT 6840.)

h. Shank Allegation

On June 19, 1995, McClain was being escorted to a jail exercise yard with other inmates when he slipped his handcuffs and ran toward another inmate with his hands raised over his head. (68 RT 6648-6649, 6653-6654.) As McClain swung his arms down toward the inmates, he was knocked to the ground by deputies. (68 RT 6655, 6659.) When the deputies lifted McClain from the ground, they found a jail-made knife lying beneath him. (68 RT 6655-6656, 6659.) McClain had been strip searched before being taken to the yard. (68 RT 6651-6652.)

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i. Witness Threat Allegation

Joseph Petelle, a teacher of Newborn's at the California Youth Authority, provided aggravating evidence about Newborn at the second penalty phase. (69 RT 6894-6900.) Petelle was recalled to testify that, as he was leaving the courtroom after his testimony, as he got between McClain and his lawyer, McClain leaned back and said, "I'll kill you." (69 RT 6922-6923.) The trial court instructed the jury that the parties had stipulated that McClain's standby counsel, Richard Leonard, heard McClain say to Petelle, "You're a dick head." (69 RT 6925.) Petelle insisted that McClain said "I'll kill you," rather than just calling him a "dick head." (69 RT 6924.)

j. Threatening a Deputy Allegation

After the close of penalty phase, Deputy Browning, the courtroom bailiff in this case testified that, on October 16, 1996, the previous day, he and Deputies Tranberg and Admire put REACT belts on each of the three defendants in this case.[40] (73 RT 7332, 7334.)

After they placed a belt on McClain, McClain asked why the belt was so warm. (73 RT 7334.) Browning told McClain they had tested it because it was departmental policy to test the belts every morning to be sure they worked. (73 RT 7334-7335.) McClain, who was in his cell, then said, "If you do one of us, you'll have to do us all." (73 RT 7336.) Browning asked, "What?" and Newborn repeated the statement as if Browning had not heard what McClain had said. (*Ibid.*) Newborn also said, "If you push one button, then you better push all three, because you know what I'm going to do." (*Ibid.*)

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[40] The trial court instructed the jury that he ordered the REACT belts in this case "as a security device to assure tranquility," and that "it does not mean that [the defendants] are guilty or not guilty." (73 RT 7332.)

In response to Newborn, McClain said "Don't get within two feet of me or I'll kill you, and I'll have weapons this time." (73 RT 7336-7337.) McClain was speaking loudly enough for the other deputies to hear. (73 RT 7340-7341.)

Neither Deputy Admire or Deputy Tranberg heard McClain say "I'll kill you." (73 RT 7342, 7345.) Admire heard McClain say, "If you get within two feet," but did not hear the rest of the statement. (73 RT 7343-7344.) He also heard McClain say something like, "Next time I'll have weapons." (*Ibid.*) Admire and Tranberg were talking to one another at the time the statements were made. (73 RT 7343-7344, 7346.)

k. Victim Impact Evidence

i. Kenneth Coats

Kenneth Coats, brother of victim Stephen Coats, testified that the group of guys who were together at George's Market after Stephanie Robinson's party split up when they left the market. (68 RT 6745, 6751, 6753.) A group that included Kenneth and Stephen Coats continued toward the Coats home. (68 RT 6751-6752.) They ran into Kenneth and Stephen's mother. (*Ibid.*)

Afterwards, Kenneth heard someone say, "Now, Blood" and saw yellow gunfire coming from a bushy area about four and a half feet away. (68 RT 6754, 6755-6756.) Stephen said, "they shooting." (68 RT 6755.) They all started running. (*Ibid.*) Kenneth heard Stephen say he was hit. (*Ibid.*) Lawrence Ayers fell to the ground. (*Ibid.*) Kenneth helped Lawrence up and the two of them ran into the bushes. (*Ibid.*)

Then Kenneth saw Eddie Evans grab his stomach and chest and heard him say "Momma." (68 RT 6757.)

Kenneth and Lawrence ran from the bushes toward George's after they saw a family of skunks. (68 RT 6758-6759.) Kenneth told Lawrence he had to go back to get his brother. (68 RT 6759.) Lawrence said, "come on, come on, he's fine, he's fine." They ran from the bushes toward George's after they saw a family of skunks. (68 RT 6758-6759.)

Kenneth went back up the street and saw his mother, sister, and aunty crying. (68 RT 6759.) His sister kept saying, "that's not him." (68 RT 6759-6760.) Kenneth told his sister that he recognized Stephen. (*Ibid.*) His sister put her jacket over Stephen and kept saying, "Momma, he's cold, he's cold." (68 RT 6759.) Kenneth tried to pick Stephen up to take him home. (*Ibid.*) His mother told him to leave Stephen there. (*Ibid.*) Kenneth's aunt, Mickey Polk, and Derieus Halliburton pulled Kenneth away. (68 RT 6759-6760.)

Stephen was sort of around the tree. (68 RT 6760.) Half of Reggie Crawford's body was on the curb and half in the street. (*Ibid.*) Eddie Evans was on the stairs. (*Ibid.*)

In his heart, Kenneth knew Stephen was dead but he did not want to believe it. (68 RT 6761.) It sunk in at the funeral. (*Ibid.*)

Stephen was older than Kenneth. (68 RT 6761.) They did a lot of stuff together; they played basketball, football, and Nintendo together with friends. (68 RT 6761-6762.) Stephen could play basketball even though he did not like it. (68 RT 6762.) Stephen was mostly a stay in the house kind of person, not an outside person. (68 RT 6761.) He could draw and his mural at Washington Middle School stands out to Kenneth. (68 RT 6762.) It had a rabbit on it with blue and green waves in the background. (*Ibid.*) It said either "don't drink and drive," or "don't do drugs." (68 RT 6763.)

For thirteen years, Kenneth woke up to his brother, two sisters, and mother every day. (68 RT 6763.) After Stephen's death, Kenneth could only wake up to his two sisters and his mother. (*Ibid.*) A part of his life that was there for thirteen years was no longer. (*Ibid.*)

Once, when Kenneth and Reggie Crawford were about to have a fight, Stephen broke it up. (68 RT 6762.) Stephen said they were all like brothers. (*Ibid.*)

ii. Deborah Bush

Deborah Bush, mother of Stephen, Kenny, Stephanie, and Christina Coats, testified about events just before the crime, the way she learned that Stephen had been killed, and the impact his death had on her and her family. (69 RT 6966-6985.)

On Halloween 1993, Bush was driving her car on Wilson Street; her daughter Stephanie was in the car with her. (69 RT 6970.) Bush saw a group of boys, including Stephen and Kenny who approached her car. (69 RT 6970-6971.) She offered Stephen and Kenny a ride, but Stephen said he would race her home. (69 RT 6971.)

After Bush parked in her driveway and reached the steps to her back door, she heard shots that sounded very close to her. (69 RT 6972.) It was horrifying. (69 RT 6973.) She ran to the front of her house where her sister grabbed her and told her to wait because someone might come by and shoot them. (*Ibid.*)

Bush pulled away and ran down the street by herself. (69 RT 6973.) She yelled her sons' names but nobody answered. (*Ibid.*) Bush came across the first body a little bit south of Wilson and Emerson. (69 RT 6974.) She felt the neck and realized the person was dead. (*Ibid.*)

A few feet away Bush saw another body with a bullet in the head. (69 RT 6974.) She realized it was Stephen and that he was dead. (*Ibid.*)

Bush's daughter, Stephanie, and sister, Brenda, were right behind her. (69 RT 6975.) Bush screamed that someone should contact emergency personnel. (*Ibid.*) Stephanie put her coat over Stephen and said everything would be okay. (*Ibid.*) Then Kenny ran up the street and tried to lift Stephen. (*Ibid.*) Police tried to restrain Kenny who said, "They killed my brother." (*Ibid.*) Kenny broke away and went back to Stephen. (*Ibid.*) The police wanted to put Kenny in their car. (*Ibid.*) Then, Bush's youngest daughter who was awakened by all the screaming, arrived and asked what was going on. (69 RT 6975-6976.) Bush told her that Stephen was dead. (69 RT 6976.)

Bush's daughters were upset because the paramedics were not helping Stephen. (69 RT 6976.) Bush had to explain that there was nothing the paramedics could do. (*Ibid.*)

There was chaos at the scene, so Bush took her children home. (69 RT 6976.) The most difficult thing she had to do was to leave one child behind. (*Ibid.*)

At one point, there were 20 to 30 people at the house. (69 RT 6977.) Bush's family were devastated. (*Ibid.*) They could not believe Stephen was dead. (69 RT 6978.)

Bush was eventually taken to the police station with Kenny so they could take his statement. (69 RT 6978.) Bush saw blood on Kenny's shirt. (*Ibid.*) The station was like a morgue because everybody was in the field. (*Ibid.*) When Bush realized that nobody would be at the station for a while, she and Kenny went back home. (69 RT 6979.)

Stephen's funeral was eight days later. (69 RT 6979.) They did not release his body until Thursday. (*Ibid.*) It had been a particularly violent weekend, so the funeral place was booked until Monday. (*Ibid.*) It was a week of hell because people kept asking Bush when there would be services, and the family did not even have the body. (69 RT 6980.)

Bush had to arrange the funeral; it was the hardest thing she had ever done. (69 RT 6980.) It did not seem right to have to pick out coffins and burial plots and to make those arrangements for her son. (*Ibid.*) It took about three hours to make arrangements. (*Ibid.*) Bush was told to come by on Saturday to see whether she approved of the way Stephen was displayed. (*Ibid.*)

Her family's lives were turned upside down. (69 RT 6980.) There were media on her doorstep, people driving by to lend support, and people Bush did not know who came by because they were so horrified. (*Ibid.*)

Stephen was Bush's quiet child. (69 RT 6980.) He loved to draw, play Nintendo, and talk on the phone. (69 RT 6981.) It was hard for him to go out. (*Ibid.*) He always pulled for the underdog. He loved little kids. (*Ibid.*) Stephen drew a portion of the mural in the video, but he never told Bush about it because he did not think it was a big deal.[41] (69 RT 6982.)

Three or four months before Stephen was killed, two of Bush's colleagues from the police department knocked on her door early one Sunday morning. (69 RT 6982.) They had with them a three or four year old Hispanic boys who told them he lived at her house. (69 RT 6982-6983.) Bush said it was a mistake. (69 RT 6983.) When Stephen woke up, the

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[41] During Bush's testimony, the prosecution played for the jury a videotape of Kenny Coats in front of a mural at Washington Middle School taken shortly after the shooting. (69 RT 6981; Peo. Exh. 105-A-1.)

little boy said Stephen was his brother. (*Ibid.*) The little boy lived down the street and Stephen had played ball with him. (*Ibid.*)

Bush's family were very close. (69 RT 6983.) Bush had been a single mother for about six years when Stephen was killed. (*Ibid.*) The year before, Bush sent out Christmas cards that said, "Debby Coats and her little jackets." (69 RT 6984.) Everyone called her kids "jackets." (*Ibid.*) They always made jokes and laughed. (*Ibid.*) Their laughter was taken that night. (*Ibid.*)

Kenny and Stephen were always together. (69 RT 6984.) Kenny said he had never slept in his room without his brother. (69 RT 6985.) Three days after Stephen was killed, Kenny was afraid for Bush's five year old nephew to leave their house. (*Ibid.*)

Bush's youngest daughter cannot talk, read, or watch anything about the incident. (69 RT 6985.) Her oldest daughter, Stephanie, had a baby two months before Stephen was killed; her baby was Stephen's life. (*Ibid.*) Stephen and Stephanie were best friends. (*Ibid.*) It's devastating. (*Ibid.*)

iii. Stephen Coats, Sr.

Stephen Coats, Sr. father of victim Stephen Coats, testified that he would never forget Halloween 1993. (70 RT 6988.) He wanted his kids to come to his place for Halloween, but they wanted to go to a party with friends; Coats Sr. planned to pick them up on Monday, the day after Halloween. (70 RT 6989.)

Instead, he got a call from his daughter Halloween night. (70 RT 6988.) She was hysterical and kept saying that he was dead. (*Ibid.*) Coats, Sr. could not understand what she was talking about, so her mother, Deborah Bush, got on the phone and explained to Coats, Sr. that Stephen

had been shot and killed. (*Ibid.*) As it was Halloween, Coats, Sr. thought it was a cruel joke. (70 RT 6988-6989.)

Afterwards, Coats, Sr. went to the crime scene. (70 RT 6989.) Stephen was lying on the ground, lifeless, with ants crawling on his face and nose and a bullet hole in his head. (70 RT 6989-6990.)

Coats, Sr. blamed himself because he had not brought Stephen to Los Angeles for Halloween. (70 RT 6990.) His daughter was traumatized. (*Ibid.*) It was a year before his other son could sleep in the room he and Stephen had shared. (*Ibid.*)

Coats, Sr. lost a son. (70 RT 6990.) His children lost the brother they loved. (*Ibid.*) Stephen's mother lost a son. (*Ibid.*) The world lost somebody who could have made it better. (*Ibid.*) Coats, Sr.'s godchild will never see his uncle. (*Ibid.*)

When Stephen was killed, Coats, Sr. and Stephen's mother were separated, so Coats Sr. saw Stephen about every other weekend. (70 RT 6989.) They played basketball or went to different places. (*Ibid.*) Coats, Sr. has memories of Stephen playing basketball, drawing, joking, laughing, playing games, looking after little kids, spending time at Christmas, and being part of a family. (70 RT 6990-6991.)

iv. Florence Crawford

Florence Crawford, mother of Reggie Crawford, testified about how she found out about Reggie's death, what Reggie was like in life, and the impact of his death on her and her family. (70 RT 6992-7006.) During her testimony, the prosecution showed the jury photos of Crawford in life. (70 RT 7003-7005; Peo. Exhs. 131A-B, 132.)

Reggie had plans for Halloween night 1993, but decided to go to a party he heard about from Stephen Coats. (70 RT 6993.) Crawford did not want her children to go trick or treating because it is so dangerous. (*Ibid.*)

Before the party, Reggie cut his hair. (70 RT 7001.) Crawford teased him about always being the last one in front of the mirror and told him he looked nice. (*Ibid.*) Reggie gave her a kiss, and that was it. (*Ibid.*)

At around 10:00pm that night, Crawford was driving home and saw Reggie with a group of boys. (70 RT 6993, 7000-7001.) She did not offer him a ride because there were too many kids. (*Ibid.*)

About five minutes after Crawford got home, she heard shooting. (70 RT 6993.) Moments later, she heard sirens. (70 RT 6994.) She decided to check on Reggie, but on her way down to the car, Reggie's friend, Robert Nolden, came running towards her and told her Reggie was shot. (*Ibid.*) Crawford was hysterical, but she did not know Reggie was dead. (*Ibid.*)

Crawford went to the crime scene, but it was blocked off. (70 RT 6995.) The officer there told her to go to the hospital because they sent the wounded boys there. (*Ibid.*) He did not say that three boys had been killed. (*Ibid.*) So, Crawford and her sisters went to Huntington Memorial Hospital. (*Ibid.*) She was at the hospital for about one half hour before she learned that Reggie was not there. (70 RT 6996.) She went back to the crime scene, but it was still blocked off, so she went home. (*Ibid.*) About 30 minutes later, Reggie's grandfather came to the house and told Crawford Reggie was dead and he had identified his body. (70 RT 6997-6998.)

A neighbor told Crawford's thirteen year old daughter that Reggie had been shot. (70 RT 6998.) When Crawford picked up her daughter at 2:00 or 3:00am, she told her daughter Reggie had been wounded; she told her daughter he was dead the next morning. (70 RT 6999.)

Reggie's grandfather took Crawford to the mortuary where she picked a casket and made a payment plan so they would proceed with the gravesite. (70 RT 7001.) About five days passed between the murder and the funeral. (*Ibid.*) Reality set in at the funeral when she saw Reggie in the casket and Crawford lost it.[42] (70 RT 7002.)

Crawford went through hell with her children who could not handle Reggie's death. (70 RT 6999.) She had to miss work because school nurses felt that her daughter needed counseling. (*Ibid.*)

Reggie had football trophies and the coach at John Muir was thinking of putting him on the team. (70 RT 7004.) After his death, the coach, traumatized by his death, retired Reggie's number. (*Ibid.*)

Crawford was a single parent and Reggie took the role of the missing father in their home. (70 RT 7005.) Reggie did everything for his brother, Dewayne. (*Ibid.*) He led him and prepared him for many things. (*Ibid.*) Crawford was the family haircutter. (*Ibid.*)

Reggie had a lot of friends, some of whom visited Crawford in the couple of years after his death. (70 RT 7006.) Seeing them made Crawford think of Reggie; she missed the teenage years he was going into, the future they had planned, and the joy. (*Ibid.*)

Crawford could not believe it had happened to her; she was a good parent and Reggie was against gangbanging. (70 RT 6998.) Reggie was killed for nothing. (*Ibid.*)

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[42] The prosecution showed the jury People's Exhibits 131A, 131B, and 132, photographs of Reggie Crawford in life. (70 RT 7003-7004.)

v. Colett Evans

Colett Evans, cousin of victim Eddie Evans, testified about how she learned of Eddie's death, what Eddie was like in life, and the impact of Eddie's death on she and her family. (71 RT 7053-7059.)

The night of Eddie's murder, after midnight, Colett received a page and voice message. (71 RT 7054.) People were crying in the background and Colett heard the words, "He's gone, my baby's gone." (*Ibid.*) Colett made some calls to relatives out of state to find out who had died, but no one knew. (*Ibid.*) Colett played the message over and over again. (*Ibid.*)

About 20 minutes later, Colett received a page and saw Katrina Evans's phone number. (71 RT 7055.) When Katrina told Colett Eddie was dead. (*Ibid.*) Colett could not accept it. (*Ibid.*)

That morning, Colett went to Katrina's and stayed with her for about two weeks. (71 RT 7058.) Katrina could not eat or sleep; she was very out of it. (*Ibid.*) She cried most of the time. (*Ibid.*)

Hundreds of people came to the funeral with good things to say. (71 RT 7058.) It was beautiful. (*Ibid.*)

Although Eddie was Colett's cousin, he called her his aunt. (71 RT 7053.) Eddie was Colett's protege, a male version of her; he said he would beat everything she had accomplished. (*Ibid.*)

Eddie wanted a home, a career, schooling, and a car like Colett's and he wanted to achieve these things at a younger age than she had. (71 RT 7054.)

Eddie was a rarity. (71 RT 7057.) He was a spunky, self-motivated kid who created things for himself. (*Ibid.*) When Colett told him to brush

his teeth three times a day, he would call to say he had brushed them four times. (*Ibid.*) Eddie had a big Kool-Aid smile.[43] (*Ibid.*)

2. Evidence in Mitigation

a. Clarence Jones

Clarence Jones, a prisoner and friend of McClain's, testified to rebut the prosecution's evidence about the shank incident (section B.1.h., *ante*). (73 RT 7273.) Jones recalled an incident involving a shank on the tier in 3100, however he did not see the incident. (73 RT 7272, 7274.) Jones did not see a shank in anyone's hand. (*Ibid.*) It would be unusual (SIC) for two people of different races to be in an altercation and for someone to throw a weapon as an aid to one of them. (73 RT 7273.)

Jones knew McClain a long time. (73 RT 7279.) Jones met McClain when both of them were in the California Youth Authority and they stayed in touch with each other on the streets. (73 RT 7277-7278.)

Jones was sentenced to 28 years in prison for carjacking, robbery, and grand theft of a vehicle. (73 RT 7275-7277.) Jones was accused of breaking a glass bottle, sticking it to somebody's neck, and taking his property, but he had been confused with another person. (73 RT 7280-7281.) Jones had to represent himself and was denied standby counsel. (73 RT 7281-7282.) He was only convicted because of racism. (*Ibid.*) He was convicted of robbery in 1987. (73 RT 7277-7278.) In 1986, Jones was convicted of being a felon in possession of a firearm. (73 RT 7278.) On

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[43] Colett Evans tried to read to the jury People's Exhibit 134, "How Can Dr. King's Dream Become a Reality," an essay for which Eddie Evans placed third place in a citywide competition. (71 RT 7058-7059.) Colett started to cry, so the trial court published the essay to the jury. (71 RT 7059.)

March 10, 1996, the sheriffs jumped on Jones and beat him up. (73 RT 7275-7276.) Jones was treated unfairly in every case. (73 RT 7283.) Jones was shackled during his penalty retrial testimony because "they" were trying to portray him as a dangerous man. (73 RT 7283-7284.)

b. Earlean Shamburger

The mother of McClain's daughter, Earlean Shamburger, testified that if McClain were put to death, it would hurt her, her kids, and McClain's daughter. (73 RT 7286, 7289.) Life would not be the same. (73 RT 7286.)

Shamburger met McClain walking down Summit Street in Pasadena with her child around the end of 1980. (73 RT 7289-7290.) McClain gave things to his daughter and to Shamburger's other children; when he couldn't, his family did. (73 RT 7291-7292.) McClain did not send child support. (*Ibid.*) Shamburger had never known McClain to have a job and did not know how he made his money. (73 RT 7291-7292.)

Shamburger's cousin was just killed and one of her brothers was in prison. (73 RT 7286-7287.) She did not know whether her cousin's death was a gang killing, just that he was shot in the head by Dirty Rob. (73 RT 7288-7289.) She did not know whether her brothers were in the Pasadena Denver Lane Blood gang and had not seen tattoos on them. (73 RT 7287.)

c. Doris Russell

Doris Russell, McClain's mother, testified that if McClain were put to death it would affect her life and the life of her entire family who were sitting in the back of the courtroom. (73 RT 7292-7293.) It was especially difficult because she was in the courtroom for something McClain had not done. (73 RT 7294.)

Russell understood that the jury had a hard job to do, but her son did not do this crime. (*Ibid.*) His behavior had not always been aboveboard, but it was unfair that he had come this far to be facing this for something he did not do.[44] (*Ibid.*)

ARGUMENT

I.
CLAIMS JOINED FROM APPELLANT NEWBORN'S OPENING BRIEF

Pursuant to Rules of Court, rules 36(a) and 13(5), McClain joins the following claims raised in Appellant Newborn's Opening Brief:

A. Guilt Phase

1. Appellant Was Deprived of Due Process, Equal Protection, and a Representative Jury in Violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by the Trial Court's Error in Refusing to Remedy the Prosecutor's Improper Exercise of Peremptory Challenges Based on Race and Sex.

(Newborn's Opening Brief at pp. 96-119 & Appendix A.)

2. Appellant Was Deprived of Due Process and a Representative Jury by the Erroneous Excusal of Juror #126 for Cause.

(Newborn's Opening Brief at pp. 119-134.)

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[44] At the conclusion of Russell's testimony, the trial court admonished the jury that he only reluctantly allowed McClain to represent himself. (73 RT 7294-7295.) He further instructed the jury was not to consider McClain's guilt or innocence, but only penalty. (73 RT 7295.)

3. **Appellant Was Deprived of Due Process, a Fair Trial, and His Right of Confrontation in Violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by the Trial Court's Excessive Restrictions on Cross-examination of DeSean Holmes.**

(Newborn's Opening Brief at pp. 135-155.)

4. **Appellant Was Deprived of Due Process and a Fair Trial in Violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by Prosecutorial Misconduct in the Form of Flagrant Appeals to the Jury's Passion and Prejudice During Closing Argument.**

(Newborn's Opening Brief at pp. 195-206.)

B. Penalty Phase

1. **Appellant Was Deprived of Due Process and a Fair Trial in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution by the Trial Court's Error in Admitting Evidence of Holding Cell Graffiti in the Absence of Any Proof of Appellant's Authorship or Endorsement of the Writing.**

(Newborn's Opening Brief at pp. 280-290.)

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II.
THE TRIAL COURT ERRED IN FAILING TO SUPPRESS GABRIEL PINA'S UNRELIABLE EYEWITNESS TESTIMONY WHICH RESULTED FROM HIGHLY SUGGESTIVE PRE-TRIAL PROCEDURES

A. Proceedings Below

1. Motions and Rulings

On November 15, 1994, McClain moved pursuant to Penal Code section 995 to set aside the indictment against him. (4 CT 891-925.) In that motion, McClain explained that the procedures that produced Gabriel Pina's identification of him were so impermissibly suggestive, that Pina's identification could not support the low probable cause threshold required to sustain an indictment. (4 CT 914-918.) McClain noted that Pina saw a public service announcement which exhibited a photograph of McClain; Pina believed the photograph was the person he saw driving the MR-2.[45] (4 CT 914.) Subsequently, Detective Korpal showed Pina a photographic lineup and Pina had difficulty identifying McClain. (4 CT 915.) Korpal then showed Pina a newspaper clipping which contained the same photograph of McClain that had appeared in the service announcement Pina had seen on television. (*Ibid.*) Only then did Pina identify McClain. (*Ibid.*) On June 20, 1995, the trial court denied the 995 motion. (8 RT 227.)

On November 16, 1994, McClain moved to suppress the eyewitness identification by Gabriel Pina, because it was so suggestive as to violate Due Process. (4 CT 926-934.) In his motion, McClain noted that Pina

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[45] Pina only described the lead car as an MR-2 during his grand jury testimony. In his other testimony and contacts with police, he gave various descriptions of this car. See Claim III, *post*, which is incorporated by reference herein.

lacked sufficient opportunity to observe the driver of the MR-2, because it was dark and the car stopped near Pina only briefly before backing away. (4 CT 933.) Furthermore, Pina was unable to identify McClain from the photographic lineup until he saw a single photograph of McClain. (4 CT 934.)

On October 23, 1995, counsel argued the suppression motion. (22 RT 2159-2163.) McClain's counsel noted in argument that the only evidence placing McClain at the scene came from Pina who saw a photograph of McClain on television, was unsure he could identify McClain in a photographic spread, and identified McClain after detectives showed him a single photograph. (*Ibid.*) Counsel further argued that McClain, who was described as having long hair, was the only person in the lineup with long hair. (*Ibid.*; Peo. Exh. 17A-E.) Indeed, one of the men in the photo spread had no hair at all. (*Ibid.*) McClain was the only person in the photos with a gold chain around his neck and his photograph was darker than all the others. (22 RT 2163.)

The prosecutor argued that the people in the six pack which contained McClain's photograph had six different hairstyles. (22 RT 2162.) In addition, detectives showed Pina six six pack photo arrays and some of the people in the six packs had long hair. (*Ibid.*) For these reasons, the prosecutor did not believe there was a substantial likelihood of misidentification. (*Ibid.*) The trial court denied the motion without explanation. (22 RT 2169.)

2. Evidence Before the Trial Court at the Suppression Hearing

McClain's suppression motion relied primarily upon Pina's grand jury testimony which referenced his November 1, 1993 taped statement to

police and the photographic lineup which occurred nearly two months after the crimes. (Peo. Exh. 17A-E.)

At the grand jury, Pina testified that he and girlfriend Lilian Gonzales took a walk with their dog at approximately 9:00 or 10:00pm. (2 CT 429-430.) As they walked North on Mentor, a car racing up the street caught Pina's attention. (2 CT 430.) Pina noticed four cars speeding up the street. (2 CT 431.) The first two cars were close together with the other two following a little behind. (*Ibid.*) When the cars reached Orange Grove, they paused at the stop and all of them turned right. (*Ibid.*)

The first car, a dark green or blue '94 or '93 MR-2 or Corolla, had tinted windows and something hanging from the mirror. (2 CT 432-433.) Pina saw one male driver, but could not see if anyone else was in the car because of the tinted windows. (2 CT 433-434.) Pina, "got a good view, but not too much as it was passing me. It was a black male, probably in his 20 's, 25." (2 CT 434.) His hair was "stringy, kind of lengthy. Maybe up to his shoulders." (*Ibid.*) It was not a jheri curl; it was just straight and "kind of had that wet look, but I can't really tell at that time." (*Ibid.*)

Soon after, Pina with his girlfriend and dog, was turning south onto Catalina when he noticed that the cars from Mentor were parked across the street from him near Emerson, but facing Orange Grove. (2 CT 438-439.) The only car moving was the MR-2, which had its parking lights on. (2 CT 440.) The MR-2 stopped near the other three cars, then

> got right next to us – I mean, how can I put it to you – door to eye look. Then he waited, hesitated there for a second as we were still walking, then he reversed his car in the middle of the street, all the way down to approximately where the first car was parked on the right-hand side. Then we were still walking.

(*Ibid.*)

Pina focused on the guy in the MR-2 with whom he had "eye-to-eye contact." (2 CT 442.) The driver leaned forward "to get a good look at me, because the way the car is designed, you almost have to look forward to see up ahead . . ." (*Ibid.*) Pina saw the driver better the second time because "he was a little before the light, so I think the light literally flashed in his car and I saw inside his car." (*Ibid.*)

When Pina saw the parked cars, there were about fifteen black males standing near them with costumes on, including one who was dressed as a joker. (2 CT 441-442.) They were being loud. (2 CT 444.) The driver of the MR-2 talked with them. (2 CT 443.)

The cars were parked there less than a minute before Pina, who had continued walking, heard gunfire. (2 CT 451.) Pina saw people running, one of whom got into the MR-2. (2 CT 452.)

A month or two after the incident, Pina glanced at a "'help wanted' type thing" on television and a photo of the driver of the MR-2 caught his eye. (2 CT 461.) Pina heard someone say, "help catch them." (2 CT 462.) Pina then went to speak with Detective Uribe. (*Ibid.*) Pina "had a hard time with the folders at first, because he was mostly with his chin up and his head tilted back." (2 CT 463.) Also, his hair was different. (*Ibid.*) Pina told the detective he could not tell if it was the guy unless he could see him look down. (*Ibid.*) The detective then showed him a photograph of him from the newspaper and Pina recognized him and "could see they are both the same guys." (*Ibid.*) The guy in the six pack looked familiar. (*Ibid.*) "He had a little bit more hair on the top and his hair in the back was, say, like in a ponytail of some sort." (2 CT 463-464.)

Before the grand jury, the prosecutor showed Pina the page from the photographic lineup which contained McClain's picture and Pina selected his photograph. (2 CT 444-445.)

3. Pina's Trial Testimony and Statements to Law Enforcement

a. The incident

Pina testified at trial that on October 31, 1993, at about 10:30 at night, he and his girlfriend, Lilian Gonzales, were walking their dog near the crime scene in this case. (25 RT 2636-2640.) Pina was walking north on Mentor when he noticed four cars going north at a high rate of speed.[46] (25 RT 2639-2640.) Pina focused on the first car to see whether he recognized it. (25 RT 2640.) Pina explained: "I remember a Honda Civic, an S model, black, about '87. I call it the lead car, the first car I saw, it was an import, about a '94." (26 RT 2710.)

The cars turned right to go east on Orange Grove. (25 RT 2643.) Minutes later, Pina was walking on the west side of Catalina. (25 RT 2644.) He noticed four cars, three of which were parked on the east side of the street in front of a house near the corner of Emerson; one of the cars was moving. (25 RT 2645, 2647.) Pina saw 10 to 15 people, one of whom was wearing a joker's costume, standing outside these cars. (25 RT 2654, 2676.)

Pina's statements to law enforcement which preceded his grand jury testimony, differed significantly. 30 minutes after the homicides, when Pina spoke with Chavira, Pina reported that he had seen about four people

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[46] See Claim III, *post*, for more detail about Pina's descriptions of the cars.

standing near the house. (26 RT 2705.) Moreover, during Pina's taped statement on November 1, 1993, he told police he believed that the people who had committed the crimes were coming from the house. (26 RT 2709.) Pina made no mention of a joker's costume in the police tape. (26 RT 2705, 2709; Def. Exh. H-1.) On the same tape, Pina indicated to police that he believed the people coming out of the house were the people involved in the shooting. (26 RT 2709.) In fact, that home belonged to prosecution witness Joe Colletti. (19 RT 1902-1903; Peo. Exh. 27.)

Pina testified that he continued walking south on Catalina on the west side of the street. (25 RT 2646.) He noticed that one of the lead cars from Mentor, with darkly tinted windows, was coming north, towards him on Catalina. (25 RT 2647.) The car pulled up parallel to Pina, then moved in reverse back toward Emerson. (25 RT 2647.) The car then came north again, and, as the car came closer to Pina, the driver looked out the window and Pina saw him. (*Ibid.*) Pina was just north of the street light and approximately 16 feet from the lead car when the driver looked at him. (25 RT 2648, 2675.)

After these cars left, as Pina was turning the corner from Catalina to go west on Emerson, Pina heard gunshots.[47] (25 RT 2658.) Then, Pina ran

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[47] On November 1, 1993, when Detective Ireland interviewed Pina, he failed to elicit from Pina his position when he observed cars, heard gunshots, and saw people running. (35 RT 3754, 3756.) Ireland did ask Pina at what point he crossed Catalina street, but failed to ask Pina whether it was before or after Pina heard gunshots. (36 RT 3756.) On November 1, 1993, Pina told Detective Uribe he did not cross over Catalina. (26 RT 2769.)

At some point, not long before trial, Pina went back to the neighborhood of the crime with prosecutor Myers. (26 RT 2691-2693.) Pina showed Myers the locations where he was when he saw the cars and

toward two cars that were parked on Emerson, a couple of houses from Wilson. (25 RT 2659.) He saw two or three people run around a house gate at the corner of Emerson and Wilson on the south side.[48] (25 RT 2659-2660.)

b. Pina's contacts with law enforcement and the prosecution

Between the night of the homicides and McClain's trial, Pina had 13-14 contacts with people from law enforcement or the prosecutor's office. (26 RT 2694-2695.) Pina refused to speak with members of McClain's defense team until after his trial testimony. (26 RT 2695.)

Approximately 30 minutes after the homicides, Gabriel Pina spoke with Pasadena Police Officer Chavira. (26 RT 2686.) Pina described to Chavira vehicles he had seen in the neighborhood of the crime scene. (36 RT 3885, 3894, 3896.) He also mentioned that he had seen people run from the cars, that he heard shots, and that he saw a person exit a residence in the neighborhood. (36 RT 3883-3886, 3894-3896.) Notably, Pina did not describe any people he had seen. (36 RT 3886, 3897.) According to Chavira, if Pina had stated that he could identify any person, that would have been in his notes. (36 RT 3897.)

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heard shooting the night of the homicides, however they did not record Pina's locations. (*Ibid.*)

[48] At the grand jury, Pina indicated that he was west of Catalina when he saw these people. (26 RT 2768-2772, Def. Exh. K.) At trial, he insisted that his grand jury testimony was incorrect; had he been in that position, it would have been physically impossible for him to see the cars and people at Emerson and Wilson. (26 RT 2769.) Pina then opined that his memory at the time of trial was superior to his memory during his interview with Uribe and during his grand jury testimony, because he had more time to think. (26 RT 2770.)

Several hours later, Pasadena Police Detective Ireland took a taped statement from Pina. (36 RT 3742.) When asked whether Pina would recognize any of the people he saw near the crime scene, Pina told the officer he had not paid attention, because of his disability, but he wished he had. (26 RT 2712-2713; 36 RT 3747.)

On November 4, 1993, Pina went to the Pasadena Police Station where Detective Uribe showed him brochures containing photographs of cars. (36 RT 3901.) Pina did not identify any of the cars in the brochures as cars he had seen the night of the homicides. (*Ibid.*)

Although police considered McClain a suspect in the homicides, Uribe did not show Pina any photographs of McClain or any other possible suspects on that date. (36 RT 3907, 3915.) According to Uribe's notes, Pina described the driver of the first car as a black man from 22-23 years old with a jheri curl and shoulder length or long hair. (36 RT 3920.) Uribe's notes indicate that Pina was unable to further describe the people he saw. (36 RT 3905.) At that meeting, Pina did not mention that he saw the driver of the lead car lean forward. (26 RT 2730.)

On December 24, 1993, a $40,000 reward for assistance in this case was published in the news media along with photographs of suspects in this case.[49] (71 RT 7097.) Pina saw these photographs when he "glanced" at the television during a help wanted type ad about this case. (2 CT 461; 26 RT 2718-2720.) Pina could not pay attention to the television when the photographs aired, because he was off to the side doing something when the announcement was broadcast. (26 RT 2718.) Also, there was a table between Pina and the television, which Pina then moved. (*Ibid.*) Despite

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[49] This is discussed in Claim III, *post*.

Pina's lack of attention to the photographs on television, he felt confident enough, upon hearing the announcement, to contact law enforcement to say he could identify either one or two suspects.[50]

On December 27, 1993, according to Uribe's notes, Pina called police and indicated that he could identify two suspects whom he had seen in the newspaper. (26 RT 2719-2720; 36 RT 3908.)

On December 29, Pina went to the police station where, despite his previous description of the driver, he told detectives he could not describe the person he had seen but would know him if he saw him. (25 RT 2664.) Detectives Korpal and Uribe then showed him a series of photo six packs, which included a photograph of McClain. (26 RT 2696; Peo. Exh. 17A-E.) McClain, was the only person in the six pack containing his photograph who had long hair. (Peo. Exh. 17A-E.) Indeed, one of the men in the photo spread had no hair at all. (*Ibid.*) In addition, McClain was the only person in the photos with a gold chain around his neck and his photograph was darker than all the others. (Peo. Exh. 17A-E.) While all the men in the six photo six packs were African American, their skin color, hairstyles, facial features, clothing, and demeanors varied greatly. (Peo. Exh. 17A-E.) Pina had trouble with the folders of photographs that the officers showed to him, because "looking face to face I have not really seen him that good." (2 CT 463; 26 RT 2697-2698.) Nevertheless, Pina pointed to McClain's photograph and told the detectives that he thought that was the guy but he was not really sure. (26 RT 2697.)

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[50] Uribe's notes indicate that Pina said he could identify two of the photographs, but, at trial, Pina claimed he was only certain about one of the suspects. (26 RT 2719-2720.)

Korpal then showed Pina a single photograph of McClain that had appeared in the newspaper. (26 RT 2697, 2699-2700, 2719.) Only after Pina saw the newspaper photograph of McClain did Pina initial the photograph of McClain in the six pack. (26 RT 2722, Peo. Exh. 17-B.)

c. Pina's trial testimony regarding his identification of McClain

At trial, as before the grand jury, Pina, in contrast to his earlier statements to police, claimed that the driver leaned forward and turned his head to the left in a lit area. (25 RT 2648-2649.) The driver of the lead car, whom Pina initially described as a black 22-23 year old male with a shoulder length jheri curl, was, according to Pina's trial testimony a man with receding, combed back hair. (25 RT 2649; 36 RT 3920.) Furthermore, the driver to whom Pina originally stated he had paid no attention, had certain facial features (which Pina never described) that stood out. (25 RT 2649.)

d. Pina's inability to identify McClain at trial without help from the prosecution

On direct examination by the prosecutor, Pina testified that he did not recognize the driver of the lead car in the courtroom. (25 RT 2649, 2651.) In response to the trial court's questioning, Pina stated that he had only identified a person as the driver of the lead car through photographs as opposed to an in-person identification. (25 RT 2651.) Pina never attended a line-up. (26 RT 2696.) Pina identified photograph 17-B-5, depicting McClain, as the driver of the lead car on Catalina Street. (25 RT 2654.) Pina also told the trial court he was not nervous. (*Ibid.*) After a break in proceedings, during which Pina had an opportunity to speak with prosecutors, Pina testified that he had not identified McClain before the

break because he was intimidated (see Claim VI, *post*) and because McClain looked different in the courtroom than he had the night of the crimes and in the photographs he identified at the police station. (25 RT 2668.)

e. Testimony of Kathy Pezdek

Defendant Holmes called Kathy Pezdek, Ph.D., an experimental psychologist whose testimony gave a framework for evaluating the accuracy of an eyewitness identification. (34 RT 3648-3665.) Factors to consider are: (1) exposure time, (2) lighting and physical distance, (3) distraction, and (4) cross-race identification. (34 RT 3657-3660.)

B. Applicable Law

1. Due Process

An unnecessarily suggestive pretrial identification which results in an unreliable trial identification violates due process of law. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 113-115; *Neil v. Biggers* (1972) 409 U.S. 188, 196-198; *Simmons v. United States* (1968) 390 U.S. 377, 383-384; *People v. Kennedy* (2005) 36 Cal.4th 595, 608.) Such a violation occurs when an identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." (*Simmons*, *supra*, 390 U.S. at p. 384.) To determine whether the circumstances of an identification are impermissibly suggestive, a court must look at the "totality of the circumstances" surrounding the identification. (*Stovall v. Denno* (1967) 388 U.S. 293, 302.)

2. Eighth Amendment Reliability

Suggestive identification procedures render the trial process unreliable and have, "too often brought about the conviction of the innocent." (*People v. Caruso* (1968) 68 Cal.2d 183, 188.) Indeed, "'the

influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor–perhaps it is responsible for more such errors than all other factors combined.'"[51] (*United States v. Wade* (1967) 388 U.S. 218, 229, citing, Wall, *Eye-witness Identification in Criminal Cases*, 3 Wigmore, Evidence § 786a (3d ed. 1940); see also Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication* (2005) 93 Calif. L.Rev. 1585, 1591, fn.2, 1601-1602.)

Recognizing the grave reliability issues common to eyewitness identification, the California Commission on the Fair Administration of Justice (hereafter CFAJ) released on April 13, 2006, its Report and Recommendations Regarding Eye Witness Identification Procedures.[52]

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[51] Northwestern University School of Law's Center on Wrongful Convictions studied exonerated defendants sentenced to death after the United States Supreme Court's decision in *Furman v. Georgia* (1972) 408 U.S. 238. (Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* (2001) Center on Wrongful Convictions, Northwestern University School of Law.) The study found that eyewitness testimony, which played a role in 46 of 86 wrongful convictions, was far and away the most common factor leading to erroneous judgments. (*Ibid.*)

[52] Citing a University of Michigan study, Gross, Jacoby, Mathewson, Montgomery & Patil (2005) *Exonerations in the United States 1989 through 2003*, 95 J. Crim. Law & Criminology 523, CFAG noted that "mistaken eyewitness identification was involved in 88% of the rape and sexual assault cases. This suggests that unexposed mistaken identifications could be present in other convictions that heavily rely upon eyewitness identifications," in which there is no DNA evidence. (California Commission on the Fair Administration of Justice (2006) *Report and Recommendations Regarding Eye Witness Identification Procedures* http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf.)

In light of the risk of unreliable conviction in eyewitness identification cases, a death sentence, such as McClain's which is substantially based upon a suggestive identification procedure violates the Eighth and Fourteenth Amendments to the United States Constitution. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

3. Pina's identification, the product of unnecessarily suggestive pre-trial procedures was irreparably unreliable

McClain addresses two issues. First, nothing necessitated the suggestive procedures law enforcement employed in this case. Second, those unnecessary procedures produced an unreliable identification.

A photographic identification procedure which focuses attention on one person is suggestive. (*Simmons v. U.S., supra*, 390 U.S. at pp. 383-384; *United States v. Montgomery* (9th Cir. 1998) 150 F.3d 983, 992.) Pina saw a photograph of McClain on television before he viewed the photographic

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CFAG's recommended procedures to increase the reliability of eyewitness identification procedures and to limit the danger of improper suggestion. (*Id.* at pp.5-6.) These recommendations include:

- Utilization of double blind procedures so that the person conducting the photo spread is unaware of the actual suspect's identity
- Presentation to the witness of one photograph at a time, in random order, with instructions to say "yes, no, or unsure as to each photo."
- Assurance of the witness that failure to make an identification will not end the investigation
- The foils in photo spreads should resemble the description of the suspect "given at the time of the initial interview"
- A witness should not be given feedback about his identification until his level of certainty about his identification has been recorded.

array. Despite having seen a photograph of McClain on television, Pina was unable to conclusively identify McClain in the photographic lineup even though, aside from race, he did not resemble any other person in the photographic six packs. This is particularly problematic because, when, as here, "defendant is of a different race than the witness, concern about suggestiveness is heightened." (*United States v. Rogers* (5th Cir. 1997) 126 F.3d 655, 658.) McClain had different hair, different facial features, and different jewelry than the men in the other photographs. (See *Foster v. California* (1969) 394 U.S. 440, 442-443 [there was a "compelling example of unfair lineup procedures," where the defendant was the tallest and the only person in the lineup wearing a leather jacket].) Furthermore, McClain's photograph was in the center of the page and was darker than any other photograph. When Pina still could not make a conclusive identification, detectives then showed him the exact photograph he had seen on television again. Only then was Pina able to identify McClain in the photo array. They did so even though the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." (*Stovall v. Denno, supra,* 388 U.S. at p. 302; see also *Davis v. United States* (9th Cir. 1970) 425 F.2d 673, 674; *United States v. Field* (9th Cir. 1980) 625 F.2d 862, 868-869.) Furthermore, Pina was again unable to identify McClain at trial until after he had an opportunity to confer with the prosecutor. All of these factors rendered the identification suggestive in ways frowned upon by the courts.

"[A]n identification procedure is unnecessarily suggestive when its use is not imperative." (*U.S. v. Montgomery, supra,* 150 F.3d at p. 992.) There was no necessity for the suggestive procedures law enforcement employed in McClain's case. (See *In re Hall* (1981) 30 Cal.3d 408, 433

["if the methods employed are suggestive, it is incumbent on the prosecution to prove that they are justified by the circumstances"].) On November 1, 1993, half a day after the homicides occurred, law enforcement considered McClain a suspect and Pina provided a description of the driver of the lead car. (36 RT 3907, 3915, 3920.) Yet, Detective Uribe did not ask Pina to look at a photographic lineup while his memory was fresh. (36 RT 3920.) Nor did detectives ask Pina to return within a reasonable amount of time to attempt to make an identification.

Furthermore, no exigency explains the detectives' selection of photographs of a group of people, who, aside from race bore no resemblance to McClain, in constructing the lineup. Especially in light of the delay in arranging an identification procedure, law enforcement surely had "ample time to prepare a non-suggestive photographic array." (*U. S. v. Montgomery, supra,* 150 F.3d at pp. 992-993.)

And, it was unnecessary for detectives to show Pina a single photograph of McClain, especially because it was the same photograph Pina had seen on television. (See, e.g, *Mysholowsky v. New York* (2nd Cir. 1976) 535 F.2d 194, 197 [condemning "exhibition of a single photograph as a suggestive practice, and, where no extenuating circumstances justify the procedure, as an unnecessarily suggestive one"]; *People v. Nation* (1980) 26 Cal.3d 169, 181.)

When, as here, law enforcement employs unnecessarily suggestive identification procedures, the next question is whether in light of the totality of the circumstances, there was a "substantial likelihood of misidentification." (*Simmons v. U. S., supra,* 390 U.S. at p. 384.)

Under *Neil v. Biggers, supra,* 409 U.S. 188, 199-200, the

> factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Examination of the totality of the circumstances prior to and during the photographic lineup in light of *Neil v. Biggers, supra*, and other markers of reliability, reveals that law enforcement's procedures in this case were so suggestive that they created the irreparable risk that Pina misidentified McClain as the driver of the lead car. Comparing Pina's identification to those of witnesses in other cases through the lens of *Biggers* and other factors reveals that Pina's identification was far less reliable than those of eyewitnesses whose identifications courts have found unreliable.

a. Pina had limited opportunity to view the driver of the lead car

Clearly, the more and greater the opportunities a witness has to observe a person, the more reliable that person's identification is to a trier of fact. (*Robinson v. United States* (D.C. Cir. 1972) 459 F.2d 847, 858.) Thus, the first factor to look at in evaluating the reliability of an identification, is "the opportunity of the witness to view the criminal at the time of the crime." (*Neil v. Biggers, supra*, 409 U.S. at p. 199.) As McClain demonstrates, Pina's opportunity to observe the driver of the first car was too limited to produce a reliable identification.

Law enforcement here failed to elicit from Pina during their early interviews with him where he was in relation to the driver of the lead car when he observed him. (26 RT 2691-2693, 2730; 35 RT 3754, 3756; 36 RT

3897.) However, at the grand jury, Pina testified that the car had pulled up "next" to him. (2 CT 440.) At trial, in contrast, Pina claimed that he observed the driver of the lead car when the car pulled up about 16 feet from him, then moved away in reverse. (25 RT 2648, 2675.) Neither law enforcement nor the prosecutor asked Pina about the duration of his observation. Moreover, Pina never indicated that he stopped walking during these observations. (25 RT 2646-2648.) Pina noted that there was a streetlight, however it was nighttime. (*Ibid.*) Also, Pina's view was obstructed by tinted windows. (25 RT 2647; 36 RT 3920.) In addition, when Pina made these observations, he was concerned about his safety. (26 RT 2693.) Perhaps most importantly, by Pina's own admission, "looking face to face I have not really seen him that good." (2 CT 463; 26 RT 2697-2698.)

Courts have addressed the adequacy of witnesses' opportunities to observe perpetrators. For example, in *Dickerson v. Fogg* (2nd Cir. 1982) 692 F.2d 238, 241, the court found that an eyewitness, who from about a car's length away, looked at the perpetrator for one or two full minutes while the suspect was pulling on a hat which came to his eyebrows, had an insufficient opportunity to view the suspect, noting the district court's observations that:

> Whatever the duration of [the eyewitness's] observation of the back seat passenger, his opportunity to form an accurate mental picture was impaired by the fact that it was nighttime, by the tension of the moment, by the distance between himself and the car, by the rear window of the car, and by the hat that . . . the man pulled over his head.

(*Id.* at p. 245; see also *U.S. v. Field, supra*, 625 F.2d at pp. 868-869 [opportunity to observe contributed to unreliable identification where one

witness viewed robber twice, each time for a few seconds, and from a distance of 20 feet; another viewed the robber from a distance of 20-25 feet during the entire robbery, but a portion of the one of the robber's faces was obscured]; *U. S. v. Rogers*, *supra*, 126 F.3d at pp. 658-659 [where the duration of the witness's observation was not clear from the record, but not long, a portion of the perpetrator's face was obscured, and witness was afraid at the time of her observations, her opportunity to observe was limited]; *Mata v. Sumner* (9th Cir. 1983) 696 F.2d 1244, 1252, appeal later mooted, [the witness, who viewed the assailant "eye to eye" for "several minutes, several seconds" had an inadequate opportunity to observe the perpetrator]; *Solomon v. Smith* (2nd Cir. 1981) 645 F.2d 1179, 1186 [although the witness viewed the perpetrator for ten to fifteen minutes, his partially obscured face and her fear during the incident contributed to the likelihood of misidentification]; *Chappel v. Garcia* (E.D. Calif. 2006) 2006 U.S. Dist. Lexis 43292 [a witness's opportunity to observe was limited where she viewed the perpetrator through the hole in the trunk of her car]; *Satcher v. Netherland* (E.D. Va. 1996) 944 F.Supp. 1222, 1295 [witness had less opportunity to view assailant than witness in *Biggers*, where witness "first saw her assailant when he was between 30 and 50 feet away from her on the bicycle path," "she looked at him a few times and made eye contact with him when they passed each other on the path," and "they were less than two feet apart" when they passed. Witness's glasses were knocked off and she "was thrown face down in the ditch alongside the bike path and that during the five to seven minute attack" she was face down]; *People v. Felix* (1993) 14 Cal.App.4th 997, 1008 [inconsistent testimony called into question the adequacy of a witness's opportunity to observe the criminal].)

Qualitatively and quantitatively, Pina had less opportunity to observe the driver of the lead car than did witnesses the adequacy of whose observations have been questioned by the courts.

b. Pina repeatedly stated over time that he did not pay attention to the driver of the lead car

The second factor listed in *Biggers* is the "witness' degree of attention." (*Biggers, supra*, at p. 199.) Pina stated repeatedly over time, including at trial, that he did not pay attention to the driver of the lead car. (25 RT 2649; 26 RT 2712-2713; 35 RT 3747.) In this case, the prosecution tried to rehabilitate Pina's identification by arguing that Pina had very good eyesight. (26 RT 2716-2717.) However, perfect eyesight is irrelevant when the witness is not actually looking at the assailant. (See, e.g., *Dickerson v. Fogg, supra*, 692 F.2d at p. 241 [the court dismissed claims that the eyewitness's experience as a security guard heightened his attentiveness, because the eyewitness could only provide a vague description of the suspect]; *United States v. Rogers* (7th Cir. 2004) 387 F.3d 925, 938 [the court doubted the degree of the witness's attention where, while witness was a participant in the criminal transaction, he was not particularly interested in the scheme, was eating and looking at clothes while it transpired, and said that all black people look alike].) Pina's lack of attention is fatal to the reliability of his identification.

c. Pina could not describe the driver of the lead car in his earliest contacts with police and his descriptions were inconsistent over time

The third matter for consideration under *Biggers* is "the accuracy of the witness' prior description of the criminal." (*Biggers, supra*, at p. 199.)

The "evolution over time of a given eyewitness's description can be fatal to its reliability." (*Kyles v. Whitley* (1995) 514 U.S. 419, 444.)

When asked if he could identify anyone, Pina told the officer at the station that he had not paid attention to the driver because of his disability–but he wished he had. (26 RT 2712-2712; 35 RT 3747.) The officer at the scene testified that, when he interviewed Pina, he was just screening witnesses and not conducting extensive questioning. (36 RT 3883-3884, 3887-3893, 3899.) However, the officer acknowledged that had Pina told him he could identify anyone, that along with any descriptions would have been in his notes. (38 RT 3897.) Additionally, this does not explain why the officer who interviewed Pina at the police station a couple of hours later was unable to obtain a description from Pina. No suspect had been caught and Pina was not injured, in danger, hurried, or otherwise impeded from giving the police a detailed description when his memory was clearest.

Days later, on November 4, 1993, Pina described the driver of the first car as a black man from 22-23 years old with a jheri curl and shoulder length or long hair. (36 RT 3920.) However, at the grand jury approximately five months later, Pina explicitly testified that the driver did NOT have a jheri curl, but rather had straight, stringy hair. (2 CT 434.) At trial, approximately two years after the killings, Pina's description of the driver had evolved even further: now the driver was a man with receding, combed back hair. (25 RT 2649; 36 RT 3920.) In other words, Pina's description of the driver at trial matched McClain's appearance in November 1995 and bore no relationship to his earlier descriptions of the driver of the lead car.

A witness's "minimally detailed description when he [talks] with the police plainly devalues his description as a factor demonstrating the

reliability of his identification." (*Dickerson v. Fogg, supra*, 692 F.2d at pp. 245-246.) In *Dickerson*, as here, the eyewitness described the perpetrator in court after seeing the defendant, but did not provide a detailed description in his initial contacts with police. (*Id.* at p. 246.) Also like McClain's case, the sole purpose of the witness's meeting with police at the scene of the crime in *Dickerson* was to conduct an investigation, there was no plausible explanation, aside from his inability to do so, why the witness did not describe the criminal. (*Ibid.*; see also *Abdur Raheem v. Kelly* (2nd Cir. 2001) 257 F.3d 122.)

Pina's failure to describe the driver when the information was freshest in his mind and his subsequent inconsistent descriptions thus point to the unreliability of his identification.

d. Pina was uncertain of his identification of McClain until detectives showed him an individual photograph

The *Biggers* Court instructs that the fourth factor to examine in evaluating the reliability of an identification is the "level of certainty demonstrated by the witness at the confrontation." (*Biggers, supra*, at p. 199.)

Here, Pina did not make an identification of McClain until after he saw McClain's photograph on television. When Pina looked at additional photographs, the photograph of McClain stood out among those in the six pack because it was darker, McClain was the only person with long hair (one had no hair at all), McClain was the only person wearing a gold chain, and, aside from race, the men shared no common facial features. (22 RT 2161, 2163; Peo. Exh. 17A-E.) Even with these arrows pointed at McClain's photograph, Pina was only able to say that McClain looked like

the guy, but he was not really sure. (26 RT 2697.) At this point, detectives did far more than urge Pina to take a second look. They took the unusual step of showing Pina a single photograph of McClain– the same photograph that aired in the news media only days before– to secure his identification. (26 RT 2697, 2699-2700, 2719.)

The United States Supreme Court has recognized that even when law enforcement use ideal procedures to obtain an identification, there is a risk of misidentification. (*Simmons, supra*, 390 U.S. at p. 383.) The risk of misidentification increases when the police show the witness a single photograph of the individual or if they show the witness photos of several people among which the photograph of the suspect is emphasized. (*Id.* at pp. 383-384; see also *People v. Citrino* (1970) 11 Cal.App.3d 778, 783 [an identification procedure was obviously suggestive where the eyewitness described the suspect as having long hair and defendant was the only person in the photo spread with long hair].) This is especially true when the witness only saw the suspect briefly.[53] (*Simmons, supra*, 390 U.S. at p. 383.)

All of the red flags the High Court elucidated in *Simmons* are present in Pina's photo identification of McClain. Pina had a brief opportunity to view the driver of the lead car and, by his own admission, did not pay

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[53] See also *Dickerson v. Fogg, supra,* 692 F.2d at p. 246. In that case, the witness who attended a live lineup was initially "pretty sure" that one of the men in the lineup was the perpetrator. (*Ibid.*) The police officer, not satisfied with this response, sent the eyewitness back for a second look. (*Ibid.*) Only then did the eyewitness say that Dickerson looked "just like" the passenger in the car. (*Ibid.*) This second identification did not inspire confidence in the court which found that the eyewitness's "ultimate positive confrontation does not significantly buttress the independent reliability under the circumstances." (*Id.* at pp. 246-247.)

attention to him. Pina then saw a photograph of McClain on television and looked at a six pack in which McClain's photograph was featured like the bullseye on a dartboard. Even then, Pina could not conclusively identify McClain until police showed him the photograph of McClain which had aired in the media and that Pina had seen before.

e. Pina did not attempt to identify the driver of the lead car until 59 days after the homicides

The fifth *Biggers* factor is the length of time between the crime and the confrontation. (*Biggers, supra*, at p. 200.) Pina did not attempt to identify a suspect until fully 59 days after the homicides. (26 RT 2696.) Detectives offered no explanation for the delay, which contributed greatly to the risk of misidentification. (See, e.g, *U.S. v. Field, supra*, 625 F.2d at p. 870 [witness's identification of questionable reliability where the first "sure" identification occurred approximately two months after the robbery]; *Dickerson v. Fogg, supra,* 692 F.2d at p. 247 [while 40 hours was not long enough to entirely obscure the witness's memory, the time of sharpest memory had passed].) The detective who interviewed Pina on November 4, 1993 acknowledged that McClain was a suspect at that time. (36 RT 3907, 3915.) The detective's notes indicated that Pina provided some description of the person he saw. (36 RT 3905, 3920.) When examined as part of the totality of the circumstances, the detectives' failure to present a photographic lineup to Pina within days of the crime when his memory was still relatively fresh, undermines the reliability of his identification of McClain.

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4. Other factors contributing to the unreliable identification.

a. Pina did not identify McClain in the courtroom until he conferred with prosecutors

Any doubt that Pina's identification of McClain was irreparably tainted, was erased when Pina failed to identify McClain in court. (25 RT 2649, 2651.) After a break in proceedings, during which Pina spoke with prosecutors, Pina was suddenly able to identify McClain with great confidence. (25 RT 2668.) Pina claimed he had not identified McClain earlier because he was intimidated, however, when the trial court asked him whether he was nervous, Pina said no. (25 RT 2654, 2668.) Furthermore, there was no evidence of threats against Pina by McClain or anyone else involved in this case.

Interestingly, Pina testified that he had never identified McClain in a live lineup, but only in photographs. (25 RT 2651; 26 RT 2696.) This is striking, because Pina was only able to identify McClain after a detective showed him a single photograph of McClain– the very same photograph aired in the media the day before Pina called police to say he could identify the suspect. (26 RT 2697, 2699-2700, 2719, 2722.) The logical inference is that Pina never identified McClain as a result of seeing him the night of the homicides. Instead, he identified a second photograph of a person who he had seen for the first time in a photograph on television or in the newspaper. He did not identify McClain as the person he saw in the car, but as the person he had seen in a photograph in the media. This is precisely the danger the Supreme Court identified in *Simmons*. (*Simmons v. U. S.*, *supra*, 390 U.S. at p. 383.)

b. Cross-racial identifications are unreliable

The trial court instructed the jury in evaluating the identification to weigh the "cross-racial or ethnic nature of the identification." (42 RT 4352.) Holmes' witness Kathy Pezdek also mentioned this factor. (34 RT 3660.) "Social science research . . . has established beyond peradventure that witness identifications, especially when cross-racial and based on brief moments of observation, are quite unreliable." (*United States v. Hannigan* (3rd Cir. 1994) 27 F.3d 890, 900; see also *U.S. v. Rogers, supra,* 126 F.3d at p. 658; *United States v. Cook* (7th Cir. 1996) 102 F.3d 249, 252; *Brown v. Davis* (6th Cir. 1985) 752 F.2d 1142, 1146; *United States v. Butler* (D.C. Cir. 1980) 636 F.2d 727, 733, fn. 31.) In light of abundant empirical data, this Court has recognized that the ability of whites, including those who are not racially prejudiced, to recognize black faces is substantially impaired. (*People v. McDonald* (1984) 37 Cal.3d 351, 368, overruled on other grounds.)

While the trial court's instruction was a step in the right direction, even jurors who are aware of problems with cross-race identifications may be unable to overcome them:

> Some jurors may deny the existence of the own-race effect in the misguided belief that it is merely a racist myth exemplified by the derogatory remark, 'they all look alike to me,' while others may believe in the reality of this effect but be reluctant to discuss it in deliberations for fear of being seen as bigots.

(*People v. McDonald, supra,* 37 Cal.3d at p. 368.)

For these reasons, both Pina's ability to identify an African-American perpetrator and the jury's ability to consider the impact of cross-racial identification were impaired. Examined in light of the totality of the

circumstances, there is a substantial likelihood that Pina misidentified McClain.

C. Inclusion of Pina's Identification Requires Reversal

When a tainted identification comes from the only eyewitness in the case, its admission cannot be harmless. (*People v. Martin* (1970) 2 Cal.3d 822, 831.) This is particularly true in this case in which, as demonstrated in Claim III, *post*, prosecutors were relying on a parade of bought and paid for criminals to make their case against McClain.

Gabriel Pina was critical to the prosecutors' case. He was the only witness against McClain who had never been arrested for a crime. Furthermore, he was the only witness against McClain who was near the crime scene and the only witness with testimony that McClain was anywhere near the area of the crimes. In the absence of any credible witness linking McClain to the homicides, the prosecutors needed Pina to prove their case against McClain.

The prosecutors demonstrated the weakness, yet centrality of Pina's testimony when, in closing argument and rebuttal, they tried to rehabilitate his incredible testimony by preying on jurors' fears of gang retaliation. (44 RT 4662-4664.)

During the jurors' lengthy 12-day deliberations about McClain's guilt, the jury requested readback of Pina's testimony from the time he first saw the four cars until the time he saw suspects return to waiting cars. (6 CT 1467-1468; 45 RT 4720.) This illustrates the great importance the jurors placed on this unreliable testimony in reaching what was obviously a very close decision. In a close case, a substantial error may require reversal and any doubts as to prejudice should be resolved in favor of appellant. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Because this prejudicial error violated McClain's rights to a fair trial, reliable guilt and penalty determinations, and due process, this Court must apply *Chapman v. California* (1967) 386 U.S. 18, 24 and reverse McClain's convictions in the Halloween killings.

III.
THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT McCLAIN'S CONVICTIONS OF CONSPIRACY, FIRST DEGREE MURDER, AND ATTEMPTED MURDER

A. Introduction

The prosecutor asserted that, after the shooting of fellow P-9 Blood gang member Fernando Hodges, McClain, Newborn, Holmes, and others met at Huntington Memorial Hospital where Hodges lay dying and entered into an agreement to kill some Crips in retaliation; the prosecutor alleged seven overt acts in support of this conspiracy (Count 10), including the meeting and agreement at the hospital. (11 RT 528; 14 RT 1093-1094; 15 RT 1193-1194; 32 RT 3366-3371, 3386-3412; 33 RT 3597-3598, 3641; 3 CT 641; see Statement of the Case, *ante*.)

Defense counsel moved for judgment of acquittal (Penal Code § 1118.1) on the first six overt acts. (32 RT 3329-3336.) During a hearing on that motion, the trial court struck overt act two, that, at Huntington Memorial Hospital, an unnamed coconspirator said in the presence of Newborn, Bailey, McClain, Bowen, and Holmes stated "let's go get the guns," from the indictment. (3 CT 641; 32 RT 3333.)

During the same hearing, the trial court informed counsel that he had "problems" with overt acts four, five, six, and seven. (32 RT 3331.) Later, the prosecutor conceded that there was no evidence to place McClain at the hospital and moved to strike overt acts one, that Defendants Newborn,

Bailey, McClain, Bowen, and Holmes met at Huntington Memorial Hospital and discussed retaliating for the murder of Fernando Hodges, and two, that, at Huntington Memorial Hospital, an unnamed coconspirator said in the presence of Newborn, Bailey, McClain, Bowen, and Holmes stated "let's go get the guns," as to McClain. (3 CT 641; 41 RT 4310-4311.) The trial court struck McClain's name from overt acts one and two before repeating the charges to the jury with its pre-deliberation instructions. (42 RT 4364.)

With these changes, the only remaining overt act that mentioned McClain alleged that he drove a car to the crime scene – a claim supported by no reliable evidence, and, more importantly, not found true by the jury. (42 RT 4365; 6 CT 1695.) The only overt act found true, that "at Pasadena Avenue and Blake Street on October 31st, 1993, at about 9 o'clock p.m., Lorenzo Newborn, Solomon Bowen, and unnamed coconspirators fired numerous rounds from a 9-millimeter gun at or near the residence of an individual believed to be a Crip," contained no reference to McClain. (6 CT 1695.)

At the close of the second penalty phase, standby counsel for McClain filed a motion for new trial because the verdict was contrary to the law and evidence. (Pen. Code §§ 1179, 1181(7); 9 CT 2315-2340; 76 RT 7564, 7566-7574.) The trial court denied this motion. (76 RT 7575.)

The prosecutor's case against McClain for the Halloween crimes rested on the incredible eyewitness testimony of Gabriel Pina, and the inconsistent testimony of informants with ample reasons to lie. The only evidence against McClain in the Price attempted murder came from Price, whose inconsistent testimony and motives to lie made him incredible. The prosecution compensated for its lack of credible evidence with scare tactics and improper reliance on McClain's gang membership. (See Claims IV &

VI.) The evidence failed to establish McClain's participation in the Halloween killings in any capacity and did not prove that McClain attempted to kill Robert Price. Because the evidence was insufficient to sustain the verdicts on all counts, McClain's convictions should be reversed.

B. Applicable Law

A conviction not supported by sufficient evidence violates the due process clauses of the Fourteenth Amendment of the United States Constitution and of article I, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule flows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, the reviewing court similarly inquires whether a "'reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*People v. Memro* (1985) 38 Cal.3d 658, 694-695, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The evidence supporting the conviction must be substantial, which means that it "reasonably inspires confidence" (*People v. Bassett* (1968) 69 Cal.2d 122, 139, cited with

approval by *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bolden* (2002) 29 Cal.4th 515, 553.) Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not limit its review to the evidence favorable to the respondent." (*People v. Johnson*, supra, 26 Cal.3d 557, 577.) Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*Ibid.*, original italics; see *Jackson v. Virginia*, supra, 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution," original italics].)

The same standard applies to a defendant's motion for a judgment of acquittal under Penal Code section 1118.1. Section 1118.1 provides in pertinent part that the trial court "on motion of the defendant . . . , at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

In considering a section 1118.1 motion, the trial court, like a reviewing court, must determine whether there is sufficient evidence to support a judgment of conviction. (See *People v. Hatch* (2000) 22 Cal.4th 260, 272; *People v. Trevino* (1985) 39 Cal.3d 667, 695.) Further, "[w]here the section 1118.1 motion is made at the close of the prosecution's case-in-

chief, the sufficiency of the evidence is tested as it stood at that point." (*Trevino, supra*, 39 Cal.3d at p. 695.)

1. The Halloween Crimes

Conspiracy is a specific intent crime which requires "(a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy." (*People v. Horn* (1974) 12 Cal.3d 290, 296, citations omitted, overruled on other grounds by *People v. Cortez* (1998) 18 Cal.4th 1223, 1230.) "Although a conspiracy may be proved by circumstantial evidence, there must be some evidence from which the unlawful agreement can be inferred before criminal liability may be imposed on the basis of conspiracy. There must be substantial evidence to establish all the essential elements of the conspiracy. Mere association alone cannot furnish the basis for a conspiracy." (*People v. Donahue* (1975) 46 Cal.App.3d 832, 840-841, internal citations omitted.)

a. Evidence of an Agreement

The prosecutor conceded that he failed to prove that McClain was present at the hospital where the alleged agreement to kill some Crips to avenge the death of Hodges occurred. (41 RT 4310-4311.) As a substitute for proof that McClain actually entered into an agreement, the prosecutor repeatedly made improper references to McClain's gang membership and activity (see Claims IV, VI, VII and VIII). However, it is well-settled that a general agreement of gang members to fight members of rival gangs – "an ordinary characteristic of gangs, does not constitute the type of illegal objective that can form the predicate for a conspiracy charge." (*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1247.) In *Garcia*, the prosecutor charged defendant, a member of a Blood gang, with conspiracy to kill three individuals. (*Id.* at p. 1246.) The Ninth Circuit found that

> Even if the testimony presented by the state had sufficed to establish a general conspiracy to assault Crips, it certainly did not even hint at a conspiracy to assault the three individuals listed in the indictment. Of course a more general indictment would not have solved the state's problems in this case. In some cases when evidence establishes that a particular gang has a specific illegal objective such as selling drugs, evidence of gang membership may help to link gang members to that objective. [footnote omitted]

(*Id.* at pp. 1246-1247.) Here, the prosecutor alleged a general agreement to attack Crips, but did not show that McClain entered into an agreement to assault the victims in this case. The prosecutor argued that McClain's testimony that he wanted to kill Crips the night of the homicides showed that he was guilty of the charged homicides. However, McClain's truthful testimony that he was looking for Crips to kill to avenge the death of his friend Fernando Hodges does not prove that he conspired with others or acted to kill the victims in this case. (36 RT 3989-3992; 44 RT 4690.)

Moreover, the evidence is legally insufficient to support the jury's finding of overt act 3, which alleged that Newborn, Bowen and others were involved in a shooting at Pasadena and Blake streets about 9:00 p.m. on the night of the homicides. (See 6 CT 1695.) 9-1-1 logs for Halloween 1993 show no calls about a shooting incident at Pasadena and Blake that evening. (35 RT 3764-3765.) Instead, the logs indicate that while there were complaints of a shooting at that location, they were logged at about 1:00 a.m. on November 1, 1993. (35 RT 3764-3769.) As the alleged incident occurred after the Halloween killings, it could not have furthered the conspiracy to commit them. The prosecution's conspiracy case therefore fails.

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b. Halloween homicides

In its attempt to show that McClain drove the getaway car in the Halloween offenses, the prosecutor relied entirely upon the testimony of unreliable eyewitness Gabriel Pina and informants Mario Stevens, a convicted felon and gang member; James Carpenter, who spoke to police under threat of arrest for drug dealing; and Troy Welcome, a gang member who was civilly committed for drug use. Each of these informants was given reward money and other assistance from law enforcement. Each of these informants gave statements and grand jury testimony that differed from his testimony at McClain's trial. And, each of these informants faced harsher punishment should he refuse to testify in McClain's case. More importantly, none of these informants provided evidence that McClain admitted participation in the Halloween crimes. In addition, the prosecutors attempted to discredit their own witness, Derrick Tate, who testified that co-defendant Holmes told him that he and two other people, neither of whom were McClain, perpetrated the shootings.

These informants had dubious credibility and did little to link McClain to the crimes, yet their testimonies were highly prejudicial. As the trial court opined: "I think informants are bullshit. Most informants are bullshitters. I set up the LAPD informant files because they bullshitted young police and young D.A.s. Everybody believes this crap . . ." (20 RT 2040.)

The prosecutor's persistent and improper reliance on arguments of guilt by association, gang evidence, and evidence of McClain's bad character to persuade the jury to convict McClain belie the sufficiency of the evidence to prove McClain's guilt beyond a reasonable doubt.

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c. Informant testimony

"[A]lthough informants are integral to law enforcement work, courts often underestimate their potential to implicate innocent persons." (Haglund, *Note*: *Impeaching the Underworld Informant* (1990) 63 S.Cal.L. Rev. 1405, 1407.) "Every informant, from the rookie to the professional, has a motive to lie. The immunized informant trades information for liberty. When an informant does not have any information to trade, she may be tempted to fabricate 'information' in order to obtain her liberty. . . . Likewise, the paid informant has visions of trading information for cash." (*Id.* at p. 1412.) Both of these motives figure prominently among informants in McClain's case, who were also motivated by personal animus and gang rivalries.

While it may be tempting to believe that the four informants in this case bolster each other's credibility, the opposite is true. On close examination, the methods used by the prosecutors and law enforcement to induce and coerce the testimony of these witnesses suggest a pattern of misconduct rather than the likelihood of truthful testimony.

This Court has consistently rejected the notion that informant testimony is inherently unreliable. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008; *People v. Ramos* (1997) 15 Cal.4th 1133, 1164-1165.) However, in McClain's case the record demonstrates that the testimony of informants Stevens, Carpenter, Welcome, and Tate was unreliable in fact.

Moreover, murder convictions and death sentences based on the testimony of such demonstrably deceptive and unreliable witnesses falls well below the heightened reliability standards required by the Eighth and Fourteenth Amendments to the federal constitution. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) These heightened reliability standards

apply to both the guilt and penalty determinations in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

As demonstrated below, the convictions and death verdicts cannot stand.

i. Mario Stevens

When "inherent improbabilities" of a witness's testimony are "glaringly present at every turn," that "evidence is insufficient to persuade a rational factfinder beyond a reasonable doubt that the defendant is guilty." (*United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, 546.) As detailed above in the Statement of Facts, such improbabilities are ubiquitous in the testimony of Mario Stevens. According to Stevens, the day after the Halloween crimes, McClain, a P-9 Blood, took a friendly stroll for about two hours with Stevens, a member of enemy gang Pasadena Denver Lane ("PDL"), at an enemy gang hangout where he then confided in his enemy that he "put in some work" on some Crips in the presence of about eleven other people. (25 RT 2543-2547, 2554, 2571-2572, 2584, 2587-2588.) During this time, PDL and P-9 had an active feud. (25 RT 2562.) Indeed, before Halloween 1993, Stevens was shot at by members of P-9. (25 RT 2573.)

Stevens's testimony is incredible on its face, but other powerful factors also point to its falsity. Stevens's initial discussion with law enforcement about the Halloween case took place in December 1993, while Stevens was in jail and wanted to get out of custody. (25 RT 2597-2598.) At that time, Stevens told law enforcement that when he was in Tulare at the end of November or beginning of December– not the day after Halloween– he had overheard a conversation about the Halloween killings; conspicuously missing from this initial discussion was any mention of a

conversation with McClain. (25 RT 2570, 2609.) Not surprisingly, Stevens got out of jail after he spoke with detectives. (25 RT 2556.)

After his release, Stevens was arrested on drug charges. (25 RT 2575.) On February 24, 1994, Stevens called the prosecutor from his cell at the Los Angeles County Jail to find out what would happen to him. (25 RT 2575-2576.) The prosecutor told Stevens to call his lawyer, but during that telephone call, Detective Korpal also told Stevens that there was a $40,000 reward in this case and that Stevens could get substantial money in exchange for truthful testimony at trial. (25 RT 2562; Def. Exh. E.)

Before Stevens testified before the grand jury, he traveled by car to Tulare with Detectives Korpal and Uribe. (25 RT 2614.) The trip lasted about two hours. (*Ibid.*) During that trip, Stevens told the detectives about a conversation he had with McClain– a conversation Stevens never mentioned in his December discussions with them. (25 RT 2618.) At trial, Stevens attributed this dramatic change in his story to his initial mistrust of the detectives and his desire in December to get out soon. (*Ibid.*) This makes no sense– had Stevens really wanted help from law enforcement, he would have given them the most specific, valuable information he had. Furthermore, he would not have embarked on a journey with detectives to Tulare had his mistrust been so great or his expectation of reward been minimal. Indeed, before he testified at trial, Stevens demanded from the prosecutor a written document stating that Stevens would receive financial compensation in exchange for his testimony at trial. (25 RT 2603; Def. Exh. G.)

Furthermore, Stevens's testimony changed during the course of the trial itself. On cross-examination Stevens testified that he told detectives on the way to Tulare that McClain said he had "put in some work" on some

Crips. (25 RT 2567.) Stevens understood "put in some work" to mean that McClain shot at someone. (25 RT 2567.) After this testimony, during a break in proceedings, Stevens met with Detectives Uribe and Korpal. (25 RT 2625.) After this meeting, Stevens testified that he could no longer recall telling the detectives that McClain said he had put in some work on the way to Tulare. (*Ibid.*) This convenient change in story brought Stevens's testimony into line with the detectives' notes.[54] Without irony, Stevens acknowledged at trial that he himself had put in work out on the street. (25 RT 2567.)

Although Stevens's story has never been clear, one thing is: over the course of his interactions with the criminal justice system, including a robbery conviction and two narcotics convictions, Stevens learned to work the system to his advantage. (25 RT 2559-2560.) When he testified before the grand jury in this case Stevens was again in custody, facing a possible five year term. (25 RT 2557-2558.) Stevens was granted probation and would have been released immediately, but for another parole violation. (25 RT 2558-2559.) Instead, he was released about four months after he testified. (25 RT 2559.)

In short, the prosecutor and law enforcement procured Stevens's convenient trial testimony through inducements including leniency, the promise of leniency, the promise of cash, the promise of relocation, the promise to help Stevens find employment, and a promise to help Stevens get into a halfway house. (25 RT 2549-2550.)

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[54] Other significant inconsistencies in Stevens's statements over time are discussed in the Statement of Facts, *ante*.

Even if the substance of Stevens's testimony were believable– which on its face it is not– Stevens's flexible notion of truth in combination with the inducements he received for his testimony make his so-called evidence wholly incredible.

Stevens's testimony illustrates this sobering observation by the United States Court of Appeals for the Ninth Circuit: "Never has it been more true than now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony . . . in return for reduced incarceration." (*Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1123.)

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government.

(*Ibid.*)

For these reasons the testimony of a paid informer is not sufficient to prove an element of a crime where "it is incredible or insubstantial." (*United States v. Earl* (9th Cir. 1994) 27 F.3d 423, 425, citing *United States v. Lai* (9th Cir. 1991) 944 F.2d 1434, 1440.)

In *Earl*, the Ninth Circuit looked at both the credibility and substantiality of a paid informant's testimony and determined that both were lacking. (*United States v. Earl, supra*, 27 F.3d at p. 425.) The informant was incredible because of numerous contradictions in his testimony. (*Ibid.*) The informant testified in support of the government's claim of constructive possession, that defendant was a crime king who stayed at the house where

police found drugs. (*Ibid.*) The court found this was insubstantial evidence that defendant was an owner/occupant of the premises or was otherwise in constructive possession of contraband.[55] (*Ibid.*)

So too, the testimony of Mario Stevens was both incredible and insubstantial. The scenario Stevens offered – which had McClain spending a casual couple of hours on enemy turf where he then told rival gang member Stevens and others (none of whom Stevens could remember) that he participated in a capital crime– is patently unbelievable.

Furthermore, even if everything Stevens said were true, none of it amounts to a confession that McClain participated in the charged crimes.

No rational juror could have found beyond a reasonable doubt that McClain drove the getaway car in the Halloween case on the basis of Stevens's testimony or on the basis of this testimony in combination with the other incredible evidence put forward by the prosecutor.

ii. James Carpenter

Even the prosecutor lacked faith in informant James Carpenter. The prosecutor urged the jury to disbelieve all of Carpenter's testimony, except for the part that was clearly untrue, i.e., that Carpenter's mother and McClain's father are twins and that Carpenter and McClain are cousins.

When the prosecutor called James Carpenter at trial, Carpenter denied that he had ever implicated McClain. (23 RT 2307.) Like Stevens, Carpenter was in jail when he first spoke with Detectives Korpal and Uribe. (23 RT 2313.) The Tulare police had arrested Carpenter on a no-bail

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[55] The Ninth Circuit based its decision on insubstantiality, but noted that "the lack of credibility that marks Douglas' uncorroborated testimony may be enough to render it insufficient." (*United States v. Earl, supra*, 27 F.3d at p. 425.)

warrant for violating probation. (23 RT 2321; 39 RT 4197.) Carpenter explained that although he told them repeatedly that he did not know anything, Korpal and Uribe insisted that he had information. (23 RT 2313.) When Carpenter did not produce the information they wanted, the detectives told him that if he did not tell them what they wanted to hear, he would go to jail for drug dealing. (23 RT 2322.)

Carpenter confirmed at trial that McClain visited him in Tulare in early November 1993, along with Alonzo Hamilton and Laward Looney. (23 RT 2305.) He denied, however, that McClain told him that he was involved in the Halloween crimes. (23 RT 2307.) Rather, Uribe and Korpal told Carpenter that McClain was involved and gave Carpenter information about there being a massacre. (*Ibid.*)

Two or three months after Korpal and Uribe interviewed Carpenter in the Tulare County Jail, Michael Thompson, Carpenter's cousin, told Carpenter that Korpal had come by Carpenter's house when Carpenter was asleep. (23 RT 2317, 2320.) Korpal told Thompson to tell Carpenter he would pay Carpenter $500 to testify; Korpal left his pager number. (23 RT 2317.) Carpenter paged Korpal who asked Carpenter if he wanted to make some money. (*Ibid.*) Carpenter told Korpal to contact his lawyer and threw away Korpal's pager number. (*Ibid.*) Thompson was arrested with a .38 which McClain had sold to him, but Carpenter did not give that information to police. (23 RT 2311.)

Korpal and Uribe testified that when they interviewed Carpenter in December 1995, Carpenter told them that, after the Halloween murders, Looney and Hamilton were laughing about a massacre and McClain offered "Boom boom, pow pow, I can still hear the noise." (23 RT 2335; 31 RT 3278.) According to the detectives, McClain then told Carpenter that he

shot three Crips to retaliate for the death of Fernando Hodges. (23 RT 2335; 31 RT 3279.) When McClain heard that the victims were children, he became nervous and cut his hair short. (23 RT 2336; 31 RT 3280.) Although Korpal and Uribe recorded their interviews of every other witness in this case, they neglected to record their interview with Carpenter. (23 RT 2340; 31 RT 3283; 39 RT 4175-4176.) Uribe took notes of the interview and Korpal prepared a typewritten report. (39 RT 4140.) Neither the notes nor the report mention that McClain said "Boom boom, pow pow, I can still hear the noise." (39 RT 4172-4173.)

Because the prosecutors could not persuade Carpenter to implicate McClain in the Halloween crime, they sought to impeach him by eliciting the false testimony that Carpenter and McClain were first cousins, because McClain's father and Carpenter's mother were twins. During Carpenter's testimony, the prosecutors referred to or adduced testimony that McClain was Carpenter's cousin at least 12 times. (23 RT 2304-2305, 2308, 2310-2313, 2316, 2326, 2328, 2330.) They also elicited such testimony from Uribe. (23 RT 2335.) Korpal later testified that Carpenter was not cooperative and commented on his "family pedigree." (39 RT 4198.) McClain's father testified that he had no twin sister and no relatives in Tulare. (38 RT 4089-4090.) This information was easily verifiable, and it is nearly impossible to believe that not a single member of law enforcement or the prosecution team investigated whether Carpenter and McClain were actually related. Indeed, trial counsel alleged to the trial court that the prosecutors had put up "lies." (38 RT 4088.)

As Carpenter is not McClain's cousin, his motive to lie on McClain's behalf is gone. Furthermore, his refusal to take the government's money in exchange for testimony implicating McClain makes it more likely that he

was truthful at trial. As Carpenter is the only informant who, at least on the record before this Court, received no financial compensation and no leniency, his testimony that McClain never spoke of any involvement in the Halloween crimes is far more credible than the testimony of Mario Stevens whose testimony the government bought with money, sentence reduction, and other promises.

Carpenter adds nothing to the substance of the prosecutors' case. (*United States v. Earl, supra*, 27 F.3d 423, 425.) Rather his testimony calls in to question the reliability of all informant testimony in this case, based on the manner in which it was obtained. Such testimony neither "reasonably inspires confidence" (*People v. Bassett, supra*, 69 Cal.2d 122, 139), nor is "credible and of solid value" (*People v. Green, supra*, 27 Cal.3d 1, 55). Further, it offends the heightened reliability standards demanded by the Eighth and Fourteenth Amendments to the United States Constitution.

iii. Troy Welcome

Troy Welcome testified that a day or two after the homicides in Tulare, a nervous McClain, sporting a new hairdo, showed him a gun with which he said he had "put in work," sang a gangster rap song, asked questions about radio broadcasts, and admitted he was on the run. (28 RT 2949-2950, 2958-2959, 2961-2962, 2965, 2973.) This testimony is the classic product of a prosecutors' deal with a devil. (*Commonwealth of the Northern Mariana Islands v. Bowie, supra*, 243 F.3d at p. 1123.) Like Mario Stevens, Welcome was a member of the PDL gang, the enemy of McClain's P-9 gang. (28 RT 2946-2947.) Remarkably, the prosecutors urged the jury to believe the testimony of two of McClain's sworn enemies that, despite their lethal conflict with him, McClain confided to them his most damning secrets. In light of the inducements police offered to

Welcome, it is no surprise they persuaded him to help them convict McClain.

Law enforcement made clear its goals to Welcome when, during a November 1993 interview with Welcome, Korpal told Welcome that if he got the chance, he would kill McClain. (29 RT 3012-3013.) Welcome was amenable to helping Korpal meet this aim. In fact, during that same interview, Welcome told Detectives Korpal and Mowery, "I don't have a subconscious about telling you guys anything because these motherfuckers are taking over and that's – that's real. And they'll smoke me if they could." (29 RT 3014.) At trial, Welcome testified that he had numerous problems with McClain in the past as they were from opposing cliques. (28 RT 2950-2951.)

This was a perfect opportunity to destroy an enemy while making a little money on the side: Welcome told police, that, while he was driving to Tulare after the homicides, he had heard about the $250,000 reward in this case. (28 RT 2978-2979.) Welcome clearly knew his cooperation in this case could bring him big money.[56]

Were revenge and money not enough, law enforcement had serious leverage over Mr. Welcome. Police told Welcome that his name had come up as a possible suspect in a homicide on El Molino. (28 RT 2982.) Amazingly, Welcome initially denied any recollection of this at trial, although he later acknowledged it. (28 RT 2892, 29 RT 3021.) Perhaps more incredible, it appears from the record below that law enforcement

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[56] At trial, Welcome testified, incredibly, that although on tape he made arrangements to collect money from the Pasadena Police Department, he had never collected that money. (29 RT 3017-3018.)

never again asked Welcome for information about the homicide on El Molino.

Welcome did acknowledge in his testimony that he had asked prosecutors to make sure he did not have to complete the final 26 days of a civil drug commitment and that prosecutor Callahan said she would see what she could do. (28 RT 2972.)

On November 26, 1993, Welcome was arrested on a gun charge; a couple of days, later, while in custody, he gave a statement to Detective Mowery. (29 RT 3001, 3020.) Mowery agreed to let Welcome and two codefendants leave the police station, but noted it would look funny that the three of them were leaving together, because it gave the appearance that the district attorney had rejected the case. (29 RT 2999-3000.)

With common ground and the possibility of reward and leniency established at the outset, Welcome in his discussions with Mowery, agreed to "do some work" for the Pasadena Police Department; this meant to help them in some cases. (29 RT 3022, 3065.) Perhaps this agreement, coupled with an unknown number of unrecorded meetings between Welcome and Korpal before Welcome's trial testimony (29 RT 3011, 3016), explains why Welcome's story grew ever more helpful to the prosecutors as time passed.

Korpal made helping law enforcement easy by letting Welcome know exactly what he needed:

> Listen, what you're telling me isn't new. I wouldn't be wasting your time or mine sitting here chatting with you if I didn't know it. I mean I've heard the word before, but I haven't heard anybody who talked directly to Herb afterwards.

(29 RT 3012.)

And, with that, Welcome knew he could improve his own future prospects by providing the government with whatever story it needed to prove the Halloween case.

Welcome saw McClain in Tulare after the Halloween killings. At trial, Welcome testified both that he drove to Tulare late Sunday/early Monday after the killings and that he drove to Tulare late Monday/early Tuesday. (28 RT 2947-2948, 2978.) Not only was his trial testimony internally inconsistent, but it contrasted greatly with his taped statements to police.

Before Welcome agreed to do some work for the police department, he told Mowery and Korpal that McClain, who changed his hairstyle in Tulare, had been on the run for a probation violation and for the Robert Price case. (29 RT 3004.) At trial, in contrast, Welcome testified that when McClain told Welcome he was on the run, Welcome believed it was for the Halloween case. (28 RT 2958; 29 RT 3004.)

Initially, Welcome told police that McClain always wore his hair in a ponytail, but in Tulare, his hair was long and combed back without the ponytail. (29 RT 3008.) At trial, Welcome testified that, in Tulare, McClain's formerly long hair was cut close to the head. (28 RT 2962.)

At trial, Welcome claimed that McClain asked their companion whether he had heard anything on the radio about the Halloween case. (28 RT 2959.) In early statements to police, Welcome said McClain's only mention of Halloween was, "Man, that shit with them kids, that shit way out. I don't even wanna talk about it." (29 RT 3007.) If anything, McClain's statement indicated his horror at the homicides, not his participation in them.

At trial, Welcome testified that, while in a car with Welcome and others, McClain put a gun in his lap and said he had put in work with it. (28 RT 2951-2953.) However, Welcome never told police about this event in his taped statements. (29 RT 3009.)

Even at trial, Welcome acknowledged that McClain never admitted any involvement in the Halloween crimes. (29 RT 3009.) Indeed, when police initially asked Welcome in a taped interview what McClain had said about Halloween, Welcome let them know that McClain had not said much. (29 RT 3010.)

Although Welcome told police in his taped statement that two of the victims were active gangbangers who had confrontations with Bloods, Welcome could not recall this fact which is so unhelpful to the prosecution, at trial. (28 RT 2976.)

Like that of Stevens and Carpenter, Welcome's fanciful testimony lacks both credibility and substance. (*United States v. Earl, supra,* 27 F.3d at p. 425.)

And, as with Stevens and Carpenter, no rational juror could have found beyond a reasonable doubt that McClain drove the getaway car in the Halloween case on the basis of Welcome's testimony or on the basis of this testimony in combination with the other incredible evidence put forward by the prosecutor.

iv. Derrick Tate

Like James Carpenter, Derrick Tate, presented problems for the prosecution. On one hand, Tate had multiple felony convictions and had heard about the reward money before he spoke with law enforcement about this case. (15 RT 1359-1360, 1365-1366; 16 RT 1380-1381, 1389.) On the other hand, neither law enforcement nor the prosecution helped Tate get

relief from the charges pending against him or from the prison sentences he was serving. (15 RT 1360.) Tate initially spoke with police because he hoped to get rid of pending felony charges; however, when he learned this was not possible, he still agreed to testify. (16 RT 1386-1389.)

Tate testified that in December of 1993, when he was visiting Pasadena, McClain's co-defendant Karl Holmes bragged to him and four or five others that he, Ernest Holly and one other person hid behind some bushes from which they emerged "blasting" and yelling "trick or treat." (15 RT 1348-1354.) Their intent was to avenge the death of a friend, Fernando, who had been killed by some Crips. (15 RT 1354.) Holmes told Tate McClain was not involved in the Halloween crimes. (16 RT 1430.)

Tate first gave this information to police in January 1994 when, under arrest at the Pasadena jail, he hoped they would help him with pending felony charges. (15 RT 1355-1356; 16 RT 1378-1379.) Crucially, Tate remained faithful to this story even after he understood that he would serve prison time regardless of whether he helped police. (15 RT 1360.) This is particularly remarkable in light of warnings conveyed through Tate's mother and girlfriend that Tate should not testify in this case. (16 RT 1393.) It is also remarkable in light of a phone conversation with Holmes's counsel and a visit from Holmes's investigator, both of which frightened Tate who was afraid of Holmes. (16 RT 1384-1389; see also Claim VI.)

All of this makes Tate a far more credible witness than the other informants in this case. Yet, the prosecutors wanted the jury to disbelieve Tate's testimony that Holmes told him McClain was not involved in the shooting. (16 RT 1430.)

Tate told police that when he saw McClain in Pasadena, he was using the name "Darryl" and said he was tired of running and wanted to

turn himself in. (16 RT 1430.) This is consistent with Troy Welcome's statement to detectives Mowery and Korpal – before he agreed to work for them – that McClain, who changed his hairstyle in Tulare, had been on the run for a probation violation and for the Robert Price case. (29 RT 3004.)

When Tate spoke with police on tape in January 1994, he told police that Holmes said McClain was not involved; rather, according to Holmes, Ernest Holly and an unnamed person were present at the shootings. (16 RT 1425-1426.) Police continued to ask Tate whether McClain was involved, until they confused him into saying that McClain was involved. (16 RT 1429.) Nevertheless, Tate was clear– both during the taped interview and at trial– that McClain was not present during the killings. (16 RT 1431.)

Detective Korpal bolstered Tate's testimony by confirming for the jury that Tate stated on tape that Holmes said that McClain was not involved. (16 RT 1440.) Korpal further confirmed that McClain indeed turned himself in which supports both Tate's recollection that McClain wanted to turn himself in and Welcome's statement that McClain was on the run because he was wanted in the Price shooting and on an alleged probation issue.

The prosecutors offered no explanation for Tate's consistent statements about McClain. Furthermore, the prosecutors' demonstration that Tate was afraid of Holmes demonstrates that Tate was willing to testify truthfully, despite any fears he may have had. If Tate had any motive to lie about McClain, the prosecutors would have presented it. They presented no such evidence. The only reasonable inference is that Tate was truthful when he said that Holmes said McClain was not involved in the Halloween crimes. When the prosecutors' own witness, with no demonstrable motive to lie, supports McClain's claims of innocence, no reasonable juror could

have found beyond a reasonable doubt that McClain participated in the Halloween killings. The conviction must be reversed.

d. Gabriel Pina's Purported Identification

Gabriel Pina made an in-court identification of McClain based on an impermissibly suggestive procedure which created a substantial likelihood of misidentification.[57] In Claim II, *ante*, which is incorporated by reference herein, McClain explains why the identification itself was unreliable. However, circumstances beyond the reliability of the identification further erode Pina's credibility. First, Pina did not come forward until a reward was offered. Second, Pina's descriptions of the cars he viewed near the scene, which were inconsistent over time, cast doubt on the reliability of his entire testimony.[58] Third, Pina's testimony was materially inconsistent with that of Lilian Gonzales who was with him when he made his observations.

i. Pina did not come forward to identify the driver of the lead car until a reward was offered

The "court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony . . . including . . . [t]he existence of a bias, interest, or other motive." (Evid. Code § 780(f); see also Evid. Code §§ 352, 791(b).) In evaluating the reliability of Pina's testimony, it is crucial to look at motive.

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[57] Pina testified about other observations he made during the night of the Halloween killings. These observations do not relate to McClain.

[58] Pina was also inconsistent in his statements and testimony about his identification of defendant Holmes.

Pina did not come forward to say that he could identify witnesses in this case until a $40,000 reward was announced in the media. (26 RT 2718-2720; 71 RT 7097.) In fact, he previously told police he could not identify the driver of the lead car. (26 RT 2712-2713; 35 RT 3747, 3897.) Despite his inconsistent descriptions, his inability to conclusively select McClain without the aid of an individual photographs, and his statements that he did not pay attention to the driver of the lead car, Pina was compensated $4500.00 for his identification of McClain. (67 RT 6642; 71 RT 7097.) It is thus not surprising that Pina became more confident of his ability to identify McClain over time.

ii. Pina's descriptions of the cars over time

A witness's inconsistent statements are relevant to the truthfulness of his entire testimony. (Evid. Code § 780(h).) Pina's descriptions of the cars he saw which evolved over time call into question the accuracy of all his testimony.

When Pina spoke with Chavira 30 minutes after the homicides, he stated that the first of the four cars he saw on Emerson was a 1983 or 1984 Toyota Corolla. (36 RT 3885, 3894.) He could not describe the other three cars except to say that they were small. (36 RT 3885.)

A few hours later, in a taped interview, Pina described the first of the four cars as dark green or blue, possibly a 1984 or brand new Celica. (35 RT 3743.) On the same tape, Pina described the second car as an older white sedan, perhaps a 1980-1989 model. (35 RT 3742-3743.) Pina could provide no details about the third or fourth car. (35 RT 3744.)

On November 4, 1993, when asked to describe the cars in order, Pina told Detective Uribe that the first car was a small import car. (36 RT 3903.)

According to Uribe's notes, Pina indicated "tinted window, modified exhaust all around." (36 RT 3920.) He described the second car as possibly a four-door white Sentra, lowered with tinted windows all the way around. (36 RT 3903-3904.)

At the grand jury, Pina testified that the lead car was a 1993-1994 MR2 or Toyota Corolla. (26 RT 2745.) Pina testified that the second car was a white Nissan. (26 RT 2745.) For the first time, Pina also described the third car as a maroon or brown Honda Civic. (26 RT 2747-2749.) Additionally, Pina was unable to describe the fourth car during his grand jury testimony. (26 RT 2749.)

At trial, Pina described the first car as a 1994 import, the third car as a black Honda CRX, and the fourth car as a two-door white Nissan Sentra. (26 RT 2750.) Although he previously described the second car as a white Nissan, Pina denied this at trial. (26 RT 2750.) Pina testified instead that People's Exh. 21, a gray or silver Ford Tempo without tinted windows (which had at some point been in De Sean Holmes's possession) resembled the second car. (17 RT 1538, 1571; 26 RT 2751-2753.)

iii. Lilian Gonzales who was with Pina when he made his observations, undercut a critical element of his testimony

At trial, Pina stated that he did not "really" discuss his testimony with Gonzales, who was still his girlfriend at the time of trial.[59] (25 RT

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[59] This claim seems implausible. When asked how he recalled what time he and Gonzales walked the dog on Halloween 1993, Pina explained, "I can't remember the exact way we used to measure the time, but me and my girlfriend concurred." (26 RT 2685.) In addition, Lilian Gonzales acknowledged that "after everything was over with, I mean when we talked

2637; 26 RT 2687-2688.) On November 1, 2993, they made an agreement with each other not to discuss the event, because an officer had told them to "keep to yourselves." (26 RT 2685-2687.)

Gonzales initially told police that when she and Pina were walking on Catalina, four cars pulled up at Catalina and Emerson.[60] (2 CT 414.) At the grand jury and at trial, she testified that she only saw two cars. (2 CT 414; 22 RT 2224-2225.) In contrast, Pina observed four cars. (25 RT 2645, 2647.)

At the grand jury, Gonzales testified that she saw a black male in a white costume and some other males in front of the house next which the two cars were parked. (2 CT 416-417.) About 30 minutes after the killings, Pina told Officer Chavira that he had seen about four people in front of the house. (26 RT 2705.) At the grand jury and at trial, Pina that he had seen 10 to 15 people, one of whom was wearing a joker's costume, standing outside these cars. (2 CT 441-442; 25 RT 2654, 2676.) In this respect, Pina's testimony came conveniently into line with that of Gonzales.[61]

However, Pina and Gonzales differed on a most crucial point. At the grand jury and at trial, Gonzales's testimony contradicted Pina's assertion that the first car backed up next to them on Catalina, giving him a second look at the driver. According to Gonzales, the car remained parked on Catalina before it backed up onto Emerson (not onto Catalina) and headed

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to his mom about it, we told her what we seen." (22 RT 2241.)

[60] Pina and Gonzales consistently concurred that four cars sped by them on Mentor Street. (2 CT 411; 22 RT 2221-2222; 25 RT 2639-2640.)

[61] See *U. S. v. Field, supra*, 625 F.2d at p. 869 [a witness's discussion of her testimony with other witnesses prior to trial casts doubt on the reliability of her testimony].

east. (2 CT 418; 22 RT 2231.) Thus, once the cars stopped in front of the house, they did not move before reversing onto Emerson. (2 CT 424.) At the grand jury, Gonzales claimed that when she and Pina were closest to the cars on Catalina, they were slightly in front and to the right of them. (2 CT 423.) At trial, Gonzales testified that when she and Pina were closest to the two cars on Catalina, they were 20-21 feet from the corner and across the street from both cars. (22 RT 2229, 2252.) This directly contradicts Pina's testimony that the first car backed up parallel to them on Catalina, giving him a second look at the driver.[62] (2 CT 440; 25 RT 2647-2648, 2675.)

Pina's testimony was inconsistent with his own prior statements and those of Gonzales, his companion and fellow observer. Such testimony neither "reasonably inspires confidence" (*People v. Bassett, supra*, 69 Cal.2d at p. 139), nor is "credible and of solid value" (*People v. Green, supra*, 27 Cal.3d at p. 55). Further, it offends the heightened reliability standards demanded by the Eighth and Fourteenth Amendments to the United States Constitution.

C. The Evidence Is Legally Insufficient to Sustain McClain's Convictions in the Halloween Case

McClain has demonstrated that prosecutors and law enforcement procured wholly unreliable informant testimony through deals and rewards. Given the house of cards upon which its case stood, the prosecutors needed something more to prove their case against McClain. So, prosecutors and law enforcement used unnecessary and impermissibly suggestive means to

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[62] Moreover, Gonzales was never sure that the two cars she saw on Catalina were two of the cars she had seen on Mentor. (22 RT 2251.) She believed they were the same cars simply because they were compact and had black males in them. (*Ibid.*)

obtain Pina's manifestly unreliable identification of McClain. The quantity of unreliable evidence likely distracted the jury from the lack of any credible evidence in support of conviction. While this tactic worked with the jury, this Court has a responsibility to right the wrong committed below. The evidence in this case is legally insufficient to sustain the convictions under the standards set forth in section B, *ante*. This Court must reverse McClain's conviction to prevent the imprisonment and execution of an innocent man in violation of federal due process guarantees and prohibitions against cruel and unusual punishment.

D. Robert Price's Inherently Unreliable Testimony is Insufficient to Sustain McClain's Convictions in the Price Case

The prosecutor's case that McClain shot Robert Price depended entirely upon the testimony of Price – a Crip gang member and convicted felon who never told the same story twice. Nothing other than Price's testimony provided evidence of who shot Price.

As with the prosecutors' witnesses in the Halloween case, Robert Price's testimony is unreliable in fact. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1008; *People v. Ramos, supra*, 15 Cal.4th at pp. 1164-1165; see § B.1.c., *ante*, which sets forth the law on informant testimony.) His testimony falls well below the heightened reliability standards required by the Eighth and Fourteenth Amendments to the federal constitution. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) The Price conviction cannot stand.

Robert Price, like other prosecution witnesses in this case, gave such unreliable evidence that it cannot sustain McClain's conviction.

Price, like Mario Stevens and Troy Welcome, was a member of one of P-9's rival gangs. (31 RT 3163.) At trial, Price told the incredible story that McClain, to whom Price had never previously spoken, walked up to Price, requested a cigarette. (31 RT 3162.) After Price gave McClain a cigarette, McClain said "thank you, Blood," and shot Price in the face. (*Ibid.*) When Price ran, McClain also shot him in the butt. (*Ibid.*) As Price was a Crip, McClain's use of the term "Blood," was an insult. (31 RT 3186.)

However, Price's story that McClain used the term "Blood," was a new development at McClain's trial. In a taped statement to police, Price claimed that McClain said, "thank you Chief." (35 RT 3763-3764.)

Price initially told hospital workers he was shot in a drive-by or by a group of men in the neighborhood. (31 RT 3177; Def. Exh. L; see Statement of Facts, *ante*, at p. 15.) When a Pasadena police detective visited Price in the hospital, Price did not say who shot him. (31 RT 3186, 3205.)

Price's view of events changed when he became aware that a reward was available in this case and the police offered him $200 for his grand jury testimony. (14 RT 1161; 31 RT 3161-3162, 3172-3174, 3216, 3161-3162, 3177, 3186-3191; Def. Exh. L.) Price then testified in conformity with the prosecution theory, but contrary to his initial statements regarding the shooting.

At trial, Price testified that police gave him the $200 to buy bandages, and not for his grand jury testimony. (31 RT 3187-3189.) When counsel for McClain asked Price whether he still needed bandages when he testified before the grand jury months after the shooting, Price answered, "I needed the money period. You know what I'm saying?" (31 RT 3188.)

Price received a total of $300 from the Pasadena Police Department before he testified at McClain's trial. (31 RT 3192.)

In light of Price's fluctuating view of reality, his rival gang status, and his admission that he testified for financial reasons, his testimony is so unreliable that it cannot constitute sufficient evidence to support either McClain's conviction for the attempted murder of Price or the use of this conviction as evidence in aggravation at the penalty phase of McClain's trial. The Price conviction and appellant's death sentence must be reversed.

IV.
THE ADMISSION OF EVIDENCE OF McCLAIN'S UNADJUDICATED ARREST WITH SEVERED CODEFENDANT BOWEN FOR GUN POSSESSION, THE PROSECUTOR'S MISCONDUCT IN ARGUING UNCHARGED CONDUCT, AND THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS IMPERMISSIBLY PREJUDICED McCLAIN

The trial court erred in admitting evidence that McClain had been arrested, 13 months prior to the capital crime, with severed co-defendant Solomon Bowen, for being a felon in possession of a firearm. This evidence was not admissible under Evidence Code section 1101, subsection (b) because 1) the gun prior failed to show that McClain had a unique access to guns, 2) the gun prior was unnecessary to demonstrate that McClain and Bowen knew each other, 3) the prosecution used the gun arrest to argue identity without making the threshold showing required for this theory; 4) the prosecution improperly used the gun arrest to obtain convictions in this case based on propensity, and 5) the inflammatory nature of the gun arrest unfairly prejudiced McClain in violation of his rights to due process, a fair trial, and reliable guilt and penalty determinations in

violation of the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and analogous provisions of the California Constitution.

In addition, the prosecutor's use of this evidence in closing argument further violated McClain's rights under state and federal statutes, case law, and constitutions.

A. Proceedings Below

On October 2, 1995, the prosecution filed a written motion to admit, pursuant to Penal Code section 402 and Evidence Code section 1101(b), evidence of McClain's arrest on September 12, 1992, with severed co-defendant Solomon Bowen. (5 CT 1252-1256.) At the time of that arrest, McClain was allegedly in possession of a .38 revolver while Bowen had a Tec-9 automatic machine gun. (5 CT 1253.)

In its written motion, the prosecution offered this unadjudicated conduct "involving co-defendants modus operandi as proof of conspiracy and identity." (*Ibid.*) "The defendants are charged with a conspiracy. . . the prosecutor must show that the defendants," entered into "an illegal agreement with the alleged co-conspirator." (5 CT 1254.) "Defendant McClain and co-conspirator Bowen have had prior illegal dealings. That evidence proves the act of entering into the charged illegal agreement, and does not violate the EC1101(b) prohibition." (*Ibid.*) The prosecutor argued that a defendant is more likely to enter into a conspiracy with someone whom he

> not only knows, but, more importantly, someone the defendant knows is willing to violate the law on occasion. Evidence of the prior illegal relationship carries the greatest probative value. A simple, bland stipulation of prior acquaintance with the alleged co-conspirator does not eliminate the bona fide prosecution need for the evidence.

(5 CT 1255.) The prosecutor further argued further that the "uncharged offenses prove an intermediate fact from which identity may be inferred." (*Ibid.*)

McClain opposed this motion in writing on several grounds. (5 CT 1303-1309.) First, the guns with which McClain and Bowen were arrested in 1992 were not alleged to have been used in the Halloween case. (5 CT 1307-1308.) Second, the gun possession arrest and the Halloween case were neither similar nor unique, thus they did not demonstrate a "signature." (5 CT 1308.) Third, there were significant dissimilarities between the two cases. (*Ibid.*) In the Halloween case, Newborn was alleged to have used a nine millimeter and Bowen was alleged to have used a .38 revolver. (*Ibid.*) Unlike the gun possession prior, the Halloween killings did not occur at the Community Arms housing projects and the perpetrators of the Halloween killings were not observed running from the scene. (*Ibid.*)

At a hearing on the motion, the prosecutor argued that the gun possession incident was relevant because it showed that McClain was with one of his co-conspirators 13 months before the crime and that they had access to weapons. (22 RT 2165.) Moreover, the prosecutor argued, because McClain and Bowen were together while engaged in criminal activity, the gun possession incident was relevant because McClain was more likely to enter into a conspiracy with somebody with whom he was familiar and whom he knew would engage in illegal activity. (*Ibid.*)

McClain offered to stipulate that he knew Bowen and argued that the trial court should exclude the possession incident under *People v. Holt* (1984) 37 Cal.3d 436. (22 RT 2166.) Further, McClain voiced his concern that the prosecution was trying to use every bad act he was ever involved in

to prove that he committed the Halloween killings. (22 RT 2168.) In addition, before McClain testified, the trial court ruled that the prosecutor could impeach McClain on cross examination with evidence of three convictions for being a felon in possession of a firearm. (36 RT 3937-3941.)

The trial court admitted the evidence, noting that the prosecution wanted to introduce the possession incident to show McClain's access to guns. (22 RT 2168.) McClain countered that everyone in this society has access to guns. (22 RT 2168-2169.) The trial court ruled, "Under the federal rules and Proposition 115 – the court has been following the guidelines of the federal court. I think it would be admissible. It may be prejudicial, but not unduly so under 352." (22 RT 2169.)

Later that day, McClain's counsel asked the trial court to reconsider its motion because both the gun possession incident and the Price shooting occurred at the Community Arms. (22 RT 2205.) The trial court instructed the prosecution not to use the words "Community Arms" in presenting evidence of the gun possession incident. (22 RT 2208.) However the trial court maintained its earlier ruling, explaining, "I don't think there is any way to keep it out. I think it's okay. I think it shows accessibility to weapons." (*Ibid.*)

At trial, the prosecutor introduced evidence of the gun possession incident through the testimony of Pasadena police officer Luis Banuelos. (23 RT 2295-2301.) Banuelos recalled contacting McClain and Bowen on September 12, 1992, at a gas station in Pasadena. (23 RT 2296-2297.) Banuelos found some live .38 rounds in McClain's pocket. (23 RT 2298.) In addition, Banuelos found a .357 revolver and a Tec-9 millimeter weapon on the south side of a wall at the south end of the gas station. (*Ibid.*)

After Banuelos's testimony, the prosecutor stipulated that the .357 and Tec-9 that Banuelos confiscated during that incident were never returned to McClain or Bowen. (23 RT 2301.)

B. The Trial Court Violated McClain's State Law and Federal Constitutional Rights When it Erroneously Admitted Evidence of McClain's Prior Arrest for Gun Possession Pursuant to Evidence Code Section 1101

1. Legal Standards Governing the Admissibility of "Uncharged Misconduct" Evidence

Subdivision (a) of Evidence Code section 1101 provides that "[e]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code § 1101(a).) As Witkin has explained:

> The reasons for exclusion are: '*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' [Citations.]

(1 Witkin Evid. (4th ed. 2000) § 42, p. 375, italics original.)

The rule excluding evidence of criminal propensity is over three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647, cited in *People v. Falsetta* (1999) 21 Cal.4th 903, 913, and *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) Indeed, the propensity rule is in effect in every jurisdiction in the United States. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 392; see also *McKinney v. Rees*

(9th Cir. 1993) 993 F.2d 1378, 1380-1381 & fn. 2 [citing statutes and cases codifying or adopting the rule]; *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

However, Evidence Code section 1101, subdivision (b), permits the use of evidence of uncharged misconduct when "relevant to prove some fact (such as motive, opportunity, intent [. . .]) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) The critical inquiry in assessing the materiality of evidence concerning uncharged misconduct is the nature and degree of similarity between the uncharged misconduct and the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) The greatest degree of similarity is required where evidence of uncharged misconduct is offered to prove identity. (*Id.* at p. 402.)

This Court has recognized that evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing *People v. Smallwood* (1986) 42 Cal.3d 415, 428, and *People v. Thompson* (1988) 45 Cal.3d 86, 109.) The primary focus of this careful analysis, of course, is to ensure that the evidence is *not* offered to prove character or propensity *and* that its practical value outweighs the danger that the jury will nevertheless view it as evidence of criminal propensity. Therefore, even if character evidence is relevant within the meaning of Evidence Code section 1101, subdivision (b), such evidence may not be admitted if its probative value is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" under Evidence Code section 352. (*People v. Ewoldt*,

supra, 7 Cal.4th at p. 404, citing *People v. Thompson* (1980) 27 Cal.3d 303, 318.)

This Court has enumerated five factors which a trial judge must consider in weighing evidence of uncharged misconduct under Evidence Code section 352: (1) whether the evidence is material, i.e., the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) whether the uncharged misconduct is remote in time. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

Trial court rulings on the admissibility of evidence under Evidence Code section 1101, subdivision (b), and on the admission or exclusion of evidence under section 352, are both reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code § 1101(a)]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [Evid. Code § 352].)

2. The Evidence of McClain's Arrest for Unlawful Gun Possession Was Not Relevant to Prove His Identity as a Conspirator or Aider and Abettor in the Halloween Murders or to Prove Any Other Disputed Issue

The gun arrest did not meet the threshold for admission under Evidence Code section 1101, subdivision (b). As explained above, the prosecutor offered the evidence of McClain's prior arrest to prove that McClain entered "into the charged illegal agreement" arguing that the arrest showed that McClain knew and had a modus operandi for entering into illegal acts with Bowen, and that McClain had access to weapons. (5

CT 1253-1255; 22 RT 2165.) The prosecutor's argument notwithstanding, McClain's prior gun possession was not relevant to the only disputed issue, i.e., whether McClain entered the agreement. While the arrest with Bowen shows that McClain had access to guns and knew Bowen more than a year prior to the Halloween murders, neither fact tends to prove that McClain entered into a conspiracy with Bowen or anyone else, or that he aided, abetted, or otherwise participated in the charged crimes.

The essential issue in dispute is identity, i.e., whether the gun arrest was admissible to show that McClain conspired to commit or otherwise participated in the Halloween killings. This Court has long held that to be admissible to prove identity, the "uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) The "'pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Ibid.* [citation omitted].)

Thus, to prove identity, the uncharged misconduct and the charged offense must be "mirror images." (*People v. Huber* (1986) 181 Cal.App.3d 601, 622; *People v. Balcom* (1994) 7 Cal.4th 414, 425 ["The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense."]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1065-1066 ["[H]ighly distinctive marks of similarity" between the prior offense and the charged crime are required for admissibility to prove the defendant's identity.]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [the prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"].)

"The strength of the inference in any case depends on two factors: (1) the *degree of distinctiveness* of the shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Thornton* (1974) 11 Cal.3d 738, 756, original italics; see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 333 [stolen credit cards in Crown Royal bags in both the charged and uncharged offenses is sufficiently distinctive "signature" characteristic to support an inference that the same person committed both the charged and the uncharged acts]; *People v. Catlin*, *supra*, 26 Cal.4th 81, 120 [the "charged and uncharged crimes bore a number of highly distinctive common marks": each victim was a close female relative of the defendant (wife or mother); the defendant stood to gain financially from each victim's death; and the victims had died from paraquat poisoning, which is "rare"]; *People v. Kipp* (1998) 18 Cal.4th 349, 370-371 [the charged and uncharged offenses had common features that revealed a "highly distinctive" pattern: in both rape-murders, the perpetrator strangled a 19-year-old woman in one location, carried the victim's body to an enclosed area belonging to the victim, and covered the body with bedding; the bodies of both victims were found with a garment on the upper body, while the breasts and genital area were unclothed; in neither instance had the victim's clothing been torn, and the bodies of both victims had been bruised on the legs]; *People v. Medina* (1995) 11 Cal.4th 694, 748 [both charged and uncharged murders involved robbery and murder of convenience store employee, each victim was shot in the head execution-style, and ballistics reports indicated use of the same handgun, later traced to the defendant]; *People v. Sully* (1991) 53 Cal.3d 1195, 1223-1225 [the admission of other crimes was proper where illicit sex, cocaine and the abuse of prostitutes were common to all crimes, and

each crime occurred in defendant's warehouse, where he lived, worked, and controlled "what came in and out"].)

On the other hand, courts will find no signature if the crimes are not uniquely similar. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 937 [finding no unique signature where the murders occurred three days apart in the same neighborhood, both victims died as a result of brutal blows to the head area, both victims were elderly women who were robbed and their homes burglarized, and in each instance an automobile belonging to the victim was taken and abandoned in the same vicinity]; *People v. Rivera* (1985) 41 Cal.3d 388, 392-393 [finding the following characteristics not sufficiently distinctive so as to demonstrate a signature: "(1) both crimes occurred on a Friday night; (2) both occurred at approximately 11:30 p.m.; (3) both involved convenience markets; (4) both markets were in Rialto; (5) both markets were located on street corners; (6) both crimes involved three perpetrators; (7) both involved getaway vehicles; (8) prior to both crimes, two or three people were observed standing outside the store; (9) defendant used an alibi defense in both cases: when accused of the prior offense, he claimed to have been with his brother all night; in the current case he claims he spent the evening with his sister"]; *People v. Antick* (1975) 15 Cal.3d 79, 94 [fact that charged and uncharged offenses involved removal of personal property from private residence during owner's absence "cannot seriously be asserted as a distinctive and signature-like feature"]; *People v. Nottingham* (1985) 172 Cal.App.3d 484, 500 [finding no logical inference of identity where (a) both victims were young women who were casual acquaintances of defendant; (b) both victims resided in the same neighborhood as defendant; (c) both attacks occurred in remote locations; (d) each victim had force applied to her neck and her clothing ripped; the

first victim had hands placed around her neck that startled her and apparently left no permanent physical injuries, while the second victim was strangled to death].)

Moreover, "the presence of marked dissimilarities between the charged and uncharged offenses is a factor to be considered by the trial court" in determining whether to admit the other crimes evidence. (*People v. Haston* (1968) 69 Cal.2d 233, 249, fn. 18; *People v. Alcala, supra*, 36 Cal.3d at p. 633 [defendant's pattern of sexual conduct was not consistent or distinctive and "[m]ost importantly, [the last victim] was killed, while the earlier victims were not"]; *People v. Guerrero* (1976) 16 Cal. 3d 719, 729 [reversing murder conviction for admitting evidence of other crime where other crime victim was raped, not murdered, and murder victim was not raped].)

It is fundamental that "where the identity of the actor is in dispute and the uncharged misconduct fails to satisfy the stringent 'so unusual and distinctive as to be like a signature' standard enunciated in *Ewoldt*, the uncharged conduct is not admissible on such issues as intent, motive or lack of mistake or accident - all of which issues presume the identity of the actor is known." (*Hassoldt v. Patrick Media Group* (2000) 84 Cal.App.4th 153, 166, citing *People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.)

The allegation that McClain possessed a gun thirteen months before the Halloween killings falls far short of this stringent mark. It was undisputed that (1) the gun McClain allegedly possessed during the earlier arrest had no relation to the crimes charged in this case, and (2) that McClain did not use a gun during the Halloween crimes or shoot any of the victims.

Moreover, the gun possession incident and Halloween killings were vastly different from each other and anything but "mirror images." There were no common features, let alone any so unusual or distinctive as to amount to a signature. As McClain argued below, many people in society possess guns.[63] (5 CT 1308.) Many young men traveling in groups have been seen running from housing projects. (*Ibid.*) Thus, "[o]ver half the population of Los Angeles County under 30 years of age would be included in [the] broad net the prosecutor has cast." (*Ibid.*)

Moreover, access to or possession of guns does not logically tend to prove or support a reasonable inference that McClain entered into an unlawful agreement to commit the Halloween killings. "Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons – a fact of *no relevant* consequence to the determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360, original italics; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393 [in a knife-murder case, reversal was required where the trial court admitted evidence of defendant's possession of 9 knives, only 2 of which could have been used in the murder, to show that he had access to knives; admission of the other 7 knives created the risk that the jury inferred that the defendant was "the kind of

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[63] As explained in Claim VII, *post*, incorporated by reference herein, in 1993, at least 753 Pasadena crimes were committed with firearms. Statistics available through the California Department of Justice, Criminal Justice Statistics Center: http://ag.ca.gov/cjsc/. The referenced information is from a Law Enforcement Information Center chart titled: Jurisdictional Trends: Reported Crimes by Category, covering the city of Pasadena from 1993-2002.

person who surrounds himself with deadly weapons"]; *People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631 [evidence of defendant's possession of weapons not used in the crime "show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons"].) Thus, when the prosecution's theory is that a particular weapon was used in a crime, it is error to admit evidence that defendant possessed other weapons. (*People v. Riser, supra*, 47 Cal.2d. at p. 577.)

McClain's prior gun possession arrest was sheer propensity evidence used to show that because he previously possessed a gun, he was the type of person who would commit crimes.

The evidence that McClain was arrested along with codefendant Bowen, who also illegally possessed a weapon, adds nothing to make the evidence relevant. There was no evidence that McClain knew Bowen was armed, no evidence of joint possession, and no evidence of a joint plan to use the weapons for illegal activity. But, even if such evidence existed, this evidence was inadmissible under Evidence Code section 1101 because it did not meet this court's "signature" test.

In *People v. Felix, supra*, 14 Cal.App.4th 997, 1005-1006, the trial court admitted for purposes of proving identity evidence that two defendants charged with, among other things, armed robbery, had been convicted of doing a robbery together. The prosecutor argued that (1) the prior robbery was relevant to show that defendants had a "propensity to rob in concert;" (2) based on their prior conviction together, if Felix was guilty, it tended to show that his codefendant was also guilty; and (3) the prior robbery conviction showed that Felix and his codefendant knew each other. (*Ibid.*)

The Court of Appeal reversed because nothing about the two crimes set them apart from other crimes of the same general classification. (*People v. Felix*, *supra*, 14 Cal.App.4th 997, 1005.) Indeed, the argument that Felix and his codefendant had a tendency to rob together – was simply classic propensity evidence. (*Id.* at pp. 1005-1006.) The fact that Felix had committed another crime of the same type with his codefendant was not admissible on the issue of identity because the prior conviction and the charged offense lacked sufficient additional marks of similarity. (*Id.* at p. 1006.)

McClain's gun possession arrest with Bowen shows only that McClain knew Bowen a year before the crime and had notice that Bowen also possessed a firearm. Unlike the crimes in *Felix*, the gun possession and homicide charges are not even of the same general type. It is unremarkable that people who enter into legal agreements tend to do so with people they know. Taken to its logical conclusion, the prosecutor's argument means that two people who individually and unlawfully possessed guns at the same time and place is relevant to prove that a year later they conspired to commit any kind of crime involving a firearm. This proposition is untenable under the strict limits on using prior conduct to prove identity under *Ewoldt*.

Furthermore, contrary to the prosecutor's argument, the gun possession arrest was not a "common mark" that "differentiates those offenses from other similar crimes" admissible to show McClain's modus operandi for doing illegal acts with Bowen. (5 CT 1253-1254.) As with other evidence admitted to prove identity, evidence of other crimes used to demonstrate a distinctive modus operandi must disclose common marks or identifiers. (See, e.g., *People v. Bradford* (1998) 15 Cal.4th 1229, 1316-

1317 [two homicides cross-admissible to show modus operandi where in each case "the victims were young White females who died as a result of ligature strangulation, were tied up, were killed approximately within nine days of each other, were acquainted with defendant, were induced to accompany him as a result of their belief that defendant would photograph them in furtherance of their professional modeling ambitions, and prior to and near the time of their deaths had accompanied defendant to a particular remote, fairly inaccessible desert area that he previously had visited"]; *People v. Balderas* (1986) 41 Cal.3d 144, 172 ["the proximity in time, the commandeering of vehicles, the use of a shotgun, and the partial or complete disrobing of the victims" were not necessarily "marks so distinct in number and significance that they logically tend to isolate the same person as the perpetrator of both"].)

The prosecutor's own argument defeats his theory of admissibility, because the allegation that "McClain and co-conspirator Bowen have had prior illegal dealings" (5 CT 1254), fails to describe crimes that share such singular features as to establish modus operandi. The fact that McClain and Bowen were arrested together for separately possessing guns more than one year before the charged crimes does not tend to prove that they conspired together to commit murder.

3. Even If Gun Possession Were Relevant, the Trial Court Should Have Excluded it under Evidence Code Section 352

Even assuming for the sake of argument that the evidence that McClain was arrested with Bowen for unlawful gun possession were relevant to prove identity or any other disputed issue, it nonetheless should have been excluded under the Evidence Code section 352 analysis set forth

in *Ewoldt*. (See § B.1., *ante*; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Under the *Ewoldt* factors, the prejudicial impact of the evidence far outweighed its probative value.[64]

The evidence of gun possession was barely probative. It had minimal tendency to prove McClain's identity as one of the conspirators or aiders and abettors in the Halloween crimes. "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing *People v. Thompson, supra,* 27 Cal.3d at p. 318, original italics.) Such probative value is missing here.

Crucially, the guns confiscated during the arrest with Bowen were not the weapons used in the Halloween case and the prosecutor did not allege that McClain used a firearm in the Halloween case. (See *People v. Henderson, supra,* 58 Cal.App.3d at p. 360; *People v. Archer, supra,* 82 Cal.App.4th at pp. 1392-1393; see also *People v. Vaiza* (1966) 244 Cal.App.2d 121, 125 [reversal required where gun admitted on "spurious" ground that it bore some resemblance to object defendant had in his hand when he threatened police absent evidence that the gun was the object in defendant's possession].) The weapons were confiscated thirteen months before the Halloween crimes so they were not relevant to planning or any other issue in this case. (See, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 822 [evidence that weapons were recovered in defendant's vehicle

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[64] One factor does not apply here, so McClain does not address it. With regard to assessing probative value, the evidence of the gun possession arrest was independent of the charged crimes. Thus, concerns which arise when the evidence is not wholly independent do not affect the probative value of the evidence here. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

after his arrest for the charged crimes was relevant to premeditation]; *People v. Hamilton* (1985) 41 Cal.3d 408, 429-430 [evidence that defendant possessed weapons that may have been used in the charged crimes admissible].)

So, too, the gun charge was unnecessary to show that McClain and Bowen knew each other. In *People v. Felix*, *supra*, the Court of Appeal rejected evidence of prior acquaintance as only slightly relevant:

> In this case, prior acquaintance had only the slightest tendency in reason to show joint commission of the robbery. No special issue had been made of acquaintance; neither defendant, for example, had denied knowing the other. Indeed, defense counsel had offered to stipulate to their prior acquaintance. Evidence that they did know each other . . . did little to meet the prosecution's affirmative burden of proof beyond a reasonable doubt. The inference to be drawn, that because defendants previously knew each other they likely committed the charged crime together, was weak and remote.
>
> The potential for improper and prejudicial impact, in contrast, was strong and clear . . . The danger that the jury would reason, 'if they did it once, the probably did it again' was too great to justify admission of a prior conviction so weakly probative of identity or any other disputed issue.

(*People v. Felix*, *supra*, 14 Cal.App.4th at p. 1006.)

Just as in *Felix*, McClain's acquaintance with Bowen was never a disputed issue. Like defense counsel in *Felix*, McClain's counsel offered to stipulate that he knew Bowen. (22 RT 2166.) And, as in *Felix*, there was additional evidence that Bowen and McClain knew each other: (1) the jury saw photographs of a bandana on which Solomon's name and McClain's nickname were written next to each other (14 RT 1166-1167; Peo. Exh. 6); (2) Prosecution witness De Sean Holmes identified Bowen and McClain together in a photograph (17 RT 1536-1537, 1539; Peo. Exh. 20); (3) there

was extensive evidence presented that both McClain and Bowen were members of the P-9 gang (19 RT 1844, 1891; 25 RT 2573, 2600; 28 RT 2946, 2986-2987; 31 RT 3194, 3200-3201; 32 RT 3388); and (4) McClain never contested that he knew Bowen– indeed he testified that they knew each other (36 RT 3984, 3989-3990, 3992; 40 RT 4219). Thus, the gun prior did little to help the prosecution meet its burden of proof. Furthermore, any inference that McClain and Bowen's earlier arrest tended to prove action in concert in this case is anemic at best because the prior was both dissimilar and remote in time from the homicides charged here. Unlike the uncharged conduct admitted in *People v. Ewoldt, supra*, 7 Cal.4th at p. 404, which had a strong tendency to prove a common design or plan, the fact that McClain was arrested with Bowen for gun possession 13 months before the Halloween crimes has little tendency to prove that he committed the Halloween crimes or that he and Bowen had a modus operandi to commit crimes together.

On the other hand, the danger of substantial undue prejudice was great. As in *Ewoldt*:

> the prejudicial effect of this evidence is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of "confusing the issues" (Evid. Code, § 352), because the jury had to determine whether the uncharged offenses had occurred.

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.)

And, while the gun possession charge is not more inflammatory than the Halloween charges, the evidence of McClain's guilt for gun possession

was far stronger than the evidence of his guilt in the Halloween case. For this reason, admission of the gun charge created a substantial risk that the jury used the prior arrest to compensate for holes in the prosecutor's case against McClain for the Halloween crimes.

Finally, the gun possession charge was too remote in time to be relevant to the Halloween crimes. In *Ewoldt*, the uncharged conduct occurred 12 years prior to defendant's trial, but the time between the prior conduct and the commencement of the charged conduct was far less. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) The 13 months that elapsed between McClain's alleged gun possession and the Halloween crimes was admittedly less than the time elapsed between the charged and uncharged conduct in *Ewoldt*. However, the passage of time is far more significant in McClain's case where, unlike the conduct at issue in *Ewoldt*, the two allegations bear so little relationship to each other.

Having failed to exclude this character evidence under Evidence Code section 1101, subdivision (b), the trial court should have excluded it under Evidence Code section 352. Remarks made by the trial court in ruling on the admission of this evidence suggest that the court was operating under the erroneous belief that its discretion to exclude the evidence under 352 had been abrogated. (22 RT 2169 [the trial court acknowledged prejudice, but cited the effect of Proposition 115 on its 352 analysis]; 22 RT 2208 ["I don't think there is any way to keep it out."].) The trial court's failure to properly exercise discretion in the mistaken belief that it lacked its full discretion itself amounted to an abuse of discretion. (*People v. Bigelow* (1984) 37 Cal. 3d 731, 743.)

4. Admission of Evidence of McClain's Prior Arrest for Unlawful Gun Possession Violated His State and Federal Constitutional Rights

Evidence of other crimes is inherently, and extremely, prejudicial (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Thompson, supra*, 27 Cal.3d 303, 318), and admission of such evidence may violate federal due process (*McKinney v. Rees, supra*, 993 F.2d at pp. 1384-1385; see also *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, rev'd on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202). In *McKinney v. Rees, supra*, 993 F.2d at pp. 1381-1382, 1384-1386, the Ninth Circuit held that the introduction of defendant's prior possession of a knife which could not have been the murder weapon violated due process. The Ninth Circuit reasoned that the prior knife possession was

> irrelevant to any element of the prosecution's case, including opportunity. . . . The only inference the jury could have drawn from such evidence is that because McKinney had owned a knife in September 1983, he owned a knife in January 1984, i.e., that he was the type of person who would own a knife. The evidence thus was evidence of another act offered to prove character and giving rise to a propensity inference, and did not tend to prove a fact of consequence.

(*Id.* at pp. 1382-1384.) Similarly, in McClain's case, the evidence of prior gun possession served to create the impression that McClain was the kind of person who would own a gun, giving rise to an improper inference that the jury should convict McClain because of his bad character. The court in *McKinney* noted that the knife evidence helped "paint a picture of a young man with a fascination with knives and with a commando lifestyle." (*Id.* at p. 1385.) Here, the gun arrest with codefendant Bowen helped the prosecutor paint McClain as a person who walked around armed and

embraced a gang lifestyle. Like the evidence in *McKinney*, admission of McClain's gun possession arrest preyed "on the emotions of the jury" and led them to mistrust McClain. As in *McKinney,* the introduction of the evidence so infected the trial as to render McClain's convictions fundamentally unfair in violation of due process. (*Ibid.*)

In addition, the admission of the inflammatory evidence violated McClain's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 not to have his guilt determined by propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) By ignoring well-established state law which allows only evidence of substantially similar crimes to be admitted for identity; which prevents the state from using evidence admitted for a limited purpose as general propensity evidence; and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived McClain of a state-created liberty interest in due process.

And, because the evidence injected unreliability into his capital trial and sentencing procedures, it violated the Eighth Amendment to the federal constitution's prohibition on cruel and unusual punishment. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304.)

For these reasons, admission of the gun prior violated McClain's Fourteenth Amendment right under the United States Constitution to due process, and a fundamentally fair trial, and his Eighth Amendment rights to freedom from cruel and unusual punishment and to a reliable penalty verdict. It also violated McClain's federal due process liberty interest (*Hicks v. Oklahoma, supra,* 447 U.S. 343) by failing to exclude irrelevant evidence (Evid. Code §1101) and in admitting prejudicial evidence that had no probative value (Evid. Code § 352).

C. The Prosecutor's Misconduct in Closing Argument

1. Proceedings Below

During guilt phase closing argument, the prosecutor cited McClain's testimony that he would not have paged his homeboys to help him in his plan to kill Crips because he works by himself. (44 RT 4688.) The prosecutor urged the jury to "Remember from the testimony of Banuelos that just a year earlier he wasn't doing it by himself; he was out with Solomon Bowen--" (44 RT 4689.) McClain objected that he was arrested for having a gun, not for shooting anyone. (*Ibid.*) The trial court simply told the prosecutor to proceed. The prosecutor again reminded the jury of "the earlier incident with Bowen which wasn't by himself." (*Ibid.*)

The prosecutor also argued:

> What Troy Welcome says is, "when that music was playing McClain took out his gun, his .380. This is my" N word, "I put in work with this. I put it down with this gun." Was he talking about the Halloween murders or was he talking about Robert Lee Price? Does it really matter? No, because McClain is refuging himself up in Tulare. He pulls out the .380 and said he used it. He used it. Price is shot with a .380. Price told you it was a .380.

(44 RT 4683.)

2. The Prosecutor Misstated Material Facts, Argued Facts Not in Evidence, and Misstated the Law

The prosecutor materially misstated the facts and argued evidence not before the jury, giving rise to an inference that McClain and Bowen had committed acts of violence together 13 months before the Halloween killings occurred. He also misstated the law, creating the impression that it did not matter whether McClain used a gun in the Price case or the

Halloween case, because if he used a gun in either the jury could find him guilty of both.

A prosecutor may not misstate the evidence or otherwise mislead a jury. (*Berger v. United States* (1935) 295 U.S. 78, 84-89; *People v. Hill* (1998) 17 Cal.4th 800, 823 [a prosecutor's "mischaracterizing the evidence is misconduct"].) So too, the "prosecution may not, consistent with a defendant's due process rights and Sixth Amendment right to confrontation 'seek to obtain a conviction by going beyond the evidence before the jury,'" because when it does so, the defendant has "no opportunity to cross-examine the prosecutor" or confront the evidence before him. (*Gomez v. Ahitow* (7th Cir. 1994) 29 F.3d 1128, 1136-1137, citing *United States v. Vera* (11th Cir. 1983) 701 F.2d 1349, 1361; *United States v. Gatto* (3d Cir. 1993) 995 F.2d 449, 455.) When a prosecutor paints "for the jury a distorted picture of the realities of [the] case in order to secure a conviction," it may render defendant's trial fundamentally unfair. (*Davis v. Zant* (11th Cir. 1994) 36 F.3d 1538, 1549.)

Here, the prosecutor's argument invited the jury to believe that McClain and Bowen, who were arrested at the same time for gun possession, were engaging in conduct similar to the Halloween killings. This argument misstated the facts in evidence and suggested that McClain was involved in violent conduct of which there was no evidence. These misstatements violated state law and deprived him of a fair trial and the right to confront witnesses under the federal constitution. (See, e.g., *People v. Hill, supra*, 17 Cal.4th at 823 [prosecutor's misstatements about material facts including the type of blood on a knife, the type of knife used, and the defendant's height were misconduct requiring reversal]; *Macias v. Makowski* (6th Cir. 2002) 291 F.3d 447, 451-452 [prosecutor's

misstatements of when a witness came forward with defendant's alibi and whether she reported it to the police were improper]; *United States v. Carter* (6th Cir. 2001) 236 F.3d 777, 785 [due process violation where prosecutor argued that a witness was not told she had misidentified the defendant when she testified that she was in fact told]; *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 315 [misconduct violated due process where prosecutor argued that defendant would go free if found insane]; *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1216-1218 [prosecutor deprived defendant of due process and confrontation rights by arguing that defendant failed to present evidence that had been excluded].)

Furthermore, the prosecutor misstated the law when he argued that if the jury found that McClain used a gun in either the Price or Halloween case, it could find him guilty of both. When a prosecutor misstates the law in closing argument, it is misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 829; *United States v. Berry* (9th Cir. 1980) 627 F.2d 193, 200.) The prosecutor's argument suggested that he did not need to prove beyond a reasonable doubt that McClain committed each crime if the jury found that he used a gun in the Price case. In *People v. Hill, supra,* 17 Cal.4th at p. 830, this Court found misconduct where the prosecutor's comments could reasonably be interpreted as suggesting to the jury she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt." Federal courts have found that such arguments violate the Fourteenth Amendment. (See, e.g., *Kellogg v. Skon* (8th Cir. 1999) 176 F.3d 447, 451-452 [the prosecutor's misstatement of burden of proof in violation of due process cured by trial court's instructions and defense counsel's argument]; *United States v. Roberts* (1st Cir. 1997) 119 F.3d 1006, 1011-1115 [prosecutor's misstatement of burden of proof violated due process].)

McClain concedes that counsel did not object to the prosecutor's misstatement of law. However, this Court has held that "if misconduct by the prosecutor is of such a character that it cannot be purged of its harmful effect by an admonition, it may constitute a ground for reversal even if no objection was made or admonition requested on behalf of the accused." (*People v. Kidd* (1961) 56 Cal.2d 759, 769.)[65] Moreover, where a miscarriage of justice would result, judgment should be reversed even in the absence of an objection. Where a defendant fails to object,

> "[t]hat means only that [defendant] is not entitled to require that we review the point as a matter of right. It does not mean that we are somehow barred from undertaking such review *ex mero motu*. Plainly, albeit impliedly, the California

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[65] More recently, this Court has held that:

> A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford, supra*, 15 Cal.4th 1229, 1333, quoting *People v. Price* (1991) 1 Cal.4th 324, 447.) Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green, supra*, 27 Cal.3d 1, 35, fn. 19; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Lindsey* (1988) 205 Cal.App.3d 112, 116, fn. 1; see also *People v. Noguera, supra*, at p. 638 [must request curative admonition "if practicable"].)

(*People v. Hill, supra*, 17 Cal.4th at pp. 820-821.)

> Constitution obligates us to reverse a judgment that results from a miscarriage of justice. Any rule of less than constitutional stature that may be construed to prevent us from discharging our duty [citations] is invalid to that extent." (*People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1, italics in original (conc. opn. of Mosk, J.).) . . . ¶ My conclusion is not remarkable. In fact, it is strictly in line with the widely applicable and well-established doctrine of "plain error." Almost all jurisdictions, state and federal, "recognize the authority of an appellate court to reverse on the basis of a plain error even though that error was not properly raised and preserved at the trial level." (3 LaFave & Israel, Criminal Procedure (1984) Scope of Appellate Review, § 26.5(d), p. 255.) Rule 52(b) of the Federal Rules of Criminal Procedure is a typical statement of the doctrine: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

(*People v. Wash* (1993) 6 Cal. 4th 215, 276-277, dis. opn. Mosk, J.) Federal courts routinely review prosecutorial misconduct for plain error. (*United States v. Trevino* (9th Cir. 2005) 419 F.3d 896, 901-902.) Under federal law, the "inquiry is whether the allegedly improper behavior, considered in the context of the entire trial, affected the jury's ability to judge the evidence fairly." (*Ibid.*) To determine whether the prosecutor's misconduct affected the jury's verdict, a reviewing court looks at whether the trial court gave a curative instruction and, if so, the efficacy of that instruction as well as the strength of the case against defendant. (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1151-1152 [plain error where the trial courts instructions were inadequate and the case boiled down to witness credibility]; *U.S. v. Roberts*, *supra*, 119 F.3d 1006, 1011-1115 [prosecutor's misstatement of burden of proof was plain error which required reversal].) Here, the trial court gave no curative instruction and the

case was a close one. McClain thus urges this court to correct the error below.

D. The Errors Taken Separately or Together Require Reversal

The erroneous admission of propensity evidence and the prosecutor's misconduct in closing argument, taken separately or together were not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) Even if the issue is reviewed only under California statutory law (Evid. Code §§ 1101, 352), the judgment must be reversed because it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.) The erroneous admission of this evidence and the prosecutor's misleading argument require reversal of the Halloween crimes and the Price attempted murder conviction.[66]

First, given the inherently inflammatory nature of this character evidence, it likely undercut the jury's ability to assess properly the remaining evidence. As California and federal courts have recognized, evidence of weapons possession creates an inference that the defendant was the sort of person likely to carry weapons. (See *People v. Henderson, supra,* 58 Cal.App.3d at p. 360; *People v. Archer, supra,* 82 Cal.App.4th at pp. 1392-1393; *People v. Riser*, *supra*, 47 Cal.2d at p. 577; *McKinney v. Rees, supra*, 993 F.2d at pp. 1382-1384.) This evidence was especially harmful because the Halloween killings received massive media attention which prompted citizens to lobby for new ammunition and gun control laws. (10 CT 2668-2669.) Indeed, the prosecution improperly and unfairly framed

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[66] The prosecutor never asserted that the gun possession arrest with Bowen was admissible for any purpose with regard to the Price case.

the issue before the jury not as whether McClain was guilty of the charged crimes, but as whether, in light of his background, he should be out on the streets. This is evidenced by the prosecutor's misstatement of law in closing argument that it did not matter when McClain used the gun a witness claimed to have seen so long as the jury believed McClain had used it in either the Price case or the Halloween case – even though there was no allegation that McClain used a gun in the Halloween case. (44 RT 4683.) If, as the prosecutor argued, it did not matter when McClain used or possessed a gun, the jury could have easily believed that it could find McClain guilty of the Halloween crimes because McClain possessed a gun on any previous occasion. This misstatement of law lessened the prosecutor's burden of proof – an error which can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) The jury's finding that McClain did not personally use a firearm in the Halloween crimes (6 CT 1600-1610) suggests that the jury found him guilty because they feared him and not because of his participation in the crimes. Thus, it is likely that the jury's guilt verdicts reflected its desire to punish McClain because he was a scary person who was likely to possess weapons, even if it did not find beyond a reasonable doubt he was guilty of the charged offenses. This is precisely the reason for which "character" or "propensity" evidence has long been prohibited. (See, e.g., Wigmore, Evidence, *supra*, § 194, pp. 646-647.)

Second, prior conduct, including allegations that the defendant and a codefendant were arrested together on other occasions are especially prejudicial where, as here, the evidence is cumulative and the case close. (*People v. Anderson* (1978) 20 Cal.3d 647, 650 [reversal required where the prosecutor elicited cumulative evidence that defendant and codefendant had

been arrested together twice previously to show a "close affinity" between the two defendants]; *People v. Alcala, supra*, 36 Cal.3d at pp. 635-636 [reversal where evidence of defendant's guilt – which included eyewitness testimony – was "fairly strong, but not overwhelming, and it was largely circumstantial" and "the jury may well have been influenced by improper consideration of the other crimes"].)

The evidence in McClain's case was cumulative and the case against him close. There was other evidence of McClain's access to guns and McClain's acquaintance with Bowen was not in dispute. (14 RT 1166-1167; 17 RT 1536-1537, 1539; 19 RT 1844, 1891; 22 RT 2166; 23 RT 2339; 25 RT 2573, 2600; 28 RT 2946, 2951-2953, 2986-2987; 29 RT 3009, 3017, 3029; 31 RT 3194, 3200-3201, 3281; 32 RT 3388; 36 RT 3984, 3971, 3989-3990, 3992; 40 RT 4219; Peo. Exhs. 6, 20.) The prosecutor's case against McClain consisted of unreliable informants and an incredible eyewitness. Moreover, McClain's jury took twelve days to reach its verdict. (6 CT 1479.)

The prosecutor's misconduct also requires reversal. "The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence." (*Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017.) This Court has explained that a prosecutor's misstatements of evidence are

> "clearly . . . misconduct" (*People v. Pinholster* (1992) 1 Cal.4th 865, 948), because such statements "tend[] to make the prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*People v. Bolton* (1979) 23 Cal.3d 208, 213; *People v. Benson* (1990) 52 Cal.3d 754, 794

["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57, 108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) "Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, *supra*, Trial, § 2901, p. 3550.)

(*People v. Hill*, *supra*, 17 Cal.4th at p. 827.)

In *Davis v. Zant, supra*, 36 F.3d. at p. 1549, the court examined four factors in determining prejudice: "1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; 2) whether they are isolated or extensive; 3) whether they were deliberately or accidentally placed before the jury; and 4) the strength of the competent proof to establish the guilt of the accused."

Applying those factors to McClain's case makes clear that the prosecutor's misconduct rendered his trial fundamentally unfair. First, the prosecutor's remarks were both misleading and prejudicial because they implied that McClain had a history of shooting people or committing acts of gun violence along with codefendant Bowen. Second, the remarks were part of a pattern of improper argument in this case. (See Claim I.A.4, *ante*.) Third, the prosecutor, who knew there was no evidence that McClain was alleged to have harmed anyone during the gun possession incident, deliberately misled the jury. Fourth, the evidence of McClain's guilt was anemic at best. (See Claims II & III, *ante*.) As in *Davis,* the prosecutor in McClain's case "was attempting to subject the jury to the influence of clearly false information, and information clearly known to the prosecutor at the time to have been false." (*Davis v. Zant, supra*, 36 F.3d. at p. 1549.)

As explained in Claim X, *post*, the trial court's instructions only exacerbated the prejudice by confusing the jury as to which other crimes it could consider. The combination of the inflammatory evidence, the

prosecutor's misconduct, and the confusing instructions amplified the prejudicial impact of each error.

For all these reasons, McClain's convictions in the Halloween and Price cases require reversal.

V.
THE TRIAL COURT VIOLATED McCLAIN'S RIGHT TO CONFRONT WITNESSES, DUE PROCESS, AND A FAIR TRIAL WHEN IT PREVENTED HIM FROM TESTING ON CROSS-EXAMINATION THE VERACITY OF PRICE'S CLAIMED MOTIVE FOR TESTIFYING

A. Introduction

The trial court violated McClain's federal constitutional rights to confront witnesses against him, to a fair trial, and to due process of law and its abused its discretion under state law when it prevented him from impeaching Robert Price with evidence of an arrest for lewd and lascivious conduct with a minor under age 14.

Price's testimony was the only evidence linking McClain to the attempted murder charge. The impeachment evidence would have undermined Price's assertion that he was testifying because he wanted punishment for the killer of the child victims in the Halloween case. This error was not harmless beyond a reasonable doubt as to either the attempted

murder or capital murder allegations.[67] McClain's convictions must be reversed.[68]

B. Proceedings Below

On direct examination, prosecution witness Robert Price testified that the Pasadena Police Department gave him two hundred dollars for medical reasons after he testified before the grand jury.[69] (31 RT 3171-3172.) On cross-examination, Price testified that he received the two hundred dollars for bandages because he had checked himself out of the hospital. (31 RT 3182, 3187-3192.)

After McClain's cross-examination, the prosecutor asked Price whether at the grand jury he had indicated an additional reason for choosing to testify. (31 RT 3197.) McClain objected that the question was beyond the scope of cross-examination, because counsel had only asked Price what he received, not what his motives were for testifying. (31 RT 3198.) The trial court overruled the objection. (*Ibid.*)

The prosecutor then read to the jury from Price's grand jury testimony:

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[67] As explained in Claim VII, *post*, the Price conviction likely played a role in McClain's capital murder convictions in the Halloween case. That claim is incorporated by reference herein. Because the trial court's failure to sever the attempted murder conviction from the Halloween counts impermissibly prejudiced the jury, this claim also requires reversal of McClain's capital murder convictions.

[68] Because McClain's invalid conviction for the attempted murder of Price was introduced during the prosecutor's case in aggravation at penalty phase, the death judgment must also be reversed. Penalty phase Claim XX, *post*, is incorporated by reference herein.

[69] The portion of Claim III, *ante*, which addresses the testimony of Robert Price is incorporated by reference in this claim.

> Well, personally, you know, one of those kids, one of those kids that got killed, I was knowing their parents. So, you know, it kind of touched me, you know. So I personally -- whoever did it, I would like to see them, you know, get paid, get convicted of that.

(31 RT 3198.)

On further cross-examination, McClain's counsel asked Price whether he had been arrested for lewd and lascivious conduct on a minor under the age of 14. (31 RT 3198.) The prosecutor objected on relevancy grounds. (*Ibid.*)

At the bench, the prosecutor complained that unless McClain could make an offer of proof as to relevance, he could not impeach Price solely with evidence of an arrest.[70] (31 RT 3199.) McClain's counsel responded:

> Ms. Harris: Okay. I would agree, and that is exactly why I stopped examining him before he got into how he feels about children. But if a man has such a contact with the police, I think I am able to explore it.
>
> The Court: The problem is you objected to her going any further, the questions about the money, but it went to his state of mind of why he testified. She went one step further. But to

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[70] The prosecutor acknowledged that Price had been arrested pursuant to Pen. Code section 288 which provides:

> (a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

go into an arrest, I don't think is sufficient. I am not going to talk about it any more.
Just leave it alone.

Ms. Harris: Okay.

(31 RT 3199-3200.)

At the trial court's instruction, McClain did not pursue this avenue of impeachment.

C. The Trial Court Abused its Discretion in Preventing Cross-examination of Price on His Arrest for Lewd Conduct on a Minor under the Age of 14, after Allowing Him to Testify for the Prosecution That He Was Testifying out of Concern for the Families of the Murdered Children

"[R]elevant evidence, may not be excluded in any criminal proceeding." (Cal. Const., art. I, § 28(d).) Relevant evidence "including evidence relevant to the credibility of a witness " is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) Section 28(d) supersedes all California rules which restrict the admission of relevant evidence.[71] (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173.) Thus, "section 28(d) makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor." (*People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn.7; but *cf. People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522-1523.) Moreover, "the jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony," including

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[71] This includes Evidence Code section 787 which prevented impeachment of a witness with character evidence. (*People v. Ramos*, *supra*, 15 Cal.4th 1133, 1179-1180.)

"the existence or nonexistence of any fact testified to by him." (Evid. Code § 780(i).) A witness may be cross-examined on any matter within the scope of direct examination, subject to the trial court's discretion to exclude evidence that is more prejudicial than probative. (Evid. Code §§ 773, 352.) Thus, a witness's statement on direct examination may open the door to otherwise inadmissible misconduct when necessary to refute the statement. (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946.)

1. The Trial Court Failed to Exercise the Discretion Required by Evidence Code Section 352

The failure to exercise discretion is an abuse of discretion. "When evidence is challenged pursuant to section 352, the failure to weigh the probative value of the evidence against its prejudicial effect constitutes a prima facie abuse of discretion." (*People v. Ford* (1964) 60 Cal.2d 772, 801; *People v. Martinez* (1980) 106 Cal.App.3d 524, 532; see also Evid. Code § 354.)

The proper exercise of discretion means that, "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." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 875.) Judicial discretion "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Bailey v. Taaffe* (1866) 29 Cal. 422, 424; see *Pointer v. United States* (1894) 151 U.S. 396, 400-404.

"Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal." (*People v. Penoli* (1996) 46 Cal.App.4th 298, 306.)

Here, the trial court acknowledged that the prosecutor went too far in her examination of Price, but when McClain made an offer of proof as to why the impeachment evidence was necessary, the trial court instructed counsel to "leave it alone," without conducting any analysis. (31 RT 3200.) On this record, this Court cannot find that the trial court engaged in the weighing and deliberation required by law. The trial court abused its discretion.

2. If the Trial Court Did Exercise its Discretion, it Abused it

Evidence Code section 352 gives a trial court discretion to exclude evidence whose probative value is "substantially outweighed" by the probability it will take too much time or create a "substantial danger" of undue prejudice, confusing the issues, or of misleading the jury.[72] If a trial court's arbitrary, capricious, or patently absurd exercise of discretion results in a miscarriage of justice, it has abused its discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; Evid. Code § 354.) For example, a trial court abused its discretion when it excluded circumstantial evidence of a witness's drug dealing to impeach her honesty. (*People v. Harris* (2005) 37 Cal.4th 310, 339.) Similarly, a trial court properly allowed a prosecutor to ask a defense expert who testified about defendant's drug addiction, whether he had been arrested for using cocaine. (*People v. Tillis* (1998) 18

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[72] The sections in Claims IV and VII which address the law on the failure to exercise discretion are incorporated by reference herein.

Cal.4th 284, 288.) This was appropriate even though the prosecutor failed to provide either discovery of the arrest or notice of his intent to use it to the defense. (*Id.* at p. 293-295.) In that case, the evidence was admissible to show the expert's possible pro-drug bias and to refute any inference by the jury that the expert was affiliated with law enforcement. (*Id.* at p. 289.)

If as *Tillis* held, a prosecutor is entitled to cross-examine a defense witness about an arrest to suggest or refute bias, surely McClain, a criminal defendant facing the death penalty was entitled under 352 to cross-examine Price about his purported motive for testifying. None of the dangers contemplated by section 352 were present in this case. McClain requested brief cross-examination of Price which was directly relevant to his statement about his motive for testifying which was raised on the prosecutor's re-direct examination. Although McClain had cross-examined Price about other issues, he had no opportunity to challenge his asserted motive for testifying. And, even if an arrest is not the most probative or reliable kind of evidence, there would have been no undue prejudice, because the prosecutor would have been entitled to ask Price about the circumstances of the arrest and to argue its reliability to the jury. There was no risk of confusing the issues; the issue before the jury was Price's motive for testifying and McClain was entitled to refute his suspect assertions about it. Finally, the risk of misleading the jury was far greater in the absence of constitutionally adequate cross-examination than it would have been had the trial court permitted McClain to proceed.

Notably, the trial court had a very different view about the admission of uncharged conduct when it allowed the prosecutor to introduce evidence that McClain had been arrested a year before the Halloween killings with severed co-defendant Solomon Bowen, even though the evidence was

inflammatory and unnecessary to prove that McClain and Bowen knew each other and had access to guns.[73] Apparently, McClain and the prosecutor were not subject to the same evidentiary limitations. The trial court thus created an unfair disparity between McClain and the prosecution, violating McClain's right under the Fourteenth Amendment to a "balance of forces between the accused and his accuser." (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Under these circumstances, the trial court's exclusion of clearly relevant and admissible evidence, with no explanation, was arbitrary and capricious. Because the proffered cross-examination was the only avenue by which McClain could challenge Price's asserted motive for testifying, and Price's testimony was the only evidence linking McClain to the attempted murder charge, this abuse of discretion resulted in a miscarriage of justice.

D. The Trial Court Violated McClain's Right to Confront a Crucial Witness Against Him

A criminal defendant has the right to confront witnesses against him. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas* (1965) 380 U.S. 400.) The primary purpose of the confrontation clause is the right to cross-examination. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316.) This is because cross-examination is the primary means by which "the believability of a witness and the truth of his testimony are tested." (*Id.* at p. 316.) An important part of testing the truth of a witness's testimony is exposure of his motives for testifying. (*Ibid.*) Thus, if the State elicits testimony from a witness, the defendant must have an opportunity to show that the testimony

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[73] See Claim IV, *ante*, which is incorporated by reference herein.

is untrue. (*Greene v. McElroy* (1959) 360 U.S. 474, 496-497.) Even when a state statute generally excludes the kind of evidence required to test the truth of a witness's testimony, the confrontation clause protects a defendant's right to present such evidence if it necessary to adequately cross-examine the witness.[74] (*Davis v. Alaska, supra,* 415 U.S. at pp. 311-315, 318-321.) In other words, the confrontation clause requires admission of otherwise inadmissible evidence if in the absence of such evidence a defendant cannot adequately cross-examine the witness. (*Id.* at p. 315.)

In *Davis v. Alaska*, the Supreme Court reversed defendant Davis's burglary and larceny convictions, because the trial court deprived Davis of a constitutionally inadequate opportunity to cross-examine a crucial prosecution witness. (*Davis v. Alaska, supra*, 415 U.S. at p. 320.) The witness, identified Davis in photographic and live lineups. (*Id.* at p. 310.) Before the witness testified, the prosecutor successfully moved to prevent Davis from cross-examining the eyewitness about his juvenile record. (*Ibid.*)

Davis assured the trial court he would not use the defendant's record for general impeachment or character purposes, but rather to show that the witness may have been motivated to testify because he feared revocation of his probation or that he might himself be a suspect. (*Davis v. Alaska*, 415 U.S. at p. 311.) Nevertheless, the trial court prohibited this line of cross-

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[74] As explained in section C of this claim, *ante*, McClain believes the evidence was admissible under California Constitution, Article I, section 28(d) because it was not introduced to impeach Price's general character nor to attack his general truthfulness. However, even if the evidence was inadmissible under California law, its exclusion violated McClain's federal confrontation clause rights.

examination, relying on a state statute which made inadmissible juvenile adjudications. (*Ibid.*)

The witness acknowledged on cross-examination that it occurred to him that the police might suspect him. (*Davis*, 415 U.S. at p. 313.) However, when Davis asked the witness whether he had, prior his cooperation in Davis's case, ever been questioned by any law enforcement, Davis said, "No" and the trial court sustained the prosecutor's objection to further questioning on this subject. (*Ibid.*)

The Alaska Supreme Court concluded it did not have to resolve the conflict between state law and Davis's confrontation clause rights, because Davis had an adequate opportunity to cross-examine the eyewitness. (*Davis*, 415 U.S. at pp. 314-315.)

Rejecting the state court's logic, the Supreme Court noted that the State's policy in protecting juveniles permitted the witness to "in effect [assert], under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry . . . ." (*Davis*, 415 U.S. at p. 314.) The court found it "difficult to conceive of a situation more clearly illustrating the need for cross-examination." (*Ibid.*)

The Supreme Court did not speculate as to whether Davis would have been able to persuade the jury to disbelieve the eyewitness had he presented with his juvenile probation status. (*Davis*, 415 U.S. at p. 317.) Instead it found that to assess the weight they should accord the witness's testimony, the accuracy and truthfulness of which were crucial to the prosecution's case, it was important that the jury hear the defense theory. (*Id.* at pp. 317-318.) Moreover, the high court observed, the limits on Davis's cross-examination may have led the jurors to believe he was

attacking a blameless witness for no apparent reason. (*Id.* at p. 318.) And, despite the Davis prosecutor's argument to the contrary, the requested cross-examination would not have been a rehash of prior-cross-examination. (*Ibid.*) Finally, the Supreme Court noted that Davis's right to confront witnesses trumped the State's strong interest in protecting juvenile offenders from the embarrassment of exposure on cross-examination, noting that trial courts must only protect a witness from questions designed to "'harass, annoy, or humiliate him.'" (*Id.* at p. 320, citing *Alford v. United States* (1931) 282 U.S. 687, 694; see also *Fowler v. Sacramento County Sheriff's Dept.* (9th Cir. 2005) 421 F.3d 1027, 1041 [a defendant's confrontation clause right outweighs any temporary embarrassment suffered by a witness].) Indeed, if the State did not want Davis to confront its witness with his juvenile record, the State could have refrained from using him. (*Davis*, 415 U.S. at p. 320.)

McClain's situation is similar to Davis's in several relevant ways. First, McClain never sought to introduce evidence of Price's arrest, until the prosecutor was allowed to elicit from Price, over McClain's objection, that Price was testifying because he wanted the person who killed the children on Halloween to be punished. Second, McClain did not offer the arrest as evidence of Price's character or as general evidence of Price's untruthfulness, rather, he offered it to refute the truth of Price's specific and "highly suspect" statement about his motive for testifying. (See *Davis v. Alaska, supra,* 415 U.S. at p. 314.) Third, Price, like the *Davis* eyewitness, was crucial to the prosecutor's case. Indeed, the prosecutor had no other evidence that McClain shot or tried to kill Price. Fourth, McClain, like Davis, was afforded a limited opportunity to cross-examine Price. But, like the inadequate cross-examination in Davis, the cross-examination here was

insufficient to test the truth of Price's testimony and may have left jurors believing that McClain was harassing Price for no legitimate reason. Fifth, Price, like the witness in *Davis*, used the trial court's protection to provide testimony of arguable truthfulness. Sixth, there was nothing repetitive or unduly time-consuming about the question McClain tried to ask. Seventh, McClain did not ask Price about the arrest to harass, annoy or humiliate him, but rather to test the truthfulness of a specific and highly relevant piece of Price's testimony, i.e., his motive for implicating McClain as the person who shot him.

Unlike the trial court in *Davis*, the trial court here actually contributed to McClain's impossible situation. McClain objected to the prosecutor's questioning about Price's feelings about the murdered children. In allowing the prosecutor to elicit this testimony while prohibiting McClain from testing its veracity, the trial court actually created the confrontation problem. The trial court should have either prevented the prosecutor from asking Price about his motive for testifying or allowed McClain to cross-examine him on the point. Instead, the trial court allowed the prosecutor to present this testimony without any adversarial testing. As the Supreme Court instructed in *Davis*, if the State wanted to protect its witness from cross-examination, it should have found another way to prove its case or make its point.

Finally, while Davis was convicted of burglary and larceny, McClain suffered far greater consequences. Not only was McClain convicted of attempting to murder Price, but the allegation played a role in his conviction for capital murder (see Claim VII, *post*) and was admitted as aggravating evidence at the penalty phase of McClain's capital trial.

The attempted murder conviction in count nine cannot stand. Furthermore, because the attempted murder charge played an improper role in obtaining them, the capital murder convictions and death sentences should be reversed.

E. Exclusion of McClain's Proffered Impeachment Evidence Was Not Harmless Beyond a Reasonable Doubt

Confrontation clause errors are subject to *Chapman* harmless error analysis.[75] (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) To determine whether the confrontation clause error was harmless beyond a reasonable doubt, courts should look at factors including, "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Id.* at p.684.)

Employing these factors, the Ninth Circuit found prejudice where, as in McClain's case: (1) the witness's testimony was material to a disputed fact; (2) the cross-examination was not cumulative; (3) no other evidence corroborated or disproved the witness's account; (4) the trial court did not preclude all evidence relevant to the witness's credibility, it prevented cross-examination on the specific issue before the jury; and (5) the State's

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[75] When a trial court abuses its Evid. Code § 352 discretion in limiting cross-examination, this Court, acknowledging the confrontation clause problems, requires the same harmless error analysis set forth in *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673. (See, e.g., *People v. Sully*, *supra*, 53 Cal.3d 1195, 1219.)

case was only as strong as the witness's testimony. (*Fowler v. Sacramento County Sheriff's Dept.*, *supra*, 421 F.3d 1027, 1041-1043.)

These indicia of prejudice are prominent in McClain's case. First, Price's testimony and the proffered cross-examination were relevant to the specific issue of whether Price's motive for testifying was his concern for the murdered children. (See *Davis v. Alaska, supra*, 415 U.S. at p. 316.)

Second, McClain's cross-examination of Price was clearly not cumulative. Indeed, McClain was not permitted to challenge Price's contention about his concern for the Halloween victims.

Third and critically, Price's testimony was the only evidence the prosecutor had that McClain was the person who shot him. Without Price's testimony, the prosecutor had no case against McClain.

Fourth, the trial court allowed some cross-examination of Price, while prohibiting McClain from asking Price the one question that could have settled in the minds of the jurors Price's motives for testifying.

Fifth, as in *Fowler*, the prosecutor's case against McClain was only as strong as Price's testimony.

Significantly, because *Fowler* was a habeas proceeding, the court to find prejudice had to determine whether the error had "substantial and injurious effect or influence in determining the jury's verdict." (*Fowler v. Sacramento County Sheriff's Dept.*, *supra*, 421 F.3d 1027, 1041; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 638.) Because the prejudice factors present in *Fowler* had a substantial and injurious effect, the same factors cannot be harmless beyond a reasonable doubt in McClain's case. The attempted murder conviction cannot stand.

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VI.
AS A RESULT OF THE TRIAL COURT'S ERRORS AND THE PROSECUTORS' MISCONDUCT, McCLAIN WAS CONVICTED BECAUSE HE WAS A GANG MEMBER, NOT BECAUSE HE COMMITTED THE CHARGED CRIMES

The trial court erroneously admitted a slew of unreliable, misleading, and inflammatory evidence that portrayed McClain as a callous, violent gang member. With little credible evidence to connect McClain with the murders, the prosecution impermissibly relied on McClain's gang affiliation to convict him through guilt by association and to portray him as a bad person with a propensity to retaliate against his rivals as well as the witnesses and jurors in this case.

It is well-settled that while gang membership or activity may be relevant in certain contexts, it is in itself insufficient to convict a defendant of criminal charges. (*United States v. Abel* (1984) 469 U.S. 45, 53.) Evidence that a defendant has an explicit agreement to support fellow gang members in fights is likewise insufficient proof for conviction of conspiracy to commit specific conduct. (*United States v. Garcia, supra*, 151 F.3d 1243, 1246.) In addition, convicting a defendant based on evidence of his association with gang members violates fundamental principles of our justice system. (*Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1056; *U. S. v. Garcia, supra,* 151 F.3d at p. 1246.) The admission of such evidence violated McClain's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra*, 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lessened the State's burden of proof, instead allowing the prosecutor to

obtain a conviction based on the jurors' fears of gangs and personal threats in combination with guilt by association. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342.) This interference with the jury's judgment also deprived McClain of his Sixth and Fourteenth Amendment rights to a trial by an impartial jury. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 278.) Moreover, the introduction of the evidence so infected the trial as to render McClain's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees*, *supra*, 993 F.2d 1378.)

Unquestionably some evidence of McClain's gang affiliation was relevant to the case. Such evidence, regarding McClain's status in the P-9 Bloods gang and its rivalry with the Crips gang, was before the jury and not in dispute. However, the fact that some gang-related evidence may have been appropriately introduced did not immunize the jury from the emotional impact of gang evidence detailing alleged criminal and violent propensities of McClain and his fellow gang members. Indeed, the evidence of threats, killings, and violence which had nothing to do with the case overshadowed the evidence that was actually relevant to the jury's determination of McClain's guilt. Even more prejudicial was the suggestion that McClain and his codefendants, by virtue of their gang association, were a direct threat to the witnesses who testified in and jurors who decided his capital case.

The emotionally-charged bad character evidence described herein was unreliable, inflammatory, cumulative, remote, and far more prejudicial than probative. Its admission violated state law as well as McClain's state and federal constitutional rights. In view of the closeness of the case and the inflammatory nature of the evidence, alone and when combined with the

other evidence described in Claims IV and VIII, its admission requires reversal of all McClain's convictions.

In addition, the admission of this evidence violated McClain's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346-347.) By ignoring well-established state law which prevents the State from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived McClain of a state-created liberty interest.

McClain was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304.)

A. The Trial Court Erroneously Admitted Gang Evidence Which Included Evidence of Threats to Witnesses by Persons Other than Defendants and Evidence of Indicia of Gang Membership, All of Which Was More Prejudicial than Probative

1. Evidence of threats/fear of testifying

a. DeSean Holmes

The prosecutor called DeSean Holmes.[76] The defense objected to his testimony, requested severance, and requested a mistrial. (17 RT 1517-1525, 1527-1529; Claim VIII is incorporated by reference herein.) McClain

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[76] To avoid confusion with defendant Karl Holmes, DeSean Holmes is referred to herein as "DeSean."

noted that the impact of this testimony would spill over to him. (17 RT 1517.) The trial court ruled that it was up to the jury to assess his credibility. (17 RT 1530-1531)

The trial court then instructed DeSean outside the presence of the jury not to mention McClain. (17 RT 1534.) Despite the trial court's instruction, DeSean identified for the jury McClain, who to his knowledge was not P-9, in a photograph with co-defendants Bailey, Newborn, and Bowen. (17 RT 1536-1537, 1539; Peo. Exh. 20.) DeSean also testified that McClain attended a party he held on October 15, 1993. (17 RT 1537-1538.)

DeSean told the jury he was uncomfortable testifying because his life had been threatened and that he had asked Deputy Brown for protection because he was afraid Ernest Holly and Danny Cooks were trying to kill him.[77] (17 RT 1545-1547.)

In addition, DeSean testified that he discussed his fears about testifying with Myers who agreed that if DeSean testified against anyone he could be killed. (17 RT 1679-1682.)

DeSean described to the jury, over McClain's hearsay objection and Newborn's relevance objection, threats Cooks allegedly relayed through DeSean's coach, his mother, and others. (17 RT 1680-1681.) The trial court found that the threats were relevant to his demeanor. (17 RT 1681.) DeSean also testified that Cooks told DeSean's coach that he was going to get DeSean the way Majhdi Parrish, a witness in another case, was killed. (*Ibid.*) Defense counsel objected to this testimony and moved to present evidence that DeSean was actually involved in carjacking Majhdi Parrish. (18 RT 1699-1702; Claim I. A.3 is incorporated by reference herein.) The

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[77] Neither Cooks nor Holly were charged with any of the allegations in the indictment against McClain.

trial court denied this motion opining that the carjacking was "collateral" to this case; instead he suggested that the prosecutor ask DeSean whether his fear of testifying stemmed from this case or another. (18 RT 1702-1707; see Claim VIII.) When Newborn's counsel asked whether he was afraid because of Majhdi Parrish, DeSean invoked the Fifth Amendment. (18 RT 1733-1735.) DeSean made clear to the jury that he had heard that other witnesses had been killed or harmed. (18 RT 1733.)

b. Johnny Brown

Sheriff's Deputy Johnny Brown testified that he had offered DeSean Holmes protection because Danny Cooks, whom Brown was investigating, and Ernest Holly were threatening his life, because "he had been asked to kill two witnesses that had been responsible for sending two of his friends to jail." (16 RT 1509-1510; 30 RT 3095, 3097-3098.) Brown added that initially, DeSean was a cooperative witness, but, over time, his attitude changed mostly because DeSean's mother and Newborn discouraged his cooperation. (16 RT 1510-1511.) Deputy Brown reported that DeSean claimed he was providing information to law enforcement because his friends had turned against him and were threatening his life. (30 RT 3103.)

As for DeSean's relationship to Parrish, Brown acknowledged that he was present when a sergeant told DeSean that after he was arrested for carjacking Parrish, Parrish was killed so police were dropping charges pending against him. (30 RT 3110.) However, when Newborn's counsel referred to Parrish as "the victim of Mr. DeSean Holmes," the trial court sustained the prosecutor's objection that the characterization assumed facts not in evidence. (30 RT 3111.)

The trial court instructed the jury to consider Brown's testimony only for defendant Newborn. (30 RT 3140.)

c. Derrick Tate

Although the trial court instructed the jury that Tate's testimony applied to Holmes and McClain, only a small portion of Tate's testimony applied to McClain. (15 RT 1347.)

On January 5, 1994, Tate told police that Holmes told him that Newborn and Ernest Holly committed the Halloween crimes. (15 RT 1337; Def. Exhs. A, B.) On cross-examination, McClain's counsel elicited from Tate that he had identified a photograph of McClain when he spoke with detectives. (16 RT 1424-1425.) Tate told police that Holmes told him McClain was not involved in the crime. (16 RT 1426.) Tate identified McClain, because Tate saw him at some point and McClain was thinking about turning himself in. (16 RT 1425-1426.) Tate had no information that McClain was involved in the shooting. (16 RT 1426.)

However, during re-direct examination, the prosecutor demonstrated that, although Tate said on the tape that Holmes said McClain was not involved, he also said, on the same tape, that Holmes said McClain was involved. (16 RT 1429.) Tate stood by his trial testimony that Holmes told him McClain was not involved in the crimes. (16 RT 1431.)

Tate's testimony included extensive gang references and reports of threats on his life which were irrelevant. (15 RT 1351-1353; 16 RT 1393-1393-1399.) On re-direct examination, explaining why he did not contact law enforcement earlier, Tate told the jury that he something could happen if he went to the police with information about this case, noting, "look at what happened to the kids." (16 RT 1392.)

The prosecutor asked Tate whether he heard of any threats and also to describe any threats of which he heard. (16 RT 1393-1394.) The defense made a hearsay objection. (16 RT 1394.) The trial court overruled the

objection, and instructed the jury that the testimony was not offered for its truth, was relevant to Tate's "state of mind, why he is testifying, why he did certain things." (*Ibid.*) Tate then testified that, two to three weeks before he testified in this case on October 11, 1995, his mother and girlfriend told him they received a threatening phone call saying that he "had better not show up in court." (16 RT 1396, 1392-1394.) Tate's mother and girlfriend did not tell him who made the threats. (16 RT 1395.) Tate then noted that the girlfriend of Terranius Pitts, a P-9 gang member who went to and/or called Tate's house to give him a warning, was in the courtroom. (16 RT 1395-1397.) It concerned Tate that "they" knew where he lived because his family were there. (16 RT 1398.) In addition, Tate's family in Illinois told him that people were coming by, looking for him, and saying he should not show up in court. (16 RT 1396.) The defense repeated its hearsay objection when Tate told the jury that one of his relatives told him never to return to Pasadena because he was in danger. (16 RT 1398-1399.) Tate continued that he heard that a witness was killed in relation to this case, and felt his life could be in jeopardy and feared for his safety. (16 RT 1399-1400.)

d. Willie McFee[78]

Over defense objection, the trial court allowed the prosecutor during redirect examination to play for the jury a tape in which McFee told Detective Uribe he was receiving threats in the form of anonymous phone

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[78] The prosecutor called McFee to testify about an incident that took place a few blocks from the Halloween crime scene. Allegedly, about an hour before the Halloween killings took place, Newborn went to McFee's house looking for a Crip. After Newborn left, McFee heard shots. (23 RT 2370-2419.) 9mm casings were found around McFee's house and in the air conditioning unit attached to his house. (20 RT 2080-2081, 2084-2087.)

calls. (24 RT 2475-2479; Peo. Exh. 47-A.) The prosecutor argued that the statements on the tape were prior consistent statements. (24 RT 2476.) Moreover, the prosecutor argued he was entitled to let the jurors know McFee had received death threats, because Newborn brought out that McFee might receive favorable treatment in criminal sentencing. (*Ibid.*) McClain objected to the tape. (*Ibid.*)

The trial court permitted McFee to tell the jury that he had been on the run for a year and a half and been forced to move because his life had been threatened for no apparent reason. (24 RT 2473-2476, 2490.) He further stated that he was testifying for his life in the face of threats he assumed came from gang members. (24 RT 2490, 2492-2493.)

The trial court did not instruct the jury that the testimony of McFee was limited to defendant Newborn.

2. Gang photographs, identification, and history

a. Police Detective Derrick Carter

At the prosecution's request, Pasadena Police Detective Derrick Carter identified from several photographs alleged P-9 members, most of whom had nothing to do with this case.[79] (14 RT 1161-1166.) Carter then described for the jury People's Exhibit 6, a photograph of a red bandana with names of alleged P-9 members written on it. (14 RT 1167.) When the prosecution asked Carter whether he knew Ishmael Offut, one of the people whose name appeared on People's Exhibit 6, Carter responded, "Ishmael was a P-9 gang member who is now dead." (*Ibid.*)

Defense counsel then objected to Derrick Carter's testimony in its entirety and moved that it be stricken from the record, because it was

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[79] Peo. Exhs. 4, 5.

irrelevant, cumulative, and highly prejudicial. (14 RT 1168.) The trial court overruled the objection, but noted, "I don't think we have to go through every possible or potential P-9 or Blood or Crip in the United States of America." (14 RT 1169.) Defense counsel objected to any further gang testimony and during Carter's testimony, continued to object that the testimony was irrelevant to no avail. (14 RT 1159, 1168-1169, 1171, 1173.)

When the prosecution asked Carter whether P-9 originated in any particular part of Pasadena, the trial court overruled the defense relevance objection, even though it conceded the testimony was irrelevant:

> Listen, let's get this out. I have said it before, I don't give gangs much stature. I think we all know from the last 10 years what they do, how they operate and, only if it is relevant to this case, what they are doing. So let's proceed.

(14 RT 1171-1172.)

The trial court, again over defense objections, allowed Carter to provide a history of P-9. (14 RT 1169-1173.) Carter also informed the jury that after Fernando Hodges was shot, Carter looked at him in the hospital – even though this testimony did nothing to connect McClain or his codefendants to the Halloween crimes. (14 RT 1169-1173.) Carter then identified for the jury a photograph of Hodges, with holes in his head, as he appeared in the hospital. (14 RT 1173; Peo. Exh. 2-B.) The trial court found this was "somewhat relevant" because the prosecutor's theory of the case was gang retaliation. (14 RT 1173.)

Finally, the trial court allowed Carter to state that, if a P-9 is gunned down, and the police happen to suspect the Raymond Avenue Crips, that if P-9s are going to "ride" on someone, they are going to ride on Raymond Avenue Crips. (14 RT 1174.)

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b. Deputy Chris Keeling

Deputy Chris Keeling, who was called to testify about a jail incident involving defendant Newborn, identified McClain as someone he knew. (19 RT 1992.) Over defense objection, the trial court asked Keeling whether it was his job to interact with gang members in custody. (19 RT 1934-1935.)

3. Legal Standards

Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code § 352.) Evidence should be excluded under section 352 if it "uniquely tends to evoke an emotional bias against [the] defendant as an individual, and which has very little effect on the issues." (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.)

Evidence Code section 1101(a) prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101(b) provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 393.) Under section 1101(b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent

...) other than his or her disposition to commit such an act." (*People v. Catlin, supra*, 26 Cal.4th 81, 145.)

The rule excluding evidence of criminal propensity derives from early English law and is currently in force in all American jurisdictions. (See *People v. Ewoldt, supra*, 7 Cal.4th at 392; *People v. Alcala, supra*, 36 Cal.3d 604, 630-631.)

Such evidence is impermissible to "establish a probability of guilt." As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. [footnote] The inquiry is not rejected because character is irrelevant; [footnote] on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.* at pp. 475-476.)

The admissibility of bad character evidence depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin, supra*, 26 Cal.4th at pp. 145-146.) There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Because such evidence can be highly inflammatory and prejudicial, its admissibility

must be "scrutinized with great care." (*People v. Thompson, supra*, 27 Cal.3d 303, 314.) When evidence of other acts is offered to prove a material fact, the court must employ a case-by-case balancing test of the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. (*People v. Stanley* (1967) 67 Cal.2d 812, 818.)

Gang evidence, like all bad character evidence, is admissible only when it is relevant to a material issue aside from character, is more probative than prejudicial, and is not cumulative.[80] (Evid. Code §§ 352, 1101(a)-(b); *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) It is not admissible to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) This is because criminal defendants have the right to a trial on the evidence linking them to the charged crime, not based on a general criminal profile. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072.) In addition, this Court has cautioned that even if gang evidence is relevant, it may have a highly inflammatory impact on the jury and, therefore, "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653, quoting *People v. Champion* (1995) 9 Cal.4th 879, 922.) Although "[m]embership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion," the highly inflammatory nature of gang evidence creates the risk that the jury will convict a defendant based on criminal disposition rather than evidence of

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[80] The legal authority and argument in Claim IV are incorporated herein by reference.

the crime charged. (*In re Wing Y* (1977) 67 Cal.App.3d 69, 79; *People v. Castaneda, supra*, 55 Cal.App.4th at p. 1072; *People v. Williams, supra*, 16 Cal.4th at p. 193; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.) Furthermore, gang evidence invites juries to improperly convict defendants based on guilt by association. (*Mitchell v. Prunty, supra*, 107 F.3d 1337, 1342, overruled on other grounds by *Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242.) A finding of guilt by association "undermines the defendant's right to a fair trial." (*People v. Castaneda, supra*, 55 Cal. App.4th at p. 1072.)

The dangers of such evidence are amplified in places such as Los Angeles where "public and political perception is that Southern California is in the midst of an unprecedented gang holocaust." (Burrell, *Gang Evidence: Issues for Criminal Defense* (1990) 30 Santa Clara L. Rev. 739, 741.) In light of these profound risks, trial courts must carefully scrutinize gang-related evidence before admitting it and resolve any doubts in favor of the defendant whose life and liberty are at stake. (*Ibid.*; *People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

Thus, other acts evidence, including gang evidence, is only admissible in very limited circumstances, when the court has carefully weighed the evidence and found that it is so probative in value that it overcomes its inherently strong prejudicial effect on the defense. (*People v. Haslouer* (1978) 79 Cal.App.3d 818, 825.)

4. The Prejudicial Effect of the Evidence Far Outweighed its Minimal Probative Value

McClain never disputed his membership in the P-9 gang. Indeed, he testified openly to his gang association and counsel discussed it freely in closing argument. (36 RT 3962-4080; 43 RT 4489, 4504-4506, 4542.)

When, as here, a defendant does not contest his gang membership, such evidence is cumulative; when, as in McClain's case, the evidence is also prejudicial, it is inadmissible. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1495; *People v. Avitia*, *supra*, 127 Cal.App.4th at pp. 193-194.)

The trial court should not have admitted the evidence to which McClain and the defense objected under Evidence Code sections 352 and 1101. The only issues in dispute were whether McClain shot and injured Robert Price, conspired to gun down either the victims in this case or some Crips, and drove the car in which the shooters left the Halloween crime scene. Outside of a single unreliable eyewitness and several convicted felons, the prosecutor had no evidence linking McClain to these crimes. So, instead of proving the case against McClain, the prosecutor used the above-described evidence to show that McClain was a bad and dangerous person with a propensity to retaliate against his enemies. The trial court, when it gave any explanation for its rulings, focused not on the impact gang evidence would have upon the jury, but rather on his personal views of gangs and gang culture. The trial court's comments, e.g., "I think gangs are the phoniest mystique of the world" (17 RT 1529), indicate that while it did not give much weight to gang evidence, it failed to recognize that most if not all of the jurors would react emotionally to the barrage of evidence from and about gang members making it very difficult for them to focus on the facts at issue. Its admission was extremely prejudicial and of little if any probative value. McClain addresses the specific testimony below.

DeSean Holmes's testimony that his mother and coach had relayed threats to him had little relevance and was highly inflammatory. The trial court stated that DeSean's testimony was relevant to his demeanor,

however, it never explained how threats he received related to his involvement in another case explained his demeanor in this case. Indeed, Officer Johnny Brown, one of the officers who handled DeSean confirmed that DeSean's fears stemmed from another case. Furthermore, on direct examination, with no defense objection, DeSean testified that he felt he could be killed for testifying. Thus, even if his demeanor were at issue, this testimony was cumulative and unnecessary to demonstrate that DeSean was nervous.

More problematic was DeSean's testimony about a threat that he would be killed just like Mahjdi Parrish. This testimony falsely suggested that Parrish's death was related to this case, when in fact, Parrish was a victim of a carjacking in which DeSean participated. Officer Brown acknowledged that he heard there had been charges against DeSean for carjacking the deceased Parrish, however, the trial court restricted the defense from cross-examining DeSean about this event (see Claim I.A.3), leaving the jury with the impression that the defendants in this case had somehow threatened DeSean.

This Court has made clear that evidence that a defendant has threatened witnesses "implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated." (*People v. Warren* (1988) 45 Cal.3d 471, 481.) Assuming there is adequate proof of a defendant's involvement in threats, such evidence is sometimes relevant to a witness's credibility. (*Ibid.*) However, as there was no allegation that McClain had been involved in any threats against any person or witness, this evidence misled the jury to believe that McClain threatened witnesses or others and invited it to infer from these fictional actions a consciousness of guilt. Furthermore, the evidence did not help the jury assess DeSean's

credibility because, it already knew that he was nervous about testifying and he ultimately provided testimony that the prosecution wanted the jury to hear. Although the trial court did instruct the jury that DeSean's testimony was limited to Newborn, it is unlikely that the instruction cured the error created by this highly charged evidence. (See *People v. Luparello* (1986) 187 Cal.App.3d 410, 426 [the trial court's curative efforts were insufficient in the face of the prosecutor's emphasis on inflammatory gang evidence].)

Derrick Tate's testimony about threats was also both irrelevant and impermissibly prejudicial. As with DeSean, the trial court permitted Tate to testify about threats he allegedly heard about two to three weeks before his trial testimony in order to explain why he had not gone to police earlier with his information and why he was testifying. However, Tate spoke to police in January 1994 and testified in October 1995. Thus, the alleged threats occurred about 21 months after Tate spoke to police. Needless to say, threats that occurred well after Tate spoke with police could have had no bearing on the delay. Furthermore, threats Tate received before he testified do little to explain why he was testifying given that threats are a disincentive to testify. Neither law enforcement nor the prosecution helped Tate get relief from the charges pending against him or from the prison sentences he was serving. (15 RT 1360, 1386-1389.) In other words, Tate testified despite any of the external influences that often affect informant witnesses.

Crucially, there is no evidence that any of these threats related to McClain. Indeed, McClain had no motive to threaten Tate who told police Holmes denied McClain's involvement in the Halloween crimes. However, because the trial court instructed the jury that Tate's testimony applied to both McClain and Holmes without further explanation (15 RT 1347), the

jury was left to infer that McClain was somehow involved in threatening Tate. The trial court should have excluded the threat testimony to shield the jury from drawing this inference. (See *People v. Warren*, *supra*, 45 Cal.3d at p. 481.)

Like the threats to which DeSean and Tate testified, Willie McFee's testimony about threats was irrelevant and highly prejudicial. The prosecutor's argument, that the alleged threats were admissible because Newborn elicited that McFee received favorable treatment from law enforcement in exchange for his testimony, makes no sense. If the prosecutor wanted to rebut McFee's testimony about favorable sentencing outcomes in exchange for his testimony, he should have presented evidence that McFee received no such treatment. The prosecutor was not entitled to bolster witnesses with whom it had made questionable deals by injecting inflammatory evidence of threats into McClain's capital trial. This is especially true because there was no evidence of the source of these threats. Although McFee's testimony related to defendant Newborn, that fact was easily obscured by McFee's emotionally charged testimony about threats.

The prosecutor further inflamed the jury when Derrick Carter provided for it a seemingly endless and totally irrelevant list of P-9 gang members along with group photographs. (14 RT 1161-1172.) The prosecutor's message to the jury was loud and clear: McClain was part of an illegal army of hoodlums whose violence would continue absent a finding of guilt in this case. Moreover, the trial court acknowledged that the testimony was unnecessary to the prosecution's case, but allowed it to proceed anyway.

Carter's identification of a photograph of the fatally wounded Hodges was also irrelevant. The trial court found it was relevant to the

prosecutor's gang retaliation theory. While Hodges's death was relevant to motive, the fact that Carter witnessed Hodges in this bloodied state was not. Furthermore, there was no dispute that Hodges was brutally murdered hours before the Halloween crimes occurred. The message of this testimony and photograph was that all gang members, including McClain, commit vicious murders.

The prosecutor made sure that McClain's gang membership was before the jury at every opportunity – even when presenting evidence wholly unrelated to McClain. When Deputy Chris Keeling testified against co-defendant Newborn, the prosecutor made sure the jury found out that Keeling knew McClain from his contacts with incarcerated gang members. (19 RT 1934-1935.) This not only reinforced that McClain was a gang member, but "emphasized that gang members frequently engage in criminal behavior." (*People v. Avitia, supra*, 127 Cal.App.4th at p. 194.) The *Avitia* Court found that the testimony of a sheriff's deputy that he spoke with hundreds of gang members in jail prejudiced defendant by strengthening the common impression that gang members often commit crimes. In combination with other gang evidence, this fact required reversal. (*Id.* at p. 195.) Not only does Keeling's comment mirror the comment in *Avitia*, but the gang evidence in McClain's case was far more extensive and the prosecution's case far weaker.

These repeated unnecessary references to threats against witnesses, none of which involved McClain, along with lists of gang members, gang history, photographs of gang members, and activities of gang members, surely played on the jurors' worst fears. "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series." (*People v. Perez* (1981) 114

Cal.App.3d 470, 479.) The prosecutor whose primary job at the time of McClain's trial was the prosecution of gang members understood public perceptions about gangs and milked them at every turn because it lacked the evidence to properly prosecute McClain. As explained further below, the "use of gang membership to imply 'guilt by association' is impermissible and prejudicial." (*Kennedy v. Lockyer*, *supra*, 379 F.3d 1041, 1056.) Nevertheless, that is what, with the trial court's blessing, the prosecutor in this case did.

For these reasons, evidence about threats against witnesses or witnesses' fears about testifying were irrelevant, misleading, confusing, and highly prejudicial. Although such testimony had little probative value, the prosecutor successfully used this dramatic and frightening evidence as a proxy for proving its case. Even if this evidence had some relevance to motive and intent, i.e., that McClain had conflicts with members of other gangs and deep loyalty to his homeboys, there was no connection between the evidence – some of which was very general and most of which had nothing to do with McClain – and the circumstances of this particular case.

In addition to being more prejudicial that probative, the evidence of the specific threats to DeSean Holmes and Derrick Tate were admitted over defense hearsay objections.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The Sixth Amendment has been made applicable to the States through the Fourteenth Amendment. (*Pointer v. Texas*, *supra*, 380 U.S. 400, 403-405; *Davis v. Alaska*, *supra*, 415 U.S. 308, 315.) This right to confrontation underlies Evidence Code section 1200 which provides that "evidence of a

statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is inadmissible hearsay. (Evid. Code § 1200.)

This Court has held that when a trial court instructs the jury not to consider testimony about threats for its truth, "[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) However, this Court has made a distinction between evidence of threats by a *defendant* and testimony regarding a witness's fear which is relevant to a witness's credibility. (*People v. Warren, supra*, 45 Cal.3d 471, 481.) While threats by a defendant may be relevant as to consciousness of guilt (ibid.), where, as here, the alleged threats themselves were not made by a defendant, they have no relevance at all and were merely prejudicial. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 187.) This Court has approved such testimony regarding threats as they relate to "a witness' 'attitude toward the action' or 'toward the giving of testimony'" in the absence of a link between the defendant and such threats, however, where such testimony was approved, the prosecution did not falsely suggest, as it did here, that there was such a link. (*People v. Green, supra*, 27 Cal.3d 1, 20.)

Nevertheless, the trial court must exclude the evidence if it is unreliable or if its prejudicial effect substantially outweighed its probative value. (Evid. Code § 352.) In McClain's case, while DeSean's demeanor may have been relevant, the testimony was unnecessary, confusing, and inflammatory. The testimony was unnecessary because DeSean and Deputy Brown had already testified that DeSean had received threats and was afraid to testify. The testimony was confusing because none of the threats came

from McClain or any other defendant in this case. Furthermore, his testimony suggested that the defendants in this case were somehow responsible for the death of Mahjdi Parrish, when (1) there was no evidence of such culpability and (2) DeSean himself allegedly participated in a crime against Parrish. (See Claim I.A.3.) Finally, the details of the alleged threats had no probative value, but carried the inflammatory and baseless suggestion that McClain and his codefendants killed witnesses.

Tate's testimony was also unnecessary, confusing, and inflammatory. Once Tate explained that he was afraid to testify because of what happened to the children, there was no need to give further detail about the nature of the threats. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 869 [the threat's existence alone is relevant to the witness's credibility].) The testimony was confusing because Tate claimed no knowledge of who made the threats. While the source of the threat may not be crucial to its effect on Tate's credibility (*ibid.*), the risk that the jury might attribute the threats to McClain was critical. This inflammatory evidence skewed the jury's ability to consider the evidence against McClain.

Finally, McClain had no opportunity to cross-examine the sources or recipients of the threats to which DeSean and Tate testified. For these reasons, he was unable to show that he was not the source of the threats. Moreover, he could not call Cooks, Holly, DeSean's coach, Terranius Pitts, and Tate's mother and girlfriend, without emphasizing the threat testimony. Thus, the testimony placed him in an impossible situation which deprived him of his right to confront witnesses, a reliable conviction and penalty determination, and due process.

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B. The Prosecutor Committed Misconduct in Examination and Argument Which Exacerbated the Error of the Admission of Gang Evidence and Urged the Jury to Convict on Improper Bases and Facts Not in Evidence

1. Proceedings Below

Over defense objection, the prosecutor in opening statement alerted the jury that it would hear the history of the P-9 gang during the course of the trial, and told the jury that P-9 was a Blood gang which had a feud with other Bloods which led to back and forth shooting. (14 RT 1092.) The night of the homicides, Fernando Hodges, a P-9 member, was gunned down. (*Ibid.*) Rather than informing the jury that it would hear evidence connecting defendants to the crime, the prosecutor argued, again over defense objection, "Now you don't have to be Inspector Clousseau to start suspecting individuals. All you have to do is be familiar with the neighborhood. All you have to do is be part of that neighborhood." (*Ibid.*)

During witness testimony, the prosecutor made remarks designed to insinuate that witnesses were in danger and fearful of testifying. After several young witnesses testified, the defense moved for a mistrial based on the prosecutor's misconduct in handling witnesses before the jury over the course of two days. (20 RT 2034.) The defense noted that the prosecutor assured witnesses in front of the jury that no cameras were present, thus insinuating that the witnesses were in danger for and fearful about testifying. (20 RT 2034-2035.) The defense argued that several facts pointed to a deliberate attempt by the prosecution to create a sense of fear in the jury by mentioning the cameras: (1) were the witnesses fearful about testifying, the prosecutor could have assured them of their safety before they testified, outside the jury's presence; (2) photos of each of the witnesses had already appeared in the media numerous times; (3) the

witnesses had attended public candlelight vigils relating to this case; (4) none of the witnesses in question were identifying a defendant; and (5) the witnesses were not gang members. (*Ibid.*) The prosecutor countered that witnesses Derius Halliburton and Mickey Polk were scared to testify and had complained that defendants were staring at them. (20 RT 2035-2036.)

The trial court denied the mistrial but agreed with the defense that the prosecutor should speak with witnesses ahead of time. (20 RT 2036.) The trial court also observed that the prosecutor spoke very softly to young witnesses and they replied in the same tone which sounded like "baby talk." (20 RT 2037.)

The most egregious misconduct occurred during closing argument. The prosecutor asked the jury to convict McClain to solve social problems and appealed to their fears. The prosecutor also misstated the evidence to the jury, made arguments with no evidentiary basis, and argued evidence that the trial court had stricken.

The prosecutor argued that witnesses were afraid and had been threatened and intimidated. (43 RT 4463-4464.) In rebuttal, the prosecutor argued that everyone is afraid of gang members, "This fear is pervasive, it is invasive, it is wrong, it must stop and it must stop here in this courtroom now." (44 RT 4627.)

The prosecutor also argued that when the testimony of a witness such as Lachandra Carr, was in conflict with the witness's grand jury testimony, the jury should accept the grand jury testimony as true because:

> The Grand Jury does provide sanctuary. It does provide safety. It does provide a place where, free from the intimidating scowls of convicted gang members, where in the safety and sanctity of a room with 20-something members of the community of Los Angeles County . . . in that location you can feel free to tell what you know. You can feel open and at

> ease. And it was there at the Grand Jury that Lachandra Carr mentioned who was at the hospital.

(44 RT 4630-4631)

The prosecutor asked the jurors: "Would any of you come to court knowing that there are gang members out there, would any of you knowing all these things come in here and say, 'I know these guys?'" (44 RT 4663-4665.) The prosecutor also persuaded the jury that Derrick Tate was warned not to testify and argued:

> See how long, how far these arms can stretch? These are real gangsters. These are people with pull. He was told not to return to Pasadena or 'you're dead.' His girlfriend and mother were called and threatened. He heard a witness in this case had already been killed. He is on Lorenzo's smash list. And Mr. Nishi was kind enough to call Mr. Tate at his girlfriend's house, which must have made Mr. Tate feel very secure that the defense knew where his girlfriend could be reached.

(44 RT 4674.) The prosecutor also told the jury it was difficult to get witnesses to come forward when there is "gang intimidation and . . . family ties."[81] He noted that people who snitch get killed, and told the jury: "These people have the juice to get you." (44 RT 4698)

The prosecutor noted that McClain's counsel argued in closing that the jury was the only thing between the police and McClain. The prosecutor then argued: "If I were the only thing between the police and McClain, I would stand out of the way. Mr. McClain has told you he hasn't killed . . . anybody yet. But he used the word 'yet.' And DeSean has told you that Lorenzo has a list of people to smash when he gets out. You are

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[81] Prosecution witness James Carpenter testified that his mother and McClain's father were twins. (23 RT 2316.) McClain's father then testified that he had no twin sister. (38 RT 4090.)

not the only thing between McClain and the police. You are the only thing between them and their next victims. " (44 RT 4701-4702.) The trial court sustained McClain's objection to the comment but denied his requests for a mistrial or a limiting instruction that the jury should not consider future dangerousness.[82] (44 RT 4717.)

The prosecutor argued to the jury that neither he nor anyone else made defendants who they were, "felons, convicted firearm offenses, dope dealers, women beaters, gang members, child killers." (44 RT 4702)

The prosecutor also argued facts that did not have a source in the evidence before the jury.

The prosecutor argued that McClain testified that, as a member of P-9, he could not go to King's Manor, but law enforcement did not so testify. However, the prosecutor never asked its law enforcement witnesses whether King's Manor was unsafe for P-9 members. (42 RT 4446.)

The prosecutor told the jury that witness Horace Carlyle testified about "that suspicious group of gang members, who were [at the hospital] for another purpose . . . And there was one who seemed to be barking out orders . . . and they were like a military organization." (44 RT 4628-4629.) In fact, Carlyle testified that he saw a group of people wearing baggy, hooded attire who appeared to be controlled and organized. When Carlyle stated that based on his experience, those people were probably in a gang

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[82] The trial court, in denying the mistrial, noted that earlier, when the prosecutor told the jury its verdict would send a message, it instructed the jury that its duty "is not to send a message but to determine the evidence in this case and make a determination in deliberation." (44 RT 4703.) However, this admonition did not stop the prosecutor from arguing that McClain was a future danger to society.

relationship, the trial court sustained the defense's objection. (15 RT 1253-1254.)

The prosecutor also blamed the defendants for the poor credibility of prosecution witnesses. (44 RT 4463).

The defense moved for a mistrial because the prosecutors' closing arguments in combination with the display of victims and coroners' diagrams during them appealed to passion and prejudice. (44 RT 4713-4716; Claim I.A.4, is incorporated by reference herein.)

2. Legal Standards

When prosecutors engage in an egregious pattern of misconduct that infects the trial, it violates the Due Process clause of the federal constitution. (*People v. Hill*, *supra*, 17 Cal.4th 800, 819.) To show such a violation, a prosecutorial misconduct claim must demonstrate both impropriety and prejudice. (*United States v. Weatherspoon*, *supra*, 410 F.3d 1142, 1145-1146.) As explained below, the prosecutors in this case committed a variety of improper acts, which, alone and together, substantially prejudiced McClain and require reversal of his conviction.

a. Improper closing arguments

The prosecutors' closing arguments were so inflammatory in their appeals to passion and prejudice that defense counsel unsuccessfully moved for a mistrial. (44 RT 4713-4716.) The misconduct during closing arguments took many forms:

i. Asking the jury to solve social problems and appealing to jurors' fears

More than once, the prosecutors argued that the jurors' role was to convict McClain to solve societal problems of gangs and violence "in this courtroom now." (44 RT 4627.) According to the prosecutor, the jury was

also responsible for keeping McClain away from society and preventing him from committing crimes. (44 RT 4717.) If this was not enough, the prosecutors made sure the jurors would believe McClain and his codefendants had "long arms" and "the juice to get you." (44 RT 4674, 4698.) The prosecutor hammered into the jurors' minds the lack of safety in the trial court by arguing that witnesses would only be honest before the grand jury and not in open court in the presence of defendants and their families and friends. (44 RT 4630-4631.) And, the prosecutor argued that witnesses were afraid and intimidated and that the jurors themselves would be scared were they witnesses in this case. (43 RT 4463-4465.) In doing so, the prosecutor implicated McClain and the other defendants in threatening not only witnesses and jurors, but all those present in the courtroom as well.[83]

These arguments were highly inflammatory and improper. Prosecutors may not invoke societal woes as a basis for conviction. (*Viereck v. United States* (1943) 318 U.S. 236, 247-248.) In *Viereck*, defendant was accused of, during World War II, of engaging in prohibited activities on behalf of Germany. (*Id.* at pp. 238-239.) In closing the prosecutor argued: "This is war. Harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death . . ." (*Id.* at p. 248, fn. 3.)

The United States Supreme Court explained that the prosecutor's appeal prejudiced defendant's fair trial rights because it was unrelated to issues in the case and its only purpose was to arouse passion and prejudice.

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[83] These arguments also violated McClain's right to be convicted on evidence beyond a reasonable doubt and not of guilt by association. The argument in section B of this claim is incorporated herein by reference.

(*Viereck v. U. S.*, *supra*, 318 U.S. 236, 247.) *Viereck* is important to McClain's case not just because it is well-settled federal constitutional law, but because McClain and Viereck's trials took place in an atmosphere of gang war or foreign war which was particularly vulnerable to prosecutorial exploitation. As in *Viereck*, the prosecutors in McClain's case took ample advantage of the jurors' fears, passions, and prejudices depriving him of a fair trial.

In *Commonwealth of Northern Mariana Islands v. Mendiola* (9th Cir. 1992) 976 F.2d 475, 486-487, overruled on other grounds by *George v. Camacho* (9th Cir. 1997) 119 F.3d 1393, the Ninth Circuit found that this prosecutorial argument was "plainly designed to appeal to the passions, fears, and vulnerabilities of the jury":

> Now as I said, a lot of people are interested in your decision . . . . Everyone in Saipan is interested. That's why there are so many people in the courtroom. The people want to know if they are going to be forced to live with a murderer.
>
> * * * *
>
> Your job is to worry about Mr. Mendiola. And when I say worry, I mean worry. Because that gun is still out there.
>
> * * * *
>
> Mr. Mendiola deserves to be punished for what he did and that's your decision. And it's important because, as I said, that gun is still out there. If you say not guilty, he walks out right out the door, right behind you.

(*Id.* at p. 486.) The prosecutor's arguments, which were certainly "intended to induce a level of fear in the jurors so as to guarantee a guilty verdict," required reversal. (*Id.* at p. 487.)

The improper comments of the prosecutor in *Mendiola* mirror the arguments of the prosecutor in McClain's case.

ii. Misstating evidence and arguing evidence that the trial court had stricken

The prosecutor committed two kinds of misconduct in regards to Horace Carlyle's testimony. First, as described above, the prosecutor flatly and materially misstated Carlyle's testimony when he said that Carlyle saw gang members at the hospital, when in fact he saw a group of people. (15 RT 1253, 1254, 44 RT 4628-4629.) A prosecutor may not misstate the evidence or otherwise mislead a jury. (*Berger v. United States*, *supra*, 295 U.S. 78, 84-89.) Misstating the substance of a witness's testimony in a prosecutor's closing argument is plain error when it affects a defendant's substantial rights. (*United States v. Carter*, *supra*, 236 F.3d 777, 783-787; *People v. Hill*, *supra*, 17 Cal.4th 800, 824-827 [reversal where the prosecutor misstated the evidence].)

Second, the prosecutor argued that Carlyle testified that the people at the hospital were gang members, even though the trial court struck from the record Carlyle's testimony that he suspected they might be gang members. (44 RT 4628-4629.) A prosecutor's reference to evidence that the trial court has excluded violates due process. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1175-1176, overruled on other grounds by *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815; see also *United States v. Beeks* (8th Cir. 2000) 224 F.3d 741, 746 [prosecutor's reference in cross-examination to excluded character evidence required reversal]; *People v. Hill, supra*, 17 Cal.4th at p. 828 [reversal where, among other things, the prosecutor

without factual support from the record argued that no similar crimes had been committed since defendant's arrest].)

In addition to this misconduct, the prosecutor further misled the jury when it argued that no officer testified that members of P-9 could not go to King's Manor. The prosecutor never asked law enforcement witnesses whether P-9 members could go to King's Manor. Nevertheless the prosecutor's argument suggested that if he had asked this question of law enforcement, they would have testified that P-9 members could go to King's Manor. This Court rejected this kind of misleading argument in *People v. Hill, supra,* 17 Cal.4th at pp. 828-829, where the prosecutor argued that she could have brought in an expert to establish a fact, but did not need to do so. The prosecutor's argument in McClain similarly suggested that the jury should assume something of which the prosecutor presented no evidence.

Each of these misleading arguments confused the jury and aroused its fears of gangs, depriving McClain of a fair trial. (*People v. Hill, supra,* 17 Cal.4th at pp. 823-827.)

iii. Shifting the burden of proof

A prosecutor may not use closing argument to shift the burden of proof to a defendant. (See *United States v. Roberts, supra,* 119 F.3d 1006, 1015 [prosecutor's argument that defendant should present a compelling case of innocence required reversal even though the prosecutor also said defendant was not required to testify and that the prosecutor had the burden of proof]; *United States v. Friedman* (2nd Cir. 1990) 909 F.2d 705, 709 [reversible error where with incorrect remarks about the role of the defense "the prosecutor managed in one breath to undermine the presumption of innocence"].)

The prosecutor attempted to shift the burden of proof onto McClain in several ways. Although the prosecutor never asked its law enforcement witnesses whether King Manor was unsafe for P-9 members, the prosecutor argued that it was significant that McClain said King Manor was unsafe, but law enforcement did not. (42 RT 4446.) The prosecutor also blamed McClain for the poor quality of its own witnesses. (43 RT 4463.) Finally, the prosecutor argued that if anyone in P-9 resembled McClain, McClain would have presented to the jury a photograph of that person. (44 RT 4662.)

These comments by the prosecutor were an improper attempt to lessen the State's burden of proof or to shift it onto McClain, by allowing the prosecutor to obtain a conviction based on the jurors' fears of gangs and personal threats in combination with guilt by association. (See, e.g., *Sandstrom v. Montana*, *supra*, 442 U.S. 510, 520-524; *Mitchell v. Prunty*, *supra*, 107 F.3d at p. 1342.)

b. Appeal to fear of gangs and guilt by association in opening statement

The prosecutor began by suggesting to the jury that rather than base its decision on evidence, it could simply get a sense of the neighborhood in which the crimes took place. (14 RT 1092.) This transparent appeal to fear of gangs set the tone for the trial in which the prosecutors repeatedly invited the jury to convict McClain of guilt by association. This pervasive misconduct violated McClain's rights to due process and a fair trial.

A prosecutor's appeals to fear of crime and gangs as the "crux" of its argument threatens a defendant's due process rights. (*Copeland v. Washington* (8th Cir. 2000) 232 F.3d 969, 975.) So too, a prosecutor's attempts to establish guilt by association is misconduct. (*United States v.*

Wolfswinkel (9th Cir. 1995) 44 F.3d 782, 787 ["The prosecution may not prove a defendant's guilt by showing his association with unsavory characters"]; *United States v. Love* (6th Cir. 1976) 534 F.2d 87.) In *United States v. Love, supra*, 534 F.2d 87, the prosecutor implied through his questioning of defendant, that defendant's employer was involved in organized crime. (*Ibid.*) The trial court sustained defendant's objection and cautioned the prosecutor not to continue making these suggestions. (*Ibid.*) Nevertheless, the Sixth Circuit held that the prejudice of the prosecutor's comments was so great that even the trial court's "valiant effort" did not cure the error. (*Ibid.*) Reversing, the court explained that due process entitled defendant to a fair trial. (*Ibid.*) So too, the prosecutors' attempt from the outset of McClain's trial to convict based on guilt by association violated McClain's due process and fair trial rights.

c. The prosecution's treatment of witnesses

The prosecutors continued to inject unfairness into the trial by treating their witnesses as if they were in grave danger, creating an atmosphere of terror in the courtroom and encouraging the jurors to convict McClain based on fear, rather than evidence. The prosecutors' actions also suggested to the jury that some extra-record evidence that McClain had threatened jurors existed when it did not. Although the trial court agreed with the defense that the prosecutors' treatment of witnesses was improper, it offered no remedy other than a gentle warning to the prosecutors and a complaint to the defense that it should "stop picking on" it. (20 RT 2036-2037.)

Such inflammatory appeals to emotion and fear are wholly impermissible and deprive a defendant of a fair trial. (*Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19.)

Through its treatment of witnesses before the jury, the prosecutors implied that evidence existed that McClain and his codefendants had threatened witnesses. These actions circumvented the rules of evidence and were clearly misconduct. (*People v. Hill, supra*, 17 Cal.4th at pp. 827-828.) They deprived McClain of his California and federal constitutional rights to due process, a fair trial, and the right to confront witnesses. (*People v. Bolton, supra*, 23 Cal.3d 208, 213.)

C. The Errors Separately or Together Require Reversal

The State cannot prove that the constitutional errors outlined above were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24.) Moreover, as McClain demonstrates below, there is a reasonable probability that absent the error, the jury would have reached a more favorable result. (*People v. Watson, supra*, 46 Cal.2d 818, 836.) While each error described herein requires reversal, the cumulative prejudice of the errors together leaves no doubt that McClain's convictions must be reversed. (See *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1214; *People v. Sturm* (2006) 37 Cal.4th 1218, 1230.)

Even a very limited admission of gang evidence can create prejudice that requires reversal. (*People v. Avitia, supra*, 127 Cal.App.4th at p. 194.) This is because gang evidence may have a "highly inflammatory" impact on the jury. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) This is especially true in a case like McClain's. As discussed above, the prosecutor's case consisted of highly suspect informants and a single unreliable eyewitness. With no credible evidence against McClain, the prosecutor relied instead on character assassination and implied threats to the jury. None of this evidence was relevant to the murders, but all of it likely inflamed the jury and misled it to believe McClain participated in the homicides.

The prosecutor conceded during opening statements that his witnesses were very problematic, and attempted to blame defendants for the flaws in their testimony: "If we had angels as witnesses, we would bring them in, but we don't. We are going to be relying on people who would tend to associate with people like the defendants. One of them is . . . Mario Stevens. We didn't go down to central casting. We are bringing you the witnesses whom they, the defendants would trust."[84] (14 RT 1116.)

The prosecutor continued to blame McClain for the poor quality of the State's case in closing argument, arguing that they "hang out with people like themselves," not with productive members of society. (43 RT 4462.)

The prosecutors, whose case against McClain could not stand, instead hammered this impermissible evidence into jurors minds to obtain convictions against him. Their success in this regard is borne out by the jury's 12 days of deliberations. (See *Kennedy v. Lockyer, supra*, 379 F.3d at p. 1056, fn. 18.)

Crucially, no jury instruction cured the harm. The trial court never explained to the jury that it could not consider evidence of street gang activities and criminal acts by gang members as proof that McClain was a bad person with a propensity to commit crimes. (See, e.g., CALJIC 17.24.3.)

While the trial court has no duty to give limiting instructions sua sponte (*People v. Collie* (1981) 30 Cal.3d 43, 63-64), in a case where highly

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[84] The trial court conceded on defense objection that the prosecutor's comment "might" be improper, but rather than grant a remedy, the trial court merely encouraged the prosecutor to talk about the evidence. (14 RT 1116.)

inflammatory character evidence is introduced, its failure to do so heightens the prejudicial effect of the error. This is because the absence of limiting instructions makes it more likely that the jury will "misuse [the evidence] as character trait or propensity evidence" and "use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 128-129.)

Given the close case against McClain as evidenced by the jury's lengthy deliberations, the prosecutor's reliance on this inflammatory evidence, particularly when considered in combination with the other bad character evidence (see Claim IV), and the absence of a curative instruction, was extremely and impermissibly prejudicial.

The prosecutorial misconduct described herein also requires reversal. The prejudice from prosecutorial misconduct is greater when, as in this case, the evidence against a defendant is weak and the prosecutor's conduct is "pronounced and persistent." (*Berger v. United States, supra,* 295 U.S. 78, 89.) A miscarriage of justice results when misconduct contributes "materially to the verdict." (*People v. Sawyer* (1967) 256 Cal.App.2d 66, 77-78.) As explained throughout this brief, the evidence against McClain was weak and the length of jury deliberations and its questions to the trial court indicate that it was a close case. (See Claims II & III.)

The prosecutors relied on improper appeals to fear of harm to jurors and witnesses, a non-existent duty to use this case to right social wrongs, racial prejudice, guilt by association, misstatements of evidence, suggestions of extra record evidence and other inflammatory tactics, all of which compensated for its lack of evidence against McClain.

In *Commonwealth of Northern Mariana Islands v. Mendiola, supra,* 976 F.2d 475, 487, the Ninth Circuit reversed where, as here, the prosecutor improperly argued future dangerousness at the guilt phase of defendant's trial. In *Mendiola*, the "prosecutor's suggestions that Mendiola would walk out of the courtroom right behind them, if acquitted, and presumably retrieve the missing murder weapon was particularly improper because the prosecutor knew that his witness, the informer Reyes, was responsible for the missing gun." (*Ibid.*) The prosecutor in McClain's case made a similarly misleading and even more prejudicial argument with regard to the death of Mahjdi Parrish. The prosecutor insinuated to the jury that Parrish was dead because he saw McClain shoot Price.[85] (44 RT 4684.)

> Robert Lee doesn't identify Herb until, what, November 11th, '93, around there; yet Herb tells you he's arrested and brought in on Robert Lee on October 30th or 29th, around there, '93, before the Halloween killings. And I think Lopez or Luna corroborated that.
>
> How does that happen? Two words. Majhdi Parrish. Who else was out there that night when Robert Lee Price was shot by Herb? Majhdi Parrish. And where is Majhdi Parrish now? Dead. The truth is everlasting . . .

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[85] Outside the presence of the jury McClain's counsel argued that the prosecutor should not argue that Parrish's death was related to this case, because she received a letter from Mr. Myers in which he stated that Parrish's death had nothing to do with this case. (17 RT 1529.) Mr. Myers did not dispute the existence of the letter at that time. (*Ibid.*) However, when McClain's counsel objected to Mr. Myers's suggestion in closing argument that McClain was responsible for Parrish's death on the basis of the letter she received, Mr. Myers stated "I don't know anything about this letter, but I can talk with you about it at sidebar." (44 RT 4684.) No discussion took place, because McClain's counsel told Mr. Myers to go on with his argument. (*Ibid.*)

(44 RT 4685.) The prosecutor presented no evidence that McClain was in any way involved in Parrish's death. Indeed, the only evidence of wrongdoing against Parrish involved prosecution witness DeSean Holmes whom the trial court shielded from defense cross-examination. (See Claim I.A.4, *ante*.)

In *Mendiola*, the weakness of the prosecutor's case also informed the court's decision to reverse. (*Commonwealth of Northern Mariana Islands v. Mendiola, supra,* 976 F.2d at p. 487.) The court noted that, as here, there was no physical evidence linking defendant to the crime and the other evidence, including the testimony of a criminal informant, was unreliable. (*Ibid.*)

Other cases also compel reversal here because the gang references were a "major component" of the prosecutors' case. (See *United States v. Wolfswinkel, supra*, 44 F.3d at p. 787.) Moreover, the trial court never mitigated the effect of the misconduct with a curative instruction or, as counsel requested, by declaring a mistrial to cure the incurable errors. (*Ibid.*; *United States v. Weatherspoon, supra*, 410 F.3d 1142, 1146; see also, *United States v. Carter, supra*, 236 F.3d 777, 783-787 [although the trial court's failure to give a sua sponte instruction was not itself reversible error, it contributed to the prejudice which did require reversal].)

And, suggestions of extra-record evidence, such as the implication of threats to witnesses and jurors, "'although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor.'" (*People v. Bolton, supra*, 23 Cal.3d 208, 213, citing Vess, *Walking a Tightrope: A Survey of Limitations On The Prosecutor's Closing Argument* (1973) 64 J.Crim.L. & Criminology 22, 28.)

McClain has demonstrated that the prosecutor committed numerous improprieties which individually and collectively prejudiced him in violation of his state and federal constitutional rights to due process, a fair trial, and equal protection. The convictions must be set aside.

VII.
THE TRIAL COURT'S FAILURE TO SEVER THE PRICE AND HALLOWEEN COUNTS VIOLATED McCLAIN'S RIGHT TO DUE PROCESS OF LAW

A. Introduction

The trial court abused its discretion in failing to sever the Price and Halloween counts, thereby denying McClain a fair trial. It failed to exercise its discretion by applying an inflexible policy to severance motions. Moreover, the evidence was not cross-admissible, each case on its own was weak, the spillover effect from the aggregate evidence increased the likelihood of conviction in each case, and McClain faced the death penalty in the Halloween case.

The prejudice resulted in gross unfairness which deprived appellant McClain of a fair trial, effective assistance of counsel, meaningful access to the courts, an impartial jury, reliable guilt and penalty determinations, an individualized sentencing determination, due process of law, and equal protection of the law as guaranteed by the state and federal constitutions and California law. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8; *Woodson v. North Carolina, supra*, 428 U.S. 280; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447-448.)

B. Proceedings Below

1. Procedural History

On October 30, 1993, Officer John Luna arrested appellant McClain as a suspect in the October 28, 1993, shooting of Robert Price. (37 RT 4061, 4221.) McClain was released the same day. (36 RT 3999; 40 RT 4222.) On the evening of October 31, 1993, three adolescent boys were shot to death in Pasadena; five of their companions received non-fatal gunshot wounds. (3 CT 631-642.)

On March 15, 1994, the Los Angeles County Grand Jury indicted appellant McClain for the attempted murder in the Price case and for three counts of murder, five counts of attempted murder, and one count of conspiracy to commit murder in the Halloween case. (3 CT 631-642.)

On June 20, 1995, appellant McClain moved to sever the Price and Halloween cases because joinder of these counts would impermissibly prejudice him. (4 CT 814-819.) The prosecutor filed a written opposition on July 7, 1994. (4 CT 851-862.) He argued that "the attempted murder was motivated by enmity for rival gang members. The triple murders were also motivated by gang enmity manifesting itself in a retaliation for the murder of a fellow gang member." (4 CT 860.) On July 8, 1994, the trial court denied the severance motion, stating, "When I read these moving papers, I can't see a severance. You can argue that in a few moments. I can't see it. And I really have been sustained on all my severance motions." (3 RT 60-61.)

The trial court added, "At this time I see no reason to sever. But if something comes up – again, because of the grand jury I don't have everything, nor do you. At this time I will not sever the case based on the moving papers and what we have." (3 RT 62.)

On June 20, 1995, McClain again moved to sever the Price and Halloween cases. (8 RT 232.) McClain moved in the alternative to sever his trial from that of his co-defendants, noting that he was the only defendant facing a separate and additional charge. (*Ibid.*) The trial court denied the motion on July 17, 1995, stating, "I have read your motion. . . . . I don't find any grounds for it. Every case we have had has had multiple defendants. That issue has come up; we have researched it. I don't see anything different about this case. ¶ We have severed off to two clients. The building is bankrupt; the County is bankrupt. Separate trials for every defendant would be unacceptable to everyone." (8 RT 248-249.)

At the conclusion of the guilt phase, the trial court read CALJIC 3.01, 3.02, 3.03, 4.51, 6.10-6.25 – accomplice liability and conspiracy instructions – but did not specify that these instructions applied only to the *Halloween* case. (42 RT 4353-4364.)

2. The Price Case

The prosecutor's case against McClain in the Price case rested on the testimony of Robert Price.[86] Price testified that very early in the morning on October 28, 1993, McClain, without provocation, shot him in the face and butt at the Community Arms Apartments from a distance of about two feet. (31 RT 3161-3162, 3167-3168.) Before the shooting, McClain asked Price for a light from his cigarette. (31 RT 3162.) McClain gave Price the light, said "thank you Blood," and shot him. (31 RT 3163, 3172.) It was an insult for McClain to refer to Price, a Crip, as a Blood. (31 RT 3186.) Price testified that the gun was a .380, however no physical evidence confirmed this. (31 RT 3163, 3172, 3190-3191, 3195.) Price had seen

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[86] Claim III is incorporated by reference herein.

McClain around the Community Arms on previous occasions. (31 RT 3167.)

Price's trial testimony was contradicted by a 1993 taped interview Price gave to officers investigating his shooting. In that interview, Price said that McClain requested a cigarette, not a light. (31 RT 3763-3764.) On receiving the light, McClain said, "thank you, Chief," not "thank you, Blood." (37 RT 3763-3764.)

Cross-examination of Price exposed other inconsistencies. After Price was shot, he went to the hospital where, according to medical records, he told medical staff that a group of men drove by in an automobile and shot him. (31 RT 3177; Def. Exh. L.) He told a hospital social worker he was shot by a group of men in the neighborhood. (*Ibid.*) When a detective visited Price in the hospital, Price did not tell him that McClain shot him. (31 RT 3186, 3195.)

Counsel stipulated that on October 28, 1993, at 1:00 a.m., Price's blood alcohol level was .11; the legal limit for operating a motor vehicle is .08. (38 RT 4130.)

McClain testified that although he was present when Price was shot, he did not shoot Price.[87] (37 RT 4062.) McClain's homeboy shot Price, because Price owed him money. (37 RT 4063.) Nevertheless, the Crips believed Price was shot for gang reasons. (*Ibid.*) Therefore, in McClain's opinion, the person who shot Price bore some responsibility for setting in motion the events leading to the Halloween killings. (37 RT 4064.) The

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[87] McClain speculated that because the actual shooter of Price was dead, Price testified against McClain so that someone would be punished. (37 RT 4062.) Price may have believed that McClain, who knew his homeboy was looking for Price, set Price up. (*Ibid.*)

prosecutor argued in closing that no one knows the motives for the Price shooting. (44 RT 4625.)

3. The Halloween Case

The prosecutor argued and McClain concurred that the motive of whoever perpetrated the Halloween killings was retaliation for the death the same evening of P-9 Fernando Hodges. (37 RT 4065.)

The Halloween killings took place at approximately 10:30 p.m. in a neighborhood of single family homes. (19 RT 1907-1908; 20 RT 2044.) The perpetrators drove to the scene in about four cars. (22 RT 2221-2223; 25 RT 2644-2645.) Some of the perpetrators waited in the cars, while at least one got out of the car and shot at the victims. (18 RT 1762; 19 RT 1984; 22 RT 2233-2236; 25 RT 2659-2660.) Kenny Coats, a surviving victim, heard someone say "now Blood," before the gunshots started. (31 RT 3243, 3248-3249.)

Law enforcement recovered .38 caliber ammunition at the crime scene. (24 RT 2518.) The bullet that was recovered from Reggie Crawford was either a .38 or .357 caliber revolver bullet. (26 RT 2809.) The bullet recovered from Stephen Coats was the same type, but they were not fired from the same gun. (*Ibid.*) Thus, at least two guns were used in the commission of the Halloween crimes. (*Ibid.*) No evidence was presented that the perpetrators knew the victims.

The prosecutor conceded that McClain was not a shooter in the Halloween case. (6 RT 178.) The prosecutor's case that McClain drove one of the perpetrators' cars rested on the testimony of eyewitness Gabriel Pina and informants Mario Stevens, Derrick Tate, James Carpenter, and Troy Welcome. The insufficiency of this evidence is explained in Claim III, *ante*, which is incorporated by reference herein.

C. Joinder of the Price and Halloween Counts Resulted in Gross Unfairness, Depriving McClain of His Right to Due Process of Law

1. The Applicable Law

Penal Code section 954 provides in part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. . . . [T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

This "provision reflects an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding

constitutional guarantee of due process to ensure defendants a fair trial."[88] (*People v. Bean, supra*, 46 Cal.3d 919, 935.)

"Whether the offenses are properly joined pursuant to section 954 is a question of law and is subject to independent review on appeal; the decision whether separate proceedings are required in the interests of justice is reviewed for an abuse of discretion." (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.) However, where one of the charges is "a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally

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[88] Proposition 115, which is applicable to cases tried after January 27, 1990, "included several new constitutional and statutory provisions on the subject of joinder and severance," including section 954.1, and article I, section 30, subdivision (a), of the California Constitution. (*People v. Arias, supra*, 13 Cal.4th 92, 126, fn. 7.) However, those provisions did not materially change the law concerning severance. (*Ibid.*) Thus, while section 954.1 states that "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together, "that statement merely codifies the preexisting rule that "cross-admissibility is not the sine qua non of joint trials." (*People v. Marquez* (1992) 1 Cal.4th 553, 572; see also *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285-1286 [statutes implementing Proposition 115 do not affect California's "jurisprudence on joinder of counts . . . [except] where an evaluation of joinder is based on the California Constitution, or rests solely on the lack of cross-admissibility of evidence"].)

Furthermore, article I, section 30, subdivision (a), simply states that the Constitution "shall not be construed . . . to prohibit the joining of criminal cases as prescribed by the Legislature," or through the initiative process. Again, that provision is consistent with this Court's prior rulings regarding severance and joinder. (See e.g., *People v. Memro, supra*, 11 Cal.4th 786, 849-850, quoting *People v. Sandoval* (1992) 4 Cal.4th 155, 172 [where the statutory requirements for joinder are met, a defendant seeking severance must "clearly establish that there is a substantial danger of prejudice"].) Accordingly, the passage of Proposition 115 did not substantially affect California law on joinder and severance of counts.

applied in a noncapital case." (*Williams*, *supra*, 36 Cal.3d at p. 454.) And, severance may be "*constitutionally* required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.) The burden is on the party seeking severance to show "'that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citation.]'" (*People v. Osband* (1996) 13 Cal.4th 622, 666.)

This Court has set forth an analytical framework to channel a trial court's discretion in deciding whether a substantial danger of prejudice to a defendant requires that the charges be tried separately. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1244; *People v. Balderas*, supra, 41 Cal.3d 144, 173.)

To determine whether severance is required, a trial court must consider "whether the evidence of the crimes to be tried jointly" is "cross-admissible; whether some of the charges are unusually likely to inflame the jury against the defendant; whether the prosecution has joined a weak case with a strong case (or with another weak case), so that a 'spillover' effect from the aggregate evidence on the combined charges might alter the outcome as to one; and whether any of the joined charges carries the death penalty." (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1244, citing *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 452-454; *People v. Davis* (1995) 10 Cal.4th 463, 508; *People v. Smallwood*, *supra*, 42 Cal.3d 415, 425-426 [all applying *Williams* analysis to review severance claims on appeal]; *Bean v. Calderon*, *supra*, 163 F.3d 1073, 1084 [reviewing California Supreme Court's decision]; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322 [applying similar standard].)

Finally, even when a trial court does not abuse its discretion in joining unrelated counts, a reviewing court must "look to the evidence actually introduced at trial to determine whether," a gross unfairness has deprived "'defendant of a fair trial or due process of law.'" (*United States v. Lane*, *supra*, 474 U.S. at p. 446, fn. 8; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1083; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 162; *People v. Bean*, *supra*, 46 Cal.3d 919, 940, quoting *People v. Turner* (1984) 37 Cal.3d 302, 313; U.S. Const., 5th, 6th, 8th & 14th Amends.)

2. Applying an inflexible policy to McClain's severance motion, the trial court failed to exercise its discretion, thus McClain is entitled to a new trial

The proper exercise of discretion means that, "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." (*Martin v. Alcoholic Beverage Control Appeals Board*, supra, 55 Cal.2d 867, 875.) Judicial discretion "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Id.* at p. 876, quoting *Bailey v. Taaffe*, *supra*, 29 Cal. 422, 424; see *Pointer v. United States*, *supra*, 151 U.S. 396, 400-404.)

Federal and California law on joinder and severance of counts were well-settled at the time of McClain's capital trial. (*Pointer v. United States*, *supra*, 151 U.S. 396, 400-404; *United States v. Lane*, *supra*, 474 U.S. at p. 446, fn. 8; *People v. Price*, *supra*, 1 Cal.4th 324, 388; *People v. Bean*, *supra*, 46 Cal.3d at pp. 935-937; *Williams v. Superior Court*, *supra*, 36

Cal.3d at p. 447.) McClain presented relevant authorities to the trial court in a written motion, which are set out in the analysis described in section D(1) of this claim above. (4 CT 812-819.)

Nevertheless, the trial court failed to acknowledge these authorities, failed to apply the factors set forth by this Court for determining whether to grant severance of counts, and failed to perform any legal analysis whatsoever. Instead, the trial court stated that all his severance rulings had been upheld, noted that he did not see any difference between this case and his other cases, and explained that financial considerations prevented him from granting the alternative remedy – severance of defendants – sought by McClain. (3 RT 60-62; 8 RT 248-249.)

In so doing, the trial court not only failed to consider all known facts in conjunction with the relevant law (see *Martin v. Alcoholic Beverage Control Appeals Board, supra*, 55 Cal.2d at p. 875), but he violated the fundamental principles mandating individualized consideration of factors impacting sentencing in capital cases and due process of law. (U.S. Const. 6th, 8th & 14th Amends.; *Woodson v. North Carolina, supra*, 428 U.S. at p. 301-305.)

This federal constitutional doctrine has been echoed and adopted by California courts, which have found reversible error when trial courts applied an across-the-board policy in their rulings. Such a policy "effectively removes the discretion of the trial judge." (*People v. Justice* (1985) 168 Cal.App.3d Supp.1, 4.) In other words, a trial court may not substitute the use of an inflexible policy for the exercise of discretion vested in it by law. (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 485.)

The trial judge's statement that he read the motions and did not see any basis within them for severance (3 RT 60-62) does not establish an

exercise of discretion. A judge's use of formulaic or legally required language does not indicate a proper exercise of discretion where the trial court's conduct and statements expressly negate any such inference. (*People v. Wade* (1959) 53 Cal.2d 322, 336-339; *People v. Surplice* (1962) 203 Cal.App.2d 784, 791-792; *People v. Beasley* (1970) 5 Cal.App.3d 617, 633-634.)

For example, in *People v. Surplice, supra*, 203 Cal.App.2d 784, 791-792, the trial judge stated that he had read and considered defendant's probation report, but it was clear from the record that the judge's earlier preconceptions about the case formed the basis of his decision. The reviewing court found that any inference from the judge's statement that he read the report was "expressly negated" by the judge's other statements and conduct. (*Ibid.*) Similarly, the trial judge's statement in this case that he read McClain's severance motion and did not see a basis for severance is belied by his comments showing his predisposition to rule against McClain for reasons unrelated to the merits of his motion – that the judge had been upheld on all his severance motions, saw no difference between this case and any other multiple defendant case, and was concerned about the county's financial woes.[89] (3 RT 60-62, 248-249.) Moreover, the judge did not seem to have the same concern for judicial economy or the county's finances when ruling to grant a *prosecution* motion for severance. This

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[89] A comment made by the court prior to the penalty retrial also raises the specter that the denial of severance may have constituted a form of judicial sanction for gang membership. When ruling to allow admission of evidence of gang membership at the penalty phase, the trial court remarked "That is highly probative. It may be prejudicial; I think everybody is prejudiced, and the court warned all the defendants and the People here, you are members of a gang, you are joined together, no severance is going to be allowed." (65 RT 6336-6337.)

violated due process because it tilted the "balance of forces" in favor of the prosecution." (*Wardius v. Oregon, supra*, 412 U.S. 470, 474-475.)

As a result of the trial court's failure to exercise its discretion, McClain was denied a fair hearing and deprived of fundamental procedural rights. (U.S. Const., 5th, 6th, 8th & 14th Amends.; *People v. Penoli, supra*, 46 Cal.App.4th 298, 306.) The convictions and death judgments must be reversed.

3. Even assuming that the trial court exercised its discretion, the denial of McClain's severance motion was an abuse of that discretion

Even assuming, arguendo, that the trial judge did exercise his discretion, he abused it, as the facts before him clearly showed the potential prejudice of joinder to McClain. (*People v. Bradford, supra*, 15 Cal.4th 1229, 1315; *People v. Osband, supra*, 13 Cal.4th 622, 666.) As McClain demonstrates below, if the trial court had applied the analysis required by *Williams v. Superior Court, supra*, 36 Cal.3d at pp. 452-454, and set forth above in section D.1., the potential prejudice would have compelled him to sever the Price and Halloween cases.

a. The evidence on the separate charges was not cross-admissible.

While the cross-admissibility of evidence on the separate charges is not dispositive (*People v. Marquez, supra*, 1 Cal.4th 553, 572), it is a key question in determining whether it was proper to join them for trial. (*People v. Memro, supra*, 11 Cal.4th 786, 850.) Since "[j]oinder is generally proper when the offenses would be cross-admissible in separate trials" (*People v. Arias, supra*, 13 Cal.4th 92, 126), it follows logically that

joinder is inappropriate where, as in this case, there is no such evidence.[90] (See *United States v. Lewis*, *supra*, 787 F.2d 1318, 1322.) Moreover, if the evidence of the various charges is not cross-admissible, a joint trial is not necessarily more efficient than separate ones, and it is only the presumed efficiency of joint trials which offsets the high risk of prejudice they pose. (*Ibid.*; see also *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084; *United States v. Lotsch* (2nd Cir. 1939) 102 F.2d 35, 36; Hein, *Joinder and Severance* (1993) 30 Am. Crim. L. Rev. 1139, 1144-1145 ["joinder of counts has a synergistic impact" which bolsters weak charges with evidence of stronger ones; the likelihood of conviction "rises substantially when offenses are joined"].

Under *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, and its progeny, evidence of separate charges is cross-admissible and supports joinder, if there is an "evidentiary connection" between the charges, as when they have distinctive "common marks" that support an inference about identity, motive, or another material fact (*People v. Bean*, *supra*, 46 Cal.3d at pp. 936-938; *People v. Johnson* (1988) 47 Cal.3d 576, 588), or when evidence on one charge "logically support[s]" an inference of guilt on another. (*People v. Arias*, *supra*, 13 Cal.4th at p. 128.) No such connection existed in this case, because the Price and Halloween case were unrelated.

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[90] Although section 954.1 "prohibits the courts from rejecting joinder strictly on the basis of lack of cross-admissibility of evidence" (*Belton v. Superior Court*, *supra*, 19 Cal.App.4th 1279, 1285), the absence of cross-admissible evidence does support an argument that the cases should not be joined. (See *People v. Osband*, *supra*, 13 Cal.4th at p. 667 [section 954.1 "codifies" the rule of *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173, that the lack of cross-admissible evidence is not sufficient to establish prejudice].)

Indeed, the "dates, victims, witnesses and evidence," were "separate and distinct for each matter." (4 CT 814, 819.)

b. There were no significant common elements between the Price and Halloween cases and the motive for the Halloween killings was uncontested

If sufficiently similar, evidence of other crimes may be admissible on the issues including identity, common plan or design, intent, and motive. (Evid. Code §1101.) For evidence of separate crimes to be cross-admissible on the issue of identity, the manner in which they were committed must be "'so unusual and distinctive as to be like a signature.'" (*People v. Ewoldt, supra*, 7 Cal.4th 380, 403, quoting 1 McCormick on Evidence (4th ed. 1992) §§ 190, pp. 801-803; *People v. Catlin, supra*, 26 Cal.4th 81, 111.) For evidence to be cross-admissible to show a common plan or design, the crimes must have "such a concurrence of common features that [they] are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402; *Catlin, supra,* 26 Cal.4th at p. 111.) To show intent, the conduct in each case must be "sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.'" (*Ewoldt, supra*, at p. 402 [citations omitted.].) If the crimes have a "direct logical nexus" the issue of motive does not necessarily rest on similarities between the two incidents. (*People v. Demetrulias* (2006) 39 Cal. 4th 1, 15.) However, when motive is not seriously contested and the other crime is highly prejudicial, the conduct is not admissible. (*People v. Bigelow*, *supra*, 37 Cal.3d 731, 748.)

Here, the prosecutor's argument, that the evidence was cross-admissible because each incident was motivated by gang enmity implicates

issues of both identity and motive. The prosecutor's relevance argument fails under either theory because the Price and Halloween crimes lacked sufficient similarities to be cross-admissible on the issue of identity, the prosecutor conceded in closing argument that the motive in the Price case is unknown, and the issue of motive was uncontested.

In *People v. Bean*, *supra*, 46 Cal.3d at pp. 936-938, the trial court found two counts cross-admissible on a modus operandi theory. This Court found error even though the crimes were substantially more similar than are the crimes in this case. The charged murders in *Bean* occurred only about 10 to 12 blocks apart, both victims were older women, both were assaulted at home, both sustained head wounds; and the cars of both victims were stolen and abandoned in the same area. (*Bean, supra*, 46 Cal.3d at p. 937.)

The Price and Halloween cases are even less similar than the crimes in *Bean*. Price involved a shooting of an adult male Crip gang member at an apartment complex rife with drug and gang activity. The prosecutor's evidence was that a single assailant approached the solitary Price on foot and fired a single gun at close range. Although Price believed the gun was a .380, no independent evidence supported this claim. In sharp contrast, the prosecutor's evidence showed that the Halloween case involved multiple assailants who, in a drive-by assault at night in a neighborhood of predominantly single-family homes, shot a group of adolescent boys using at least two guns. The prosecution never asserted that McClain used a gun in the Halloween case.

In his opening statement, the prosecutor promised the jury it would learn that McClain said, "thank you, Blood" before shooting Price, just as Kenneth Coats heard someone say "now, Blood" before the Halloween shootings. (14 RT 1104.) However, the prosecutor's argument evaporated

when it became clear that in a 1993 tape-recorded interview, Price never used the word "Blood," but instead told police that his assailant said "thank you, Chief." (37 RT 3763-3764.) Indeed, Price only claimed that McClain said, "thank you, Blood," after receiving money in exchange for his testimony. (14 RT 1161; 31 RT 3161-3162, 3172-3174, 3177, 3186-3191, 3216; Def. Exh. L.) Thus any alleged similarity between these cases is illusory.

Finally, the prosecutor's assertion – later contradicted in closing argument– that each crime was motivated by gang enmity does not make the conduct cross-admissible. Price's claim that McClain said, "thank you, Blood," was demonstrably unreliable, and possible gang motives in each case is simply not distinctive enough to make them cross-admissible on the issue of identity. This Court has held that when evidence of gang membership is the "sole distinctive factor allegedly common to each incident," joinder "might indeed have a very prejudicial, if not inflammatory effect on the jury." (*Williams v. Superior Court, supra*, 36 Cal.3d at p. 453.) In *Williams*, as here,

> [t]he circumstances of the incidents differ in virtually every regard -- the location, the time of day, the number of people involved, and the method of attack. In addition, there is no evidence that the same weapon was used in the fatal assaults, and it certainly could not be fairly claimed that the two episodes reveal a common design or plan.

(*Id.* at p. 450.)

Simply put, the Price and Halloween cases involved no "distinctive marks." (*Bean, supra*, 46 Cal.3d at p. 937.) The use of a gun by a male in Pasadena in October 1993 was not "distinctive," since a high percentage of all homicides involve generally similar facts. (See Fox & Zawitz, *Homicide*

Trends in the United States[91] [both the perpetrators and the victims of approximately 65% of homicides are male, and handguns are the most commonly-used weapons in homicides].) Moreover, in 1993, at least 753 Pasadena crimes were committed with firearms.[92] The alleged gang motives in each case are also not distinctive. Gang activity in California is so prevalent that in 2000, California voters, recognizing that "Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities," passed a ballot initiative making gang members guilty of conspiracy for benefitting from their gangs' criminal activities. (Statutory note, Deering's Ann. Pen. Code § 182.5 [text of Proposition 21, effective March 8, 2000].)

The superficial similarities in this case distinguish it from decisions finding cross-admissibility based on distinctive common marks. For example, in *People v. Catlin*, *supra*, 26 Cal.4th at pp. 111-112, this Court found that the marked similarities of other crimes evidence was admissible to establish a common plan or design.[93] In *Catlin*, all the victims were the

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[91] Available at the Bureau of Justice Statistics website: http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm

[92] Statistics available through the California Department of Justice, Criminal Justice Statistics Center: http://ag.ca.gov/cjsc/. The referenced information is from a Law Enforcement Information Center chart titled: Jurisdictional Trends: Reported Crimes by Category, covering the city of Pasadena from 1993-2002.

[93] See, e.g., *People v. Balcom*, *supra*, 7 Cal.4th 414, 424 [in both uncharged and charged rapes, defendant, wearing dark clothing and a cap, sought out lone woman unknown to him in apartment complex in the early morning, gained control over her at gunpoint, initially professed only an intention to rob the victim, stole the victim's ATM card, obtained her personal identification number, then announced his intention to rape the victim, forcibly removed her clothing, committed a single act of intercourse,

and escaped in the victim's car]; *People v. Lewis*, *supra*, 25 Cal.4th 610, 637 [evidence of defendant's involvement in a fight several hours before murder was admissible to show intent to rob in capital felony-murder prosecution, where in both incidents the defendant overcame the victims by force, reached into the victims' back pocket to obtain their wallets and, after taking the victims' money, went to a particular apartment to buy methamphetamine]; *People v. Hayes* (1990) 52 Cal.3d 577, 617 [evidence of defendant's prior assault and robbery was admissible to show intent to rob in capital felony-murder prosecution, where on both occasions the "defendant assaulted a male victim in a motel room that defendant was occupying or visiting, the victim was bound with coat hangers, and another room at the motel was searched for property belonging to the victim"]; *People v. Gordon* (1990) 50 Cal.3d 1223 [evidence of prior robbery and murder was admissible to prove intent in subsequent robbery and murder where the victims were armored-car drivers who had just picked up receipts; the victims were robbed and killed in front of K-mart stores; and .38-caliber revolvers and 9-mm Lugar pistols were fired]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1046-1047, 1049 [other crimes evidence was admissible to prove defendant's intent to rob in prosecution for kidnapping for robbery and robbery, where both the prior crimes and charged offense occurred in parking lots; the defendant approached the victim with a weapon at or near the victims' automobiles; the defendant told the victim to move into the passenger seats; and defendant delayed his inquiry about money]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1021-1022 [evidence that defendant planned to commit a robbery against a different victim was admissible to prove intent to rob in felony-murder prosecution, where both the plan and actual crime were to obtain a car and money and involved catching the victims unaware, hitting them on the head, taking their wallets and car keys, and then escaping in the victim's car to Colorado]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1246-1247 [evidence of prior killing was admissible to show intent to rob and kill, where both victims were homosexual men of about the same age; both men met defendant in public places and accompanied him to more secluded locations where they were robbed and killed; both victims, who were killed close together in time, were rendered helpless and then were shot in their heads at close range by the same gun; both victims were robbed of their credit cards which the defendant immediately used to buy merchandise and obtain cash].) Even under the rule that "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to

defendant's "close female relatives" (his mother, and two wives); all the deaths benefitted him financially; and all the victims were poisoned with paraquat, an extremely rare occurrence. (*Ibid.*) That three such distinctively similar crimes occurred in one family raised a "very strong" inference that a common plan was involved. (*Id.* at p. 112.)

Unlike the crimes in *Catlin* , and as discussed above, the Price and Halloween crimes bore few similarities. Price involved the early evening shooting of an adult male Crip gang member at an apartment complex rife with drug and gang activity by one assailant using a single weapon. In sharp contrast, the Halloween case involved the nighttime shooting of a group of adolescent boys in a neighborhood of predominantly single-family homes by a group of assailants, some of whom – *not* including McClain – used firearms. There were no significant common elements between these two disparate crimes.

Just as the two counts were not cross-admissible on issues of identity, common design or plan, and intent, they were inadmissible on the issue of motive. As explained above, gang crime is rampant. (Statutory note, Deering's Ann. Pen. Code § 182.5, [text of Proposition 21, effective March 8, 2000].) Were this Court to permit joinder of counts simply because each was alleged to have been motivated by gang enmity, all kinds of crimes could be joined that bore no relationship to each other.

Perhaps more importantly, motive was never at issue in either the Price or Halloween counts. (*People v. Bigelow, supra*, 37 Cal.3d 731, 748.) McClain acknowledged that whoever committed the Halloween killings

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prove intent[,]" *People v. Ewoldt, supra*, 7 Cal.4th at p. 402, there is significantly more similarity between crimes in these cases than is present in McClain's case.

did so to retaliate for the death of Fernando Hodges. (37 RT 4065.) Even if McClain and the prosecutor correctly believed that the person who shot Price started the chain of events leading to the Halloween killings, the prosecutor did not need the Price case to demonstrate a motive for them. There was ample evidence that the Halloween killings flowed from the killing of Hodges and no one disputed this.

In *People v. Bigelow, supra*, 37 Cal.3d at p. 737, defendant was convicted of felony (robbery and kidnaping) murder. Several acts of uncharged conduct were admitted, including an escape from custody, burglaries, robberies, and credit card theft. (*Id.* at p. 746.) The prosecutor offered the evidence in part to show that defendant's motive in the murder was to obtain the victim's property. (*Id.* at p. 748.) This Court found that the other crimes evidence was "highly prejudicial, yet [had] only marginal relevance to a fact (motive) which was not seriously contested, and has virtually no tendency to prove that fact." (*Ibid.*) In McClain's case, the evidence of Hodges's killing was far more relevant to the motives of the perpetrators of the Halloween killings than was the allegation that the Price and Halloween crimes were both motivated by gang enmity. This is particularly true because the record is not clear as to the motive for the Price shooting. McClain testified that he believed that Price was shot over a financial dispute. (37 RT 4063.) Other than Price's and McClain's respective gang affiliations, no evidence elucidated the motive for the Price shooting. Indeed, the prosecutor argued in closing that no one knows the motive for the Price shooting, thereby undercutting its own theory of relevance. (44 RT 4625.) Moreover, there was no serious doubt as to why the Halloween killings occurred. Thus, even if the Price shooting had been

motivated by gang enmity, the trial court should have severed that count because the motive for the Halloween killings was not in dispute.

c. As the Price and Halloween cases were not connected, each lacked independent significance to the other

Evidence of crimes that are not distinctively similar may be cross-admissible, if the evidence helps prove that the defendant committed each crime. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 127-128; *People v. Catlin*, *supra*, 26 Cal.4th at pp. 111-112; *People v. Price*, *supra*, 1 Cal.4th 324, 388.) Thus, in *Arias*, this Court held that murder and robbery charges from one incident were properly joined with kidnap and robbery charges from a incident which occurred two weeks later, because the latter charges stemmed from defendant's "desire to flee apprehension" for the earlier crimes; thus, the murder "supplied evidence of [his] motive" for the kidnaping, while the kidnaping/robbery "indicated consciousness of guilt" as to the murder. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 127-128.)

While there was evidence that McClain went on the run to avoid prosecution for the Price shooting, the prosecutor made no attempt to prove that the Halloween killings were committed to escape criminal liability for any other crime.

The strongest argument in favor of a link between the two incidents was McClain's own testimony that the Price shooting, which Crips believed was gang-related, motivated Crips to kill Hodges on Halloween. McClain's observations are ultimately irrelevant because there was ample evidence that the Halloween killings were a failed attempt to avenge the death of Hodges and no one disputed this fact.

The prosecutor theorized in opening statements that Price's testimony that McClain said, "thank you Blood," showed a connection to the Halloween killings because Kenneth Coats heard someone say, "now, Blood," before shots were fired on Halloween. (14 RT 1104.) This tenuous thread was severed when the investigating officer testified that in a 1993 tape, Price told police that McClain actually said, "thank you, Chief."[94] (37 RT 3763-3764.)

There was no suggestion that the Halloween crimes proved the Price count. And, as explained above, the Price count which alleged that McClain by himself walked up to Price in a housing project and shot him did not help prove that McClain was among a group of P-9 gang members who shot several adolescent boys. The prosecution never demonstrated that the same weapon was used in both crimes, nor did it show that the crimes were carried out in a similar fashion. The prosecutor conceded that the motive in the Price case was unknown, while arguing forcefully that the motive in the Halloween killings was abundantly clear. Independent significance is therefore absent in this case.

d. The prejudicial effect of joinder outweighed any potential benefits

To determine whether joinder poses a substantial risk of prejudice, this Court must consider the additional factors outlined in *Williams*, i.e., (1) whether "certain of the charges are unusually likely to inflame the jury against the defendant;" whether "a 'weak' case has been joined with a

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[94] Not surprisingly, Price's version of events became more favorable to the prosecution after he received money in exchange for his testimony. (14 RT 1161, 31 RT 3161-3162, 3172-3174, 3177, 3186-3191, 3216, Def. Exh. L; see Claim III.)

'strong' case;" and (3) whether "any one of the charges carries the death penalty." (*People v. Cunningham, supra*, 25 Cal.4th at p. 985, citing *Williams v. Superior Court, supra*, 36 Cal.3d at pp. 452-454.) Here, all of those factors should have indicated to the trial court that a joint trial on these charges was likely to be highly prejudicial.

Moreover, the principal benefit of joinder here, for the prosecution, was precisely that it would be so prejudicial, because the combined weight of the charges would make up for the weakness of the evidence on each one. That was a improper basis for joining those charges, because the evil to be prevented by severance is just that kind of spillover effect. (See *Williams v. Superior Court, supra*, 36 Cal.3d at p. 454 ["joinder should never be a vehicle for bolstering either one or two weak cases . . . particularly where conviction in both will give rise to a possible death sentence"].)

e. Inflammatory evidence

"[I]t may be error to consolidate an inflammatory offense with one that is not under circumstances where the jury cannot be expected to try both fairly." (*People v. Mason* (1991) 52 Cal.3d 909, 934.) Here, the Halloween charges were so inflammatory that no jury could have considered them fairly in combination with any other charge.

The Halloween case was highly inflammatory because the victims were young children engaged in typical childhood activities who were caught in the middle of gang violence that had spilled into a quiet Pasadena neighborhood. (10 CT 2660.) Moreover, intense publicity surrounding the Halloween case demonstrates the inflammatory nature of the charges. It was one of the most highly publicized cases in the Los Angeles area in 1993. (1 CT 220-222, 229, 251; 2 CT 403, 464; 3 CT 626, 688, 690-692,

694, 696-697, 699-700, 702, 704, 706, 708, 710, 712, 714-715; 7 CT 1834-1835, 1837-1838, 1901-1904; 9 CT 2558-2778; 11 CT 3032-3113; 2 RT 26, 31-34, 43-44; 6 RT 181-182, 191; 8 RT 229; 9 RT 272; 11 RT 550; 14 RT 1068-1069; 25 RT 2537-2538.) Hundreds of residents, fearing that their own children were at risk, mobilized to demand answers. (10 CT 2660.) Mayor Rick Cole noted that he had "never seen something come together almost instantaneously with such broad support. But what happened on Halloween is something that touched people in this city as few things have." (*Ibid.*)

Weeks after the murders, the police had failed to identify any suspects. (10 CT 2660.) Despite its lack of progress, Pasadena Police Lieutenant Denis Petersen, mindful of the intense public outcry, assured the people of Pasadena that law enforcement was "ultimately going to get to the bottom of it." (*Ibid.*)

Public pressure continued to mount. (10 CT 2660.) A Coalition for a Non-Violent City formed to seek solutions to persistent violence. (*Ibid.*) The City Council, the Los Angeles County Board of Supervisors, and the Stop the Violence Increase the Peace Foundation created a $40,000 reward fund. (10 CT 2660-2661.) Citizens lobbied for new ammunition and gun control laws. (10 CT 2668-2669.)

Half of the jury pool from McClain's first trial admitted to having heard about this case in the media. (2 CT 503.)

Furthermore,

> the evidence of gang membership – the sole distinctive factor allegedly common to each incident – might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial. The implication that gangs were involved and the allegation that [McClain] is a gang

> member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders, or alternatively that involvement in one shooting necessarily implies involvement in the other.

(*Williams v. Superior Court*, supra, 36 Cal.3d at p. 453.)

The prosecution in this case hammered the jury with McClain's gang membership and used it to paint him as a menace to society. (See Claim VI, *ante*, incorporated by reference herein.) The prosecutor described defendants as "felons, convicted firearm offenders, dope dealers, women beaters, gang members, child killers," and told the jury that "You are the only people now who stand between them and this. And by your verdict you will be sending a message, one way or the other." (44 RT 4702-4703.) The prosecutor argued that the fear of gang members "is pervasive, it is invasive, it is wrong, it must stop and it must stop here in this courtroom now." (44 RT 4627.)

Because the prosecution alleged that the Price case was gang-related, it was inherently inflammatory. (44 RT 4627.) However, it was substantially less inflammatory than the Halloween case, because it did not capture the media's attention, the victim was an admitted gangster and convicted felon, and it did not involve the gunning down of innocent children in their own neighborhood. In light of the inherently inflammatory nature of the Halloween case coupled with the allegations of gang motivations in both cases, the trial court abused its discretion by failing to sever these charges.

f. The Spillover Effect of Joinder

Williams and its progeny recognize the probable prejudice in joining two weak charges because they may bolster each other. Thus, this Court

has found that only when the evidence of each count is "overwhelming" can a reviewing court be confident that joinder was not prejudicial. (See, e.g., *People v. Odle* (1988) 45 Cal.3d 386, 404 ["overwhelming"]; *People v. Lucky* (1988) 45 Cal.3d 259, 278 ["extremely strong"].) Furthermore, the federal courts make clear that there is a

> 'high risk of undue prejudice whenever, as in this case, joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.' *United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1116. It is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, *see Ragghianti*, 527 F.2d at 587, than it is to compartmentalize evidence against separate defendants joined for trial. Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case. *See* Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behavior 319, 331-35 (1985); Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Human Behavior 339, 343, 347-51 (1985).

(*United States v. Lewis*, *supra*, 787 F.2d at p.1322; *Bean v. Calderon*, *supra*, 163 F.3d at p.1087.)

Here, despite the lack of sufficient evidence that McClain was involved in either the Price or the Halloween cases (see Claim III, *ante*), the jury convicted him in both because in their minds the two cases became "one case which [was] considerably stronger that [any of them] viewed separately." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.) This was especially prejudicial because McClain was the only defendant charged in the Price case.

In *Bean v. Calderon, supra*, 163 F.3d at pp.1083-1087, the United States Court of Appeals for the Ninth Circuit noted several factors that mandated severance in Bean's case. Each of those factors is present here.

First, in *Bean*,

> the trial court delivered several instructions that could have applied only to the Schatz crimes without explaining which instruction applied to which set of offenses. For instance, the jury was instructed regarding the liability of principals and aiders and abetters, as well as a . . . theory in which proof of a conspiracy establishes the guilt of all conspirators, without reference to the crime to which the instruction applied. The sole instruction that addressed the existence of multiple counts read as follows: 'Each count charges a distinct offense. You must decide each count separately. The defendant must be found guilty or not guilt of any or all of the offenses charged. Your findings as to each count must be stated in a separate verdict.'

(*Id.* at p. 1083.) The trial court in McClain's case gave identical instructions, also failing to inform the jury that the aider/abetter and conspiracy instructions could only be applied to the Halloween case. (6 CT 1526-1528, 1533-1551; 42 RT 4353-4364.)

Second, the *Bean* Court pointed out that, as here, "not only did the trial court join counts for which the evidence was not cross-admissible, but the State repeatedly encouraged the jury to consider the two sets of charges in concert . . . Thus, the jury could not 'reasonably [have been] expected to 'compartmentalize the evidence so that evidence of one crime [did] not taint the jury's consideration of another crime." (*Bean, supra*, 163 F.3d at p. 1084, quoting *United States v. Johnson* (9th Cir. 1987) 820 F.2d 1065, 1071.) Perhaps the most prejudicial example of this is the prosecutor's argument, referencing the testimony of Troy Welcome, that it did not matter which crime McClain committed with the gun:

> Was he talking about the Halloween murders or was he talking about Robert Lee Price? Does it really matter? No, because McClain is refuging himself up in Tulare. He pulls out the .380 and said he used it. He used it. Price is shot with a .380. Price told you it was a .380.

(44 RT 4683.)

With these words, the prosecutor not only suggested that the jurors should consider the cases as evidence of each other, but, contrary to fundamental constitutional protections, that the jury could find McClain guilty of both if it found evidence of either.

The spillover effect of joinder is also evident from the prosecutor's argument that the jury should believe that McClain's comments about each crime indicated that he was a sociopath who committed both. (42 RT 4407.) All the prosecutor's arguments about McClain's bad character were exacerbated by the fact that he was the only defendant charged with the separate Price offense. (See, e.g., 44 RT 4702.)

Third, like the trial court in Bean, the trial court in this case never specifically instructed or admonished the jury that they could not consider evidence of the Price and Halloween crimes as evidence of each other. (*Bean, supra*, 163 F.3d at p. 1084.)

Fourth, as in *Bean*, McClain's "jury received its instructions 'in the waning moments of the trial,' a factor that further diminished their impact." (*Bean, supra*, 163 F.3d at p. 1084.)

Fifth, the *Bean* Court recognized that the disparity between the evidence on each of the charges created "'the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again.'" (*Bean, supra*, 163 F.3d at p. 1085, quoting *United States v. Bagley* (9th Cir. 1985) 772 F.2d 1065, 1071.) In light of the

prosecution's emphasis on McClain's bad character, the jury in his case undoubtedly drew this impermissible conclusion. The prosecutor argued that the Price shooting showed that McClain had a "callous and cavalier attitude toward other human beings." (42 RT 4407.) The jury undoubtedly considered this argument regarding McClain's "callous" character to overcome the lack of credible evidence of his participation in the Halloween crime.

Sixth, the juries in Bean's and McClain's cases convicted them of all charges. Thus, no "acquittal offered affirmative evidence of the jury's ability to assess the [Price and Halloween] evidence separately." (*Bean, supra*, 163 F.3d at pp. 1085-1086.)

Seventh, and finally, the State in *Bean* argued that joinder was proper because it was more convenient for the state. (*Bean, supra*, 163 F.3d at p. 1086.) The *Bean* court found this defense of joinder to be "exceedingly asthenic." (*Ibid.*) Here, the trial court opined "[t]he building is bankrupt; the County is bankrupt. Separate trials for every defendant would be unacceptable to everyone." (8 RT 248-249.) As with the State's rationale in *Bean*, if this Court were to adopt the trial court's reasoning, "joinder would never be improper." (*Bean, supra*, 163 F.3d at p. 1086.)

Thus, like Bean, McClain "suffered a violation of his constitutional rights." (*Bean, supra*, 163 F.3d at p. 1085.) What this Court foresaw in *Williams* happened here: "the jury [] aggregate[d] all of the evidence, though presented separately in relation to each charge, and convict[ed] on [all] charges in a joint trial, whereas, at least arguably, in separate trials, there might not be convictions on [all] charges." (*Williams, supra*, 36 Cal.3d at p. 453.)

g. The Halloween case was a capitally charged offense

Because the Halloween case carried the death penalty, this Court must "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court, supra*, 36 Cal.3d at p. 454; see also *People v. Lucky, supra*, 45 Cal.3d 259, 277; *People v. Smallwood, supra*, 42 Cal.3d 415, 430-431.) In fact, the trial court must consider both cases "separately and together in order to fairly assess whether joinder would tend to produce a conviction when one might not be obtainable on the evidence at separate trials." (*Williams v. Superior Court, supra*, 36 Cal.3d at p. 454; *People v. Musselwhite, supra*, 17 Cal.4th at p. 1244.)

For the same reason, the trial court was also required to assess the likely effect of joinder, and carefully weigh whether the possible conservation of judicial resources that might result outweighed the almost certain prejudice to McClain's rights to a fundamentally fair trial, and a reliable penalty determination. Yet, the court gave the issue virtually no "scrutiny and care," and disregarded what it recognized as a clear potential of prejudice relying solely on his experience in other cases. (3 RT 60-62; 8 RT 248-249.) That cursory treatment of the question was clearly inadequate, since "questions of life and death were at stake." (*People v. Smallwood, supra*, 42 Cal.3d at pp. 430-431.)

4. The impermissible prejudice to McClain far overshadowed any minimal benefits of joinder

After considering the four factors enumerated above, the trial court was required to weigh the potential prejudice and the benefits of joinder. (*People v. Bean, supra*, 46 Cal.3d at p. 936; *People v. Smallwood, supra*, 42

Cal.3d at p. 430.) The county's financial woes notwithstanding, had the trial court performed the requisite weighing, he would have seen joinder would not yield any substantial benefits. (8 RT 248-249.) The two cases involved few common witnesses, and none whose testimony would have been repeated at separate trials; because the evidence of the separate charges was not cross-admissible, "there simply was no significant judicial economy to be gained from joinder." (*Smallwood, supra*, 42 Cal.3d at p. 430.)

Here, as in *Smallwood*, "'[t]he only real convenience served by permitting joint trial of [these] unrelated offenses against the wishes of the defendant [was] the convenience of the prosecution in securing a conviction.'" (*Smallwood, supra*, 42 Cal.3d at p. 430, quoting *United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 738.) Moreover, even if separate trials did require additional time and expense, they would have been *more* efficient in the most important sense: the verdicts they produced would have been more reliable, untainted by the prejudicial effect of exposing the jury to evidence of other crimes. (See *People v. Smallwood, supra*, 42 Cal.3d at p. 428.)

"Although there is inevitably some duplication in cases where the same defendant is involved, it would be error to permit this concern to override more important and fundamental issues of justice." (*Williams, supra*, 36 Cal.3d at p. 451.) "Quite simply, the pursuit of judicial economy must never be used to deny a defendant his right to a fair trial." (*Id.* at pp. 451-452.)

The benefits of joinder were nearly non-existent, and the prejudice described above denied appellant McClain a fair trial. Thus, the trial court abused its discretion. The convictions and sentences must be reversed.

5. McClain is entitled to a new trial because joinder of the Price and Halloween cases rendered his trial fundamentally unfair

The denial of McClain's severance motion not only violated California law but also violated the federal Constitution. "Put simply, the joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams*, *supra*, 36 Cal.3d at pp. 447-448.) Thus, even if the trial court did not abuse its discretion in joining the Price and Halloween cases, this Court must reverse because the joinder "resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Arias*, *supra*, 13 Cal.4th at p. 127; U.S. Const., 5th, 6th, 8th & 14th Amends.)

As explained above, misjoinder denied McClain his right to a fair trial. (*Bean v. Calderon, supra*, 163 F.3d 1084.) These verdicts were clearly the result of a "spillover effect" – precisely the type of evil severance is designed to prevent. (*People v. Sully*, *supra*, 53 Cal.3d 1195, 1222; *Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 88; *United States v. Lewis*, *supra*, 787 F.2d at p. 1322.) Thus, McClain is under sentence of death as a result of the trial court's failure to sever in violation of the Eighth Amendments requirements of heightened reliability in capital cases. (See *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) Thus, even though the evidence was insufficient on each charge, the jury convicted appellant McClain of both. (Claim III is incorporated by reference herein.)

6. Conclusion

The trial court failed to exercise or abused its discretion when it refused to sever the Price and Halloween cases. (*People v. Bradford*, *supra*, 15 Cal.4th 1229, 1315-1318) [refusing to sever "joinable" charges is

reversible error when it results in demonstrable prejudice].) This rendered the trial and verdicts grossly unfair and deprived appellant McClain of due process of law and a fair trial in violation of the federal and state constitutions and international law. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 15, 16 & 17; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Bean v. Calderon, supra*, 163 F.3d at p. 1084; *People v. Arias*, *supra*, 13 Cal.4th at p. 127.)

VIII.
THE TRIAL COURT'S FAILURE TO SEVER McCLAIN FROM DEFENDANTS NEWBORN AND HOLMES DEPRIVED HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Proceedings Below

1. Pretrial motions

On June 29, 1994, defendant Newborn filed a motion to sever himself from all defendants based on *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518. (4 CT 821-834.) On July 8, 1994, the trial court heard arguments on this motion. Without addressing the substance of the motion, the trial court said, "when I read these moving papers, I can't see a severance. . . and I really have been sustained on all my severance motions." (3 RT 60-61.) The trial court continued, "I don't want any more delays. Now we have the severance. I read every motion you have here. I do not hesitate from severing a case if I think it is appropriate." (3 RT 61.) McClain also made clear that he was concerned with severing the Price count from the Halloween counts, which the trial court also denied. (*Ibid.*; Claim VII, *ante*, incorporated by reference herein.)

On July 5, 1995, McClain filed another written motion to sever him from codefendants Newborn, Bailey, Bowen, and Holmes. (4 CT 1003-1013.) On July 17, 1995, the trial court granted the prosecutor's motion to sever defendants Bailey and Bowen. (8 RT 247.) McClain renewed his severance motion and asked to be tried alone or at least separate from Newborn. (*Ibid.*) McClain again reminded the court that he was being tried on counts that applied to no other defendant. (8 RT 248.) The trial court denied the severance motion, stating:

> I don't find any grounds for it. Every case we have had has had multiple defendants. That issue has come up; we have researched it. I don't see anything different about this case. We have severed off to two clients. The building is bankrupt; the County is bankrupt. Separate trials for every defendant would be unacceptable to everyone."

(8 RT 248-249.)

The defense again moved to sever during trial when the prosecutor called witness Derrick Tate. (15 RT 1336.)

2. Motions, Rulings, Testimony, and Argument Pertaining to DeSean Holmes

The prosecutor called DeSean Holmes to testify about incriminating statements of defendant Newborn.[95] The prosecutor entered into a written agreement with DeSean that he would not testify against defendant Holmes who was his cousin. (17 RT 1514, 1522.) Newborn's counsel wanted to bring out statements by Newborn to DeSean that implicated McClain and Holmes, arguing, "I want to bring out the lies about his cousin, and I intend to bring out the lies about Herb McClain. I am not going to sit here and let him lie about me alone." (17 RT 1517.)

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[95] DeSean Holmes will hereafter be referred to as "DeSean" to avoid confusion with his cousin, defendant Karl Holmes.

McClain's counsel responded:

> I told the court when we first began to seriously talk about trying this case how this was going to be. It is playing out even greater than my fears anticipated at that time. Yes, Mr. Myers may stand up and question the witness regarding some aspects; but Mr. Jones, in defense of his client, has to bring out other things. Those other things that he will bring out will spill over to my client. I will have no way of confronting or examining those folks that will be making those statements.
>
> I would request the court again grant my mistrial, grant me a severance, let me try my case by myself with my client, whereby he will receive a fair and impartial hearing.
>
> I think by lumping these defendants together we have created a situation whereby half-truths are presented to the jury. And in doing that what happens is a spill-over effect.
>
> The second thing that I would request the court to do is that should this young man testify that it is clearly understood that his statements do not relate to my client.
>
> I understand in reading the discovery that he met my client sometime in October at a party prior to the homicides which occurred in this case -- or the homicide which was supposed to be the impetus for the three homicides. The fact that he has met my client, I am not real sure of what the relevancy of that is.

(17 RT 1517-1518.)

McClain's counsel also objected that the prosecutor provided the tapes of DeSean's statements very late, leaving her no opportunity to have the tapes transcribed; the one transcription the prosecutor did provide was full of gaps and counsel needed time to decipher the difficult-to-understand recording. (17 RT 1519-1520.)

In sum, McClain's counsel requested that the trial court rule that

> At this point in time right now my client will be granted a mistrial, we will be granted a severance and allowed to proceed at some later time with us only; if the court decides not to do that, then at least to the extent that this young man is

> going to testify to give us some time to adequately prepare; and, three, to limit his testimony as to other defendants and not involve my client.

(17 RT 1520.)

The trial court denied the severance and mistrial motions. (17 RT 1530.) It also cautioned DeSean to be careful to answer only the question asked. (17 RT 1534.)

The bulk of DeSean's testimony concerned alleged incriminating statements by Newborn about a burglary and shooting he committed with severed codefendant Bowen at the home of Willie McFee and Newborn's participation in the Halloween crimes; DeSean also testified that he was afraid to testify because of threats against him and his family. (17 RT 1540-1573; Claim VI., *ante*, incorporated by reference herein.) DeSean held a party on October 15, 1993, which Newborn, Holmes, McClain, and Hodges attended. (17 RT 1537-1538.) To DeSean's knowledge, McClain and Newborn were not members of P-9. (17 RT 1539.)

The prosecutor elicited from DeSean that Newborn said others were present with him during the shooting at McFee's house. (17 RT 1565.) DeSean did not mention the names of the other people who were present or participated. (*Ibid.*)

On cross-examination by Newborn, DeSean said that he went to the police station to pick up a subpoena in a case in which he described himself as a crime victim. (17 RT 1575, 1587, 1592.) When Newborn asked him about the case, DeSean invoked the Fifth Amendment. (17 RT 1587.) The trial court sustained the prosecutor's objection to Newborn's cross-examination about the incident. (*Ibid.*) Later, Newborn's counsel again sought to cross-examine DeSean about the incident, making the following offer of proof:

> He was the driver of a car from which shots were fired at another gentleman. After the shots were fired out of the car driven by this witness, they fled the scene and there was a high-speed pursuit, at which time the driver, Mr. DeSean Holmes, bailed out of the car and fled. That was approximately noontime.
>
> At 8 p.m. later that night, after discussing the matter with numerous parties, the report indicates Mr. DeSean Holmes came back to the police station and indicated that -- matters that tended to totally exonerate him.

(18 RT 1692.)

At the prosecutor's suggestion, the trial court prevented cross-examination on this issue, but permitted a stipulation that DeSean was not a victim in the case. (18 RT 1694.)

Over McClain's objection, the prosecutor elicited from DeSean that his coach[96] told him that if he testified in this case, Danny Cooks was going to hunt and kill him, just like they killed Mahjdi Parrish, a witness in another case. (17 RT 1680-1681.)

The next day, counsel for Newborn and McClain unsuccessfully sought to cross-examine DeSean about whether he himself was involved in a carjacking of Parrish. (18 RT 1700-1701; Claim I.A.3., *ante*, incorporated by reference herein.) The trial court then refused McClain's mistrial request after counsel argued:

> Mr. Myers brings up subjects that he knows will bring up issues that we cannot adequately adjudicate and litigate in front of the jury, leaving the jury -- here is the impression the jurors have --
>
> The Court: I am not laughing. It is comical.

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[96] The record is not clear as to whether DeSean referred to a coach from school or from some other program.

Ms. Harris: It is just mind-boggling to me. The jurors have the impression that this young man is afraid because Majhdi Parrish was on some list of Lorenzo Newborn's to be killed. And now if we ask this man about it, we find out that perhaps he had something to do with it. And that is just totally unfair, and all of this was brought out on this side of the table seeking truth.

(18 RT 1702.)

Noting that this issue comes up in all multiple defendant and gang cases, the trial court opined that it was still proper for the prosecutor to question DeSean generally about his fears. (*Ibid.*) When Newborn's counsel asked DeSean about his testimony that he heard about other witness killings and mentioned Parrish, DeSean again invoked the Fifth Amendment. (18 RT 1733.) The trial court found no privilege and DeSean acknowledged he heard about Parrish. (18 RT 1734.) However, the trial court sustained the prosecutor's objection when Newborn asked DeSean whether Parrish had been a complaining victim in a case filed against him. (18 RT 1734.) DeSean again invoked the Fifth Amendment. (18 RT 1735.)

After DeSean testified, the trial court admonished the jury that his testimony was limited to Newborn. (18 RT 1753.) During the prosecutor's closing argument, the trial court instructed the jury that it could only use DeSean's testimony against Newborn. (44 RT 4672.) The prosecutor suggested in closing argument that McClain was responsible for the death of Mahjdi Parrish. (44 RT 4685.)

B. The Trial Court's Failure to Sever McClain from Codefendants Newborn and Holmes Left the Jury with the Impression That McClain Had Committed Other Crimes with Which He Was Not Involved

McClain was deprived of his right to confront witnesses against him when the trial court permitted DeSean to imply that, in his incriminating

statements, Newborn had mentioned McClain when he had not; failed to sever McClain from his codefendants; allowed DeSean to testify; and denied McClain's motion for mistrial in light of DeSean's testimony. Any of these remedies would have protected McClain's rights, yet the trial court chose none of them. In addition, the trial court arbitrarily granted the prosecutor's motion to sever defendants Bowen and Bailey while denying McClain's motion for severance.

A criminal defendant has the right to confront witnesses against him. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas*, supra, 380 U.S. 400.) The primary purpose of the confrontation clause is the right to cross-examination. (*Davis v. Alaska, supra*, 415 U.S. 308, 315-316.) Thus, jointly charged defendants are entitled to severance if an improperly redacted statement of a codefendant is admitted, even if the trial court provides clear limiting instructions. (*Bruton v. United States, supra*, 391 U.S. 123, 137.) A redacted confession by a codefendant is defective if it names the accused directly (*ibid.*), states that an accomplice was involved (*Richardson v. Marsh* (1987) 481 U.S. 200), obviously refers to the existence of an accomplice (*Gray v. Maryland* (1998) 523 U.S. 185), or "contextually" implicates an accused through other evidence at trial (*People v. Fletcher* (1996) 13 Cal.4th 451, 469).

In *People v. Aranda, supra*, 63 Cal.2d 518, 530-531, this Court established the steps a trial court must take to remedy the prejudice to other defendants of a codefendant's extrajudicial statement. The trial court must first attempt to redact all references to the codefendant from the statements. If the trial court cannot eliminate the prejudice by editing the statements, it must grant separate trials. If the trial court will not sever the trials and cannot properly redact the statement, it must exclude the statement. So, the

prosecutor who opposes severance risks complete exclusion of the statements.[97] (Cf. *People v. Box* (2000) 23 Cal.4th 1153, 1195.)

When as here, the trial court opts to redact the statement, a reviewing court must determine the "sufficiency of this form of editing . . . on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial." (*People v. Fletcher*, *supra*, 13 Cal.4th at p. 468.) A prominent risk in redacting statements is that the jury may receive misleading testimony. (See, e.g., *Gray v. Maryland*, *supra*, 523 U.S. at p. 204, fn .1 (dis. opn. of Scalia, J .); Note: *Richardson v. Marsh*: *Codefendant Confessions and the Demise of Confrontation* (1988) 101 Harv. L.Rev. 1876, 1889-1890 ["Generally, taking fragments of a document out of context causes distortion. Redaction designed to eliminate all references to a codefendant, however, actually rewrites the document, distorting the facts presented to the jury."].) A conviction based on uncorrected false evidence

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[97] Proposition 8, which abrogated the exclusion of evidence except when required by the federal constitution does not affect other remedies. (See *People v. Fletcher*, *supra*, 13 Cal.4th at p. 465.) Thus, this Court's guidelines for determining the appropriateness of joinder determine whether a trial court applied the proper remedy for avoiding *Aranda/Bruton* issues. (*Bruton v. United States*, *supra*, 391 U.S. 123; Cal. Const., art. I, § 28, subd. (d).)

Of course, the federal constitution sometimes requires exclusion. In fact, *Bruton* quoted with approval this Court's statement in *Aranda* that the prosecution's evidentiary needs must yield to the accused's right to confrontation. (*Bruton v. United States*, *supra*, 391 U.S. at p. 134, fn. 9.) In *Richardson v. Marsh*, *supra*, 481 U.S. 200, the high court explained that a trial court could eliminate *Bruton* concerns by properly redacting the non-testifying codefendant's statement to remove references not only to the accused by name, but to the very existence an accomplice. (*Id.* at p. 211.)

For these reasons, the remedies set forth in *People v. Aranda*, *supra*, 63 Cal.2d at pp. 530-531, govern here.

violates the Fourteenth Amendment. (*Napue v. Illinois* (1959) 360 U.S. 264, 269.)

The issue here is contextual implication. (*People v. Fletcher*, *supra*, 13 Cal.4th at p. 469.) In most cases on this issue, the goal of redaction is to erase the defendant's name from the codefendant's statement. (See, e.g., *Richardson v. Marsh*, *supra*, 481 U.S. 200; *Gray v. Maryland*, *supra*, 523 U.S. 185; *People v. Fletcher*, *supra*, 13 Cal.4th at p. 469.) In this unusual case, however, DeSean never claimed that Newborn mentioned McClain. The only defendant Newborn named was Bowen, whose case the trial court had already severed. Although Newborn's statements to DeSean would not have been admissible against Bowen in a separate trial, the trial court redacted Bowen's name from the statement. This was unnecessary and confusing. Because DeSean testified that he had seen McClain with Newborn, Holmes, and Hodges together on October 15, 1993, DeSean's testimony that Newborn and "others" participated in the shooting at McFee's created the impression that Newborn named McClain when he did not.

As explained above, the trial court had several options. It could have prohibited DeSean from mentioning McClain at all, allowed DeSean to testify that Newborn named Bowen, severed McClain from his codefendants, or granted a mistrial after DeSean's testimony. It did none of these.

DeSean's testimony was also misleading, because it gave the impression that he was somehow the victim of a crime perpetrated by Mahjdi Parrish when the opposite was true. Thus, the manner in which the trial court and prosecutor redacted the statement was prejudicially misleading. (See Claim I., A., 3, *ante*.)

Moreover, the trial court never questioned the prosecutor's request to sever defendants Bailey and Bowen. On this record, there is no meaningful distinction between McClain's requests for severance and that of the prosecutor. Indeed, the trial court seemed to feel that it could deny severance because its prior rulings had been upheld on review. It never explained why the prosecutor's motion had any more merit than McClain's. However, it did indicate that concerns of judicial economy dictated the result of McClain's motion, while voicing no such concerns about the prosecutor's request to sever Bailey and Bowen. Under these circumstances, when the trial court granted the prosecutor's request and denied McClain's it arbitrarily upset the "balance of forces between the accused and his accuser," in violation of the Eighth and Fourteenth Amendments. (*Wardius v. Oregon*, *supra*, 412 U.S. 470, 474; *Gregg v. Georgia* (1976) 428 U.S. 153, 188-189.)

These errors require reversal of all counts.

C. The Trial Court's Denial of McClain's Severance Motion Resulted in Testimony Which Erroneously Suggested to the Jury That McClain Committed Other Violent Crimes Requires Reversal

Because the errors here implicate the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, the State must prove that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 23-24.) It cannot do so.

The misleading redaction of DeSean's statements coupled with the trial court's improper limits on cross-examination implied to the jury that McClain was responsible for the misconduct attributed to Newborn and gave the prosecutor fodder for inflammatory closing argument.

The redaction of DeSean's statement did not protect McClain from incriminating testimony. Rather, its bizarre effect was to suggest that Newborn implicated McClain when in fact he did not. Although the trial court instructed the jury that DeSean's testimony was limited to Newborn, DeSean's testimony that he had seen McClain with his codefendants and Hodges sent a message to the jury that McClain was involved in Newborn's conduct. This became particularly problematic when DeSean testified that Newborn and "others" were involved in a shooting that took place at the home of Willie McFee, and hour before and a short distance from the Halloween killings. (17 RT 1565.) Indeed, the only charged overt act the jury found true was that "at Pasadena Avenue and Blake Street on October 31st, 1993, at about 9 o'clock p.m., Lorenzo Newborn, Solomon Bowen and unnamed co-conspirators fired numerous rounds from a 9-millimeter gun at or near the residence of an individual believed to be a Crip." (45 RT 4751.)

Because the prosecutor presented evidence that McFee had received death threats (24 RT 2475-2479, 2489-2490, 2492-2493; Peo. Exh. 47-A), if the jury believed that McClain was involved in the shooting at McFee's house, it could also have believed that McClain was responsible for threats against McFee. (Claim VI., ante, incorporated by reference herein.) As this court has held, suggestions of extra-record evidence, such as the implication of threats to witnesses, "'although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor.'" (*People v. Bolton, supra*, 23 Cal.3d 208, 213, citing Vess, *Walking a Tightrope: A Survey of Limitations On The Prosecutor's Closing Argument* (1973) 64 J.Crim.L. & Criminology 22, 28.)

Further prejudice flowed from the prosecutor's improper closing argument to the jury. The prosecutor insinuated to the jury that McClain was involved in the shooting of Majhdi Parrish, a crime that was not at issue in this proceeding, for which McClain was never implicated, and of which no evidence was presented at trial:

> Robert Lee doesn't identify Herb until, what, November 11th, '93, around there; yet Herb tells you he's arrested and brought in on Robert Lee on October 30th or 29th, around there, '93, before the Halloween killings. And I think Lopez or Luna corroborated that.
>
> How does that happen? Two words. Majhdi Parrish. Who else was out there that night when Robert Lee Price was shot by herb? Majhdi Parrish. And where is Majhdi Parrish now? Dead. The truth is everlasting . . .

(44 RT 4685.)

Defense counsel's inability to explore DeSean's relationship to the death of Parrish meant that the prosecutor's inflammatory and impermissible argument went unchecked. (See Claim I.A.3, *ante*.) The prosecutor also argued that DeSean Holmes had no motive to fabricate evidence against the defendants because he did not need protection from them, but instead from Danny Cooks, Ernest Holly, and their associates. (44 RT 4646.) As a result of the trial court's limits on cross-examination of DeSean, the defense was unable to argue that to obtain a deal from the government, while at the same time protecting himself from Cooks and Holly, DeSean needed to help law enforcement solve the high profile Halloween murders.

For these reasons, McClains rights to confrontation, a fair trial, and due process were violated. His convictions must be reversed.

IX.
THE TRIAL COURT DEPRIVED McCLAIN OF HIS RIGHT TO PRESENT A DEFENSE, DUE PROCESS OF LAW, CONFRONTATION, AND A FAIR TRIAL BY FAILING TO TAILOR CALJIC 2.06 TO THE EVIDENCE IN THIS CASE

The prosecutor requested CALJIC 2.06, "Efforts to Suppress Evidence," because testimony showed that McClain cut his hair days after the Price shooting and Halloween killings. (41 RT 4293.) The trial court permitted the instruction over McClain's objection. (41 RT 4294.)

The trial court read this version of CALJIC 2.06 to the jury:

> If you find that a defendant attempted to suppress evidence against himself or herself in any manner, such as by the intimidation of a witness, by an offer to compensate a witness, by destroying evidence, by concealing evidence, by cutting hair, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(42 RT 4337.)

The trial court erred. The suggestions that McClain intimidated or offered to compensate a witness, or destroyed or concealed were without evidentiary support and removed from the jury the determination of the preliminary factual findings necessary for finding a consciousness of guilt. All the consciousness-of-guilt instructions were unnecessary, argumentative instructions. Moreover, all three instructions permitted the jury to draw irrational inferences against McClain. The erroneous instruction deprived McClain of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

A. The Trial Court Failed to Determine Whether There Was an Evidentiary Basis for the Conduct Listed in the Instruction and to Appropriately Modify the Instruction

A trial court must not instruct the jury on legal issues that are irrelevant to the case or might confuse the jury. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) Accordingly, "it is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." (*People v. Hannon* (1977) 19 Cal.3d 588, 597; *People v. Valdez* (2004) 32 Cal.4th 73, 137.)

A trial court must determine whether the supporting evidence exists before instructing the jury it may draw inferences from it. (*People v. Hannon*, supra, 19 Cal.3d at p. 598.) Failure to do so forces the jury to perform the trial court's duty to resolve questions of law. (*Ibid.*)

Thus, the trial court in McClain's case committed two errors.[98] First, it failed to determine whether there was evidence in the record that McClain had intimidated a witness, offered to compensate a witness, or destroyed or concealed evidence, thereby forcing the jury to perform duties reserved to the court.

Second, it instructed the jury that it could draw inferences of McClain's consciousness of guilt if it found that he suppressed evidence by intimidating a witness, offering to compensate a witness, or destroying or concealing evidence even though there was no evidence that McClain

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[98] McClain also disputes the prosecutor's contention that cutting his own hair amounts to suppression of evidence. (But see, *contra*, *People v. Randle* (1992) 8 Cal.App.4th 1023, 1036 ["suppression of evidence was accomplished by a change of appearance"].) However, he concedes that the jury was entitled to determine whether cutting hair was evidence of consciousness of guilt.

engaged in any of these. Even the prosecutor, in requesting the instruction, never argued the existence of evidence in support of such conduct. Because there was no evidence, it would have been unreasonable for the jury to consider these issues as consciousness of guilt. (See *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1140.) Nevertheless, the trial court invited the jury to consider this conduct in evaluating whether McClain's behavior evidenced consciousness of guilt. The erroneous inclusion of these unsupported indicia of consciousness of guilt was exacerbated by the modification of the instruction to include a single case-specific fact, the cutting of McClain's hair. The inclusion of this case-specific fact invited the jury to infer that each of the other facts were also supported by the evidence even though they were not.

Moreover, because McClain never had an opportunity to defend against or refute the unsupported allegations contained in the instruction, the instruction violated his rights to present a defense and to confront the evidence against him. (*California v. Trombetta* (1984) 467 U.S. 479, 485; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *United States v. Cronic* (1984) 466 U.S. 648, 656; *Taylor v. Illinois* (1988) 484 U.S. 400, 409.)

The trial court's unmodified version of CALJIC 2.06 inflamed the jury with the suggestion– recognized by this Court to be highly prejudicial– that McClain threatened and tried to buy off witnesses. Because the jury heard these allegations in the trial court's instructions and not on the McClain had no way to refute this or subject it to the adversarial testing demanded by the Sixth and Fourteenth Amendments. His rights to present a defense, a fair trial, confrontation, and due process where thereby violated.

B. The Consciousness-of-guilt Instructions Were Unfairly Partisan and Argumentative

The consciousness-of-guilt instructions were not just unnecessary, they were impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC No. 2.06 the consciousness-of-guilt instruction given in this case, are impermissibly argumentative. Structurally, they are almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows:

> "If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated."

(*Id.* at p. 437, fn. 5.)

The instruction here told the jury, "[i]f you find" certain facts (false statements, attempt to suppress evidence or flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC No. 2.06 impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*, *supra*, 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay*

v. Normet (1972) 405 U.S. 56, 77). Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship, supra*, 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias, supra*, 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly, supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often

entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty. Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[99]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E.2d 1230, the Indiana Supreme Court relied on

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[99] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745, holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements.)

The argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I,

§§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Consciousness-of-Guilt Instructions Permitted the Jury to Draw Irrational Permissive Inferences about McClain's Guilt

In this case, the giving of CALJIC 2.06 improperly allowed appellant's jury to make a permissive inference. (See *People v. Ashmus, supra*, 54 Cal.3d at p. 977.) It permitted the jury to infer one fact, consciousness of guilt, from the fact that McClain cut his hair. Because these inferences lacked a rational basis, however, the giving of this instruction violated the due process guarantees of the state and federal Constitutions. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *People v. Castro* (1985) 38 Cal.3d 301, 313.)

The rational connection required between a fact and permissive inference is not merely a connection that is logical or reasonable; it is rather a connection that is more likely than not. Permissive inferences must satisfy the test stated in *Leary v. United States* (1969) 395 U.S. 6:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend.

(*Id.* at p. 36; see also *Ulster County Court v. Allen, supra*, 442 U.S. at pp. 165-167, and fn. 28.)

The only "consciousness of guilt" evidence that could be probative in any given case is evidence of "consciousness of guilt" of the particular offense for which a defendant is being charged and tried. Obviously, if a defendant acts in a manner that demonstrates a guilty mind concerning a particular crime, that does not make it any more likely that he has reason to feel guilty about a different crime. The complained-of instructions, however, do not make this distinction, and indeed suggest to a jury that if it finds a factor supposedly showing some "consciousness of guilt" of some unstated crime, this is evidence of guilt of the crime for which the defendant is on trial. However, as in this case, that is not a logical inference, because a defendant may have "consciousness of guilt" of an uncharged offense just as easily as he might have "consciousness of guilt" of a charged offense, and it may be impossible to tell which is true because the record shows more than one offense of which the defendant might be feeling guilty.

In such circumstances, there is no logical connection between the evidence and the defendant's guilt of the offense for which he is being charged and tried. The instructions permitted the jury to infer a given mental state from the defendant's acts, when it was impossible to tell whether those acts showed that particular mental state or a different mental state. Any conclusion as to which inference to draw would be speculation, not rational inference. A conviction based on speculation lightens the prosecution's burden of proving each element of a crime beyond a reasonable doubt, and thereby violates a defendant's right to due process. (See *In re Winship, supra*, 397 U.S. at p. 364.)

Furthermore, since this presents a situation where there is no rational – as opposed to speculative or conjectural – connection between the

underlying facts and the sought-after inference, instructing the jury that it may draw the desired inference from the underlying facts is a violation of a defendant's right to due process of law. (*Ulster County Court v. Allen, supra,* 442 U.S. at pp. 157, 165.)

Because the consciousness of guilt instructions permitted the jury to draw irrational inferences of guilt against appellant, the delivery of those instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.) It also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, § 17.)

D. The Trial Court Deprived Mcclain of the Rights to Present a Defense, a Fair Trial, and Due Process of Law and Lessened the Prosecutor's Burden of Proof

McClain asserts that the error lowered the prosecutor's burden of proof. This Court has repeatedly rejected that assertion. (*People v. Wilson* (2005) 36 Cal.4th 309, 330.) McClain respectfully disagrees with this Court's general analysis. In addition, he urges this Court to examine this claim in light of the specific facts of his case.

E. Prejudice

These errors prejudiced McClain. "It is obvious under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received

with deference and may prove controlling." (*Starr v. United States* (1894) 153 U.S. 614, 626.) This is especially true in a close case. (*People v. Weatherford* (1945) 27 Cal.2d 401, 403.) Furthermore, this Court recognizes the highly prejudicial nature of evidence of threats to witnesses and requires adequate substantiation as a prerequisite to its admission. (See *People v. Warren, supra*, 45 Cal.3d 471, 481.)

In McClain's case, the erroneous instruction played right into the prosecutor's hands. The only allegation in the instruction with any evidentiary support was also the most innocuous– i.e., that McClain cut his hair within days or weeks of the charged crimes. It is hard to imagine that the jury could focus on McClain cutting his hair when the trial court suggested that McClain engaged in far more nefarious conduct for which there was no evidentiary basis. As explained in Claims III, IV, VI and VII,[100] the prosecutor successfully compensated for its weak evidence against McClain by portraying him as a dangerous person who was a threat to witnesses, jurors, and society at large, despite the lack of any legitimate evidence. This instruction improperly bolstered the prosecutor's argument that witnesses were afraid and had been threatened and intimidated. (43 RT 4463-4464.) Thus, in giving this instruction, the trial court aided the prosecutor's improper attempt to convict McClain of capital murder and attempted murder with suggestions designed to frighten and appeal to the emotions of the jury thereby distracting it from the weakness of the evidence before it.

Because of the constitutional dimensions of the error, McClain urges this Court to apply the *Chapman* harmless error standard and find the error

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[100] Each of these claims is incorporated by reference herein.

not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) However, it is reasonably probable that, but for the instructional error, McClain's jury would not have convicted him of the crimes charged. (*People v. Watson*, *supra*, 46 Cal.2d 818, 837.) Thus, under either standard, McClain's convictions must be reversed.

X.
THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS REGARDING OTHER CRIMES REQUIRE REVERSAL

The trial court's giving of CALJIC 2.50 in tandem with 250.1 and 250.2 require reversal of all McClain's convictions. These instructions allowed the jury to find McClain guilty of a conspiracy by a mere preponderance of the evidence in violation of McClain's right to due process. (*In re Winship*, *supra*, 397 U.S. 358; *Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) The instructions also failed to specify the other crimes evidence at issue, gave no guidance as to which purpose applied to which piece of evidence, and did not specify whether the other crimes evidence applied to the Price count or the Halloween crimes. Reversal is automatic where, as here, "structural error" occurs, because the error permeates "[t]he entire conduct of the trial from beginning to end" and "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

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A. Proceedings Below

McClain objected to CALJIC 2.50, which the trial court gave on grounds that McClain testified. (41 RT 4305-4306.) The trial court read to the jury a modified version of CALJIC 2.50 (1994 revision):

> Evidence has been introduced for the purpose of showing that a defendant committed a crime other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged,
>
> The existence of a conspiracy.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case.
>
> You are not permitted to consider such evidence for any other purpose.

(42 RT 4344-4345.)

The trial court followed the preceding instruction with CALJIC 250.1 and 250.2:

> Within the meaning of the preceding instruction, the other crime purportedly committed by the defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose until you are satisfied that a particular defendant committed the other crime.
>
> The prosecution has the burden of proving these facts by a preponderance of the evidence.
>
> "Preponderance of the evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find the evidence on either side of an

issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all the evidence bearing upon every issue regardless of who produced it.

(42 RT 4345-4346.)

B. Legal Standards

Where a jury is not properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, the defendant is deprived of due process. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 280; *People v. Flood* (1998) 18 Cal.4th 470, 479-482.) Any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." (*Cool v. United States* (1972) 409 U.S. 100, 104.)

"[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.) Where such an error exists, it is considered structural and thus is not subject to harmless error review. (*Id.* at pp. 280-282.) If a jury instruction is deemed "ambiguous," it will violate due process when a reasonable likelihood exists that the jury has applied the challenged instruction in a manner that violates the Constitution. (*Estelle v. McGuire*, *supra*, 502 U.S. 62, 72.)

1. The Instructions Lessened the Prosecutor's Burden of Proof

In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, the Ninth Circuit held that giving CALJIC No. 2.50.01 together with CALJIC No. 2.50.1 (6th

ed. 1996) constituted structural error because the instructions permitted the jury to find the defendant guilty of the charged offenses by relying on facts found only by a preponderance of the evidence. There, the defendant was charged with several sexual offenses against his spouse and a child. Evidence of prior uncharged sexual assaults he had allegedly committed against his spouse was admitted under Evidence Code section 1108. For this reason, the trial court instructed the jury pursuant to CALJIC Nos. 2.50.01[101] and 2.50.1.[102] (*Id.* at p. 817.)

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[101] At the time of Gibson's trial, CALJIC No. 2.50.01 read in pertinent part:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. . . . If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 817.)

[102] At the time of Gibson's trial, CALJIC No. 2.50.1, as modified, read as follows:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses and/or domestic violence other than those for which he is on trial. You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses and/or domestic violence.

The jury in *Gibson* "received only a general instruction regarding circumstantial evidence [CALJIC No. 2.01], which required proof beyond a reasonable doubt, and a specific, independent instruction [CALJIC No. 2.50.1] relating to previous sexual abuse and domestic violence, which required only proof by a preponderance of the evidence." (*Id.* at pp. 821-823.) CALJIC No. 2.50.1 carved out of the general reasonable doubt standard a specific exception for other crimes evidence, which carried only a preponderance burden. (*Ibid.*)

The Ninth Circuit held that the interplay of the two instructions allowed the jury to find that the defendant "committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." (*Id.* at p. 822, original italics.) The instructions provided "no explanation harmonizing the two burdens of proof discussed in the jury instructions." (*Id.* at p. 823.) Therefore, Gibson's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Ibid.*)

Indeed, CALJIC Nos. 2.50.01 and 2.50.1 "told the jury exactly which burden of proof to apply. However, contrary to the Supreme Court's clearly established law, the burden of proof the instructions supplied for the permissive inference was unconstitutional." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 822.) The inference that CALJIC No. 2.50.01 carved out an exception to the reasonable doubt burden was exacerbated by the

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(*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 817-818.)

prosecutor's argument that the defendant was "[t]hat kind of guy," and therefore he "did in fact commit [the charged sex] crimes." (*Id.* at p. 824.)

Finally, the Ninth Circuit noted that Gibson's jury was instructed *without* the addition of cautionary language that was added to CALJIC No. 2.50.01 in 1999, "to clarify how jurors were required to evaluate the defendant's guilt relating to the charged offense if they found that he had committed a prior sexual offense."[103] (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 818.)

In *People v. Orellano* (2000) 79 Cal.App.4th 179, the Court of Appeal reversed the defendant's convictions based upon a similar analysis. Specifically, the Court of Appeal held that, absent the cautionary language of the 1999 revision to CALJIC No. 2.50.01, CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 unconstitutionally allowed the jury "to find by a preponderance of the evidence that appellant committed the prior crimes, [and] to infer from such commission of the prior crimes that appellant . . . 'did commit' the charged crimes, without necessarily being convinced beyond a

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[103] The language that was not given in *Gibson*, but was added to CALJIC No. 2.50.01 in 1999, reads:

> However, if you find by a preponderance of the evidence that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 818, quoting CALJIC No. 2.50.01 (7th ed. 1999).)

reasonable doubt that appellant committed the charged crimes." (*Id.* at p. 184.) The court recognized that "there is a reasonable likelihood the jurors were misled by the incomplete instruction. Since we have no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed." (*Id.* at p. 186, citing *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.)

Although *Gibson* and *Orellano* involved the interplay of CALJIC Nos. 2.50.01 and 2.50.1, the interplay of CALJIC Nos. 2.50 and 2.50.1 in this case resulted in structural error for essentially the same reasons. The jurors in McClain's case were instructed that they could consider other crimes evidence admitted against McClain to find "the existence of a conspiracy." Conspiracy is a substantive crime which the prosecution must prove beyond a reasonable doubt. (Pen. Code § 182; *Cage v. Louisiana* (1990) 498 U.S. 39, overruled on other grounds by *Estelle v. McGuire*, *supra*, 502 U.S. 62.) However, the instructions provided no "explanation harmonizing the . . . burdens of proof." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 823.) Instead, it is reasonably likely that the jury believed that CALJIC No. 2.50.1 carved out an exception to the general reasonable doubt standard; at the very least, McClain's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Id.* at pp. 823-824.)

Under these circumstances, if the jury found evidence that appellant had committed "other crimes," they were permitted to convict based on a finding by a preponderance of the evidence that McClain was guilty of a conspiracy. (*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 822-824; *People v. Orellano*, *supra*, 79 Cal.App.4th at p. 186.)

2. The Instructions Confused the Jury by Failing to Specify Which "Other Crimes" it Could Consider

These instructions were also faulty because they invited the jury to consider other crimes evidence without defining or naming those other crimes and without stating the evidentiary purpose of the conduct. The instruction allowed the jury to use the unspecified other crimes evidence to prove the "defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged," and "the existence of a conspiracy," but not to "prove the defendant is a person of bad character of that he has a disposition to commit crimes." (42 RT 4344-4345.) Because the instruction was silent as to *how* the evidence might be used to show knowledge or the existence of a conspiracy *other* than by showing predisposition or bad character, it is both confusing and contradictory. Thus, the jury was given free rein to use other crimes evidence introduced against all three defendants against McClain, to use any evidence introduced against McClain as evidence of other crimes, and to use all of the other crimes evidence in determining McClain's guilt of both the Halloween and Price charges. (42 RT 4344-4345.)

This was confusing for at least two reasons. First, uncharged criminal activity other than the gun prior came out during the course of trial and McClain's testimony. Second, the trial court, over defense objection, allowed the prosecution to impeach McClain with four prior felony convictions, but provided no instructions to the jury as to the limited purposes for which it could consider them.

In *People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6, this Court specifically directed that in any case in which the court has properly admitted both a prior felony conviction of the defendant for the purpose of

impeachment and other crimes evidence on a substantive issue, it is the trial court's duty to give a cautionary instruction on the other crimes evidence that identifies the evidence to which it relates. (See also *People v. Key* (1984) 153 Cal.App.3d 888, 899.) It is vital that where a trial court instructs the jury on the use of prior uncharged conduct or convictions, the instructions give the guidance necessary to avoid the possible extreme and unfair prejudice that "other crimes" evidence can entail. (*People v. Rollo*, *supra*, 20 Cal.3d at pp. 122-123; *People v. Key*, *supra*, 153 Cal.App.3d at p. 899; see *People v. Garceau* (1993) 6 Cal.4th 140, 184-187; *McKinney v. Rees, supra*, 993 F.2d 1378, 1384.) This is because a defendant's constitutional rights are violated when a jury considers a defendant's unadjudicated conduct as evidence of propensity or in any other way that lightens the prosecution's burden of proof. (*People v. Garceau*, supra, 6 Cal.4th at p. 186; *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 774-775, overruled on other grounds by *Woodford v. Garceau* (2003) 538 U.S. 202.)

In McClain's case, the trial court's vague instruction could have referred to any number of possible other crimes. There were two distinct sets of conduct about which the jury heard. First, the jury had no way to know that this instruction did not apply to crimes admitted to impeach McClain. Over defense objection, the trial court granted the prosecution's motion to impeach McClain with four felony convictions – one for grand theft auto and three for being a felon in possession of a firearm, but provided no limiting instruction as to how the jury should use this evidence.[104] (36 RT 3937-3941.)

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[104] McClain's counsel brought these out on direct examination. (36 RT 3971.)

Obviously, a jury may not consider a prior conviction used for impeachment under Evidence Code section 788 as evidence of a defendant's guilt of the charged offense. This Court has recognized that the language of CALJIC 2.50, which refers to evidence "that the defendant committed a crime other than that for which he is on trial," allows an undirected jury to use the prior convictions in this improper way. (*People v. Rollo, supra*, 20 Cal.3d at pp. 122-123.) In *People v. Catlin, supra*, 26 Cal.4th 81, 144-145, evidence of other crimes were admitted and the trial court instructed the jurors that they could consider those crimes for two purposes. Catlin complained that the instruction was not specific enough, citing *People v. Rollo, supra*, 20 Cal.3d 109. This Court distinguished Catlin's case from Rollo's because in Catlin's case, the trial court specifically instructed the jury that it could only consider defendant's prior conviction for impeachment purposes. (*People v. Catlin, supra*, 26 Cal.4th 81, 147.) The trial court gave no such instruction in McClain's case, thus the trial court erred. The absence of a specific instruction that these convictions were only admissible to impeach McClain, coupled with the trial court's vague reference to "other crimes" in instruction 2.50 likely led the jury to believe that it could use the convictions as character evidence, as evidence of a conspiracy, or as evidence that McClain "had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged."

Second, there was significant evidence that McClain both used and sold illicit substances. On both direct and cross-examination, prosecution witness Tanya Underwood testified that McClain admitted to avoiding police because he was a gang member and drug dealer. (23 RT 2274, 2281, 2283.) On cross-examination by counsel for codefendant Newborn, Mario

Stevens identified McClain as a person who smoked dope. (25 RT 2585.) McClain mentioned during his testimony that he traveled from Pasadena to Tulare and to Kansas City to sell drugs; he often carried one to two thousand dollars worth at a time. (36 RT 3966; 37 RT 4035-4039.) He also acknowledged carrying weapons to protect his drug stock. (37 RT RT 4036.)

Clearly, the possession, use, and sale of drugs – including the possession of illicit drugs while in possession of a weapon and the transport of them over county and state lines – are crimes other than those for which McClain was on trial. (CALJIC 2.50; see, e.g., Health & Saf. Code §§ 11350, 11351, 11351.5, 11352, 11359, 11360, 11370.1, 11378, 11379; 21 U.S.C.A. §§ 841, 844, 960.) Yet the trial court never admonished the jury not to consider this as evidence that McClain committed the Price or Halloween crimes and never told the jury exactly what proper purpose this evidence served. The instruction was thus vague and confusing.

Additionally, the admission of the prior convictions and other misconduct, without a limiting instruction, violated McClain's constitutional right to due process because the jury did not know that it could not consider the convictions to prove his guilt of the charges in this case. (See *Garceau v. Woodford*, *supra*, 275 F.3d at p. 774; *Panzavecchia v. Wainright* (5th Cir. 1981) 658 F.2d 337, 341 [holding that it violated due process for the jury to hear "repeated references to the defendant's criminal past without any limiting instruction to relate this evidence only to the firearm violation and to disregard it altogether in considering the murder count"]; *Murray v. Superintendent, Ky. State Penitentiary* (6th Cir. 1981) 651 F.2d 451, 453 [noting that the Sixth Circuit has held that "it is unfair

and violative of due process if evidence of other crimes is admitted without a limiting instruction"].)

3. The Instructions Did Not Include Any Guidance as to Which Charges the Other Crimes Evidence Applied

The trial court also failed to instruct the jury about the relevance of other crimes evidence to each charge against McClain. This is especially troubling because McClain was charged with the unrelated attempted murder of Robert Price. (See Claims III.D, V & VII, *ante*.)

The prosecution never argued that the other crimes evidence was relevant to the Price attempted murder. The prosecutor alleged that McClain shot Price. In contrast, the prosecutor argued that McClain's participation in the Halloween homicides consisted of driving a car, not of shooting any of the victims. (See Claims III, XII & XVIII.)

In *Bean v. Calderon, supra*, 163 F.3d 1073, 1083, where defendant faced multiple charges, the trial court gave instructions that could have only applied to certain charges "without explaining which instruction applied to which set of offenses." (See also *United States v. Lewis, supra*, 787 F.2d 1318, 1322-1323.) The issue in *Bean* was the trial court's failure to sever charges from each other. The United States Court of Appeals for the Ninth Circuit found that the trial court's failure to instruct the jury that it could not consider evidence admitted in support of one charge in determining guilt on another exacerbated the prejudice of joinder. (*Bean v. Calderon, supra*, 163 F.3d at pp. 1084-1085.) Under those circumstances, the jury could not "reasonably be expected to compartmentalize the evidence" so that evidence of one charge did not "taint the jury's consideration of another crime." (*Bean v. Calderon, supra*, 163 F.3d at p. 1084, citing *United States v. Johnson, supra*, 820 F.2d 1065, 1071; *United States v. Douglass* (9th

Cir.1986) 780 F.2d 1472, 1479.) The absence of an instruction to provide proper guidance to the jury, in combination with the trial court's failure to sever charges that were not cross-admissible, violated Bean's constitutional rights and required reversal. (*Bean v. Calderon, supra*, 163 F.3d at pp. 1085-1086.)

As in *Bean*, the trial court in McClain's case also erred in failing to sever the charges against him and then exacerbated the error with improper instructions that failed to provide the jury with the guidance necessary to reach a constitutionally tenable verdict. (See Claim VII, incorporated by reference herein.)

C. The Instructions on Other Crimes Require Reversal of McClain's Convictions

In the instant case, the instructions given permitted the jury to find McClain guilty of the conspiracy charge by a mere preponderance of the evidence, and therefore constituted structural error within the meaning of *Sullivan.* (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.) *Sullivan* error precludes harmless error review because no verdict within the meaning of the Sixth Amendment has been rendered (*id.* at p. 280), and also because the consequences of the deprivation of the right to a jury trial are "necessarily unquantifiable and indeterminate" (*id.* at pp. 281-282). (See also *Jackson v. Virginia*, *supra*, 443 U.S. 307, 320, fn. 14 ["Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"].) A structural error standard is appropriate in this case because, " [t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." (*Sullivan v.*

Louisiana, supra, 508 U.S. at p. 280.) Even if the Court should find that this did not constitute structural error, it should find that there was a reasonable likelihood that the jury failed to apply the instructions in a manner that met the constitutionally required burden of proof. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.)

Moreover, the confusing and vague instructions violated McClain's rights to due process, a fair trial, and a reliable conviction and penalty determination in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. As noted in *People v. Garceau*, a reviewing court must assess this error under the federal *Chapman* standard.[105] (*People v. Garceau, supra*, 6 Cal.4th at p. 186; but see *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-280 [stating that the *Chapman* standard is illogical when an instruction lightens the burden of proof; such an instruction is structural error which requires reversal].)

Under any prejudice standard, the judgment must be reversed because it is reasonably probable that the erroneous instructions contributed to the verdict. (*People v. Watson, supra*, 46 Cal.2d 818.)

Applying *Chapman*, the analysis then requires an assessment of "how the jurors understood" the improper, confusing instruction. (*People v. Rollo, supra*, 20 Cal.3d at p. 122.) To do so, this Court must "consider the potentially devastating impact of other-crimes evidence . . ." (*People v. Garceau, supra*, 6 Cal.4th at p. 186; see *People v. Sam* (1969) 71 Cal.2d 194, 203; *Michelson v. United States, supra*, 335 U.S. 469, 475.)

The prosecutors' arguments magnified the confusion that the instruction created. In closing, the prosecutors argued repeatedly that

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[105] *Chapman v. California, supra*, 386 U.S. 18, 24.

McClain was a person of bad character who was a risk to society and even the jurors. (See 43 RT 4462-4464; 44 RT 4627, 4630-4631, 4674, 4698, 4701-4702.) Indeed, the prosecutor strongly suggested in closing argument that McClain was responsible for the murder of Mahjdi Parrish, even though he presented no evidence of this at trial and McClain was never charged with Parrish's death. (44 RT 4684-4685.) Because the trial court's instructions did not specify that these spurious allegations were not "other crimes" that the jury could consider, it is likely that they jury believed the prosecutor and used these allegations as proof of conspiracy and as proof that McClain had "knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged." Furthermore, in the absence of any specific guidance, the jury was free to use this conduct in its determination of both the Halloween and Price crimes.

It is also likely that the jury considered the other crimes evidence and prior convictions as proof of identity. (See Claim IV.) Of course, identity was the central issue in this case. The invitation to use improper and prejudicial other crimes evidence to determine the most important guilt phase issue illustrates the "devastating impact" of this evidence.

Moreover, because the trial court mentioned no other purpose, the jury must have understood this instruction to invite consideration of McClain's prior convictions for grand theft auto and gun possession, as well as his drug-related activities for the purpose of considering McClain's knowledge and his guilt on the conspiracy charge.

Not only was the conspiracy charge a substantive crime, conviction of which required a jury finding of proof beyond a reasonable doubt, but the facts underlying the conspiracy charge were essential to the prosecution's proof of the Halloween murders. The prosecution's theory was that

McClain and other P-9 members got together and made a decision to kill some Crips in retaliation for the murder of their homeboy, Fernando Hodges, then committed acts in furtherance of that agreement. If McClain was not, as the prosecution alleged, part of a conspiracy, then little support remains for the prosecution's theory of the case and McClain's participation in it.[106] There is no suggestion that McClain was an actual shooter in the Halloween case. Moreover, the jury did not find true the only overt act that would have placed McClain near the crime scene (i.e., that he and others caravanned to the crime scene). In the absence of credible evidence against him, it is likely that the propensity evidence and the trial court's faulty instructions persuaded the jury to convict McClain in both the Price and Halloween cases.

For these reasons, McClain's case illustrates the "'grave danger of prejudice' to an accused when evidence of an uncharged offense is given to a jury" of which this Court has warned. (*People v. Thompson*, *supra*, 27 Cal.3d 303, 317.) Such evidence "breeds a 'tendency to condemn,'" not because the jury believes the accused is guilty of the present charge, but because the jury may believe such evidence shows that the accused is a criminal. (*Ibid.*)

While the instructions which permitted the jury to convict McClain of conspiracy without proof beyond a reasonable doubt, and invited the jury to use evidence that McClain engaged in illicit drug dealings, had been caught with weapons, and was generally a bad guy to convict him of the Price and Halloween crimes, require reversal in themselves, their impact is

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[106] See Claims III, VII and VIII.

greater when considered in conjunction with the admission of rank propensity evidence and extensive prosecutorial misconduct this case.[107]

McClain's convictions must be reversed.

XI.
THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under former CALJIC No. 2.51 (5th ed.):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(6 CT 1513; 42 RT 4346.) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to McClain to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process

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[107] McClain contends that the weapons convictions and the unadjudicated gun prior were not admissible to show his knowledge or access to guns; even if they were, their prejudicial effects far outweighed any minimal probative value. As noted above, there was considerable evidence that McClain, like everyone else in this society, had access to guns. The prior convictions were grossly cumulative. See Claims IV & VI.

and a reliable verdict in a capital case.[108] (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. The Instruction Allowed The Jury To Determine Guilt Based On Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See 6 CT 1493-1494, 1514; 42 RT 4337, 4346 [CALJIC Nos. 2.03, 2.06 and 2.52 stating with regard to a wilfully false or deliberating misleading statement, an attempt to suppress evidence,

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[108]The claim of error is reviewable even in the absence of a trial court objection. Although McClain's trial counsel did not object to the false statement and flight instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code §§ 1259 & 1469; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

and flight that each circumstance "is not sufficient by itself to prove guilt . . . ."].) The placement of the motive instruction, which was read immediately before the flight instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it prejudiced McClain during deliberations. The instruction appeared to include an intentional omission allowing the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated McClain's constitutional rights to due process of law, a

fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7 & 15.)

B. The Instruction Impermissibly Lessened The Prosecutor's Burden Of Proof And Violated Due Process

The jury was instructed that an unlawful killing with malice aforethought is murder and that murder "preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation," is first degree murder. (42 RT 4368-4369.) The trial court also instructed the jury that lying in wait murder is first degree murder and instructed the jury on conspiracy and attempted murder. (42 RT 4358-4373.) The trial court also defined the mental states required for first degree murder, conspiracy to commit murder, and attempted murder. (43 RT 4358-4373.) However, by informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on the one fact that the prosecutor's capital murder case demanded and that McClain's contested – i.e., that the jury find that McClain had the intent to kill Price and the victims in the Halloween case. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana*, *supra*, 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case.

The only theory supporting the first degree felony murder allegation was that McClain attempted to kill Robert Price for gang reasons and that he conspired to kill the victims in the Halloween case to retaliate for the murder of Fernando Hodges. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.)

> "A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, italics added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were

> acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, italics added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: 'But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.'"

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, italics added.) Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if McClain had the intent to kill, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction Shifted the Burden of Proof to Imply That McClain Had to Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on McClain to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived McClain of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing McClain to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required

While McClain conceded that he had a motive to kill to avenge the death of Fernando Hodges, he disputed that he had the intent to kill the victims in the Halloween case. This instruction invited the jury to find that because McClain had a motive to retaliate for the death of Hodges, he had the intent to kill the victims. The intent to kill in retaliation was crucial to the charges of conspiracy, murder, and attempted murder with regard to the Halloween crimes.

The prosecutor's argument further confused matters for the jury:

> The fact is McClain even said the way that he was going to express his grief, such as it were, over the loss of his fellow homeboy was to go out and kill someone else. He admitted it to you. It's not in dispute; it's a fact. These guys were out to kill Crips because Fernando Hodges was killed in their mind by a Crip. That's a fact. And retaliation is motive.

(44 RT 4628.)

The prosecutor's emphasis on McClain's motive to retaliate in combination with the erroneous instruction encouraged the jury to equate motive with the intent to kill.

The erroneous instruction also requires reversal of the Price count. Under CALJIC No. 2.51, if the jury found that McClain had a motive to kill Price, it need not have found that he had the intent to kill him. Price's testimony was the only evidence that McClain attempted to murder him. The prosecutor emphasized in closing argument that McClain shot Price because he was trying to keep Crips out of the Community Arms. (44 RT 4627.) The prosecutor also presented extensive evidence of McClain's gang membership as a motive for all the charged crimes. (See Claim VI, *ante*, incorporated by reference herein.) Thus the prosecutor's argument and emphasis throughout trial on McClain's gang-motivated behavior exacerbated the erroneous instruction's invitation to consider McClain's gang loyalties as intent.

Accordingly, this Court must reverse the judgments on all counts because the error which affected the central issue before the jury was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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XII.
McCLAIN WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS JURY INSTRUCTIONS AND INSUFFICIENCY OF EVIDENCE AS TO THE SPECIAL CIRCUMSTANCE FINDINGS

Appellant McClain and the codefendants were charged with a lying-in-wait special circumstance allegation as to the three counts of murder, and a multiple murder special circumstance allegation. (3 CT 631-642.) The jury returned true findings on the special circumstance allegations, but found the firearm use allegations *not true* as to appellant McClain. (6 CT 1600-1603.) In addition, the only overt act found true in conjunction with the conspiracy charge in Count 10 was that "At Pasadena Avenue and Blake Street, on October 31, 1993 at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen, and unnamed co-conspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip." (6 CT 1598.)

The jury was instructed with the 1993 version of CALJIC 8.80.1, which stated in pertinent part:

> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider-and-abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of murder in the first-degree.

(6 CT 1564.) The multiple murder special circumstance allegation required the prosecution to prove that "The defendant has in this case been convicted of at least one crime of murder of the first-degree and one or more crimes of

murder of the first or second-degree." (6 CT 1566.) The jury also specifically found *not true* the Penal Code section 12022(a)(1) allegation that McClain was "armed with a firearm" in the commission of the conspiracy. (6 CT 1609-1610.)

In light of the jury's not true findings on each allegation of gun use relative to the Halloween shootings, the jury did not credit the testimony of the informants who said McClain said he "put in work" with a gun on Halloween. The jury was manifestly *not* persuaded beyond a reasonable doubt that McClain ever had a weapon, ever fired a weapon, or was ever present at the scene of the fatal shootings. Rather, the jury at most found that McClain was present, unarmed, in the vicinity of Blake Street and Pasadena Avenue when someone fired a handgun at or near the residence of the Crip known as "Crazy D."

Moreover, the evidence apparently credited by the jury failed to establish that McClain was present at the Emerson Avenue/Wilson Street shootings. Although the prosecution presented testimony of Gabriel Pina regarding his alleged identification of McClain at the scene of the Emerson and Wilson shootings, the jury apparently did not credit the testimony because they did not find true the overt act that McClain had caravaned to the scene.

McClain was necessarily convicted of the substantive counts of murder and attempted murder on the basis of conspiracy liability, as the jury was instructed that "[a] member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequence of an act of a co-conspirator to further the objective of the conspiracy, even though such act was not intended as part of the agreed upon objective and even

though he was not present at the time of the commission of such act." (CALJIC 6.11, 6 CT 1535.)

A conviction of three counts of murder based on a conspiracy theory of liability is insufficient to support a true finding on either the multiple murder or lying-in-wait special circumstance allegations. The Eighth Amendment requires that a finding of capital eligibility entails *at a minimum* that the defendant was "a major participant" in the homicidal conduct, and harbored a mental state of either reckless indifference to human life or intent to kill as to the victims. These minimum constitutional requirements were promulgated in *Tison v. Arizona* (1987) 481 U.S. 137, and are embodied in the *current* version of CALJIC 8.80.1, but were *not included* in the version given to McClain's jury.

The evidence apparently credited by the jury consisted of *minor* participation in the shooting at Pasadena Avenue and Blake Street, as to which the jury found *not true* that appellant was armed at the time. At most, the jury's findings demonstrate that they believed beyond a reasonable doubt that McClain harbored intent to kill based on his testimony that he intended to retaliate for Fernando Hodges' death by killing a Crip, however, that intent was unmoored from any act that established McClain to be "a major participant" in the charged murders. That is inherently insufficient to establish guilt of a lying-in-wait special circumstance. While the scope of liability according to the conspiracy instruction would clearly have attributed liability to McClain for the acts of the individuals who actually perpetrated the shootings at Emerson and Wilson, but the constitutional principle of *Tison, supra*, precludes such liability. (See also *Enmund v. Florida* (1982) 458 U.S. 782.)

The constitutional function of a special circumstance allegation in California is to provide a rational basis for distinguishing capital-eligible murders from other non-capital first-degree and/or second-degree murders. The special circumstance allegation as to an aider-and-abettor requires proof that the aider-and-abettor was personally involved in the capital murder at the minimum level required by *Tison, supra*. It does not permit the attribution of a special circumstance to an aider-and-abettor or co-conspirator whose culpability falls short of that. The jury was never so instructed in this case and, therefore, the special circumstance findings must be reversed.

The special circumstance findings must not only be reversed, but dismissed as well for insufficiency at evidence under *People v. Johnson, supra*, 26 Cal.3d 557, and *Jackson v. Virginia, supra*, 443 U.S. 307. Given that the jury's only affirmative findings did not place McClain at the scene of the Halloween shootings, but put him at a *different* location at a different time with a *different* potential victim, there is insufficient evidence to support the special circumstance findings as to the murders alleged in Counts 1, 2, and 3. The circumstances of this case are analogous to those in *Benedith v. State* (Fla. 1998) 717 So.2d 472, in which the Florida Supreme Court vacated a death sentence "because the evidence was insufficient to withstand an analysis pursuant to *Tison v. Arizona*." (*Id.* at p. 476.) The evidence was found sufficient to support a first-degree felony murder conviction based on testimony that Benedith was seen "with the victim beside the victim's car within five minutes of the firing of the shots that killed the victim"; appellant had the victim's car on the night of the murder; and appellant had the murder weapon in his possession less than a month later when apprehended for a different crime.

However, the Florida Supreme Court struck the death penalty because "the evidence does not prove that appellant was the actual shooter, that he procured the firearm for use in the robbery, that he possessed a firearm before or during the robbery, that he or [codefendant] had ever used a firearm previously in a robbery, or that he could have prevented the use of the firearm while the robbery was being committed." (*Benedith v. State*, *supra*, 717 So.2d 472, 477.) Moreover, "a reasonable inference could be drawn that either appellant or [codefendant] did the actual shooting."

The evidence in this case is far less probative as to McClain's role in the events, because there was no credible evidence that he was even present, much less participating, in the events surrounding the Emerson and Wilson shooting. His role is at most that of a conspirator, who was elsewhere at the time that some indeterminate group of co-conspirators committed the Emerson and Wilson shootings. That is simply insufficient to satisfy the standard of *Tison*, and the special circumstance findings must be vacated and dismissed.

XIII.
THE TRIAL COURT DEPRIVED McCLAIN OF THE RIGHT TO COUNSEL AT HIS PENALTY RETRIAL

A. Introduction

Through a series of errors, the trial court deprived McClain of his right to counsel at his penalty retrial. First, the trial court arbitrarily dismissed the lawyer who had represented McClain for two years, through the guilt and initial penalty phases of his capital trial. Second, the trial court told McClain that his only choices were to proceed pro per or with attorney Richard Leonard. When McClain sought pursuant to *People v. Marsden*

(1970) 2 Cal.3d 118, 123-125, an opportunity to explain to the trial court his reasons for wanting substitute counsel or to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, 833-834, the trial court treated McClain's request solely as a *Faretta* motion. Thus, McClain never had the opportunity to state for the record the reasons for which he wanted a different lawyer to represent him, which, if sufficient under *Marsden*, would have resulted in a substitution of counsel at the penalty retrial. Third, the confusing statements of the trial court, the prosecutor, and Newborn's counsel about McClain's right to counsel and the meaning of his *Faretta* waiver resulted in a waiver that was not knowing, voluntary, and intelligent. These errors individually and cumulatively denied McClain his fundamental rights to counsel at the retrial of his capital penalty phase, a fair trial, and a reliable and non-arbitrary penalty determination.

B. Proceedings Below

On February 9, 1996, the penalty jury in McClain's case announced that it was unable to reach a verdict. (7 CT 1863; 59 RT 5757-5759.) On that date, the trial court stayed all motions to give the prosecutor an opportunity to decide whether to retry the penalty phase. (60 RT 5767.) On March 15, 1996, the prosecutor announced his decision to move forward with a penalty retrial. (60 RT 5769.) On March 21, 1996, the trial court ordered the parties back for trial on March 25, 1996. (60 RT 5778.) On the same date, McClain's counsel joined an oral motion by Newborn for a continuance on grounds that counsel would be ineffective at the penalty retrial without adequate preparation time for at least three reasons: (1) this was a large case that required extensive motions, (2) additional investigation was necessary, including some out-of-state, and (3) the retrial would necessarily encompass the entire case and not just the penalty phase.

(60 RT 5774-5775.) The trial court denied the motion, explaining that there was nothing unusual about this case that would require extra time to prepare. (60 RT 5775.) The trial court understood that counsel had other engagements, but did not find good cause for a continuance, commenting that counsel should have anticipated that this case would go to trial again. (*Ibid.*)

McClain's counsel also noted that she had health problems; the trial court acknowledged that she needed time to lower her blood pressure and that this case would be difficult to do, but concluded, "I think we are just going to have to do it. I don't feel like I want to do it either." (60 RT 5778-5779.) The trial court ordered the parties back in court on March 25, 1996. (60 RT 5781.)

On March 22, 1996, counsel for McClain filed a "Notice of Motion to Continue Trial; Declaration of H. Elizabeth Harris in Support Thereof Penal Code § 1050," requesting a 60-day continuance.[109] (7 CT 1913-1923.) In support of this motion, counsel filed a letter from her physician recommending that she refrain from trial work for 60 days due to high blood pressure and severe headaches. (7 CT 1923.) Counsel also submitted a declaration from the same physician which recommended that Ms. Harris discontinue trial practice." (7 CT 1915.)

On March 25, 1996, attorney Anslyene Abraham stood in for Ms. Harris on McClain's behalf. (60 RT 5782.) The trial court stated "the new rules of court are that we do not grant any continuance on a 1050 without good cause." (60 RT 5783.) The trial court then relieved Ms. Harris of her

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[109] Ms. Harris was appointed to represent McClain on April 22, 1994. (3 CT 755.)

representation of McClain and granted a continuance for good cause.[110] (60 RT 5784.) The trial court then announced that the alternatives were the appointment of Richard Leonard at the recommendation of Ms. Abraham or for McClain to go pro per. (60 RT 5784.) The trial court noted that, in a death case, no court would find the pro per option a good thing to do. (*Ibid.*)

On March 27, 1996, Richard Leonard was appointed to represent McClain. (60 RT 5788.) McClain noted on the record that he had an opportunity to meet Mr. Leonard and that he wanted to represent himself. (60 RT 5788, 5791.) The trial court requested from McClain a written motion. (60 RT 5791.) The trial court also admonished McClain that very few lawyers, in its opinion, should handle death penalty cases. (60 RT 5793.) The trial court's admonition continued:

> we may have a mini trial, but you sat through that, you should be prepared. You know what the motions are. I don't think you are qualified, not because of that but because of the nature of the case. Understand? ¶
>
> I am not trying to embarrass you. I said I will not advise you at this time, but look at the *Faretta* warnings.
>
> My God in heaven, if you want to get out of your cell a little bit, if you behave yourself we can do some other things, but why wander around to face eternity maybe when you have competent counsel. And remember the D.A.'s had meetings on this thing, too. They took a long time to make a decision. I said the court was still trying to look at that. ¶

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[110] It is unclear from the record whether the trial court thought it was required to relieve Ms. Harris to create good cause for a continuance. If such was the trial court's thinking, it was erroneous.

He needs a chance to talk to Mr. Leonard. He needs a chance to prepare the other motion . . .

(60 RT 5793.)

On April 4, 1996, before McClain filed his own written motion, the prosecutor filed its "Points and Authorities Supporting Defendant McClain's Motion for Self Representation and Appointment of Stand-By Counsel; and People's Motion for Continuance Pursuant to Penal Code § 1050.1." (7 CT 1956-1967.) In it, the prosecutor attributed McClain's displeasure with Leonard to Leonard's stated need for two months to prepare for trial. (7 CT 1961.) However, the record does not reflect this. Indeed, the prosecutor provided no transcript citation to support this contention. (*Ibid.*)

On April 5, 1996, McClain filed his "Notice of Motion and Motion to Represent Self in Proper or to Appoint New Counsel: Memorandum of Points and Authorities." (7 CT 1943-1945.)

In this motion, McClain sought pursuant to *People v. Marsden*, *supra*, 2 Cal.3d 118, 123-125, an opportunity to state on the record the reasons that he was dissatisfied with Mr. Leonard so the trial court might exercise its discretion to discharge Leonard and appoint someone else. (7 CT 1945.) McClain also cited in his motion *Faretta v. California*, *supra*, 422 U.S. 806, 833-834, which guarantees a defendant's right to voluntarily and intelligently elect to represent himself. (*Ibid.*)

On March 27, 1996, the trial court noted that he had received from McClain "it appears to be, motion with some points and authorities to act as his own counsel." (60 RT 5799.) Newborn's counsel then moved to strike the prosecutor's motion with regard to McClain's representation because the prosecutor has no standing with regard to the attorney-client relationship

and further requested that the prosecutor remove himself from the courtroom. (*Ibid.*)

The court responded that the prosecutor was entitled to be in court because the discussion was only about whether there was an appointment. (60 RT 5799-5800.) The prosecutor responded that this was a *Faretta* motion, not a *Marsden* motion (60 RT 5800), despite the clear meaning of McClain's written motion. Mr. Leonard affirmatively declined to comment on this issue, and the court determined that the prosecutor was entitled to be in court. (60 RT 5800.) The trial court never addressed McClain's *Marsden* motion.

The trial court then asked the prosecutor whether McClain had any history of violence toward law enforcement which would justify denying the *Faretta* motion. (60 RT 5801.) The prosecutor noted that while McClain had allegedly shanked someone in the jail, he had no history of targeting law enforcement. (*Ibid.*) The trial court then asked for case law on whether McClain could represent himself if there were violence toward law enforcement and told McClain that if he allowed him to go pro per, McClain would not be allowed to move from his chair, which would be awkward. (*Ibid.*) The trial court then indicated it would consult with a supervisor from the sheriff's department and asked Mr. Leonard to prepare some points and authorities. (*Ibid.*) The record contains no points and authorities on this issue prepared or submitted by Mr. Leonard.

On April 9, 1996, the trial court held a hearing on McClain's *Faretta* motion, but still did not acknowledge the *Marsden* motion. (60 RT 5813.) At the hearing, the trial court read aloud the Los Angeles County form submitted by all prospective pro per defendants, asking McClain whether he understood each item he checked off on the form. (60 RT 5813-5823.)

McClain told the trial court that he understood each item on the list. (*Ibid.*) The Los Angeles Superior Court form addressed basic constitutional guarantees which apply to the guilt phase of a criminal trial, but did not mention rights pertaining to a capital penalty phase. (7 CT 1976-1980; RT 5813-5823.) McClain also stated, in response to the trial court's questioning, that he once represented himself in a jailhouse assault case and the charges were dismissed.[111] (60 RT 5819.) The form McClain completed indicated that McClain did not graduate from high school, but obtained a G.E.D. (7 CT 1977.) It listed McClain's employment experience as "brick mason" and "store clerk."

The prosecutor asked whether McClain understood that he was waiving claims to ineffective assistance of counsel on appeal. (60 RT 5823-5824.) Newborn's counsel then piped in that McClain was not waiving the right to raise incompetency claims, but rather to raise claims of deprivation of counsel. (60 RT 5824.) The trial court thanked both of them for their input, but did not clarify its position on what McClain was or was not waiving insofar as the right raise claims of ineffective assistance of counsel on appeal. (*Ibid.*) The trial court then allowed McClain to go pro per, noting that he had read McClain's written motion. (*Ibid.*)

The prosecutor offered that, procedurally, the trial court should next determine when Mr. Leonard should be ready to proceed as standby counsel. (60 RT 5825.) McClain felt that he could go forward in less than a week. (*Ibid.*) The prosecutor commented that the trial court should, since it was letting McClain proceed pro per, appoint Mr. Leonard as standby

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[111] The trial court made no further inquiry so it is unclear why the charges were dismissed. The pro per form which McClain completed indicates that the case was in "C.C.B." (7 CT 1977.)

counsel in light of McClain's behavior at trial. (60 RT 5828.) The prosecutor further argued that, should the trial court appoint Mr. Leonard, it would be clear error not to allow him the time to prepare. (*Ibid.*) The trial court then continued the case until June 28, 1996. (60 RT 5833.) McClain noted his objection to waiving time. (*Ibid.*)

On June 28, 1996, Mr. Leonard filed a continuance motion to which McClain objected. (60 RT 5860.) Jury selection for the penalty retrial did not commence until August 13, 1996. (60 RT 5869.)

C. The Trial Court's Denial of McClain's Original Counsel's Reasonable Request for a Continuance Violated McClain's Right to the Assistance of Counsel at His Penalty Retrial

Trial courts have broad discretion to deny or grant continuances. (*Morris v. Slappy* (1983) 461 U.S. 1, 11.) However, when a trial court arbitrarily and unreasoningly concerned with expeditiousness, denies a justifiable continuance request, this denies a defendant the right to assistance of counsel. (*Id.* at pp. 11-12.) Indeed, such a "myopic" insistence on moving forward can render the right to counsel "an empty formality." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589.) For these reasons, a trial court's discretion "must be balanced against the defendant's Sixth Amendment right to counsel." (*United States v. Nguyen* (9th Cir. 2001) 262 F.3d 998, 1003.)

1. The trial court's denial of counsel's continuance request for a 60-day continuance, which was supported by health-related good cause, arbitrarily delayed the penalty retrial for nearly six months

Penal Code section 1050(e) permits trial courts to grant continuances only for good cause, not simply for the convenience of the parties. This

Court has held that illness of trial counsel is good cause for a continuance. (*People v. Johnson*, *supra*, 26 Cal.3d 557, 570.)

McClain's counsel cited several factors in support of her continuance motion, including a need for additional preparation.[112] More importantly, counsel raised and the trial court acknowledged trial counsel's health problems.[113] (60 RT 5778-5779.)

Trial counsel requested only 60 days to recuperate from her documented high blood pressure. (7 CT 1913-1923.) Nevertheless, the trial court denied the continuance, appointed new counsel, and stated that only then did it have good cause to grant the continuance. (60 RT 5783-5784.)

As a result of the trial court's failure to grant the continuance, the penalty retrial was delayed for nearly six months – three times longer than counsel requested. (60 RT 5869.) This long and unnecessary delay contravened the plain meaning of Penal Code section 1050, which requires that "all proceedings in criminal cases shall be set for trial and heard and determined and the earliest possible time" and gives death penalty cases precedence over other proceedings.

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[112] The trial court's response, that trial counsel should have expected a penalty retrial (60 RT 5775) is difficult to understand, unless the trial court believed that, based on the evidence presented to the first jury, it was unlikely to reach a verdict. In light of the flimsy evidence against McClain (see Claims II and III), this is a reasonable conclusion. However, allowing a penalty retrial to go forward in which the evidence was clearly inadequate seems arbitrary and fundamentally unfair. Furthermore, it undercuts any notion of judicial economy.

[113] The trial court later commented on the record that McClain's counsel requested the continuance because she was "physically and mentally not ready to go to trial." (60 RT 5867.)

This illogical result itself illustrates the arbitrariness of the trial court's denial of counsel's continuance request. However, as McClain demonstrates below, the trial court's decision was infected with further arbitrariness, which ultimately deprived McClain of counsel at his penalty retrial.

2. The trial court failed to balance its discretion against McClain's right to counsel

In *Morris v. Slappy*, *supra*, 461 U.S. 1, the United States Supreme Court addressed whether a state trial court violated the defendant's Sixth Amendment right to counsel by denying his motion for a continuance until the deputy public defender initially assigned to defend him recovered from emergency surgery. Balancing the defendant's right to counsel against the public's interest in the prompt and efficient administration of justice, the high court found that trial court's refusal to grant a continuance for defendant's initial counsel to recover from surgery was within its discretion where: (1) original counsel had only represented defendant at a preliminary hearing and supervised the case investigation; (2) defendant did not request a continuance until the third day of trial, 11 days after the appointment of substitute counsel; (3) defendant voiced satisfaction with substitute counsel on the first day of trial; (4) substitute counsel repeatedly stated on the record that he was prepared and did not need a continuance to proceed; (5) delay would have caused additional distress to victims and witnesses; (6) granting a continuance would have delayed the proceedings; and (7) defendant was not facing the death penalty. (*Id.* at pp. 4, 6, 9, 13-15.)

Had the trial court balanced the interests in this case as the high court requires, it would have found that McClain's case to be vastly different from *Slappy*. Furthermore, other equities favored McClain's right to

continue the penalty retrial for 60 days so he could proceed with the same counsel.

First, McClain was facing the death penalty. The Supreme Court has long noted the critical role of counsel at a capital sentencing phase. (*Strickland v. Washington* (1984) 466 U.S. 668; *Williams v. Taylor* (2000) 529 U.S. 362; *Wiggins v. Smith* (2003) 539 U.S. 510.) This role is so crucial that when a defendant is actually or constructively denied counsel, prejudice is presumed. (*Strickland v. Washington, supra*, 466 U.S. 668, 692.) The requirements for representing a defendant in a capital penalty phase are so specialized that the American Bar Association has promulgated guidelines for representation of capital defendants. (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989, rev. 2003.).) The Supreme Court has held that in referring to the ABA standards as guides, it applied its own clearly established law. (*Wiggins v. Smith, supra*, 539 U.S. 510, 522.) There is no record that the trial court in McClain's case gave any thought at all to the unique and important role of counsel at a capital penalty retrial.[114]

Unlike McClain, whose very life was on the line, the defendant in *Morris v. Slappy* faced a term of years in prison. As the Supreme Court has explained, "there is no doubt that 'death is different.'" (*Ring v. Arizona* (2002) 536 U.S. 584, 605-606, citations omitted.)

Second, unlike Slappy's lawyer, McClain's counsel had represented him for a long time – exactly one year and eleven months – when she requested the 60-day continuance. (3 CT 755; 7 CT 1913-1923.) She

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[114] As explained in Claim V.C.1, the failure to exercise discretion required by law is an abuse of discretion. That section is incorporated by reference herein.

represented him during pretrial proceedings, at the guilt phase of his capital trial, and at his initial penalty trial after which the jury could not reach a unanimous verdict. Undoubtedly, the lawyer who had represented McClain for nearly two years in his capital case would have understood the facts and legal issues in McClain's case better than an attorney newly-appointed to the case.

It is perhaps for these reasons that California courts avoid substitutions of counsel during criminal proceedings unless a defendant shows that "failure to replace counsel would substantially impair the defendant's right to assistance of counsel." (*People v. Smith* (2003) 30 Cal.4th 581, 604.) The trial court's repeated lavish praise of McClain's counsel during the trial and initial penalty phase make clear that it held no such concerns about her performance. (See, e.g., 12 RT 727; 14 RT 1053, 1068; 15 RT 1235, 1316-1318, 1332, 1334-1335, 1346; 16 RT 1371; 17 RT 1530-1531, 1533; 19 RT 1928-1929, 1960; 20 RT 2055-2056; 22 RT 2207, 2209; 23 RT 2352; 24 RT 2536; 28 RT 2927; 29 RT 3080; 36 RT 3938-3939, 3941; 37 RT 4054; 44 RT 4710, 4719; 53 RT 5242-5243; 58 RT 5745.) Thus, it is baffling that the trial court was willing to dismiss her and appoint new counsel, especially when she would have been prepared to proceed long before substitute counsel could learn the facts and legal issues in this complex capital case.

Third, defendant Slappy did not request a continuance until the third day of trial. McClain's counsel requested a continuance at the first court appearance after the penalty jury hung. Her request was timely, reasonable, and supported by California law. (See § C, *ante*.) Moreover, granting the continuance would have served, rather than impeded, the public interest by

moving the proceedings forward more quickly than they were once new counsel was appointed.

Fourth, defendant Slappy voiced his approval of new counsel on the first day of trial, only to request a continuance to allow his original counsel to resume his representation on the third day of trial. McClain engaged in no such shenanigans. His counsel made a timely motion for a continuance with good cause.

Fifth, defendant Slappy's new counsel represented on the record that he was prepared to commence trial, despite Slappy's protestations. Here, McClain's counsel explicitly told the trial court she was not ready and requested a continuance with documented good cause.

Sixth, in Slappy's case, which involved charges of rape and oral copulation, the Supreme Court was deeply concerned about the negative impact of delay on victims and witnesses. McClain is mindful of the traumatizing effect delay may have on victims and their survivors. Here, any such trauma would have been minimized had the trial court granted the 60-day continuance instead of postponing the retrial for nearly six months.

Seventh, in Slappy's case, a continuance would have delayed the proceedings. As noted repeatedly, the trial court's failure to grant the continuance in this case created a much longer delay than was necessary.

This examination of McClain's case in light of controlling Supreme Court precedent – which the trial court wholly failed to do – demonstrates the constitutional necessity of granting the continuance so that his counsel could continue. The trial court's failure to grant the continuance and to weigh its usual discretion to deny a continuance against McClain's right to counsel deprived McClain of the right to counsel and the right to a capital

penalty proceeding free of arbitrariness. The death judgment must be reversed.

D. The Trial Court's Denial of McClain's *Marsden* Motion Without a Hearing Denied Him a Fair Trial and the Effective Assistance of Counsel

As explained above, McClain moved to replace Richard Leonard as counsel for the penalty retrial. (7 CT 1943-1945.)

The Sixth Amendment right to counsel in a criminal proceeding is a fundamental right, made applicable to the states by the Fourteenth Amendment's due process clause. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345.) This is because of the "obvious truth," that "in our adversary system of justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (*Id.* at p. 344.) This right applies at every critical stage in the criminal proceedings. (*United States v. Wade*, *supra*, 388 U.S. 218, 224; *Hamilton v. Alabama* (1961) 368 U.S. 52, 53.) Sentencing is a critical stage of a criminal proceeding which must satisfy federal due process requirements. (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) Additionally, the Sixth Amendment right to counsel applies to capital sentencing proceedings, just as in an ordinary trial. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 686-687.) Because of the profound consequences to the defendant of a capital sentencing proceeding, the United States Supreme Court has "consistently required that capital proceedings be policed at all times by an especially vigilant concern for procedural fairness and for the accuracy of the factfinding." (*Id.* at p. 704, Justice Brennan concurring and dissenting.) This means that a capital defendant "requires the guiding hand of counsel at every step in the proceedings against him." (*Powell v. Alabama* (1932) 287 U.S. 45, 69.)

Thus, the federal constitution imposed on the trial court a duty to vigilantly enforce McClain's right to the guiding hand of counsel at his penalty retrial. The trial court failed in this duty.

An indigent defendant is only entitled to one court appointed lawyer. (*People v. Marsden, supra,* 2 Cal.3d at p. 123.) Thus, a trial court has discretion to grant or deny a motion to substitute counsel unless the defendant sufficiently shows that failure to substitute counsel will substantially impair the right to assistance of counsel. (*Ibid.*) That said, a

> trial court cannot thoughtfully exercise its discretion in this matter without listening to [defendant's] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom.

(*Ibid.*)

For these reasons, when a judge denies a motion to substitute counsel based only on courtroom observations and without allowing a defendant to put on the record instances of misconduct, it abuses its discretion. (*People v. Marsden, supra*, 2 Cal.3d at p. 124.) This is because when a judge makes a decision while denying a party an opportunity to be heard the decision "is lacking in all the attributes of a judicial determination." (*Ibid*; *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843; *People v. Dennis* (1986) 177 Cal.App.3d 863, 869.)

Despite clear guidance from this Court, the trial court in McClain's case denied him the opportunity to make the record in support of his motion to substitute counsel, thus abusing its discretion. In fact, the trial court failed even to acknowledge that McClain had filed a *Marsden* motion.

After excluding the lawyer who had represented McClain throughout the guilt and penalty phases of his capital proceedings, it erroneously told McClain that his only options were to appoint attorney Richard Leonard or for McClain to represent himself. (60 RT 5784.) Based on the trial court's incorrect statement of the law, McClain indicated a desire to represent himself. (60 RT 5788, 5791.) Before McClain had a chance to file his own written motion, the prosecutor, jumping at an opportunity to secure a death sentence against McClain proceeding pro per after he failed to persuade the first jury to do so when McClain was represented by counsel, filed a written motion encouraging the trial court to allow McClain to represent himself pursuant to *Faretta v. California, supra*, 422 U.S. 806.[115] (7 CT 1956-1967.)

McClain filed on his own a written motion seeking substitution of counsel and an opportunity to make a showing on the record in support of new counsel or to proceed in propria persona. (7 CT 1943-1945.) For reasons not in the record, the trial court, which stated it had read McClain's written motion, insisted on treating it solely as a *Faretta* motion. (*Faretta v. California, supra*, 422 U.S. 806.) The prosecutor encouraged this reading of McClain's motion and persuaded the trial court to allow him to

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[115] Both the prosecutor's motion and his presence in the courtroom during the hearing on McClain's motion were highly inappropriate. *Marsden* hearings are held outside the presence of the prosecutor both because the defendant may need to discuss case strategy and because the prosecutor has no interest in who represents the defendant. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1094; *People v. Dennis, supra*, 177 Cal.App.3d at p. 871.) Interestingly, the only person in the courtroom who came to McClain's aid on this issue was counsel for co-defendant Newborn. It is impossible to know whether, had the trial court actually permitted McClain to proceed on the *Marsden* motion, it would have removed the prosecutor from the courtroom.

remain in the courtroom during proceedings on the motion. (60 RT 5799-5800.)

Because the trial court failed to address McClain's *Marsden* motion, there is no way to know what he would have presented in support of his motion to substitute counsel. As in *Marsden*, we are "compelled to resort to speculation" as to the defendant's understanding of his rights and the reasons for which he believed Richard Leonard would not provide constitutionally adequate representation, because "he was not permitted to explain his meaning and to proceed with enumeration of asserted instances of inadequate representation." (*People v. Marsden, supra*, 2 Cal.3d at p. 124.)

McClain was on his own with no help from the trial court or his appointed counsel. The trial court may not have been legally obliged to assist McClain,[116] who may as well have been representing himself at this

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[116] Nevertheless, this Court teaches:

> It is in the highest tradition of American jurisprudence for the trial judge to assist a person who represents himself as to the presentation of evidence, the rules of substantive law, and legal procedure, and judges who undertake to assist, in order to assure that there is no miscarriage of justice due to litigants shortcomings in representing themselves, are to be highly commended.

(*People v. Marsden, supra,* 2 Cal.3d at pp. 125-126.)

moment.[117] However, it was not entitled to mislead McClain about and limit his legal options.

As in *Marsden*, this Court "cannot ascertain that defendant had a meritorious claim, but that is not the test." (*People v. Marsden, supra*, 2 Cal.3d at p. 126.) Because the trial court denied or ignored McClain's motion without allowing him to establish on the record the reasons for his dissatisfaction with Mr. Leonard, he was denied due process and a fair trial. (*Ibid.*) And, as in *Marsden*, this Court cannot conclude that the denial of effective assistance of counsel did not contribute to McClain's death sentence. (*Ibid.*; *Chapman v. California* (1967) 386 U.S. 18.) The trial court's failure to address McClain's *Marsden* motion was an abuse of discretion that resulted in a denial of counsel in violation of article I, section 15 of the California Constitution and the Sixth and Fourteenth Amendments. The death verdict should be reversed.

E. McClain's Waiver of the Right to Counsel Was Not Knowing, Voluntary, or Intelligent

The Sixth Amendment right to self-representation, requires a valid waiver of the right to counsel. (*Faretta v. California, supra*, 422 U.S. at p. 821.) "[A]ny waiver of the right to counsel must be knowing, voluntary, and intelligent." (*Iowa v. Tovar* (2004) 541 U.S. 77, 88.) The trial court has the "serious and weighty" responsibility to ensure that the accused's waiver is competent and intelligent and "must draw every inference against

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[117] Mr. Leonard could not be reasonably expected to advocate the position that McClain's right to counsel would be substantially impaired should Leonard's representation continue. (See, e.g., *United States v. Del Muro* (9th Cir. 1996) 87 F.3d 1078, 1080-1081 [there is an actual conflict of interest when an attorney is forced to argue and present evidence of his own ineffectiveness].) Indeed, he supported the trial court's reading of McClain's written motion as a *Faretta* motion. (60 RT 5800.)

supposing that the defendant wishes to waive the right to counsel." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 465; *People v. Marshall, supra*, 15 Cal.4th 1, 23.) Accordingly, the record must show that defendant "'knows what he is doing and his choice is made with his eyes open.'" (*Faretta, supra*, 422 U.S. 806, 835, citing *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279.) The inquiry is whether a defendant understands the significance and consequences of a decision and whether it was uncoerced. (*Godinez v. Moran* (1993) 509 U.S. 389, 401, fn.12.) And, when a waiver implicates more than one constitutional right, the record must show that the defendant understood that he was waiving more than one constitutional guarantee. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243-244.) Whether a defendant had enough information to waive counsel depends on case-specific factors including the defendant's education or sophistication, the complexity of the charge, and the stage of the proceeding. (*Iowa v. Tovar, supra*, 541 U.S. at p. 88.) Moreover, the court must look at the defendant's conduct and not just his words. (*People v. Marshall, supra,* 15 Cal.4th 1, 23.) For all these reasons, a trial court does not satisfy the requirements of *Faretta* by "just going through the motions of merely eliciting the proper responses to boilerplate questions." (*Moran v. Godinez* (9th Cir. 1994) 57 F.3d 690, 705.)

This Court reviews whether a waiver of counsel is knowing and voluntary de novo, examining the entire record. (*People v. Marshall, supra,* 15 Cal.4th at p. 24.)

The circumstances of McClain's case indicate that he did not make a knowing, voluntary, and intelligent waiver of his right to counsel at his penalty retrial for at least four reasons.

First, the trial court, telling McClain that the only options available to him were representation by Richard Leonard or self-representation,[118] failed to fully and accurately inform him of his legal options with regard to counsel. It is only under these circumstances, where the trial court led him to believe that he had no other option, that McClain sought to represent himself.

Second, the boilerplate form which McClain completed and the trial court used in making its determination of the validity of the waiver of counsel, was inadequate to inform McClain of the constitutional issues presented by the lack of counsel at a capital penalty phase. Crucially, both the form and the trial court omitted entirely any mention of capital defendant's "constitutionally indispensable" Eighth and Fourteenth Amendment rights to have the penalty jury consider and give meaning to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. 586, 604.) Without this understanding of the fundamental purpose of a capital penalty phase, McClain's decision to represent himself at penalty phase cannot have been knowing or intelligent.

Fourth, *Faretta* requires this Court to consider factors such as McClain's lack of education, the complexity of a multi-defendant capital case, and the highly specialized nature of penalty phase litigation. (*Iowa v. Tovar, supra*, 541 U.S. at p. 88; see also ABA Guidelines for the

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[118] The trial court's confusion about the law and about how to proceed are further evidenced by the trial court's determination to seek advice from the sheriff and the prosecutor about McClain's rights vis a vis his right to counsel in his death penalty case. (60 RT 5801.)

Appointment and Performance of Defense Counsel in Death Penalty Cases (1989, rev. 2003).) McClain did not graduate from high school. Furthermore, his prior experience as a brick layer and store clerk hardly prepared him to defend himself in a capital penalty phase. All of these factors point to the inescapable conclusion that McClain had no idea what he was giving up when he waived his right to counsel.

Because McClain's waiver of the right to counsel at his capital penalty phase was not knowing, voluntary, or intelligent, the death verdict must be reversed.

F. The Deprivation of Counsel at McClain's Capital Penalty Phase Requires Reversal Without a Showing of Prejudice

When a defendant is denied the assistance of counsel at a critical stage in the proceedings, prejudice is presumed. (*United States v. Cronic*, *supra*, 466 U.S. 648, 659; *Mickens v. Taylor* (2002) 535 U.S. 162, 166; *Gideon v. Wainwright*, *supra*, 372 U.S. 335.) McClain is thus entitled to automatic reversal of his death judgments. Even assuming arguendo that the *Chapman* harmless error standard applies, reversal is still required.

The starkest indicator of prejudice in this case is that, when McClain's long-time counsel defended his first penalty phase, the jury, after deliberating for seven days was unable to reach a penalty verdict. In contrast, after McClain represented himself at his penalty retrial, the jury sentenced him to death. In light of the complexity of litigating a capital penalty phase, this result is not surprising. As McClain recounts above, the trial court expressed clearly and explicitly its belief that McClain, who never graduated high school and had worked only as a brick mason and store clerk, was wholly unqualified to represent himself, particularly in a death penalty case. (60 RT 5793.)

It should also be noted that McClain was excluded from certain proceedings at which other counsel were present. After McClain cross-examined prosecution witness Joseph Petelle, the trial court ordered all defendants, including McClain out of the courtroom so that it could speak with counsel off the record. (69 RT 6925-6926.) This left McClain unrepresented during a conference at his capital penalty phase.

The prosecutor's eagerness to have McClain represent himself further emphasizes the inevitability of McClain's incompetent self-representation. As explained in Claims II, III, VI and XVII, the guilt case against McClain was weak. The jury at the penalty retrial expressed its concerns about the weakness of the prosecution's case in its requests to the trial court to examine guilt phase evidence. (75 RT 7545.) At the first penalty trial, counsel persuaded the jury that the evidence against McClain was weak enough that it might impose a death sentence on an innocent man. McClain's openly expressed distress in the courtroom indicated that he would be a far less formidable opponent than his prior counsel. Moreover, it was likely the penalty jury would feel threatened by McClain's anger at being wrongfully charged with capital murder. The prosecutor capitalized on this by arguing that the jury should infer from McClain's behavior in court that he deserved the death penalty in this case because he would kill again. (74 RT 7382.) Of course, McClain did not know he could object to the prosecutor's improper and highly prejudicial closing argument.

McClain also failed to make other motions that could have changed the result of the trial. For example, the prosecutor used twelve of fourteen peremptory challenges to strike women – four black, four Hispanic, and four white – from the jury. (13 CT 3499.) There was thus a prima facie case of discrimination in jury selection based on the gender and race of

prospective jurors for which any competent counsel would have requested a hearing. (See *Johnson v. California* (2005) 545 U.S. 162; *J.E.B. v. Ala. ex rel. T.B.* (1994) 511 U.S. 127, 146; *Batson v. Kentucky* (1986) 476 U.S. 79, 93-94; *Davis v. Secy. for the Dep't of Corr.* (11th Cir. 2003) 341 F.3d 1310 [habeas relief granted where trial counsel failed to preserve a potentially meritorious *Batson* claim].) Such a hearing could have arrested the prosecutor's improper behavior, resulting in a more fairly constituted jury. Furthermore, had McClain not prevailed at a hearing, he would have at least preserved the issue for appellate review. Instead, McClain was tried by a jury that may well have been the product of discrimination in jury selection, and this issue is waived on appeal.

Another clear example of McClain's incompetence was his failure to move to prevent prosecution witnesses Robert Browning, David Admire, and Les Tranberg from testifying that McClain was wearing a stun belt. The Supreme Court has found that jury awareness of restraints on defendant during a capital penalty phase "inherently prejudicial," such that a defendant "need not demonstrate actual prejudice to make out a due process violation." (*Deck v. Missouri* (2005) 544 U.S. 622, 635.) Because of the inherent prejudice, to prevail on such a claim, the government must prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Ibid.*)

McClain is not required to show that the deprivation of counsel at his capital penalty phase prejudiced him; such prejudice is both clear and abundant in the record. The death verdict must be reversed.

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XIV.
THE TRIAL COURT VIOLATED McCLAIN'S RIGHTS TO PRESENT A DEFENSE, DUE PROCESS, A FAIR PENALTY TRIAL, AND A RELIABLE PENALTY DETERMINATION WHEN IT FORCED McCLAIN TO WEAR A STUN BELT AND ALLOWED DISCLOSURE TO THE JURY THAT McCLAIN WAS ELECTRONICALLY RESTRAINED

A. Introduction

The trial court forced McClain to at his penalty retrial wear a stun belt which physically and psychologically impeded McClain's ability to defend himself and gave the jury the impression that he was a serious threat to its safety.

The trial court's errors deprived McClain of his federal constitutional rights to due process, a fair penalty trial, and a reliable penalty determination as well as state law rights when it forced him to wear a stun belt after acknowledging there was no legal basis for his ruling, had a McClain witness testify in shackles, made the jury aware that McClain wore the stun belt, and gave an irrelevant and constitutionally inadequate jury instruction. Additionally, the trial court violated McClain's rights under international law provisions prohibiting torture.

B. Proceedings Below

1. The trial court's decision to require stun belts

When the jury returned its guilt verdicts, McClain made an obscene hand gesture towards them. (45 RT 4783.) The trial court explained that McClain's high emotional state was understandable and that in its experience, his behavior was not unusual. (45 RT 4787.) Through counsel, McClain acknowledged to the trial court that he should not have gestured obscenely to the jury. (*Ibid.*) The trial court then praised McClain for his behavior throughout the guilt phase:

I complimented you many times. You sat there all the way through, and this jury sat and watched all of you. You took the stand; you made some profanity. Most of the time all of you were gentlemen.

(45 RT 4788-4789.)

Mr. McClain – my bailiffs you never gave them any trouble at all, neither have you. Stay on the same course. All right? They are just here to do their job.

Don't comment. You have always been gentlemen to my staff, and I appreciate that. So hang in there.

(45 RT 4793.)

One week later, without warning, the trial court asked McClain and his codefendants whether they had received the stun belt notification form, commenting:

The security is done by the security people involved, that is, the bailiffs. Based on some activity, they have requested that you do this and a document was given to you and you didn't want to sign it.

(46 RT 4798-4799.)

The trial court then read to McClain the notification form which explains the trial court was able to shock him with 50,000 volts of electricity if he attempted to escape, made sudden or hostile movements, tampered with the belt, failed to comply with verbal commands, or acted or communicated with overt acts of aggression to anyone in his immediate vicinity. (*Ibid.*)

McClain indicated that while he understood the form, he did not agree with its terms. (*Ibid.*) The trial court commented that the courtroom staff have always treated McClain with dignity and it required McClain to treat them in the same way. (46 RT 4800.)

This exchange between McClain and the trial court followed:

McCLAIN: I want to say nobody tripping, but now all of a sudden, we get those belts. That is like a slap in my face. After all, I have been sitting here and I ain't done nothing hostile and none of that shit and still get that.

THE COURT: Remember that security is done by the sheriffs and if they perceive things that jeopardize your safety or injury to you or them or any staff member, that is what the law provides. So we will review this for later on.

(*Ibid.*)

At one point, the trial court indicated that he was forcing the defendants to wear stun belts for their own benefit. (73 RT 7314.)

No further review took place and McClain wore the stun belt throughout the first penalty trial.

During a hearing after the first penalty mistrial, defendant Newborn told the prosecutor to "fuck off" and "suck my dick." (60 RT 5769.) The trial court responded, "we will have to probably use the restraints again." (60 RT 5770.) At the same hearing, when the trial court denied Newborn's motion sever his penalty retrial from McClain's, the trial court, indicating his displeasure with the attitude of defendants, declared: "They are not going to run this court. I am going to run this trial. Have you got the word? And you will be belted." (60 RT 5778.) The trial court gave no further explanation for its ruling.

At a later hearing, when McClain requested that the trial court provide substitute counsel or that he be allowed to represent himself, the trial court asked the prosecutor whether McClain had any history of violence toward law enforcement which would justify denying the *Faretta* motion. (60 RT 5801.) The prosecutor noted that while McClain had allegedly shanked someone in the jail, he had no history of targeting law enforcement. (*Ibid.*)

2. The disclosure of the stun belts to the jury

After the prosecutor and defendants completed putting on penalty phase evidence, the trial court announced that it was going to conduct a 402 hearing based on "what some of the defendants said to the deputies." (73 RT 7296.) The trial court continued "and then if that complies with 190.2 or .3 the court is going to allow it. I think it does comply."[119] (*Ibid.*) The prosecutor told the trial court that Deputy Browning personally heard McClain threaten to kill him. (73 RT 7298.)

The trial court held a 402 hearing and determined that the incident should be introduced as aggravating evidence against McClain. (73 RT 7301-7325.)

Holmes then objected that the effect of this testimony would be very prejudicial against all defendants. (73 RT 7312.)

The trial court, discussing its anger about the Browning incident, noted, "I made the decision on that based on their conduct. They don't make that decision; I make that decision. That's even for their benefit." (73 RT 7314.)

The prosecutor called Browning in its case in rebuttal. (73 RT 7331-7340.) Browning testified that every morning, deputies place electronic devices on all defendants convicted of murder. (73 RT 7332.) Holmes asked the trial court to instruct the jury not to use the stun belts against the defendants. (*Ibid.*) The trial court then instructed the jury:

> The court makes a decision, based on things the court knows, whether or not to wear this device. It is a security device to

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[119] There is no record that the prosecutor made a motion to introduce this evidence. It thus appears from the record that the trial court made the decision to hold the 402 hearing and introduce the evidence sua sponte. (See Claim XV, *post.*)

assure tranquility in the court, security for everyone. It does not mean that they are guilty or not guilty.

(*Ibid.*)

During closing argument, McClain argued "sympathy ain't my approach. Sympathy is not my approach because I don't care what he thinks or what these people think, you know; and if I didn't have this belt on, I would be able to express it a lot more boisterous than I am now." (74 RT 7420.)

The following exchange then took place before the jury:

The Court: You are wearing a belt because you have acted up in this courtroom. So don't tell this jury without that belt what you might do.

McClain: I never once have been violent in this court. I never once have been violent in this court.

(*Ibid.*)

During closing argument, the prosecutor argued that McClain posed a future danger:

Not only did Mr. McClain demonstrate his propensity for sociopathic behavior and violence in the past, he's done it here in this courtroom, threatening to kill again and again.

(74 RT 7382)

McClain is a really dangerous man. He is a danger in here; he is a danger in the street, and he will be a danger in state prison. And that is why life without parole is not fair.

(74 RT 7397)

It's not fair to let them hang out with their buddies and make new friends and new associates and put at risk new lives.

(74 RT 7402.)

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3. The stun belt device used on McClain

Both this Court and the United States Court of Appeals for the Ninth Circuit have outlined in detail the workings of the Remote Electronically Activated Control Technology (REACT) belt that McClain was forced to wear during his capital penalty retrial. (*People v. Mar* (2002) 28 Cal.4th 1201, 1215, fn.1, 1225-1227; *Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1234.)

> The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures.

(*People v. Mar, supra*, 28 Cal.4th 1201, 1215, citing *People v. Mar*, 77 Cal.App.4th 1284 [citations omitted.].)

A "disturbing number" of belt activations are accidental. (*Id.* at pp. 1228-1229; see also *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897, 899 [up to 24.4% of activations are accidental].)

Additionally, the belt prongs which attach near the kidney region may leave welts on the skin of the victim that require up to six months to heal. (Comment: *The React Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether its Use Is Permissible under the*

United States and Texas Constitutions (1998) 30 St.Mary's L.J. 239, 248-249.)[120]

Producers of the stun belt note that the psychological effects on the wearer far outweigh the physical dangers. (Comment: *The React Security Belt*, *supra*, 30 St.Mary's L.J. at p. 252.) Indeed they promote the belt as a provider of "total psychological supremacy," over prisoners. (*Ibid.*) One representative of the company which produces the belts indicated that the fear the belt creates will elevate the wearers blood pressure as much as the shock. (*Id.* at p. 252, fn. 68, citing Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, Progressive, July 1, 1996, at p. 18.) Another company representative opined that if the stun belt killed anyone, it would be death from fright. (*Id.* at p. 252, fn. 67.)

The physical and psychological effects of stun belts prompted the United Nations Committee Against Torture to urge the United States to abolish the use of stun belts the use of which nearly always violates the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (hereafter "Torture Convention."). (See Amnesty International, United States of America in Amnesty International Report 2001 at http://web.amnesty.org/report2001/webamrcountries/UNITED+STATES+OF+AMERICA?OpenDocument.)

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[120] This Court also relies on this article, describing it as a lengthy and well-researched article that has been cited in a number of prior judicial decisions. (*People v. Mar, supra*, 28 Cal.4th at p. 1215, fn.1.)

C. The Trial Court Violated McClain's State Law Rights, His Federal Constitutional Rights to Present a Defense, Due Process, a Fair Trial, and a Reliable Penalty Determination, and His International Law Rights by Erroneously Forcing McClain to Wear a Stun Belt Finding Manifest Need for Electronic Restraints

A trial court may not compel a criminal defendant to wear a stun belt or physical restraints without a finding of manifest need. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1216, 1220; *People v. Duran* (1976) 16 Cal.3d 282.) This is because the unnecessary imposition of restraints on a criminal defendant "'inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense.'" (*People v. Mar*, 28 Cal.4th at p. 1219, citing *People v. Harrington* (1871) 42 Cal. 165, 168.) Even though the jury does not know the defendant is wearing a stun belt, the device may have a debilitating effect on the defendant's ability to participate in his defense:

> The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.

(*Id.* at p. 1226.)

Manifest need exists if there is a serious security threat at trial. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1220; *People v. Duran, supra*, 16 Cal.3d 282, 291.) Neither charged emotion nor undercurrents of tension are in themselves sufficient to support a finding of manifest need. (*People v. Mar*, 28 Cal.4th at p. 1221.) Likewise, a trial court's belief that electronic

restraint is in the defendant's best interest does not demonstrate manifest need, even when the trial court's belief is objectively true. (*Id.* at p. 1223.)

The trial court must make its own due process determination on the record and may not delegate this duty to law enforcement, the prosecutor, or security personnel. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218; *People v. Hill*, *supra*, 17 Cal.4th 800, 841-842.) Similarly, a trial court may not adopt a policy of forcing all inmates accused of crimes to wear a stun belt, but must make case by case determinations. (*Mar*, 28 Cal.4th at p. 1218.) This prohibition also applies to defendants at capital penalty phases. (*Deck v. Missouri*, *supra*, 544 U.S. 622, 624.) If a trial court determines that extra security measures are warranted, it must use the least restrictive alternative. (*Mar*, 28 Cal.4th at p. 1206.) Thus, it must consider in each case whether use of the stun belt is warranted. (*Ibid.*) The trial court must also require adequate assurance that the defendant has no medical condition that would make the stun belt unduly dangerous. (*Id.* at pp. 1205-1206.)

Where a trial court makes no record of the facts underlying its decision, it abuses its discretion unless the defendant has engaged in threatening or violent conduct in the jury's presence. (*Mar*, *supra*, 28 Cal.4th at p. 1217.) A reviewing court may not assume based on its own culling of the record that the trial court made the required determination of manifest need. (*Id.* at pp. 1220-1221.) Thus, this Court may not simply infer from the proceedings below that the trial court made the required determination of manifest need in the absence of any on the record determination.

The trial court in McClain's case abused its discretion in every way contemplated by *Mar*. First, the trial court made no findings on the record about why the stun belts were necessary. (45 RT 4798-4800.) In fact, in its

last on-record comments before requiring McClain to wear a stun belt, the trial court commended McClain for his courtroom conduct and told him to "hang in there." (45 RT 4793.)

Second, the trial court delegated decisions about the need for additional security to security personnel rather than making its own determination, an abdication of duty that this Court expressly prohibited in *Mar* and *Duran*.

Third, just as it made no record of its reason for demanding extra courtroom security, the trial court never considered on the record whether the stun belt was the least restrictive alternative for achieving any security need it perceived.

Fourth, the only clues to the trial court's motives for imposing the stun belt on McClain at the penalty retrial was its displeasure with Newborn's obscene insults and its subsequent declaration of control over its courtroom. (60 RT 5769, 5770, 5778.) While the trial court's reaction was understandable from a human perspective, it did not support a finding of manifest need for the restraints.

Fifth, there is no indication that the trial court sought or received assurance that McClain had no medical condition that rendered use of the stun belt unduly dangerous. (*Mar*, *supra*, 28 Cal.4th at p. 1205.)

Sixth, a testifying deputy indicated a policy of using the stun belt on all defendants convicted of murder, even though this Court clearly requires that courts make defendant by defendant determinations of manifest need for restraints. (*Mar*, *supra*, 28 Cal.4th at p. 1218; 73 RT 7332.)

Seventh, the trial court expressed the view that its decision to require stun belts was for the benefit of the defendants. (73 RT 7314.) McClain disputes the trial court's contention. But, more importantly, this Court

makes clear that it is irrelevant whether the stun belt would have helped McClain to control his emotions and behave in a more appealing manner. The trial court was not entitled to order McClain to wear the stun belt over his objection and without a finding of manifest need. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1223.)

For all these reasons, the trial court clearly abused its discretion. It is also instructive to look more closely at the facts of *Mar*. Mar was charged with interfering with a peace officer in his duties and of resisting a peace officer resulting in serious bodily injury to the officer. (*Mar*, *supra*, 28 Cal.4th at p. 1213.) The Court of Appeal, based on its own review of the record, found that defendant was on trial for assaulting a guard, had a previous escape conviction, had a previous assault on a peace officer conviction, and had recently threatened two corrections officers and his own attorney. (*Id.* at p. 1220.) For these reasons, the Court of Appeal found that the trial court had sufficient evidence to compel Mar to wear a stun belt. Reversing that decision, this Court found that the trial court had erred for three important reasons. First, the security officials who put the stun belt on Mar made no record of circumstances to support their decision. (*Ibid.*) Second, the trial court did not require security personnel to make such a showing. (*Ibid.*) Third, and most importantly, the trial court made no record of any determination that Mar posed a serious security threat that created a manifest need for the use of restraints. (*Ibid.*)

Notably, the prosecutor in McClain's case conceded that McClain had never attacked or threatened to attack law enforcement. (60 RT 5801.) Indeed, there was never during his trial an allegation that McClain harmed law enforcement. The only allegation that McClain threatened a bailiff came after the close of evidence at a capital penalty retrial at which the trial

court required him to endure the fear of receiving a 50,000 volt shock while he was representing himself. This Court noted that the evidence of Mar's threatening conduct to law enforcement was not totally one-sided. (*Mar*, *supra*, 28 Cal.4th at p. 1224.) Similarly, the evidence that McClain threatened the bailiff was not clear cut. (Claim XV is incorporated herein.) If on the record in *Mar*, the court of appeal erred in assuming manifest need, then this Court cannot, consistent with its precedent, assume manifest need in McClain's case.

Finally, nothing in the record at the time of the trial court's decision to force McClain to wear a stun belt would have supported a finding of manifest need. Even if McClain's speech was inappropriate for the courtroom, "a stun belt may not properly be used, over a defendant's objection, to deter a defendant from making verbal outbursts that may be detrimental to the defendant's own case." (*Mar*, *supra*, 28 Cal.4th at p. 1223, fn. 6.) Thus, while the trial court was entitled to complain about defendants' profanity, such language in no way threatened courtroom security and could not support a finding of manifest need for restraints.

Requiring McClain to wear a stun belt also violated federal law. "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken into account the circumstances of the particular case." (*Deck v. Missouri*, *supra*, 544 U.S. at p. 632.) Federal courts have also held that the chilling effect of a stun belt prejudices a defendant's Sixth Amendment right to a fair trial. (*Hawkins v. Comparet-Cassani, supra*, 251 F.3d at 1239-1240.) In a sentencing proceeding, a defendant's Eighth Amendment rights may also be implicated. (*Id.* at p. 1239; *Deck v. Missouri*, *supra*, 544 U.S. at p. 633.) The United States Supreme Court has also found that the use of restraints

on a defendant is an affront to the dignity of the process. (*Deck*, 544 U.S. at p. 631.) To justify the abridgement of these rights, a trial court must balance it against the need for courtroom security. (*Hawkins v. Comparet-Cassani, supra*, 251 F.3d at p. 1240.) This balancing must include consideration of whether less prejudicial alternatives are available. (*Ibid.*)

There is a fine line between aggressive advocacy and a breach of order. (*Hawkins v. Comparet-Cassani, supra*, 251 F.3d at p. 1239.) When the consequence of crossing that line is a 50,000 volt shock, defendants "may be deterred from engaging in forceful, but permissible advocacy for fear of being stunned if they cross the line." (*Id.* at p. 1240.) A court can protect a defendant's right to zealous advocacy by requiring stun belts when there are identifiable threats of violence or escape. (*Ibid.*) Thus, in determining whether to impose a stun belt on a defendant, a trial court must distinguish between verbal disruption and threats to courtroom security. (*Ibid.*)

The trial court violated McClain's Sixth, Eighth, and Fourteenth Amendment rights because it failed to: (1) balance his constitutional protections against the need for courtroom security; (2) make any record that McClain, posed a risk of escape or violence in the courtroom; or (3) determine the availability of less prejudicial alternatives. McClain's verbal disruptions, obnoxious as they may have been, were insufficient justification for abridgement of his constitutional rights.

Moreover, the application of the stun belts appears to have been motivated, at least in part, for the improper purposes of punishing McClain's prior speech and chilling his future speech. During McClain's closing argument, before the jury, the court asserted that the belt had been imposed because McClain had "acted up" in court. (74 RT 7420; see also

45 RT 4793 [court refers to defendants' failure to "keep quiet]; 73 RT 7316 [court remark's that it is concerned with McClain's "attitude"]; 73 RT 7325 [court's directive that McClain refrain from "comment"].) As the court could only have been referring to McClain's prior speech, it is clear that, even though that had never been asserted as a justification for the restraints, in the court's mind, a restriction on McClain's speech was the hoped for effect. That restriction violated McClain's First Amendment right to speech and well as his rights under the Sixth, Eighth and Fourteenth Amendments. Additionally, the use of stun belts under the circumstances in this case violated international law. (Torture Convention, art. 2, 10, 11, 16 & 15.)

The trial court thus abused its discretion and violated McClain's constitutional rights by failing to make on the record an independent finding of manifest need. To the extent that the trial court made any record at all, it was of his displeasure with defendants' language. The death judgments must be reversed.

D. The Trial Court Violated McClain's State Law Rights and His Federal Constitutional Rights to Due Process, a Fair Trial, and a Reliable Penalty Determination by Erroneously Permitting the Jury to Be Tainted with the Disclosure That He Was Wearing a Stun Belt

The federal Constitution prohibits visibly shackling or restraining an offender at a capital penalty phase absent a finding that an essential state use justifies shackling of the particular defendant. (*Deck v. Missouri, supra*, 544 U.S. 622, 624.) This is because, whether a defendant will live or die is at least as important as whether he is guilty or innocent. (*Id.* at p. 632.) Additionally, the severity and finality of a death sentence create a critical need for a reliable penalty determination. (*Ibid.*)

When a defendant appears before it in shackles, jurors will infer "as a matter of common sense" that the trial court believes he is a danger to the community. (*Deck v. Missouri, supra*, 544 U.S. at p. 633.) Even where the prosecutor does not specifically argue it, future dangerousness is "nearly always a relevant factor in jury decisionmaking." (*Ibid.*) This is particularly true in California where a prosecutor may argue future dangerousness to the jury. (*People v. Harris, supra*, 37 Cal.4th 310, 358.)

By adversely affecting the jurors' perceptions about a defendant's character, shackling

> undermines the jury's ability to weigh accurately all relevant considerations -- considerations that are often unquantifiable and elusive -- when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale."

(*Deck, supra*, 544 U.S. at p. 633, citations omitted.)

Thus, a trial court may not routinely force a defendant to wear visible shackles. (*Ibid.*) As a prerequisite, a trial court must exercise its discretion to make a case specific finding of circumstances such as special security needs or escape risk related to the defendant on trial. (*Ibid.*)

Once the jury became aware that McClain was wearing a stun belt, the stun belt became the constitutional equivalent of visible shackles. Thus, the trial court had a duty to conceal the stun belt from the jury lest it create avoidable prejudice. (*Mar, supra*, 28 Cal.4th at p. 1217.)

Just as it exercised no discretion in forcing McClain to wear a stun belt at his capital penalty retrial (see § C, *ante*), the trial court made no record of the basis of its decision to disclose to the jury that McClain was wearing a stun belt. The trial court only expressed on the record its anger over McClain's alleged threat against the bailiff. After the close of all the

evidence at the penalty retrial, the trial court introduced sua sponte an allegation that McClain had threatened a deputy after the deputy fitted him with a stun belt. (73 RT 7296.) Despite an objection from defendant Holmes about the prejudice this testimony would cause, the trial court never considered on the record how it would prejudice McClain. As shown elsewhere, the trial court should never have introduced evidence of the alleged threat. (See Claim XV, *post.*) However, having done so, the trial court was required to exclude from the testimony any mention that McClain was wearing a stun belt. (See Pen. Code § 1044; *People v. Sturm*, *supra*, 37 Cal.4th 1218, 1241 [reversing death penalty because of judicial misconduct; confirming that section 1044 "outlines the duty of the judge to control trial proceedings and limit the introduction of evidence 'to relevant and material matters'"].)

Not only did the trial court include this evidence, but it told the jurors during McClain's closing argument that he was wearing the stun belt because he had acted up in court. (74 RT 7420.) In other words, the trial court not only failed to avert disclosure of the stun belts to the jury, it actively ensured that the jury would know of the belt and its clear implication that the defendants were deemed so terribly dangerous as to require "unique force" to control the defendants. (*United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1305.) In doing so, the trial court violated McClain's rights to due process, a fair penalty retrial, and a reliable penalty determination. The death verdicts must be reversed.

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E. The Trial Court Violated McClain's State Law and Federal Constitutional Rights by Giving the Jury an Erroneous Instruction on the Use of Restraints

When a defendant is visibly restrained, a trial court must give sua sponte and instruction that the restraints should play no role in the jury's determination. (*People v. Duran, supra*, 16 Cal.3d at pp. 291-292; see *People v. Slaughter* (2002) 27 Cal.4th 1187, 1213-1214 [shackling at penalty retrial harmless in absence of admonition where it was not noticeable to the jury].) The standard instruction is CALJIC 1.04:

> The fact that physical restraints have been placed on defendant [] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely.

Rather than modify CALJIC 1.04 to reflect that this was a penalty rather than a guilt proceeding, the trial court gave the jury the following admonition:

> The court makes a decision, based on things the court knows, whether or not to wear this device. It is a security device to assure tranquility in the court, security for everyone. It does not mean that they are guilt or not guilty.

(73 RT 7332.)

The trial court's ad hoc instruction deprived McClain of the right to present mitigation, confront the evidence against him, and a reliable penalty determination.

The substitute instruction was erroneous for at least two reasons. First, the instruction invited the jury to speculate that the trial court knew, but did not reveal to the jury, that McClain was a threat to everyone in the

courtroom, including the jurors. McClain had no opportunity to defend himself against or rebut the trial court's undisclosed reasons for imposing the stun belt. (U.S. Const., 6th, 8th & 14th Amends.) The benefit of CALJIC 1.04 is that it lets the jurors know they must not speculate as to why restraints were imposed; indeed they must disregard the restraints entirely. In contrast, the trial court's admonition told the jury it had imposed the restraints for security purposes and made sure the jury believed that he had information in support of this determination. In other words, the admonition practically ensured that the jury would use the restraints as evidence of McClain's dangerousness, both present and future. Moreover, the trial court's comment in the jury's presence during McClain's closing argument that McClain was wearing the belt because he had "acted up in court," virtually assured that the jury would consider the restraints for that improper purpose.

Second, McClain's guilt was not at issue in his capital penalty proceeding. Indeed, the trial court instructed the jury that it must accept that McClain had been found guilty of capital murder beyond a reasonable doubt. (75 RT 7503-7504.) The trial court's admonition was thus confusing, irrelevant, and constitutionally deficient.

F. The Errors in Forcing McClain to Wear a Stun Belt and Disclosing this Fact to the Jury, Taken Independently and Together, Require Reversal of His Death Sentences

While this Court did not determine with finality which harmless error standard applies to the stun belt violation, it must apply *Chapman* to any error which abridges a defendant's federal constitutional rights. (*Chapman v. California*, *supra*, 386 U.S. 18; see *People v. Harrington*, *supra*, 42 Cal. 165, 168.) Here, the potential impact of both McClain's

demeanor and the visible restraints on the jury's assessment of his character implicates his Sixth, Eighth, and Fourteenth Amendment rights. (See *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604.)

1. Wearing the stun belt prejudiced McClain

In *Mar*, this Court considered several factors in determining that defendant was prejudiced even under the *Watson* standard. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225.) Each of these indicia of prejudice are present in McClain's case. (*Id.* at pp. 1223-1224.)

As in *Mar* whether the jury believed the prosecutor's version of the threat against the bailiff "turned completely on the jury's evaluation of the credibility of witnesses." (*Mar*, *supra*, 28 Cal.4th at p. 1224.) In *Mar*, the defendant himself testified. (*Ibid.*) Here, McClain bore the burden of representing himself. (Claim XIII is incorporated by reference herein.) Like the right to testify, the right to represent oneself is fundamental. (*Faretta v. California*, *supra*, 422 U.S. 806.) Here, McClain's ability to represent himself was directly related to the reliability of the jury's decision about whether he would live or die.

In evaluating the prejudice of the stun belt to Mar's right to testify, this Court acknowledged that it could not tell from the record what impact the stun belt had on either his testimony or his demeanor. (*Mar*, *supra*, 28 Cal.4th at p. 1224.) However, when Mar objected, he asked to be relieved of the stun belt during his testimony, describing the anxiety it made him feel. (*Ibid.*) Noting that many people are nervous when testifying, this Court recognized that

> in view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict, it is reasonable to believe that many if not most persons would

> experience an increase in anxiety if compelled to wear such a belt at trial.

(*Ibid.*)

When McClain objected, he noted that the stun belt was a slap in the face. (46 RT 4800.) During closing, McClain argued that without the belt, he would have been a lot more "boisterous," than he actually was. (*Ibid.*) When the trial court told McClain he was wearing the belt because he had acted up in court and ordered him not to tell the jury what he would do in its absence, McClain protested accurately that he had never once been violent in the courtroom. (*Ibid.*) "Boisterous" commonly means loud or vociferous. (See Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/boisterous.) Clearly, when McClain used the word boisterous, he meant that he would have advocated for himself more aggressively in the absence of restraints. (See *Hawkins v. Comparet-Cassani, supra*, 251 F.3d at p. 1240.)

As when a defendant testifies, when a defendant represents himself his demeanor before the jury is crucial. And, while testimony is merely a portion of the trial, a defendant who acts as his own lawyer must give an opening statement, examine witnesses, and provide closing argument to the jury. As the Ninth Circuit observed, the greater a defendant's participation in his defense, the greater the potential chilling effect of the stun belt. (*Hawkins v. Comparet-Cassani, supra*, 251 F.3d at p. 1239.) Thus, a self-representing defendant has an equal if not greater interest in freedom from fear of electrocution than the defendant who testifies.

In *Mar*, this Court's prejudice analysis boiled down to three circumstances: the closeness of the case, the crucial nature of Mar's testimony, and the likelihood that the stun belt had "at least some effect on

defendant's demeanor while testifying." (*Mar, supra*, 28 Cal.4th at p. 1225.)

Analogous circumstances exist here. McClain's was a close case. (See Claims III, XVII & XXV.) The first penalty jury could not reach a verdict. Courts have repeatedly recognized a prior hung jury as evidence that a subsequent error resulting in an adverse determination to the defendant was prejudicial. (*United States v. Paguio* (9th Cir. 1997) 114 F.3d 928, 935; *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978; *Province v. Ctr. for Women's Health and Family Birth* (1993) 20 Cal.App.4th 1673, 1680.) The second penalty jury deliberated for nine days during which it asked several questions, including some which bore on McClain's guilt.

Although McClain did not testify at his penalty retrial, he did represent himself, a task which required equal if not greater and more extended composure before the jury.

Finally, given the circumstances of his case it is reasonable to assume that the stun belt impaired McClain's ability to think clearly and maintain a positive demeanor before the jury. (*Mar, supra*, 28 Cal.4th at p. 1226.)

Under either *Watson* or *Chapman*, the death verdicts must be reversed.

2. The trial court and the prosecutor both exacerbated the prejudice by emphasizing McClain's potential for future dangerousness

The trial court's disclosure to the jury of the stun belt without justification was inherently prejudicial. (*Deck v. Missouri, supra*, 544 U.S.

at p. 635.) This is in part because it is impossible to discern from the trial record how the jury utilized this information. (*Ibid.*)

As the high court makes clear, the greatest threat posed by visible restraint is that the jury will consider the restraints themselves as evidence that the defendant is a present and future danger. (*Deck v. Missouri, supra*, 544 U.S. at p. 633.) In McClain's case, both the trial court and the prosecutor ensured that McClain would suffer this type of prejudice.

Perhaps the most fatal prejudice occurred during McClain's closing argument. McClain attempted to explain to the jury the psychological impact of the stun belt on his ability to advocate for himself, when he said that he would be more "boisterous" without the stun belt. (See *People v. Mar, supra*, 28 Cal.4th at p. 1205; 74 RT 7420.) The trial court responded: "You are wearing a belt because you have acted up in this courtroom. So don't tell this jury without that belt what you might do." (74 RT 7420.) This shocking statement invited the jury to use in its capital penalty determination the stun belt as evidence of McClain's violent propensities and falsely suggested that McClain had done things in the courtroom that posed a risk to everyone present, including the jurors. Since the trial court did not specify the acts to which he referred, McClain had no way to defend himself against its charges.

Furthermore, while McClain truthfully protested that he had never done anything violent in the courtroom, the jury was left to decide whether to believe the trial court or McClain – a contest which McClain had no chance of winning.

In addition, as anticipated by the Supreme Court's discussion in *Deck*, the prosecutor argued that McClain was a future danger:

> McClain is a really dangerous man. He is a danger in here; he is a danger in the street, and he will be a danger in state prison. And that is why life without parole is not fair. That is not the only reason it is not fair. ¶
>
> I will challenge anybody who speaks in this courtroom to guarantee that Newborn or McClain, based upon their past conduct, based upon the evidence that you've heard, guarantee that they won't harm again. I wonder if anybody would bet their life on that.

(74 RT 7397.)

It is common sense to assume that the jury's knowledge of the restraints increased the weight of the prosecutor's future dangerous arguments. (*Deck v. Missouri, supra*, 544 U.S. at p. 633.) Notably, in his future dangerousness argument, the prosecutor listed past conduct and evidence as two separate items for the jury's consideration. This invited the jury to view the stun belt as "past conduct" even if it was not admissible as evidence. When the trial court invited the jury to speculate about the acts precipitating its imposition of the stun belt, it lit a fire under the prosecutor's dangerousness argument.

While in most cases the prejudice from visible restraints flows from the implication that the defendant is dangerous, here the trial court expressly told the jury that there was a nexus between the stun belt and McClain's dangerous character.

The courts have recognized that where a trial court "took efforts to obscure the jury's view of the restraints," the prejudice may be lessened. (See, e.g., *United States v. Mahasin* (8th Cir. 2006) 442 F.3d 687, 691.) However, the trial court took no action whatsoever to avert the disclosure to the jury of the stun belts. On the contrary, it instigated the disclosure.

Under these circumstances, the State cannot prove beyond a reasonable doubt that the error was harmless. The death verdicts must be reversed.

3. The trial court also exacerbated the prejudice by permitting the sheriff's department to force McClain witness Clarence Jones to appear before the jury in shackles, permitting the prosecutor to cross-examine him about his shackling at a previous trial, and delaying its instruction to the jury that the restraints should not reflect on McClain

Appellant Newborn accuses McClain of exacerbating the prejudice that flowed from the jury's knowledge that defendants wore stun belts during their penalty retrial when he cross-examined Jones about his own restraints. (Newborn's Opening Brief at pp. 235-237.) McClain agrees that the portion of Jones's testimony dealing with shackling and electronic restraints exacerbated the prejudice, but believes the responsibility for the prejudice lies squarely with the trial court and the prosecutor. (Claim XVI, *post*, is incorporated by reference herein.)

McClain called Jones to rebut the prosecution evidence about a shank incident in the county jail. (73 RT 7272.) The trial court informed McClain generally that there is a special procedure for bringing jail inmates to testify in court, but did not mention that the witness would be brought before the jury in visible restraints. (72 RT 7256.)

After the prosecutor cross-examined Jones and McClain said he had no further questions, the trial court asked Jones whether there was anything else he wanted to say. (73 RT 7279.) Jones responded that McClain was a good guy who was innocent of the charged crimes and also discussed race in the criminal justice system. (73 RT 7279-7280.) The prosecutor, on re-cross, asked Jones about the circumstances of a prior conviction. (73 RT 7280.) McClain objected that this was outside the scope of direct

examination. (*Ibid.*) The trial court overruled the objection on grounds that McClain had brought the witness in as a character witness. (*Ibid.*)

The prosecutor's re-cross of Jones continued:

Q. And while you were waiting for trial in the case on which you were convicted, didn't you have outbursts towards the court, the deputies and you had to be shackled?

A. No.

Q. Did you have to be shackled?

A. What happened was –

Q. Were you shackled?

A. You want to know why?

Q. You can tell me about that later. A simple question: were you shackled?

A. For no reason, yes.

Q. You are not a dangerous man, are you?

A. No.

(73 RT 7283.)

McClain attempted to address the prosecutor's questioning on further re-direct examination of Mr. Jones:

Q. I mean it's obvious the way they bring you in here with all those chains, they are trying to paint a picture you are some dangerous dude?

A. Exactly. That is what I said downstairs when I come through here. From my understanding, as far as this black thing around here, this is a zapper, and this is not supposed to be exposed to the jury. How they got me, they are trying to -- I told the sheriff downstairs that the picture that they are painting, you know, for the jury on me, you know –

Q. Would inadvertently reflect on me?

A. Yes, exactly.

Mr. Myers: I would ask the court to admonish the jury that nothing concerning this shackling should reflect upon Mr. McClain.

(73 RT 7284.)

No admonition followed. However, after Jones left the courtroom and another witness was on the stand it issued this belated admonition:

> The jury is admonished the fact he is shackled and brought here with deputies has no reflection on Mr. McClain. You called him as your witness. You take your witnesses as they are, not what they are, not how they are dressed.

(73 RT 7285.)

Courts agree that the shackling of defense witnesses prejudices a defendant. The right to appear before a jury free of visible restraint applies to defense witnesses as well as defendants and the same analysis governs in each case. (*Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1484; *People v. Duran, supra*, 16 Cal.3d at p. 288, fn. 4; the law and argument from § E of this claim is incorporated by reference herein.) A trial court may not shackle a witness solely because he is a maximum security prisoner. (*Harrell v. Israel* (7th Cir. 1982) 672 F. 2d 632, 636.)

The trouble here began when Jones was brought in to testify wearing a stun belt and handcuffs with no notice to McClain. To object, McClain would have had to highlight Jones's restraints for the jury. Moreover, the trial court had made clear that it was leaving all security decisions to the bailiffs. (46 RT 4798.) It would thus have been futile for McClain to object to Jones's shackling. (See *People v. Chatman* (2006) 38 Cal.4th 344, 380.) The trial court made at least three errors: it (1) held no hearing and

made no on record finding of manifest need;[121] (2) made no attempt to conceal Jones's restraints; and (3) failed to immediately instruct the jury not to consider Jones's shackling in considering McClain's penalty in response to the prosecutor's request and then gave the jury a belated instruction that implied a relationship between McClain and the shackled witness.[122] (See *People v. Duran, supra*, 16 Cal.3d at pp. 291-292.)

Although McClain limited his direct examination of Jones to a shank incident in the county jail, the trial court asked Jones an open-ended question which resulted in testimony about McClain's character. (73 RT 7272-7280.) The trial court then allowed the prosecutor over McClain's objection to ask Jones about the gory circumstances of his prior misconduct and proceedings, including the highly prejudicial information that Jones was shackled at his own trial. (73 RT 7283.) The prosecutor's final question to Jones, i.e., whether Jones was a dangerous man, was the nail in the coffin. The jury could have only concluded that McClain was himself a dangerous man who had dangerous, threatening friends. (Claims VI and XVI are incorporated by reference herein.) When later in the proceedings

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[121] Clearly, if it had made the requisite finding of manifest need, the trial court could have ordered the bailiffs to bring Jones into court wearing the kind of concealed stun belt it forced McClain to wear.

[122] The appropriate instruction is CALJIC 2.29:

> The mere fact that a witness [is in custody] [or] [is in physical restraint] must not prejudice you for or against any party. [Do not speculate as to why a witness [is in custody] [or] [is in physical restraint].]
>
> That a witness is [in custody] [or] [subject to physical restraint] is not by itself evidence that a witness is or is not believable.

the jury became aware that McClain was wearing a stun belt, it could only conclude that he was as dangerous as Jones.

In this no win situation, McClain had no choice but to ask Jones about the elephant in the room – i.e., the visible stun belt and shackles. McClain had to elicit from Jones the prosecutor's real and wholly improper motive for questioning Jones about being shackled at his own trial and forced to testify in shackles at McClain's penalty retrial. Had McClain not cross-examined Jones in this manner, the jury would have been left with only one reasonable interpretation for the shackling, i.e., that McClain was as dangerous as Jones. At least after McClain's cross-examination, the jury could consider that the prosecutor had a motive for wanting Jones to appear very dangerous.

The trial court fueled the jurors' perceptions that shackling of Jones was evidence of McClain's dangerousness – a risk that even the prosecutor recognized. The prosecutor specifically asked the trial court to admonish the jury that nothing about "this" shackling should reflect upon McClain.[123] (73 RT 7284.) But the trial court sat silent. Its message was clear: the jury was free to impute to McClain any dangers it associated with the shackling of Jones. Once another witness was on the stand, the trial court did give an admonition about the shackling. But this admonition which highlighted the fact that McClain "called him as your witness. You take your witnesses as they are," only served to highlight McClain's relationship to the shackled witness.

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[123] Presumably the prosecutor meant the shackling of Jones in the courtroom. It is unclear whether he also referred to the shackling of Jones at his own trial.

Finally, in its closing argument, the prosecutor demonstrated that McClain's and Jones's assessment of the motives for shackling Jones was right on the money:

> You saw Mr. McClain's witness, Mr. Jones. These are the types of people with whom Mr. McClain chooses to associate himself while in custody, killers, robbers. ¶
>
> It is not punishment near enough for the monstrous acts and lives led by these defendants. It's not fair to let them hang out with their buddies and make new friends and new associates and put at risk new lives. It's just not fair; it's not right.
>
> Every day you read about a new lawsuit by some prisoner asking for better toothpaste, better food, different shampoo. These guys adapt and adjust and persevere in prison. It is not the same as if you all would be doing the time. It's just another neighborhood to people like Newborn and McClain and Holmes. And it's just not fair that they can spend the rest of their lives reading and watching TV and working out and having all the freedom that is provided to them in prison where they cannot be watched 24 hours a day, seven days a week.

(74 RT 7402.)

Thus, with the trial court's blessing, the prosecutor imputed Jones's dangerous character to McClain. One cannot say that the shackling of Jones was not in the jury's mind during this highly charged argument.

The error was prejudicial under any standard. The death verdicts must be reversed.

4. The trial court further exacerbated the prejudice by giving an instruction that invited the jury to consider the restraints as evidence of McClain's dangerousness

Although no instruction could have ameliorated the prejudice created when the trial court disclosed the stun belt to the jury, the trial court

expanded the prejudice geometrically by giving an instruction that drew attention to the restraints and asserted a need for them, thus underscoring McClain's dangerousness. This is especially problematic because the prosecutor argued, over defense objection, McClain's present and future dangerousness in closing argument. (74 RT 7397, 7400-7403.)

This Court must assume that the jurors followed the trial court's admonition. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.) In doing so, the jury could only have concluded that it could use the stun belts and the related courtroom security issues as evidence that McClain was a present and future danger. For these reasons, the penalty determination in this case was unreliable and cannot stand. (U.S. Const., 8th & 14th Amends.; *Deck v. Missouri, supra*, 544 U.S. at pp. 632-633; *Lockett v. Ohio, supra*, 438 U.S. 586, 604.)

5. The errors taken together require reversal

Each error described above is grounds for reversal. However, to fully appreciate the prejudice McClain suffered, it is useful to look at their compound effect. Without any finding of manifest need, the trial court forced McClain to represent himself in the fight for his life under the constant threat of electric shock. McClain was responsible for planning his penalty defense, making timely and appropriate objections, examining witnesses, identifying appropriate motions, and arguing before the jury. These tasks are onerous for anyone, let alone a defendant who knows he might be jolted with 50,000 volts of electricity at any moment.

This Court may never know the extent to which the stun belt hindered McClain. What it can know, is that the trial court then forced McClain to deal not just with the psychological effects of the belt, but the specter of dangerousness raised when the trial court introduced evidence

after the close of penalty evidence and on its own motion that McClain was wearing a stun belt.

Were this not enough, the trial court had McClain's witness Clarence Jones testify with visible restraints and allowed the prosecutor to elicit from him information linking restraints to dangerousness. Jones's dangerousness was clearly imputed to McClain when the trial court, despite the prosecutor's request, failed to immediately instruct the jury that the shackling of Jones should not prejudice McClain or play a part in his penalty determination. Moreover, the trial court's belated admonition only highlighted the relationship between McClain and Jones.

The trial court then added two poisonous ingredients to this prejudice stew. It informed the jury that McClain wore a stun belt and admonished the jury that McClain wore the stun belt for security reasons. While the trial court told the jury not to consider the stun belt as evidence of guilt, its instructions practically begged the jury to consider the stun belt in its penalty determination.

Faced with this pervasive and inherent prejudice, the State cannot prove beyond a reasonable doubt that the stun belt did not contribute to the death judgments. McClain's death sentences cannot stand.

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XV.
THE TRIAL COURT PREJUDICIALLY ASSUMED THE ROLE OF PROSECUTOR WHEN IT INTRODUCED SUA SPONTE AFTER THE CLOSE OF PENALTY PRESENTATIONS AGGRAVATING EVIDENCE FOR WHICH THERE WAS AN INSUFFICIENT FACTUAL BASIS AND WHICH VIOLATED McCLAIN'S RIGHT TO CONFRONT WITNESSES

A. Introduction

The trial court, acting as prosecutor, introduced after the close of penalty evidence aggravating and inflammatory evidence that McClain allegedly threatened a deputy. It instructed the jury to determine whether the incident was a terrorist threat (Penal Code section 422) after it indicated that an essential element of the crime was absent.[124] The error, which resulted in the disclosure to the jury that McClain was wearing a stun belt, violated McClain's rights to due process, a reliable penalty determination, confrontation, and a fair and impartial tribunal, requires reversal.

B. Proceedings Below

After the conclusion of penalty phase evidence, the trial court announced that it was going to conduct a 402 hearing based on "what some of the defendants said to the deputies" to determine whether the allegation was admissible under 190.2 or 190.3. (73 RT 7296.)

At a hearing the same day, Deputy Browning testified that after Deputies Tranberg and Admire put the stun belt on him, McClain asked why the belt was so warm. (73 RT 7303.) Browning responded to McClain that they had tested the belt. (*Ibid.*) McClain put his shirt on and walked back to his cell to retrieve an outer shirt. (*Ibid.*) The deputies then placed a

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[124] At the time of trial, Penal Code section 422 was entitled "terrorist threats." In 2000, the statute was renamed "criminal threats." (See *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1.)

belt on Newborn who asked why they tested the belts. (73 RT 7304.) Browning explained to Newborn that it was department policy to test the belts every morning to be sure they were in working order. (*Ibid.*)

Browning then heard McClain yell from his cell, "if you do one of us, you'll have to do us all." (73 RT 7304.) Newborn repeated the statement at Browning's request. (73 RT 7304-7305.) Browning then heard McClain say, "Don't get within two feet of me or I'll kill you. We'll all have weapons this time." (73 RT 7305.) McClain then finished putting on his shirt and walked to his seat in the courtroom. (*Ibid.*)

On cross-examination, McClain asked Browning whether he recalled saying he could not wait to get his turn to shock him. (73 RT 7306.) Browning claimed that was a lie. (*Ibid.*) Browning believed McClain was upset because he called out his name in a militaristic way. (*Ibid.*) Browning denied that he was testifying because he wanted to be part of the process against McClain. (*Ibid.*)

After Browning testified, the trial court offered this explanation of its decision to introduce the evidence:

> For God's sake, Mr. McClain, it is their job; they are paid sworn peace officers. They just work here. They try and make everything comfortable for you and your lawyer. And they have been doing very well under the circumstances. I told you many times in trial I appreciate you not disrespecting them. Do you understand? And I do. I mean that. But if you made that statement, it is a matter of credibility for this court, me, to make that decision. The man is under oath. He is a deputy assigned here to take care of you. He came to me. He was gravely concerned, *but not about safety*. They get threatened by people every day. Every day they get threatened. That's not the concern. *The concern is an attitude*, what you are doing, what you said, how it affects this trial. And I have repeatedly put you on notice you cannot do that.

(73 RT 7316, emphasis added.)

McClain then called Deputy Admire who testified that he had not heard any threat. (*Ibid.*) On cross-examination, Admire testified that he could not hear McClain because of his position. (73 RT 7320.) When the trial court asked whether Admire heard anyone repeat what McClain said, he responded that he heard some of the other comments. (73 RT 7320.)

Deputy Tranberg then testified that he did not hear McClain say "I'm going to kill you." (73 RT 7322.) On cross-examination, Tranberg testified that although he was only four feet away from McClain, it was difficult to hear him because of his position. (73 RT 7323.) Nevertheless, he did hear McClain say something about having weapons. (73 RT 7323-7324.) McClain elicited from Tranberg that he often gives orders and hears comments from prisoners from the exact position he was in relative to McClain when the alleged threats took place. (73 RT 7323.)

McClain then asked to call Newborn who asserted his Fifth Amendment right not to testify. (73 RT 7324.) McClain noted that without Newborn, he could not present a defense to the charge. (*Ibid.*) McClain again told the trial court that to defend himself against this allegation, he needed to call Newborn. (73 RT 7328.) The trial court denied the motion.[125]

The trial court admitted the evidence noting:

> We have called three deputies. One heard the words that you will kill somebody; one did not hear, one heard part of it. It is

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[125] McClain also asked the trial court to allow him to subpoena deputies Gutierrez and Bailey who would testify that McClain had never given them a problem. (73 RT 7316.) The trial court denied the request noting that the issue was whether McClain made threats, not whether there were general problems with deputies. (73 RT 7319.)

> a question of credibility, whether the jury will believe that person. *You have been constantly warned in this court, almost daily, all of you, to be quiet.*

(73 RT 7325, emphasis added.) It added:

> And this is what the court prefaced when I said these deputies are here to protect you, this court, the personnel, to service you, to make sure you have food, that you are clothed, that you are comfortable. Yesterday when you needed a doctor, we took you to the doctor. They are not your enemies, and *it is repulsive to me* that you or anyone else threaten to kill them or injure them in any way. *I think the jury should hear it.*

(73 RT 7327, emphasis added.)

Browning's testimony before the jury was substantially similar to his testimony at the 402 hearing. (73 RT 7331-7341.) However, Browning added that after Newborn repeated what McClain had said, Newborn also said, "if you push one button, then you better push all three because you know what I'm going to do." (73 RT 7336.) Browning acknowledged that when McClain made his statement, it was loud enough for all three deputies to hear it. (73 RT 7341.)

Admire also largely repeated his 402 testimony. (73 RT 7342-7344.) However, Admire added that he was talking when McClain allegedly said "I'll kill you" to explain why he had not heard the statement. (73 RT 7344.) Admire did not directly answer when McClain asked if he ever altered his behavior because of any perceived threat to his life. (*Ibid.*)

Tranberg's testimony also tracked his testimony at the 402 hearing. (73 RT 7345-7346.) He did not hear the words "I'll kill you," although he was probably about three feet from Browning. (73 RT 7345.)

At the conclusion of Tranberg's testimony, the trial court gave a jury instruction which differed from its later instruction. (73 RT 7347.)

The prosecutor made extensive reference to the incident in closing argument. (74 RT 7378, 7382, 7385-7386, 7400-7401.)

When it finally instructed the jury, the trial court read CALJIC 9.94 which includes the elements of Penal Code section 422 which at the time referred to terrorist threats.[126] (75 RT 7515-7516.)

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[126] The jury was provided a written instruction (8 CT 2184) and was orally instructed on Penal Code section 422 as follows:

> Every person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which threat on its face and under the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, is guilty of a violation of section 422 of the Penal Code, a crime. In order to prove such crime, each of the following elements must be proved:
>
> 1. A person willfully threatened to commit a crime which, if committed, would result in death or great bodily injury to another person.
> 2. The person who made the threat did so with the specific intent that the statement be taken as a threat.
> 3. The threatening statement on its face and under the circumstances in which convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and
> 4. The threatening statement caused the other person reasonably to be in sustained fear for his own safety. It is immaterial whether the person who made the threat actually intended to carry it out.

(74 RT 7515-7516.)

C. The Trial Court Assumed the Role of Prosecutor When it Introduced Legally Insufficient Aggravating Evidence of a Criminal Threat and Admitted Statements of Newborn Who Was Unavailable for Cross-examination

The trial court, incensed by the possibility that McClain had threatened a deputy, committed four errors. First, it acted as McClain's prosecutor when, after the close of penalty evidence it introduced on its own motion evidence that McClain had threatened a deputy. Second, the trial court stated on the record that the deputies were not concerned for their safety, an element of the crime of criminal threats, but nevertheless allowed testimony about the incident. Third, the trial court admitted the evidence in spite of the notice and rebuttal requirements of Penal Code section 190.3. Fourth, the trial court allowed deputies to testify about Newborn's statements during the alleged incident even though McClain could not cross-examine him.

The trial court's first error, which was the foundation for its other errors, was its failure to maintain impartiality. "A fair trial in a fair tribunal is a basic part of due process." (*In re Murchison* (1955) 349 U.S. 133, 136.) An impartial trial court is necessary for a fair trial. (*Weiss v. United States* (1994) 510 U.S. 163, 178.) Thus, when a defendant's behavior so provokes a trial court that it becomes a partisan who issues retaliatory rulings, due process is violated. (*Tumey v. Ohio* (1927) 273 U.S. 510, 532-534; *Taylor v. Hayes* (1974) 418 U.S. 488, 494, 501; *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 465-466.)

Here, the trial court vocally and forcefully explained that it introduced and admitted the aggravating evidence – normally the job of the prosecutor – because it was irate that McClain allegedly threatened its

bailiff. While the trial court's concern for the deputies in its courtroom was laudable, the resulting errors were not.

The trial court's second error was in admitting this incident as evidence of a criminal threat. Penal Code section 190.3(b) permits the jury, when relevant, to take in to account: "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." However, a trial court may not allow the jury to "consider an uncharged crime 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* (1985) 38 Cal.3d 762, 778 [citation omitted]; *Jackson v. Virginia, supra*, 443 U.S. 307, 318-319.) The purpose of a *Phillips* hearing is to "conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity." (*People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25.) An essential element of criminal threats is that the statement causes the person hearing it "reasonably to be in sustained fear for his or her own safety." (Pen. Code § 422.) The trial court made explicit before admitting this evidence that the deputies were not concerned for their safety; rather, they were concerned about McClain's "attitude." (73 RT 7316.) The prosecutor validated the trial court's assessment when it failed to ask a single question about whether the alleged threat caused fear in the deputies. When McClain questioned a deputy whether he felt any fear, the deputy did not acknowledge having felt any fear at all. (73 RT 7344.) Indeed, at the time of the alleged statement, McClain who was in his cell and wearing a stun belt, was unable to carry out a threat. (See *People v. Boyd, supra*, 38 Cal.3d at p. 777 [a defendant who was locked in his room "was not in a position to

carry out the threat"]; *People v. Phillips, supra,* 41 Cal.3d at pp. 73, 76 [defendant's agreement to commit a homicide that he could not have committed improperly admitted under 190.3(b); testimony of single witness about criminal solicitation improperly admitted under 190.3 where statute required either a second witness or other corroborating evidence]; Claim XIV is incorporated by reference herein.)

Furthermore, in its determination to admit this legally insufficient evidence, the trial court failed to consider on the record its relationship to future dangerousness which was the heart of the prosecutor's case in aggravation.

Third, the evidence failed to meet two requirements of Penal Code section 190.3 which provides:

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trial court informed McClain it planned to introduce this evidence after the close of penalty phase evidence and one day before the actual testimony took place. In *People v. Caro* (1988) 46 Cal.3d 1035, 1059, this Court permitted the use of an escape attempt that occurred during the defendant's guilt phase as evidence in aggravation even though the trial was already underway, because the defendant received notice as soon as the prosecutor was aware of the incident and the trial court gave defendant extra time to prepare. McClain's case differs because the incident took place after the penalty phase evidence had closed and the trial court offered

him no extra time or resources to prepare a defense. The trial court even ignored McClain's request to call additional witnesses. (See *People v. Carrera* (1989) 49 Cal.3d 291, 335 [late notice caused no prejudice where defendant was "fully able to meet [the] aggravating evidence"].) Thus, the trial court failed to cure the late notice by giving McClain an opportunity to defend himself against this damning evidence.

Additionally, the allegation was introduced as rebuttal evidence even though it bore no relationship to any evidence introduced by McClain. "[T]he scope of bad character evidence offered in rebuttal must relate directly to the particular character trait concerning which the defendant has presented evidence." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1072.) McClain presented no evidence of his good institutional behavior, thus the alleged threat was inadmissible as rebuttal evidence. (See, e.g., *People v. Burton* (1989) 48 Cal.3d 843, 859-860 [defendant's institutional record inadmissible and irrelevant to statutory aggravation where defendant had not placed it at issue].)

Fourth, the trial court allowed the deputies to testify about two statements they attributed to Newborn whom McClain was never able to cross-examine. The Sixth Amendment bars admission of incriminating statements of a co-defendant in a joint trial. (*Bruton v. United States*, *supra*, 391 U.S. 123, 136-137.) Thus, a non-testifying co-defendant's statements which inculpate the defendant are inadmissible. (*Ibid.*) Deputy Browning's testimony that Newborn repeated McClain's statement, then made an independent statement that inculpated all three defendants thus violated McClain's confrontation clause rights. McClain made clear on the record that cross-examination of Newborn was essential to his defense and the trial court nevertheless admitted the statements.

In this manner, the trial court, angry and determined that the "jury should hear" about the alleged threat, assumed the role of prosecutor and committed errors which resulted in the admission of unreliable aggravating evidence at McClain's capital penalty phase. (See *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604.) In its repulsion at McClain's inability to "be quiet" the trial court also violated his rights to due process, confrontation, and a fair and impartial tribunal.

D. The Trial Court's Assumption of the Role of Prosecutor When it Admitted Evidence of Legally Insufficient Aggravating Evidence Which Led to the Disclosure to the Jury That McClain Was Wearing a Stun Belt Requires Reversal

The trial court's prosecutorial behavior is structural error which requires reversal. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 283 [judicial bias constitutes structural error].) If this Court does not find judicial bias, the State must prove that the Sixth, Eighth, and Fourteenth Amendment violations detailed above were not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 23-24.)

Notably, this was the last evidence the jury heard before retiring to its deliberations. It received special emphasis because the trial court introduced it after the parties had concluded their penalty presentations. This evidence also had a critical impact because it disclosed to the jury that McClain was wearing a stun belt and gave an enormous boost to the prosecutor's closing arguments which focused on present and future dangerousness. McClain has documented the prejudice that flowed from the disclosure to the jury of the stun belts in this very close case during which the jury's questions during deliberations indicated its concerns about

his actual innocence. (Claims XIV and XVI are incorporated by reference herein.)

However, the prosecutor derived arguments from this evidence that went well beyond the dangerousness implied by the stun belts. The threat allegation reared its head repeatedly during the prosecutor's argument:

> We heard of that threat uttered by Mr. McClain against Deputy Browning here in this courtroom, in this very courtroom.

(74 RT 7378.)

> Not only did Mr. McClain demonstrate his propensity for sociopathic behavior and violence in the past, he's done it here in this courtroom, threatening to kill again and again.

(74 RT 7382.)

> The next area is factor (b). Factor (b) is the presence or absence of criminal activity by the defendants, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. What does that mean? Well, those were all the other witnesses that we brought in to talk about the crimes that Mr. McClain and Mr. Newborn have in the past committed.

(74 RT 7385-7386.)

> And then Deputy Browning, who is assigned – was assigned to this courtroom to supply comfort and convenience, to feed and clothe and take care of Mr. McClain, who has to deal with him on a daily basis, so that it makes no sense for Browning to be anything other than -- attempt to be professional and cordial with Mr. McClain, what does that get him? It gets Browning a death threat, too, a threat to kill him if Browning gets within two feet of McClain. And maybe there will be an attempt to deny that, too.

> McClain is a really dangerous man. He is a danger in here; he is a danger in the street, and he will be a danger in state prison. And that is why life without parole is not fair.

(74 RT 7396-7397.)

> Mr. McClain who has a history of robbery, of thievery, of gun toting, of gangsterism, of threatening people who come to court, threatening people who try to take care of him in the lockup, he's not the worst of the worst? I don't know what scale others may use, but on the scales of justice it doesn't get any worse than what you have in front of you.

(74 RT 7400-7401.)

The prosecutor's exploitation of the trial court's errors indicate just how important this evidence was to his case. The prosecutor pounded the theme of McClain's present and future dangerousness and echoed the trial court's own language about McClain's ingratitude to Browning who provided him with faithful daily service.

Moreover, the prosecutor took full advantage of McClain's inability to cross-examine defendant Newborn when it argued that Browning had no motive to be anything but cordial with McClain. (74 RT 7397.) McClain's questioning of Browning at the 402 hearing indicated his desire to in his defense, place the incident in context. However, he could not do so because Newborn was the only witness who could have provided another perspective on the incident. Without "the defendant's version of the facts" as well as the prosecution's to "decide where the truth lies," the jury's determination was arbitrary and unreliable. (*Washington v. Texas* (1967) 388 U.S. 14, 19, 23.)

The death verdicts must be reversed.

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XVI.
THE TRIAL COURT PREJUDICIALLY INTERFERED WITH McCLAIN'S DEFENSE WHEN IT ELICITED CHARACTER EVIDENCE FROM WITNESS CLARENCE JONES AND RULED THAT ITS OWN QUESTIONS OPENED THE DOOR TO INFLAMMATORY AND IMPROPER CROSS-EXAMINATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Proceedings Below

In support of calling witness Clarence Jones at his penalty retrial, McClain offered that Jones would testify to "my demeanor in jail, the type of person I am in jail, like pertaining to the jailhouse sticking and all that, testify what type of person I am since he's known me and all that." (72 RT 7189.)

However, on direct examination, McClain limited his questions to a jailhouse shank incident that the prosecutor introduced in aggravation in addition to Jones's expertise on jailhouse conflicts:

Q. Mr. Jones, I called you today to get a better understanding from your point of view on the tiers. Do you remember when an incident occurred involving a shank or some type of an assault on the tier in 3100?

A. Yes.

Q. At that time did you ever see any weapons in anybody's hand?

A. No.

Q. All right. So if someone else testified to the point that they said -- well, excuse me. Strike that. Would it be uncommon, particularly in a racial incident, for someone else to throw a weapon out on the tier?

Mr. Myers: Objection, calls for speculation, lack of foundation.

Q. By defendant McClain: If you know.

The Court: Are you housed in county jail at this time?

The Witness: Yeah.

The Court: How long have you been there?

The Witness: I've been there about almost a year.

The Court: Have you been there before?

The Witness: Yes.

The Court: And so you've seen incidents like this before?

The Witness: Yes.

The Court: You know what a shank is?

The Witness: Yes.

The Court: You know how they make a shank?

The Witness: Yeah.

The Court: The gentleman is an expert in, I guess, what you are asking.

Q. By Defendant McClain: So would it be unusual, say, for one race person to be involved in an altercation with a person of another race and somebody would take it upon themselves to throw some type of weapon as an aid to that person?

A. (Nods head up and down.)

Defendant McClain: No further questions.

(73 RT 7272-7273.)

The prosecutor then cross-examined Jones about his personal knowledge of the event in which McClain was involved and impeached him with questions about an altercation with sheriffs, and convictions for carjacking and robberies. (73 RT 7276-7277.) The prosecutor also asked Jones how long he had known McClain. (73 RT 7277-7278.) Jones

responded that he and McClain met about 10 years earlier at the California Youth Authority. (73 RT 7278.)

McClain then briefly questioned Jones on redirect examination:

Q. Mr. Jones, I brought you here to give the jury a better -- another point of view of exactly what goes on on the tier, not for you to be put on trial, right?

A. Right.

Q. Just so you don't feel uncomfortable, I just want to pass that to you.

A. Yeah.

Defendant McClain: No further questions.

(73 RT 7279.)

The following exchange then took place:

The Court: Do you want to say anything back?

The Witness: I just want to say, you know, that I've been knowing this guy for quite a long time and as far as, you know, my opinion of him, he's a good guy and he's not what these people claim that he is. And I feel, you know, further down life's road that his innocence will be proven, that he is really innocent of the crime he is he's not what these people claim that he is. And I feel, you know, further down life's road that his innocence will be proven, that he is really innocent of the crime he is being, you know, placed up under, you know.

The Court: Mr. Myers, do you want to ask any questions?

The Witness: I am not finished, your honor.

The Court: I don't want you to testify. I asked if you wanted to answer Mr. McClain.

The Witness: I got one more thing to say.

The Court: Go ahead and say it. It's okay.

The Witness: And I just wanted to say this to the jury, that he's a young black man and there is a racial war going on in these courtrooms; and these white boys, white Caucasian guys that's got, you know, high-publicity cases, they don't file the death penalty against them and all. I don't think it's fair, you know, for the young Brother, you know, to be found guilty on a D.P.

(73 RT 7279-7280.)

The prosecutor then cross-examined Jones again: By Mr. Myers:

Q. The case on which you were convicted, didn't you break a glass bottle, stick it to somebody's neck and then take his property?

A. They got me confused.

Defendant McClain: Outside the scope, your honor.

The Court: I'm sorry?

Defendant McClain: Outside the scope.

The Witness: No, I didn't.

The Court: You brought him here. He is giving a character reference for you. The Court let him answer your questions.

Defendant McClain: He had a chance to ask that question.

The Court: Mr. McClain.

(73 RT 7280-7281)

The prosecutor continued to question Jones about the prior conviction and Jones continued to testify that his conviction was unfair because of racism, his decision to go pro per because of incompetent counsel, and an uncertain eyewitness. (73 RT 7281-7282.) Jones continued

that each of his prior convictions was unfair and that he was a victim of racism. (73 RT 7282-7283.) The prosecutor impeached Jones with a 1978 conviction, a 1981 conviction for receiving stolen property and firearms possession, a 1987 robbery conviction, a 1992 vandalism and graffiti conviction, and a 1995 conviction for battery and possession of a controlled substance. (73 RT 7282-7283.)

The prosecutor continued his cross-examination:

Q. And while you were waiting for trial in the case on which you were convicted, didn't you have outbursts towards the court, the deputies and you had to be shackled?

A. No.

Q. Did you have to be shackled?

A. What happened was –

Q. Were you shackled?

A. You want to know why?

Q. You can tell me about that later. A simple question: Were you shackled?

A. For no reason, yes.

Q. You are not a dangerous man, are you?

A. No.

(73 RT 7280-7283.)

The prosecutor then asked the trial court "to admonish the jury that nothing concerning this shackling should reflect upon Mr. McClain." (73 RT 7284.)

The trial court did not immediately admonish the jury. However, after Jones left the courtroom and another witness was on the stand it issued an admonition. (73 RT 7285.)

Although the trial court, initially described Jones as a character witness, the prosecutor conceded that Jones's testimony was not character evidence. (73 RT 7325.) The trial court later acknowledged, "The court allowed you a witness on a particular incident. That was you attempting to shank somebody in prison. That is what you told me." (73 RT 7326.)

During closing argument, the prosecutor argued that McClain's association with Jones was evidence of his future dangerousness. (74 RT 7402.)

B. The Trial Court Erroneously Ruled That its Own Questioning of Jones Opened the Door to Inflammatory and Improper Cross-examination Outside the Scope of McClain's Own Direct Examination

The trial court committed four errors. First, it interfered with McClain's strategic decision not to use Jones as a character witness. Second, it penalized McClain for the court's own questioning of Jones by giving the prosecutor carte blanche to ask irrelevant and inflammatory questions on cross-examination, to impeach him with prior convictions and facts underlying his criminal trials that portrayed him not as a dishonest witness, but as a dangerous and violent criminal. Third, the trial court failed to fulfill its role as an impartial, unbiased judge. Fourth, forcing McClain's witness to appear in jail clothing and shackles while permitting the prosecutor to call an incarcerated witness in a suit violated due process and equal protection.

The Sixth and Fourteenth amendments guarantee the right to present a defense at a capital penalty phase to safeguard the adversarial process. (*Crane v. Kentucky*, *supra*, 476 U.S. 683, 690; *Strickland v. Washington*, *supra*, 466 U.S. 668, 685.) Additionally, the Eight Amendment ensures a reliable capital sentencing determination. (*Lockett v. Ohio*, *supra*, 438 U.S.

586, 604.) These protections are inextricably tied to the right to effective assistance of counsel. (*Strickland, supra*, 466 U.S. at p. 686.) When a trial court "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," it violates the right to counsel. (*Ibid.*) Thus, an impartial tribunal is essential to a fair trial. (*Id.* at p. 685.)

"A lawyer must be able to determine questions of strategy during trial, and . . . his decision must be binding." (*United States ex rel. Cruz v. LaVallee* (2nd Cir. 1971) 448 F.2d 671, 679.) The right to determine defense strategy without external interference is equally if not more critical when a defendant represents himself. (*Faretta v. California, supra*, 422 U.S. 806, 819-821.) Thus, "there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." (*Herring v. New York* (1975) 422 U.S. 853, 857.)

Here, the trial court's questioning of witness Jones invited comment on McClain's character which McClain did not himself elicit on direct examination. Although the trial court claimed it was allowing Jones to answer McClain's last question, the record indicates that McClain never asked a question. Rather, McClain apologized to Jones for subjecting him to the prosecutor's aggressive impeachment. While McClain initially indicated that he intended to use Jones as a character witness, he made clear his change in strategy when he concluded his direct examination without asking any character-related questions.

The prosecutor's own statements indicate that McClain did not use Jones as a character witness:

> Mr. McClain indicated yesterday the witness that he would call today, the first gentleman who was in shackles, would be testifying about Mr. McClain's character. As it turns out he testified about the inequities of the judicial system and the racial bias that exists.

(73 RT 7325.)

And, the trial court later indicated that McClain called Jones to testify about the attempted shanking. (73 RT 7326.) Had McClain introduced evidence about his own character through Jones, the prosecutor would have been entitled to ask Jones about incidents implicating *McClain's* character. (See Pen. Code §§ 1101-1102; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1305.) He did not. Thus, as the record plainly shows, the trial court misunderstood Jones's testimony. It was not character evidence.

McClain recognizes the trial court's right to question witnesses. (Pen. Code § 775.) However, "a trial judge improperly interjects himself into the trial by questioning witnesses when the attorneys are competently conducting their cases." (*United States v. Block* (11th Cir. 1985) 755 F.2d 770, 775.) While other aspects of his self-representation may have been grossly incompetent McClain's decision not to use Jones as a character witness was clearly a sound one.

The trial court compounded its errors by overruling McClain's appropriate objections, i.e., that the prosecutor's questions were beyond the scope of McClain's direct examination and that the prosecutor had already impeached Jones with evidence of felony convictions and prior misconduct.

Even if McClain had introduced evidence about his character through Jones, the prosecutor was not entitled to go into graphic detail about Jones's moral turpitude and prior shackling which were irrelevant to

McClain's character. As explained in Claim XIV, the trial court failed in its duty to find manifest need before having Jones brought into court in shackles. But even if the trial court had made such a finding, it had a subsequent obligation to do everything in its power to minimize the ensuing prejudice to McClain. (*People v. Duran, supra*, 16 Cal.3d at pp. 291-292.) Instead, the trial court over McClain's objection, allowed the prosecutor to make shackling the focus of Jones's testimony.

Unfortunately, this error is one of many which was compounded by the trial court's failure to exercise its discretion under Evidence Code section 352.[127] When McClain objected to the testimony, the trial court was obligated to examine the prosecutor's proposed cross-examination.

Finally, this error raises serious questions about the trial court's impartiality. Although the trial court's reasons are not explicit in the record, it was clearly unhappy with McClain's behavior throughout the proceedings. For example, after McClain made an obscene gesture during the reading of the guilt verdicts, the trial court referred to him as being a "jerk in front of the jury." (45 RT 4788.) Another time, when defendant Newborn told the prosecutor to "fuck off" and "suck my dick," the trial court mistakenly attributed the obscenity to McClain, commenting that such behavior was "not unusual for McClain." (60 RT 5769; see, e.g., *Berger v. United States* (1921) 255 U.S. 22, 28-29, 36 [where defendant was German the trial court's comment that the hearts of German Americans were "reeking with disloyalty" indicated personal bias against defendants].) The trial court's imposition of a stun belt on McClain absent a finding of manifest need also suggested that the trial court's patience was running thin.

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[127] Claim V.C.1 is incorporated herein by reference.

(Claim XIV is incorporated by reference herein.) The trial court's introduction on its own motion of aggravating evidence against McClain after the close of penalty phase evidence through which the jury learned that McClain was wearing a stun belt was also a sharp indicator of the trial court's feelings toward McClain. (Claim XV is incorporated herein by reference.) Equally troubling evidence of bias is the trial court's inaccurate statement before the jury, during McClain's closing argument, that he was wearing a stun belt because he had acted out in court. In addition to these errors, the trial court delegated McClain witness Jones's courtroom attire to the sheriff, although it previously allowed the prosecutor to call incarcerated witness DeSean Holmes in a suit and tie. (17 RT 1527.) This violated due process because it tilted the "balance of forces" in favor of the prosecution." (*Wardius v. Oregon*, *supra*, 412 U.S. 470, 474-475.) While the trial court at times justifiably may have felt frustrated with the conduct of defendants, it erred when, in venting its feelings "it undertook to develop evidence favorable to the prosecution." (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1572.)

C. The Prejudice Requires Reversal

From the outset, the prosecutor relied on theories of guilt by association and McClain's allegedly dangerous character to compensate for his weak evidence against McClain. (Claims III, IV.C, VI, VIII, XVII, XIX & XXI are incorporated by reference herein.) This theme carried over into McClain's penalty phase.

During its deliberations, the jury unsuccessfully requested evidence and testimony from the first trial. Specifically, it wanted to know if there were any "other eyewitness testimony or independent investigation." (75 RT 7545.) The jury, whose questions reflected its more than reasonable

concerns about McClain's participation in the homicides, received no evidence of McClain's culpability. Instead, it heard the prosecutor's highly prejudicial cross-examination of Jones which yielded this equally inflammatory closing argument:

> You saw Mr. McClain's witness, Mr. Jones. These are the types of people with whom Mr. McClain chooses to associate himself while in custody, killers, robbers.
> * * *
> It is not punishment near enough for the monstrous acts and lives led by these defendants. It's not fair to let them hang out with their buddies and make new friends and new associates and put at risk new lives. It's just not fair; it's not right.

(74 RT 7402.)

This argument focused specifically on Jones's appearance. Notably, the prosecutor's own jailhouse witness testified at the guilt phase in a suit and tie. In other words, the prosecutor, who unlike McClain had control over his witness's attire, did not call his own witness in jailhouse clothing and shackles.

The prosecutor also argued that McClain was a present danger in the courtroom and community, and would continue to be a danger in state prison. (74 RT 7397.) This frightening and prejudicial argument was invited by the trial court's errors.

The trial court made a bad situation worse by giving the jury a strange, untimely, confusing admonition, which did not mention Jones by name. After Jones's testimony, the prosecutor requested an admonition that the shackling. (73 RT 7284.) The trial court was silent. Only after Jones had left the courtroom and another witness took the stand, the trial court offered this guidance to the jury:

> The jury is admonished the fact he is shackled and brought here with deputies has no reflection on Mr. McClain. You called him as your witness. You take your witnesses as they are, not what they are, not how they are dressed.

(73 RT 7285.)

Because the rules governing restraint of a defendant also apply to defense witnesses (*People v. Duran, supra*, 16 Cal.3d at pp. 291-292) a trial court should have given a sua sponte instruction to prevent the jury from drawing adverse inferences from the shackling of a witness.[128] It would have been easy for the trial court to modify, CALJIC 1.04, which a trial court must give when it requires a defendant to wear visible restraints, using the word "witness":

> The fact that physical restraints have been placed on defendant [] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely.

This instruction is useful, because it addresses issues of witness credibility and guilt by association. The trial court's instruction, in contrast,

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[128] The 2003 revision of CALJIC includes an appropriate instruction:

> The mere fact that a witness [is in custody] [or] [is in physical restraint] must not prejudice you for or against any party. [Do not speculate as to why a witness [is in custody] [or] [is in physical restraint].]
>
> That a witness is [in custody] [or] [subject to physical restraint] is not by itself evidence that a witness is or is not believable.

(CALJIC 2.29)

conveyed to the jury that because McClain called Jones, he had to accept any prejudice that flowed from Jones's status. This rendered the admonition that the restraints on Jones did not reflect on McClain meaningless. Further, it did nothing to address the prosecutor's improper use of Jones's shackling to impeach his testimony. Thus, the jury was free to improperly utilize the testimony about Jones's prior shackling as evidence both of his untruthfulness and his dangerousness.

The absence of any admonition to the jury not speculate about why Jones was restrained in combination with the prosecutor's questions about whether Jones was previously shackled because he was dangerous became more prejudicial because the jury learned that McClain himself was forced to wear a stun belt. The jury received the unequivocal message that restraints are reserved for dangerous people. As a result, it was free to use the shackling of McClain as aggravating evidence in support of his ultimate death sentence. The trial court's initial silence after the prosecutor's request for an admonition sent a clear message that the jurors could properly consider the shackling of Jones against McClain. By the time the trial court issued its admonition, it was too late to cure the error.

The trial court's errors, which strongly suggest its bias, infected the jury's penalty determination. Judicial bias is structural error which requires reversal. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 283.) If this Court does not find judicial bias, the State must prove beyond a reasonable doubt that the violations of McClain's federal constitutional rights that resulted from the trial court's interference, which produced the testimony, argument, and faulty admonition described above, did not scare the jurors into choosing death despite their lingering doubts about McClain's guilt. That

said, the trial court's errors were so egregious that prejudice is evident under any standard, including *Watson*.

The death verdicts must be reversed.

XVII.
THE TRIAL COURT'S EXCLUSION OF McCLAIN'S PROPOSED LINGERING DOUBT EVIDENCE, THE PROSECUTOR'S MISCONDUCT IN ARGUING LINGERING DOUBT, AND THE ERRONEOUS JURY INSTRUCTIONS ON LINGERING DOUBT VIOLATED McCLAIN'S FEDERAL CONSTITUTIONAL AND STATE LAW RIGHTS

A. Introduction

At his penalty retrial, as at his first penalty trial, McClain's mitigation defense focused on lingering doubt. He sought to reconstruct the lingering doubt arising from the prosecution's guilt-phase case – evidence that the penalty retrial jury obviously did not hear. This evidence, bearing on the circumstances of the crimes, went to the heart of McClain's culpability for the murders and thus bore directly on his deathworthiness. At the prosecutor's request, the trial court excluded all McClain's proffered lingering doubt evidence. The trial court erred. The trial court then permitted the prosecutor to argue to the jury that McClain had an opportunity to present lingering doubt evidence when, in fact, he had none. The trial court erred again. Finally, the trial court denied the jury's proper request to review evidence relevant to lingering doubt that had been admitted at McClain's guilt phase and delivered a mistaken ad hoc instruction on lingering doubt to the jury. The trial court erred yet again.

As shown below, the trial court's exclusion of McClain's proposed lingering doubt evidence, the prosecutor's improper argument about lingering doubt, and the court's erroneous jury instructions about lingering

doubt deprived McClain of a fair trial, effective assistance of counsel, meaningful access to the courts, an impartial jury, reliable guilt and penalty determinations, an individualized sentencing determination, due process of law, and equal protection of the law as guaranteed by the state and federal constitutions and California and international law.[129] (ICCPR, Part I, arts. 1, Part II, arts. 2, 3, 14, Part III, arts. 6-10, 12-15, 17-22, 25-27; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.)

B. Proceedings Below

A single jury made the guilt determination and heard evidence in the first penalty phase in this case. (59 RT 5756.) That jury deliberated for twelve days before finding McClain guilty of capital murder. (6 CT 1461-1462, 1464-1466, 1468, 1471, 1474-1477, 1479.) That jury was unable to reach a penalty verdict, and a penalty retrial ensued. (59 RT 5756-5762; 60 RT 5769.)

At the first penalty phase, McClain's counsel focused on lingering doubt about his guilt in the Halloween murders and his culpability for three aggravating circumstances, relying largely on the weakness of the prosecution's guilt phase case. (53 RT 5304-5330, 5333-5345; 54 RT 5402-5410, 5461-5470; 55 RT 5480-5517; 57 RT 5620-5625; 58 RT 5713-5731.)

McClain represented himself at the penalty retrial. (7 CT 1981; 59 RT 5756-5758.) At the outset, he informed the trial court his penalty defense would be lingering doubt. (64 RT 6314.) In response, the trial court told standby counsel to instruct McClain on proper lingering doubt

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[129] Claims II and III are incorporated by reference herein.

evidence and reminded McClain that he had a "responsibility" to the other defendants. (*Ibid.*)

The prosecution presented extensive guilt phase evidence including enlarged transcripts of McClain's guilt phase testimony, testimony of three medical examiners,[130] a firearms examiner, a paramedic and law enforcement who responded to the Hodges crime scene, the child whose party the victims attended before they were killed, a security guard at Huntington Memorial Hospital, Gabriel Pina who purportedly identified McClain as the driver of one of the cars at the crime scene, people who lived near the crime scene, a "gang expert,"[131] testimony of children who attended and left the party with the victims, and numerous photographs of the deceased victims. (66 RT 6415-6490; 67 RT 6511-6558, 6581-6583, 6592-6645; 68 RT 6733-6766; 69 RT 6865-6889, 6909-6921, 6966-6985; 74 RT 7373-7377, 7383-7384.)

In addition, the trial court allowed defendant Holmes to call Gabriel Pina who had already testified for the prosecution; McClain cross examined Pina about the identification. (65 RT 6315-6317; 67 RT 6604-6645; see Claims II and III.)

On August 12, 1996, McClain filed a written motion to present expert eyewitness evidence. (8 CT 2050-2055; 69 RT 6852-6853.) The trial court denied the motion on October 8, 1996, noting

> I don't find in this case that identity is an issue at this time in a case where you have been found guilty of three

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[130] The victims' causes of death were undisputed.

[131] The trial court had earlier stated for the record its opinion that gang experts are not especially helpful. (65 RT 6337.)

counts of murder, all the special circumstances were true, five counts of attempt murder.

We are in the penalty phase and the court is not even sure about lingering doubt. The court has read the cases that counsel have given me. I am not even sure that the prosecution has to put much forward on that.

Since you opened the door a little bit and I told Mr. Jones in his opening statement I would allow some, I am hung out to dry here. Same thing with you Mr. Nishi. . . .

I don't find identity is an issue in this. I am not going to do it.

The Court has had little or no luck with identification experts. I find that they testify to some things that they have done in laboratories and it has no relevance to people in the street under duress, excitement or things involving your identity. So I am not going to allow it.[132]

(8 CT 2150; 69 RT 6853.)

The trial court also denied McClain's motion to subpoena severed co-defendants Aurelius Bailey and Solomon Bowen who could have testified to the plea agreement they reached and to McClain's lack of involvement in the crime. (71 RT 7101-7102; 72 RT 7190-7192.) McClain argued that whatever part Bailey and Bowen played

for the deal that they took, whatever role they played in that, they would be familiar with anything that happened that night and would be able to say if I was there or not, if they seen me at any time during the night. So whatever little information they would have would be to my benefit. . . .

Wherever they was at that night, I feel that that would lead – that would help me in my lingering doubt case, that wherever they were at that night, if they took a deal admitting anything to do with

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[132] The trial court allowed defendant Holmes to present extensive expert eyewitness evidence at the guilt phase of McClain's trial. (34 RT 3648-3727; 35 RT 3800-3851.)

this case they would have some type of knowledge since they pled guilty to a lesser charge or whatever. . . .

I believe they have some information that could help me in my defense.

(72 RT 7190-7191.) The prosecutor responded that although Bailey and Bowen pleaded guilty, they "never admitted guilt."[133] (72 RT 7191.)

The trial court stated that he could not find any cases where lingering doubt is mandated. (72 RT 7191.) "Under 352 it is my discretion where it comes in. I can't see where two co-defendants who pled can assist you in lingering doubt from a different jury. That is the issue I have." (*Ibid.*)

McClain added that because Bailey and Bowen had known him most of his life, that they would be good witnesses to testify as to the type of person he was. (72 RT 7192.)

The trial court agreed to reconsider the issue, but later denied McClain's motion:

> It is a 352 matter. This is not a matter for the jury to hear, I don't think, about lingering doubt. You have been found guilty. This is not the guilt phase in the first trial. This only would go to one possible phase from your motion, to further prove your innocence. You are not going to prove your innocence to this jury. This jury is not going to rule on your guilt or innocence. . . .
>
> That is the basis of this motion. So on that ground the court will deny it. It is not timely. . . .
>
> They know you from your childhood. It is still not timely.

(72 RT 7254-7255.)

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[133] In pre-trial proceedings, the prosecution stated on the record that co-defendant Bailey was a shooter. (6 RT 178.)

The juries at both penalty phases heard and saw extensive victim impact evidence, including witness testimony, photographs, school certificates, and other items. (52 RT 5193-5206; 54 RT 5412-5416, 5420-5429, 5431-5441, 5471-5477; 68 RT 6745-6763; 69 RT 6966-6985; 70 RT 6988-6991, 6992-7006; see Statement of Facts, *ante*, at pp. 55-65.)

The prosecutor, in closing, argued to the jury:

> And you may hear an argument about lingering doubt . . . . but ultimately has there been any evidence to indicate that these defendants were anywhere but here on Halloween night? Has there been anything to cause a doubt that lingers? Has there been anything to say somewhere, somehow there is some other evidence that the most heinous crime in the history of Pasadena was misinvestigated, was bungled, that there was no delay in reaching a judgment in this case, that the prior jury that convicted these defendants did so in an unfair fashion?
>
> There is only one thing ever that can be proven beyond a lingering doubt in any courtroom, and in this case that one thing is that these kids aren't going to be trick or treating this Halloween. They're not coming back. That has been proven beyond a lingering doubt.
>
> We have given them the opportunity to present evidence to show that they weren't there, but no such evidence has been presented.

(74 RT 7371.)

McClain immediately objected stating that he was not given the opportunity to present such evidence. (74 RT 7372.) Counsel for codefendant Holmes added that the defense has no burden. (*Ibid.*) The prosecutor responded, "they have no burden, but they have the opportunity." (*Ibid.*) The trial court then instructed the prosecutor to continue his argument. (*Ibid.*) The prosecutor went on:

> If they are going to try to tell these jurors . . . that there is a reason you should have a doubt to linger, they should give you a reason, and they haven't.
>
> And you will receive an instruction that will be given to you by this court, and it's going to say for the purposes of this penalty phase of the trial you must accept the verdicts and findings rendered by the jury in the guilt phase of this trial. That is, you must accept that the defendants have been proved guilty beyond a reasonable doubt of three counts of murder in the first degree, five counts of willful, premeditated and deliberate attempted murder and one count of conspiracy to commit murder, as set forth in the information.
>
> The court will also tell you the guilt phase has not been retried, therefore as a penalty phase jury you must accept the guilt phase verdicts and findings.
>
> The court will also define to you what reasonable doubt is and lingering doubt.

(74 RT 7372-7373.)

In closing, McClain repeatedly argued his innocence and asked the jury not to consider his outbursts in court, his unsavory language, or his status as a gang member in determining his punishment. (74 RT 7418-7441.) He argued lingering doubt and that had he not presented himself as a hard-core gang member at the guilt phase, the case would never have reached a penalty phase. (74 RT 7425.)

When McClain tried to argue the guilt phase testimony of the eyewitness identification expert who testified at the guilt phase, the trial court stopped him on the prosecution's objection. (74 RT 7436.)

During closing arguments for defendant Holmes, his counsel argued that the testimony of Gabriel Pina was not enough to support a death verdict. (74 RT 7452.) The prosecution objected that the guilt verdict in

this case did not rest entirely on Pina's testimony. (*Ibid.*) The trial court responded in the presence of the jury:

> Your argument is lingering doubt as to a particular witness. The trial had many witnesses, circumstantial evidence. They didn't hear that. They had a mini trial of just some witnesses. You can argue only that one point. That is all they heard.

(*Ibid.*)

The following day, counsel for defendant Holmes, joined by McClain, objected on the record to the court's comments because, "the jury might be misled into believing that lingering doubt no longer exists." (75 RT 7491.) The trial court responded that there was no harm, because it was not a jury instruction but rather, "that is my comment on it." (75 RT 7492.)

Counsel for Holmes further objected that the court was asking the jury to speculate about evidence it did not hear. (*Ibid.*) The trial court rejected this argument. (75 RT 7492-7496.)

Over the objection of defendants McClain and Holmes, the trial court added his own instruction on lingering doubt:

> On the issue of lingering doubt, the court stated at the time of opening statements that I would be commenting on that concept. You will get a jury instruction on that. There were numerous comments about Mr. Pina's identification in this case. The court stated yesterday that is only part of the evidence in the guilt phase. There is direct and circumstantial evidence and there were guilty verdicts.
>
> Therefore, you should not speculate as to what evidence the jury in the guilt phase based its verdicts on.
>
> For the purposes of your duties in this trial you must accept the fact there was evidence presented beyond a reasonable doubt to convict the defendants of the charges against them.

(75 RT 7490-7496, 7498-7499.)

The trial court also read to the jury special instructions 1-2 (8 CT 2171-2172; 75 RT 7503-7506) which provided in part:

> The guilt phase has not been retried; therefore as a penalty phase jury, you must 'accept' the guilt phase verdicts and findings . . . .
>
> Reasonable doubt is not at issue in the penalty phase; the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt . . .
>
> Lingering doubts as to guilt may be considered as a factor in mitigation. A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of a juror a reasonable doubt.

(8 CT 2171-2172; 75 RT 7504-7505.)

The day after its deliberations began, the jury sent the trial court some questions. The jury asked, "Can the jury request testimony from the prior trial and see it? . . . . If so, was there any other eyewitness testimony or independent investigation? . . . . Also, can we see the newspaper with photos?" (75 RT 7545.) The trial court denied the jury's requests and added:

> [O]n this issue of lingering doubt, the court stated at the time of opening statements that I would be commenting on that concept.
>
> There have been numerous comments about Mr. Pina and his identification in this case. As the court stated yesterday, that was only part of the evidence at the trial of the guilt phase. There are other types of evidence, including direct evidence and circumstantial evidence.
>
> Therefore, you should not speculate as to what evidence the jury in the guilt phase based its verdicts on. For purposes of your duties in this trial you must accept the fact

that there was sufficient evidence beyond a reasonable doubt to convict the defendants of the charges against them.

Secondly, as to one of your special jury instructions – we do not know the number – I will reread it for you. It says:

For the purposes of the penalty phase of the trial you must accept the verdicts and findings rendered by the jury in the guilt phase of the trial. That is, you must accept the defendants have been proved guilty beyond a reasonable doubt . . .

[T]he reasonable doubt of guilt and truthfulness of the charge . . . shall not be reexamined by this jury, you.

The guilt phase has not been retried. Therefore, as a penalty phase jury you must accept the guilt phase verdicts and findings. . . .

Lingering doubt as to guilt may be considered as a factor in mitigation. A lingering doubt, is defined as a doubt, however slight, which is not sufficient to create in the mind of a juror a reasonable doubt.

(75 RT 7545-7548.)

The jury deliberated for nearly three days before it returned death judgments against McClain, Holmes, and Newborn. (75 RT 7552-7555.)

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C. The Trial Court Erroneously and Prejudicially Excluded McClain's Evidence of Lingering Doubt

1. Lingering doubt evidence is relevant, mitigating, and admissible

In a capital penalty phase, the defendant has state law and federal constitutional rights to present and have the sentencer consider, all relevant mitigating evidence, including that not enumerated by statute. (U.S. Const., 6th, 8th & 14th Amends.; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114; *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604.)

This Court has long recognized the relevance of lingering doubt as mitigating evidence. (*People v. Blair* (2005) 36 Cal.4th 686, 750-751; *People v. Davenport* (1995) 11 Cal.4th 1171, 1193; *People v. Cox*, *supra*, 53 Cal.3d 618, 677; *People v. Fierro* (1991) 1 Cal.4th 173, 241-243; *People v. Terry* (1964) 61 Cal.2d 137, 145-147, overruled on other grounds by *People v. Laino* (2004) 32 Cal.4th 878, 893; but, cf., *In re Gay* (1998) 19 Cal.4th 771, 814 [a "defendant may not retry the guilt phase of the trial in order to create [lingering] doubt"].)

Thus, a defendant may not be precluded from offering lingering doubt evidence or arguing its relevance in mitigation. (*People v. Cox*, *supra*, 53 Cal.3d at p. 677; *People v. Terry*, *supra*, 61 Cal.2d at pp. 145-147.) "Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible."[134] (*People v. Terry*, *supra*, 61 Cal.2d at p. 146.)

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[134] Indeed, 117 formerly death-sentenced prisoners have been exonerated since 1973. (Source: http://www.deathpenaltyinfo.org/article.php?scid=6&did=110)

Because doubt is an inherent part of the system, a penalty "jury should have before it not only the prosecution's unilateral account of the offense but the defense version as well; the jury should be afforded the opportunity to see the whole picture . . ." (*People v. Terry*, *supra*, 61 Cal.2d at p. 141.)

"If the same jury determines both guilt and penalty, the introduction of evidence as to defendant's asserted innocence is unnecessary on the penalty phase because the jury will have heard that evidence in the guilt phase. If, however, such evidence is excluded from the penalty phase, the second jury necessarily will deliberate in some ignorance of the total issue." (*People v. Terry*, *supra*, 61 Cal.2d at p. 146.)

"The circumstances of the crime are a traditional subject for consideration by the sentencer," and the law requires it. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.)

And, the "circumstances of the crime" necessarily "includes the defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty. Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting to the defendant the opportunity of presenting his claim of innocence." (*Terry*, *supra,* 61 Cal.2d at p. 146.)

For these reasons, when a capital defendant has separate guilt and penalty phase juries, he must be "able to introduce to the penalty phase jury guilt evidence intended to show lingering doubt." (*People v. Hawkins* (1995) 10 Cal.4th 920, 967; *People v. Davenport*, *supra*, 11 Cal.4th 1171, 1193; *Terry*, *supra*, 61 Cal.2d at p. 146.)

Furthermore, in McClain's situation, where the prosecution's case rested on a single unreliable eyewitness and "the testimony of witnesses

with less-than-clean backgrounds and incentives to lie," lingering doubt would have been a viable penalty defense. (See *Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567, 624.)

In *Oregon v. Guzek* (2006) __ U.S. __, 126 S.Ct. 1226, 1230-1231, the United States Supreme Court, in a narrow decision, held that states may limit the introduction of lingering doubt evidence that was available but not introduced at the defendant's guilt phase. Justice Breyer, writing for the majority, noted that Guzek would not be prejudiced, because Oregon law ensured his "right to present to the sentencing jury *all* the evidence of innocence from the original trial regardless." (*Id.* at p. 1233.) The High Court did not resolve whether a capital defendant has an Eighth Amendment right to introduce evidence of residual or lingering doubt during a capital penalty phase. (*Id.* at pp. 1211-1232.) Nor did it determine whether the defendant was entitled to introduce the evidence to impeach witnesses called by the government at penalty phase. (*Id.* at p. 1233.)

Moreover, *Guzek* restated that the Eighth Amendment "insists" on both a reliable capital penalty determination and the right to a sentencing jury able to "'consider and give effect to mitigating evidence' about the defendant's 'character or record or the circumstances of the offense.'" (*Oregon v. Guzek*, *supra*, 126 S.Ct. at p. 1232, citing *Penry v. Lynaugh*, *supra*, 492 U.S. 302, 328.)

These rights are essential because a "process that accords no significance to relevant facets of . . . the circumstances of the particular offense . . . treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304-305.)

The right to individualized sentencing in capital cases flows from "the fundamental respect for humanity underlying the Eighth Amendment" which "requires consideration of . . . the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Ibid.*)

When the United States Supreme Court

> addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina* [citations omitted], we spoke in the most expansive terms. We established that the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context, and thus the general evidentiary standard – 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' – applies [citations omitted]. We quoted approvingly from a dissenting opinion in the state court: 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonable deem to have mitigating value.' [citations omitted]. Thus, a state cannot bar, 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.' [citations 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.' [citations omitted]

(*Tennard v. Dretke* (2004) 542 U.S. 274, 284.)

As McClain demonstrates below, the trial court's exclusion of his proffered lingering doubt evidence which was either presented or unavailable at guilt phase of his trial violated his rights under state law and the federal constitution. His death judgment must be reversed.

2. McClain's evidence was relevant, mitigating, and essential to support his lingering doubt penalty defense

a. Dr. Kathy Pezdek

The trial court erred in excluding the testimony of Kathy Pezdek, Ph.D. an expert in memory and eyewitness identification to help the jury assess the credibility of prosecution witness Gabriel Pina. As explained in Claims II and III, *ante*, which are incorporated by reference herein, Pina, who testified for the prosecution at the penalty retrial, was the only witness who claimed to see McClain near the crime scene, and the only major witness against him who was not a convicted criminal, was key to the prosecution's case against McClain. Pezdek testified extensively at McClain's guilt phase to the factors the jury might consider in evaluating the credibility of Pina's identification. (34 RT 3648-3727; 35 RT 3799-3851.) The trial court's concession that McClain could challenge Pina's identification, while excluding the evidence that would have permitted him to do so was erroneous, irrational, and plainly wrong under this Court's precedent. McClain's argument that the jury should consider lingering doubt as the basis for a sentence less than death had little or no meaning because the trial court prevented him from supporting the argument with evidence.

i. Pina's identification of McClain was a key element of the prosecution's case

It was prejudicial error to exclude Dr. Pezdek's testimony because Pina's identification of McClain was "a key element of the prosecution's case but [was] not substantially corroborated by evidence giving it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1111;

see Claim II & Statement of Facts, *ante*.) Pina's centrality to the prosecution's case is emphasized by the prosecutor's decision not to call any of the unreliable informants who testified against McClain at guilt phase. (See Claim III.) Exclusion of Pezdek's testimony would have only been proper if it added "nothing at all" to the information before the jury. (*People v. McDonald*, *supra*, 37 Cal.3d 351, 367.) However, in this case, where Pina was both the only person who claimed to have seen McClain near the crime scene and the only major prosecution witness against McClain without any felony convictions, and the only prosecution witness who provided testimony specific to McClain at the penalty retrial, McClain was entitled to present expert evidence to help the jury evaluate this essential testimony.

ii. Dr. Pezdek's testimony was admitted at guilt phase

Dr. Pezdek's testimony was admitted at guilt phase, and McClain was entitled to have his penalty jury hear all guilt phase evidence.[135]

In *Crane v. Kentucky*, *supra*, 476 U.S. 683, 687, the trial court erred in assuming that evidence introduced at one proceeding was irrelevant in a subsequent proceeding. So too, the trial court in McClain's case assumed that evidence admitted at the guilt phase was not admissible at penalty. The trial court's ruling was clearly contrary to law, because California recognizes lingering doubt as a legitimate defense at the penalty phase of a capital trial and McClain was entitled to present a complete picture to the jury that would decide whether he would live or die. (See *People v. Anderson* (2001) 25 Cal.4th 543, 591, fn. 16; *People v. Riel* (2000) 22

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[135] At the very least, the trial court should have distributed to the jury transcripts of Dr. Pezdek's guilt phase testimony.

Cal.4th 1153, 1209; *People v. Padilla* (1995) 11 Cal.4th 891, 951-952.) A lingering doubt defense necessarily rests on guilt phase evidence, including the kind of evidence McClain sought to introduce.

In *Oregon v. Guzek*, *supra*, 126 S.Ct. at p. 1231, the Supreme Court found that, in Oregon, where state law guaranteed a defendant's right to introduce anything admitted at a capital guilt phase at the penalty phase, the Eighth Amendment permitted the trial court to exclude evidence of innocence at the penalty phase that was available but not presented at the guilt phase. While the High Court did not resolve whether the Eighth Amendment always requires the admission of guilt phase evidence at a capital penalty phase, it reasoned in its ruling that the

> negative impact of a rule restricting defendant's ability to introduce *new* alibi evidence is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury *all* the evidence of innocence from the original trial regardless. That law permits the defendant to introduce at resentencing transcripts and exhibits from his prior trial.

(*Id.* at p. 1233.) It follows that, while the Eighth Amendment does not always require courts to permit defendants to introduce new and previously unavailable evidence at penalty phase, it does demand that courts allow defendants to introduce at least the evidence admitted at the guilt phase.

In addition, this Court's precedents make clear that in California, defendants are permitted to introduce such evidence. "A bifurcated trial does not restrict a defendant's ability to introduce guilt phase evidence designed to foster residual doubt." (*Hawkins*, *supra*, 10 Cal.4th 920, 967.) In fact, guilt phase evidence enables a "jury to construct a clear profile of" a defendant. (*Williams v. Vasquez* (E.D. Cal. 1993) 817 F.Supp. 1443, 1467.)

A penalty "jury may consider all evidence presented at the guilt phase in proof of the capital offense and the special circumstances." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1330.) And, all guilt phase evidence is relevant to the circumstances of the crime. (*People v. Champion, supra*, 9 Cal.4th 879, 947.)

When a capital defendant has separate guilt and penalty phase juries, he must be "able to introduce to the penalty phase jury guilt evidence intended to show lingering doubt." (*Hawkins, supra*, 10 Cal.4th at p. 967; *Davenport, supra*, 11 Cal.4th at p. 1193; *Terry, supra*, 61 Cal.2d at p. 146.)

Thus, trial courts, with the blessing of this Court, routinely instruct penalty phase juries to consider "the evidence from the guilt phase in making [their] penalty phase decision" at the request of either party. (*People v. Navarette* (2003) 30 Cal.4th 458, 513-514; see, *e.g.*, *Williams v. Vasquez, supra*, 817 F.Supp. 1443, 1467, fn. 27; *People v. Coffman* (2004) 34 Cal.4th 1, 120-121; *Champion, supra*, 9 Cal.4th 879, 946-947; *In re Fields* (1990) 51 Cal.3d 1063, 1080; *People v. Brown* (1988) 46 Cal.3d 432, 451; *People v. Gates* (1987) 43 Cal.3d 1168, 1209.)

McClain was thus entitled to have his penalty jury consider all the evidence introduced at guilt phase under the Eighth Amendment and California law.

iii. The trial court conceded that the defense could challenge Pina's identification as part of its lingering doubt case

The trial court voiced two competing opinions about the eyewitness identification evidence in this case. As explained in section B, *ante*, the trial court initially rationalized its refusal of McClain's request to call Dr. Pezdek by explaining that identity was not an issue in the case and that it

was unsure about lingering doubt in general. (69 RT 6853.) The trial court noted that in its experience, such experts testify to laboratory experiments that were not relevant to McClain's identity.[136] (*Ibid.*)

However, the trial court later limited McClain's lingering doubt arguments to Pina, announcing that eyewitness identification was the ONLY issue open to the defendants in this case, because the prosecutor did not present other testimony to the penalty retrial jury. (74 RT 7452.) Further, the trial court did not permit McClain to refer to Pezdek's guilt phase testimony in argument. (74 RT 7436.)

The trial court thus left McClain in the absurd position of having to defend himself against eyewitness testimony – testimony the trial court conceded was the primary thrust of the prosecution's penalty retrial case – without being allowed to call witnesses or refer to guilt phase testimony of witnesses who clearly impeached the prosecution's witness. McClain's right to argue lingering doubt without Pezdek's evidence was thus a hollow one.

b. Testimony of Codefendants Bowen and Bailey

As explained in section B, *ante*, the trial court also denied McClain's motion to subpoena severed co-defendants Aurelius Bailey and Solomon Bowen who could have testified to McClain's lack of involvement in the crime and their knowledge of McClain's upbringing. (71 RT 7101-7102; 72 RT 7190-7192.) The trial court explained that he could not find cases which mandated lingering doubt evidence, that it was a "352 matter." (72

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[136] The trial court nevertheless allowed defendant Holmes to present extensive expert eyewitness evidence at the guilt phase of McClain's trial. (34 RT 3648-3727; 35 RT 3800-3851.)

RT 7254-7255.) The trial court erred in excluding this relevant evidence which went to the heart of McClain's lingering doubt defense because: (1) had they been available, McClain would have been entitled to call them at guilt phase; (2) new evidence of innocence which was unavailable at the guilt phase is admissible at penalty phase; and (3) the trial court lacked discretion to exclude the evidence under Evidence Code section 352.

The trial court's error deprived McClain of a defense sanctioned by California law.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment [citations omitted] the Constitution guarantees criminal defendants a meaningful opportunity to present a 'complete defense.' [citations omitted] That opportunity would be an empty one if the prosecution were permitted to exclude competent, reliable evidence . . . . In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' [citations omitted.]

(*Crane v. Kentucky*, *supra*, 476 U.S. 683, 690-691.)

i. Had they been available, McClain would have been entitled to call Bowen and Bailey at his guilt phase

Because Bowen and Bailey entered guilty pleas and were sentenced after the close of McClain's guilt phase and a mistrial was declared in the first penalty phase, they were protected by the Fifth Amendment from testifying at either proceeding. (U.S. Const., 5th & 14th Amends..)

However, had they been available, McClain clearly would have been constitutionally entitled to call them to provide exculpatory evidence. (U.S. Const., 5th, 6th, 8th & 14th Amends.; see § D, *post.*) The prosecutor had

sole control over the timing of their plea agreements, while McClain had none.

In *Oregon v. Guzek, supra*, 126 S.Ct. at page 1233, the Supreme Court held it was proper to exclude new evidence of lingering doubt at a capital penalty phase where the defendant made no showing that the evidence was previously unavailable, reasoning as follows:

> The defendant here has not claimed that the evidence at issue was unavailable at the time of his original trial. Thus, he need only have introduced it at that time to guarantee its presentation (albeit through transcripts) to a resentencing jury as well.

The High Court's logic reflects its concern both for respect for the finality of judgements as well as the opportunity of a defendant to present exonerating evidence. Unlike Guzek, whose proffered evidence was available at his guilt phase, McClain had no prior opportunity to present the testimony of Bailey and Bowen. Surely the Supreme Court did not mean that McClain would have to keep this newly available evidence under wraps until he files a state habeas petition.[137] Under these circumstances, the Eighth Amendment required admission of this testimony to ensure the reliability of McClain's death sentence.

ii. California law permits new evidence of innocence at penalty retrials regardless of prior availability

Furthermore, California courts routinely admit new evidence of innocence at penalty retrials. (Compare *People v. Anderson, supra*, 25 Cal.4th 543, 561, with *People v. Anderson* (1987) 43 Cal.3d 1104, 1117;

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[137] McClain was sentenced to death on January 27, 1997, nearly 10 years ago. (76 RT 7575-7590.) To date, he has no habeas counsel.

People v. Davenport, supra, 11 Cal.4th at pp. 1191-1192, with *People v. Davenport* (1985) 41 Cal.3d 247, 256-260; *People v. Easley* (1988) 46 Cal.3d 712, 719, with *People v. Easley* (1983) 34 Cal.3d 858, 864-867.)

This Court has also made clear that a defendant may present new evidence of innocence at a penalty phase – even when a single jury hears both guilt and penalty. (*People v. Alcala* (1992) 4 Cal.4th 742, 766.) In *Alcala* the defendant, who had not testified at guilt phase, testified at penalty phase and denied committing the murder. (*Id.* at p 766.)

Approving of this procedure, this Court held that the exclusion of evidence of wrongful convictions in other capital cases "did not prevent defendant from introducing *relevant evidence* regarding the circumstances of [the victim's] death, in an attempt to create a lingering doubt. Indeed, defendant's own testimony at the penalty phase, denying the commission of any offense against [the victim], attempted to create such a doubt." (*Id.* at p 807, emphasis added; see also *People v. Fierro, supra*, 1 Cal.4th 173, 203 [noting that the defendant testified at the penalty phase, but not the guilt phase, of the trial].)

Evidence of innocence that was not available during the guilt phase is especially appropriate in the context of a penalty retrial. For example, in *People v. Terry, supra*, 61 Cal.2d at pages 146-147, this Court relied on its opinion in *People v. Friend* (1957) 47 Cal.2d 749, 767-768, which it quoted as follows:

> '[I]n deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the consideration of the several objectives of punishment . . . of the presumptions concerning, or possible uncertainties attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, *or an*

> *apprehension that explanatory facts may exist which have not been brought to light*, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important.' (Emphasis added by the *Terry* court.)

In this case, the jury could not exercise such discretion because exculpatory evidence that was unavailable at the guilt phase was excluded from the penalty retrial.

The proffered testimony of codefendants Bailey and Bowen that McClain did not participate in this crime was clearly relevant and admissible at McClain's penalty retrial in support of his lingering doubt defense. It was the kind of evidence his jury wanted and needed to hear to allay its apprehensions about facts not presented and to ensure the correctness of its verdict. Thus, McClain is entitled to a new penalty phase, with a fully informed jury.

iii. The trial court lacked discretion to exclude the testimony of Bailey and Bowen

The trial court denied McClain's motion to subpoena Bailey and Bowen under a misapprehension that Evidence Code section 352 controlled the issue, stating, "I can't see where two co-defendants who pled can assist you in lingering doubt from a different jury. That is the issue I have." (72 RT 7191.)

The trial court agreed to reconsider the issue, but again denied McClain's motion invoking 352 and declaring, "This jury is not going to rule on your guilt or innocence." (72 RT 7254-7255.)

The trial court's reliance on section 352 was misplaced. As explained in section C.1, *ante*, McClain was entitled to have his penalty jury

hear all relevant mitigating evidence, including evidence relating to the circumstances of the crime. In addition, McClain was entitled to a fair and reliable penalty determination and to present a defense. Furthermore, California courts clearly err when they exclude lingering doubt evidence at capital penalty phases. (See § C.1, *ante*.) However, had it been appropriate for the trial court to engage in a 352 analysis, such analysis would have compelled the admission of Bailey and Bowen's testimony.

This is true for the simple reason that a state may not apply its evidentiary rules "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Because the trial court excluded the critical evidence of Bailey and Bowen in such a way, McClain was denied "a trial in accord with traditional and fundamental standards of due process." (*Ibid.*)

The Ninth Circuit has instructed reviewing courts to consider the following five factors in determining whether the exclusion of defense evidence violates due process: whether the evidence (1) has probative value on the central issue; (2) is reliable; (3) can be evaluated by the trier of fact; (4) is the sole evidence on the point or "merely cumulative"; and (5) constitutes a major part of the defense. (*Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530.) The court must "balance the importance of the evidence against the state interest in exclusion." (*Ibid.*)

All five factors were present here. First, the testimony of Bailey and Bowen that McClain did not participate in the murders is probative of lingering doubt, the central issue at McClain's penalty phase. (See § C.1, *ante*.) Second, Bailey and Bowen's testimony would have been reliable, as neither had anything to gain or lose. Third the jury could have easily evaluated their credibility as witnesses. Fourth, Bailey and Bowen were the

only participants in the crime who were available to testify to McClain's lack of involvement in the crime. (See § C.2.b.i, *ante*.) Fifth, testimony that McClain was not present when the murders took place was absolutely central to the defense. (See §§ C.1 & C.2.b.i., *ante*, & D.1., *post*.)

Accordingly, the trial court's exclusion of this highly probative evidence violated McClain's federal and state due process rights to present a defense and to a fair trial, his Sixth Amendment right to compulsory process, and his right to a fair and reliable penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7 & 15; *Tinsley v. Borg*, *supra*, 895 F.2d 520, 530.) The death judgment must be reversed.

c. The trial court erred in denying the jury's request to view the evidence introduced at guilt phase

Not only did McClain seek to introduce evidence of lingering doubt, but the second penalty jury during its deliberations asked the trial court if it could review other guilt phase evidence. (75 RT 7545.) The trial court denied this request although the law clearly entitled McClain to place this evidence before the jury. (See § C.2.a.i-ii., *ante*.) The trial court's error prevented the jury from viewing the "whole picture" (*People v. Terry*, *supra*, 61 Cal.2d at pp. 145-147) and undermined the reliability of its death judgment. The error requires reversal.

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D. Additional Federal Constitutional Bases for Relief

1. The trial court prevented McClain from presenting a complete defense and deprived him of compulsory process and a fair and reliable penalty determination

The exclusion of the testimony of Dr. Pezdek and of co-defendants Bailey and Bowen violated McClain's rights to compulsory process and to present a defense. (U.S. Const., 6th & 14th Amends.) "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, *supra*, 410 U.S. 284, 302.)

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Washington v. Texas*, *supra*, 388 U.S. 14, 19; *Crane v. Kentucky*, *supra*, 476 U.S. 683, 690-691; see also *Green v. Georgia* (1979) 442 U.S. 95, 97 [the exclusion of a witness to whom a codefendant confessed at penalty phase denied defendant a fair trial on the issue of penalty].)

Moreover, the Eighth and Fourteenth Amendments demand heightened reliability "in the determination whether the death penalty is appropriate in a particular case." (*Sumner v. Shuman* (1987) 483 U.S. 66, 72; U.S. Const., 8th & 14th Amends.) Heightened reliability is compelled by the oft-cited observation that "death is a fundamentally different kind of penalty than any other that society may impose." (*Harris v. Alabama* (1995) 513 U.S. 504, 516; see also *Ring v. Arizona*, *supra*, 536 U.S. 584,

605-606; *Herrera v. Collins* (1993) 506 U.S. 390, 405; *Lankford v. Idaho* (1991) 500 U.S. 110, 125-126; *Clemons v. Mississippi* (1990) 494 U.S. 738, 750, fn. 4; *Beck v. Alabama, supra*, 447 U.S. 625.)

Nevertheless, the trial court did not allow McClain to support his lingering doubt defense with the testimony of Dr. Pezdek and of co-defendants Bailey and Bowen. This error was particularly egregious in light of the jury's obvious concern with the reliability of Pina's testimony and its desire to view additional guilt phase evidence. (75 RT 7545.)

Thus, the resulting violations of McClain's right to present a complete defense and to a fair and reliable penalty determination, require reversal of the death verdict. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

2. The trial court deprived McClain of Equal Protection Under the Law, by treating McClain differently from both the prosecutor and similarly situated defendants

The prosecution presented extensive guilt phase evidence including enlarged transcripts of McClain's guilt phase testimony, testimony of three medical examiners,[138] a firearms examiner, a paramedic and law enforcement who responded to the Hodges crime scene, the child whose party the victims attended before they were killed, a security guard at Huntington Memorial Hospital, Gabriel Pina who purportedly identified McClain as the driver of one of the cars at the crime scene, people who lived near the crime scene, a "gang expert," testimony of children who attended and left the party with the victims, and numerous photographs of the deceased victims. (66 RT 6415-6490; 67 RT 6511-6558, 6581-6583,

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[138] The victims' causes of death were undisputed.

6592-6645; 68 RT 6733-6766; 69 RT 6865-6889, 6909-6921, 6966-6985; 74 RT 7373-7377, 7383-7384.)

In contrast, the trial court prevented McClain from challenging this evidence with evidence from the guilt phase, including Dr. Pezdek's testimony, and testimony of the two co-defendants who pled afterwards. (69 RT 6853; 72 RT 7190-7291, 7254-7255.) The trial court's decision to prevent Dr. Pezdek from testifying is especially striking because the court allowed the prosecution to present its proffered gang experts – despite the trial court's earlier statement for the record that in its opinion, gang experts are not especially helpful. (65 RT 6337.)

In doing so, the trial court created a constitutionally untenable situation in which a criminal defendant was able to exercise fewer rights than the state prosecuting him. (See *Wardius v. Oregon* , *supra*, 412 U.S. 470, 472; *Green v. Bock Laundry Machine Co.*, *supra*, 490 U.S. 504, 510.) Due process generally requires a "balance of forces between the accused and the accuser." (*Wardius v. Oregon, supra*, 412 U.S. 470, 474.) The Supreme Court has "therefore been particularly suspicious of 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." (*Id.* at p. 475, fn. 6.)

As the Sixth and Fourteenth Amendments to the federal constitution guarantee "a criminal defendant certain fair trial rights not enjoyed by the prosecution," the trial court not only denied him equal protection and due process, but gave him less than his constitutional due. (*Green v. Bock Laundry Machine Co.*, *supra*, 490 U.S. at p. 510.)

Furthermore, this Court has held that when a capital defendant argues lingering doubt, the prosecution is entitled to present additional guilt

evidence at the penalty phase. (*People v. Sanchez* (1995) 12 Cal.4th 1, 63-65.) Equal Protection principles mandate that the courts allow a capital defendant the same opportunity to refute prosecution evidence. McClain had no such opportunity.

Finally, it is well-settled that the courts must treat "similarly situated defendants the same." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 323.) California's death penalty statute mandates that when a defendant is convicted of capital murder, "the trier of fact shall determine," punishment. (Pen. Code § 190.3.) While a trial court may empanel a separate jury on a showing of good cause (Penal Code section 190.4), single juries are preferable. (*People v. Yeoman* (2004) 31 Cal.4th 93, 119.) This preference necessarily assumes that penalty juries will have heard the guilt phase evidence. (*Id.* at p. 120.) By preventing McClain from presenting, and his jury from hearing, evidence that was introduced at his guilt phase, the trial court treated him differently from defendants whose guilt and penalty phases are heard by a single jury and violated his right to equal protection under the law. The death verdicts must be reversed.

3. The trial court's error arbitrarily deprived McClain of a state created liberty interest protected by the due process clause of the Fourteenth Amendment

As explained above, California recognizes lingering doubt as a legitimate defense at a capital penalty phase. (See *People v. Anderson*, *supra*, 25 Cal.4th at p. 591, fn. 16; *People v. Riel*, *supra*, 22 Cal.4th 1153, 1209; *People v. Padilla*, *supra*, 11 Cal.4th 891, 951-952.) McClain's right to present that defense is a liberty interest protected by the federal guarantee of due process of law. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295,

1300.) The exclusion of McClain's proffered evidence thus violated McClain's Fourteenth Amendment rights. The death verdicts must be reversed.

E. The Prosecutor's False Statement to the Trial Court and Misleading Statements to the Jury Deprived McClain of the Rights to Present Mitigating Evidence, to Present a Defense, and to Rebut Evidence and Argument Used Against Him

The prosecutor committed misconduct in two ways. First, opposing McClain's motion to subpoena severed codefendants Bailey and Bowen, the prosecutor falsely told the trial court that Bowen and Bailey who had entered guilty pleas, had not admitted guilt. Second, after arguing successfully to exclude McClain's proposed lingering doubt evidence, the prosecutor argued to the jury that McClain presented no lingering doubt evidence because there was none to present.

1. The prosecutor engaged in misconduct by making false statements to the trial court about the Bowen and Bailey guilty pleas

When McClain moved to call co-defendants Aurelius Bailey[139] and Solomon Bowen, prosecutor Myers responded that although Bailey and Bowen pleaded guilty, they "never admitted guilt."[140] (72 RT 7191.)

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[139] In pre-trial proceedings, the prosecution stated on the record that codefendant Bailey was a shooter. (6 RT 178.)

[140] There was no doubt about the seriousness the admissions inherent in Bowen's guilty pleas. As the trial court told Bowen:

> You are receiving the break of a lifetime . . . . The three defendants that you know have been or will be sentenced to life without the possibility of parole on three counts and they have four or five other attempted murder life sentences. They will never be out of jail.

Bailey pleaded no contest to three counts of voluntary manslaughter. (RT of Bailey's January 28, 1996, plea proceeding at pp. 12-13.) At the plea proceeding, Myers explained to Bailey that a plea of no contest had the same legal effect as a guilty plea. (*Id.* at p. 9.)

Bowen pleaded guilty to two counts of assault with a deadly weapon, (RT of Bowen's February 7, 1996, plea proceeding at pp. 3, 18) based on allegations that he and codefendant Newborn fired shots at Willie McFee's house after Hodges was killed and just before the homicides. (*Id.* at p. 4.) Mr. Myers alleged that this assault occurred as Bowen and Newborn plotted their revenge on Hodges's killers and that either or both of them fired one of the weapons in the homicides. (14 RT 1095-1099.)

The prosecutor's statement to the trial court that Bailey and Bowen did not admit guilt, was a false statement of law and fact. (*Berger v. United States*, *supra*, 295 U.S. 78, 88; *People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Dennis* (1988) 17 Cal.4th 468, 522.) In so asserting, the prosecutor failed in his "duty to refrain from improper methods calculated to produce a wrongful conviction . . ." (*Berger, supra*, 295 U.S. 78, 88.)

As the prosecutor explained to Bailey when he pled no contest to voluntary manslaughter, a plea of no contest has the same legal effect as a guilty plea and "'admits every element of the crime charged.'" (*People v. Wallace* (2004) 33 Cal.4th 738, 749, quoting *People v. Thomas* (1986) 41 Cal.3d 837, 844, fn.6; see also *North Carolina v. Alford* (1970) 400 U.S. 25, 35 [there is no practical difference between a guilty plea and a plea of no contest]; *In re Chavez* (2003) 30 Cal.4th 643, 649; *People v. West* (1970) 3 Cal.3d 595, 612 [a defendant's guilty or no contest plea "demonstrates that

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(RT of Bowen's February 14, 1996 plea proceeding at p. 8.)

he not only knows of the violation but is also prepared to admit each of its elements"].) Any attempt to contradict a plea is "tantamount to challenging the validity of the plea." (*United States v. Morrison* (9th Cir. 1997) 113 F.3d 1020, 1021-1022.) Thus "[a]ny attempt to contradict the factual basis of a valid plea must fail." (*Id.* at p. 1021.)

The prosecutor's statement to the court that Bailey and Bowen never admitted guilt is contrary to law and no honest prosecutor who arranged a plea agreement would state otherwise. This misconduct was especially harmful because McClain, a pro per defendant, lacked the knowledge to contradict the erroneous statement.

2. The prosecutor engaged in further misconduct by using deceptive methods to argue for death

As described in detail *ante* in section C.2.a. of this claim, the trial court, granting the prosecutor's objection, excluded the testimony of McClain's eyewitness identification expert who testified at the guilt phase as well as evidence from codefendants Bailey and Bowen who would have testified that McClain was not present at the Halloween crime scene. Having successfully barred the core of McClain's lingering doubt defense, the prosecutor in his closing argument emphasized the lack of this very evidence. In a series of rhetorical questions, he told the jury repeatedly that there was no evidence that cast any doubt on McClain's guilt for "the most heinous crime in the history of Pasadena." (74 RT 7371.) McClain's objections were overruled. (74 RT 7372.) And the prosecutor was permitted to continue his argument in the same vein. He told the jury that the defendants have given the jury no reason to doubt their guilt; that the guilt phase was not retried; and that "for the purposes of this penalty phase," it "must accept the verdicts and findings rendered by the jury in the

guilt phase of this trial." (*Ibid.*) In this way, the prosecutor exploited the absence of the evidence that he had so vigorously, but erroneously, urged the trial court to exclude. The prosecutor thus committed misconduct under state law by using "deceptive or reprehensible methods to attempt to persuade . . . the jury" to impose death (*People v. Avila* (2006) 38 Cal.4th 491, 610 [citation omitted]) and rendered the penalty trial fundamentally unfair under the due process clause of the Fourteenth Amendment. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-647.)

A death sentence cannot stand on a prosecutor's material and deliberate misstatement of the truth. (*Miller v. Pate* (1967) 386 U.S. 1, 3-7; *People v. Hill*, *supra*, 17 Cal.4th 800, 819-839.) When prosecutorial misconduct prejudicially deprives a defendant of a specific constitutional right, the judgment must be overturned. (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 642-647.)

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in representing the sovereign power, of the State." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; *Berger v. United States*, *supra*, 295 U.S. at p. 88.)

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.) Specifically, prosecutors may not, as did the prosecutor in McClain's case, prevent a defendant from introducing material evidence, argue that defendant had the same opportunity to call witnesses as the State, and then invite the jury to speculate that defendant did not present the evidence because it did not exist. (*Paxton v. Ward*, *supra*, 199 F.3d 1197, 1216-1218.)

In doing exactly that in this case, the prosecutor deprived McClain of the rights to present mitigating evidence, to present a defense, to rebut evidence and argument used against him, and to confront the State's witnesses, and to a fair and reliable penalty proceeding. (*Paxton v. Ward*, *supra*, 199 F.3d at p. 1218; U.S. Const., 6th, 8th & 14th Amends.)

F. The Trial Court's Erroneous Lingering Doubt Instruction Prevented McClain's Penalty Jury from Giving Effect to Relevant Mitigating Evidence

As explained above, the trial court prevented McClain from introducing lingering doubt evidence which was relevant and admissible under both California law and the federal Constitution. (See § C, *ante*.) In addition, the trial court refused the jury's request to review relevant guilt phase evidence, instructed it not to speculate about other guilt phase evidence, and told the jury that other direct and circumstantial evidence existed. (75 RT 7490-7496, 7498-7499.) Thus, while the trial court instructed the jury that it could consider lingering doubt as a factor in mitigation, it denied the jury the evidence necessary to determine whether lingering doubt played a mitigating role in McClain's case. In doing so, the trial court paid lip service to lingering doubt as a mitigating factor under California law, but withheld from the jury the evidence it needed to assess the force of and give effect to McClain's lingering doubt defense.

Under these circumstances, "the instruction is ambiguous and therefore subject to an erroneous interpretation. . . . [T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in away that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

The United States Supreme Court has repeatedly held that when a defendant's "proffered evidence [is] relevant, the Eighth Amendment [requires] the trial court to empower the jury with a vehicle capable of giving effect to that evidence." (*Smith v. Texas* (2004) 543 U.S. 37, 44; *Boyde v. California, supra,* 494 U.S. at pp. 377-378.)

In other words, not only does "the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen.' to that evidence." (*Sumner v. Shuman, supra,* 483 U.S. at p.76, quoting *Eddings v. Oklahoma, supra*, 455 U.S. 104, 115, fn.10; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

Furthermore, the ambiguous instruction violated McClain's right under California law to present and argue lingering doubt, a well-established penalty defense in this state. (*People v. Sanchez, supra*, 12 Cal.4th 1, 77-78; *People v. Terry, supra*, 61 Cal.2d at p. 153.)

The jury's questions indicate that it wanted to hear, and, in accordance with *Lockett*, to listen to McClain's mitigating evidence. However, the trial court stood in its way. The trial court's ambiguous instructions permitted the jury to consider in its penalty determination only the prosecutorial "mini-trial" that the trial court allowed it to hear, without the highly relevant and admissible lingering doubt evidence that McClain proffered. When the jury indicated to the trial court its reservations about the guilt-related evidence before it, the trial court ordered the jury to assume the existence of prosecution evidence and prevented them from reviewing it. In this manner, the trial court made it impossible for the jury to give effect to McClain's mitigating evidence, and deprived it of a state law

defense in violation of the Eighth and Fourteenth Amendments and their California counterparts.

G. The Trial Court's Errors Require Reversal

Each of the errors pertaining to McClain's lingering doubt defense prejudiced him. Moreover, each error compounded the impact of the others. The trial court excluded McClain's relevant, admissible, and crucial lingering doubt evidence and deprived the jury of the evidence introduced at McClain's guilt phase. Then the prosecution untruthfully argued that McClain had an opportunity to present such evidence. The trial court then instructed the jury that while it could consider lingering doubt, it had to assume that sufficient direct and circumstantial evidence were presented at guilt phase to sustain a conviction. In the absence of McClain's proffered evidence as well as the requested guilt phase evidence, this instruction was ambiguous. This concert of errors would be harmful in any case. As McClain demonstrates below, on this record, the State cannot prove that the errors individually or in combination with the others, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 381 U.S. 18, 24.) Moreover, McClain has demonstrated a very reasonable probability that the violations of state law affected the penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d 432, 447-448.)

At least two juries expressed doubts about McClain's guilt in this case. His first jury deliberated for 12 days before finding him guilty and then hung at penalty phase, while the penalty retrial jury deliberated for nearly three days before it returned death judgments against McClain. (See *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 ["The jury spent three days deliberating in the penalty phase, suggesting that the California jury saw this as a close case."]; *People v. Murtishaw* (1981) 29 Cal.3d 733,

775 ["The jury deliberated two full days before deciding the death penalty, suggesting that the issue of penalty was close."]; see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 962 [the fact of a prior mistrial at which the jury heard evidence not presented in the penalty retrial was a factor demonstrating prejudice]; *Caliendo v. Warden of California Men's Colony* (9th Cir. 2004) 365 F.3d 691, 698 ["the case was close enough that Caliendo's first jury hung"].)

The length of the guilt jury's deliberations and ultimate inability to determine a sentence is critical to prejudice because it illustrates that the jury which heard the guilt evidence did not return a death verdict after a penalty phase in which McClain's mitigation theory was lingering doubt. The penalty retrial jury also voiced doubts about McClain's guilt when it sought to review the guilt phase evidence and to see any evidence that could confirm the testimony of Gabriel Pina. With the benefit of the guilt evidence, including the testimony of eyewitness expert Kathy Pezdek, the jury would have seen for itself the weakness of the prosecution case against McClain. The trial court's ruling served the prosecutor's case by preventing exposure of the penalty jury to the inconsistent and unreliable informants whose dubious testimony littered the guilt phase.

Furthermore the testimony of Bailey and Bowen could have confirmed McClain's consistent assertion that he did not take part in the homicides. Although they did not testify at guilt phase, their unavailability was entirely out of McClain's control. The result is that no jury ever heard testimony which could have persuaded the jury not to convict McClain of capital murder.

Generally, evidence of lingering doubt may be the most relevant and significant kind of evidence a capital defendant could present at penalty

phase. According to a comprehensive study of capital jurors "[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact. . . . . [T]he best thing a capital defendant can do to improve his chances of receiving a life sentence . . . all else being equal, is to raise doubt about his guilt." (Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1563; see also *Williams v. Woodford, supra*, 384 F.3d 567, 624.)

In McClain's situation, where he offered previously unavailable evidence of his innocence and the prosecution's case rested on a single unreliable eyewitness and "the testimony of witnesses with less-than-clean backgrounds and incentives to lie," lingering doubt would have been a viable penalty defense. (See *Williams v. Woodford, supra*, 384 F.3d 567, 624.)

The significance of the trial court's error was exemplified and amplified by the prosecutor's misconduct. Nothing on the record indicates that the trial court disagreed with the prosecutor's false statement that Bailey and Bowen did not admit guilt when they entered their pleas in this case. It is therefore impossible to say that this misrepresentation did not influence the trial court's decision to exclude the evidence.

More importantly, in misleading this jury – which through its questions to the trial court clearly expressed doubts as to McClain's guilt – to believe that the trial court gave McClain an opportunity to present his lingering doubt case, the "prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record." (*Berger v. United States, supra*, 295 U.S. at p. 84.)

Prosecutorial misstatements to the jury are especially egregious because jurors place confidence in prosecutors to fulfill their obligations to seek justice and serve the law. (*Berger v. United States*, *supra*, 295 U.S. at p. 88.) As a result of the confidence jurors place in prosecutors, misleading statements by a prosecutor to the jury "are apt to carry much weight against the accused when they properly should carry none." (*Ibid.*)

For these reasons, the prosecution's deliberate misstatement to the jury that McClain had an opportunity to present lingering doubt evidence when in fact he had none, "crossed the line between a hard blow and a foul one, consequently giving rise to a valid constitutional claim." (*Paxton*, *supra*, 199 F.3d at p. 1218.) It therefore "called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial," to remove the "evil influence upon the jury of these acts of misconduct. . ." (*Berger v. United States*, *supra*, 295 U.S. at p. 85.)

When, as here, prosecutorial misconduct is pronounced and the case against defendant is weak, "prejudice to the accused is so highly probable that we are not justified for assuming its nonexistence," and a "new trial must be awarded." (*Berger v. United States*, *supra*, 295 U.S. at p. 89.)

In the absence of McClain's lingering doubt evidence or an opportunity to review the guilt phase evidence, and in combination with the prosecutor's misleading argument, the trial court's instructions suggested to the jury that no lingering doubt existed and that the prosecution had produced strong evidence against McClain at guilt phase. Naturally, the jury's reliance on the trial court's charge compelled the jury to return a death judgment against McClain.

"'The influence of the judge on the jury is necessarily and properly of great weight' [citation omitted] and jurors are ever watchful of the words

that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

Accordingly, a "jury is presumed to follow its instructions." (*Weeks v. Angelone* (2000) 528 U.S. 225, 234; *Richardson v. Marsh* (1987) 481 U.S. 200, 211.) "Similarly, a jury is presumed to understand a judge's answer to its question." (*Weeks v. Angelone*, *supra*, 528 U.S. 225, 234; accord *Armstrong v. Toler* (1826) 24 U.S. 258, 278-279.)

So, when, as here, a jury asks questions that indicate doubts as to a defendant's guilt, and a trial court responds with a charge that is ambiguous in light of the evidence, it is "indeed a long jump at guessing to be confident that the jury did not rely on the erroneous [instruction] given them as a guide." (*Bollenbach v. United States, supra*, 326 U.S. 607, 614.)

Here, the trial court's instructions created the erroneous impression that the prosecutor had presented strong guilt phase evidence and led the jury to believe there was no viable evidence of McClain's innocence.

The death verdicts must be reversed.

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XVIII.
McCLAIN WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS EXCLUSION OF EVIDENCE OF FAVORABLE DISPOSITIONS GRANTED TO CODEFENDANTS BOWEN AND BAILEY, AND BY UNFAIR PROSECUTORIAL MISCONDUCT IN EXPLOITING THE EXCLUSIONARY RULING; McCLAIN'S DEATH SENTENCE VIOLATES EIGHTH AMENDMENT PRINCIPLES

A. Summary of Facts

The prosecutor moved to exclude the disposition of codefendants of Bailey and Bowen, and the trial court granted the motion. (65 RT 6338.) The prosecutor's motion to exclude the evidence, filed September 23, 1996, following the penalty mistrial, noted that "[t]wo codefendants, Bailey and Bowen, subsequently entered into negotiated dispositions in the instant matter." (8 CT 2089.) The prosecutor cited *People v. Carrera*, *supra*, 49 Cal.3d 291, 343, for the proposition that "[t]he punishment meted out to a codefendant is irrelevant to the decision the jury must make at the penalty phase: whether the defendant before it should be sentenced to death"; and also cited *People v. Belmontes* (1988) 45 Cal.3d 744, 810. However, *Carrera* and *Belmontes* do not fully address and provide for the Federal Constitutional due process considerations inherent in capital sentencing.

Codefendant McClain in pro per raised the issue again during penalty trial, and the court reiterated its ruling. (71 RT 7101-7102.)

B. The Trial Court's Error and Prosecutorial Exploitation of that Error Violated McClain's Right to Due Process and His Right to a Proportionate, Non-Arbitrary Sentence Under the Eighth Amendment

McClain's federal right to due process in capital sentencing was violated when the trial court refused to allow McClain to inform the jury

making his penalty determination of the negotiated dispositions given to two of his codefendants. (*Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735.) Moreover, Eighth Amendment principles eschewing the arbitrary or disproportionate imposition of the death penalty were violated because appellant was sentenced to death and codefendants whose culpability was alleged to be greater than or equal to McClain's were given favorable negotiated dispositions. (*Furman v. Georgia, supra*, 408 U.S. 238; *Enmund v. Florida, supra*, 458 U.S. 782.)

In a recent case, the Sixth Circuit reversed a death sentence on the basis of *Furman* and *Enmund* where the actual triggerman in a murder for hire was given a harsher sentence (the death penalty) than the person who hired him (life imprisonment). (*Getsy v. Mitchell* (6th Cir. 2006) 2006 U.S. App. LEXIS 19472.) Getsy's capital sentence was reversed on the basis of the lack of symmetry between his and his codefendant's relative culpability and their sentences. (*Ibid.*) Following *Furman*, the *Getsy* court held that "inconsistent and disproportionate sentences in the same case violate the clearly established *Furman* arbitrariness principle and hence the Eighth Amendment." (*Getsy v. Mitchell, supra*, 2006 U.S. App. LEXIS 19472, at p. 23.) The Getsy court also based its conclusion on the Eighth Amendment principle of proportionality embodied in *Enmund* and observed that the Eighth Amendment is "violated when defendants with 'plainly different' culpability receive[] the same capital sentence. It requires proportionality comparison with others participating in the same crime." (*Getsy v. Mitchell, supra*, 2006 U.S. App. LEXIS 19472, at p. 26.) Applying this principle, the court held that "in a capital case with respect to the *very same* crime stemming from the *very same* facts, the Eighth Amendment does not permit codefendants with plainly similar culpability to receive different

sentences -- especially when the defendant with arguably less culpability receives the harshest of all sentences, the death penalty." (*Getsy*, *supra*, at p. 31, emphasis in original.) In the instant case, these principles were violated when Bailey, who was alleged to be one of the shooters in the Halloween crime as well as an active participant in planning a retaliatory action for the death of Fernando Hodges as described by the overt acts alleged as to the conspiracy charge, was given a favorable negotiated disposition and McClain, who the prosecutor admitted was not one of the shooters and whose participation in the alleged planning was comparatively minimal, was given the death penalty. Likewise, these principles were violated by the fact that Bowen, whose participation was alleged to be comparable to that of McClain, was given a favorable negotiated disposition.

In another recent case, the Ninth Circuit addressed the question of the unfairness of leaving jurors ignorant of favorable dispositions granted to codefendants. (*Morris v. Ylst*, *supra*, 447 F.3d 735, 747-748.) *Morris* granted penalty relief to the petitioner because of a *Brady* violation, and Judge Ferguson filed a concurring opinion in which he expressed concern about the inherent unfairness in prosecutorial discretion in pursuing the death penalty against some capital eligible defendants, while foregoing it against equally culpable others, and leaving the capital jurors ignorant of this process. Judge Ferguson's solution to this inherent anomaly is that "[t]he jury must be permitted to consider, as a mitigating factor in its determination of whether to impose the death penalty, the government's admission that it singled Morris out for capital punishment among three equally guilty perpetrators." (*Id.* at p. 748.)

Applied to this case, the trial court erred in refusing to permit the defense to present evidence and in further refusing to instruct that the jury could consider as a mitigating factor the prosecution's determination to pursue the death penalty against appellants McClain, Newborn, and Holmes, while foregoing it against codefendants Bailey and Bowen, who were alleged in the indictment to have played equally or more culpable roles in the charged crimes.

Bailey was alleged to have personally used a firearm in the events leading to the death of the victims. (3 CT 631-639.) The jury found true an overt act alleging that Bowen had fired a 9-millimeter gun at or near the residence of an individual believed to be a Crip. (6 CT 1695.) The prosecutor never argued that McClain used a firearm in the Halloween crimes and, indeed, the prosecutor conceded on the record that McClain was not a shooter. (3 CT 631-639; 6 RT 178.)

It is unclear whether the jury even believed that McClain drove a car to and from the scene of the Halloween shooting, as they did not find true the caravaning overt act. (42 RT 4365; 6 CT 1695.) Under these circumstances, McClain's participation fell far short of that of Bailey and Bowen, and far short of that required for death eligibility in general.

The inherent unfairness is particularly acute in a case like this where the prosecutor improperly capitalizes on and exploits the exclusion order. Here, the prosecutor argued that the three defendants convicted of these crimes were so bad that "only death will make it just." After laying a foundation that the death penalty is reserved for the "worst-of-the-worst" (74 RT 7398), and that coappellants McClain, Newborn, and Holmes are the worst-of-the-worst, the prosecutor continued:

> I'm asking you to give it [the death penalty] most of all on behalf of yourselves, because if you look into your heart these are the worst-of-the-worst. Their crimes are the worst-of-the-worst, and they killed some of the best-of-the-best. And *only death* can make it fair; *only death* will make it just.

(75 RT 7415, emphasis supplied.) That is a patently misleading and hypocritical argument, given that the prosecutor offered very favorable plea bargaining to Bailey and Bowen whose culpability for the murders was equal or greater. As to those two, a punishment far less than death was sufficient to make it "fair" and "just" in the prosecutor's opinion, but then argued a contrary opinion to McClain's jury to improve the prospects of a death verdict. Where, as here, the prosecutor's rhetoric in support of the death penalty is premised on a patently false factual premise of the prosecutor's own making, the prosecutor cannot simultaneously resist the efforts of the defense to provide relevant factual information. The prosecutor must either forego that inflammatory rhetoric, or permit the jury to be accurately apprised of how justice was actually distributed by the prosecutor in the case.

There is an analogy here to the due process violation condemned by the United States Supreme Court in *Simmons v. South Carolina* (1994) 512 U.S. 154, 165. In *Simmons*, the prosecutor successfully persuaded the court not to instruct the jury that if given life imprisonment, the defendant would be *in*eligible for parole and would spend the rest of his life in prison. Having obtained that ruling, the prosecutor then implied to the jury that the death penalty was the best choice to prevent the defendant from committing further acts of violence *generally*. The due process violation occurred because "[t]he State raised the specter of petitioner's future dangerousness generally, but thwarted all efforts by petitioner to demonstrate that, contrary

to the prosecutor's intimations, he would never be released on parole and thus, in his view, would not pose a future danger to society." The Supreme Court noted that "the state is "free to argue that the defendant will pose a danger to others in prison," but "the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility." (*Id.* at p. 165, fn. 5.)

The analogy here is that the prosecutor concealed information about the favorable life dispositions conferred with a prosecutorial blessing to codefendants Bowen and Bailey, and then argued to McClain's jury that the death penalty was the *only* penalty appropriate for the defendants because they were the "worst-of-the-worst." (See also *People v. Varona* (1983) 143 Cal.App.3d 566 [reversible error for prosecutor to successfully urge exclusion of evidence and then argue that the jury should penalize the defense because of the absence of that evidence]; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825 [federal constitutional error for prosecutor to assert unproven facts under the guise of closing argument].) *Gaines* found that the error required reversal under the *Chapman* standard.

The prosecutorial misconduct here is also analogous to that which required reversal of a death sentence in *In re Sakarias* (2005) 35 Cal.4th 140. There, the prosecutor in sequential trials of two codefendants argued "significantly inconsistent and irreconcilable" versions of the offense to portray *each* defendant as the actual killer. This Court concluded that the prosecutor's undisclosed embrace of two incompatible positions violated the defendant's due process rights as to penalty. (*Id.* at p. 165.)

Here, the prosecutor endorsed the position in front of McClain's jury that the crimes were so heinous that "only death" was fair and just as a penalty. In contrast, the prosecutor took the contrary and irreconcilable

position at Bailey and Bowen's disposition that a non-capital outcome was entirely consistent with the interests of justice. Had McClain's jury known of the prosecutor's *actions* with respect to the Bailey and Bowen dispositions, those actions would have spoken far louder in mitigation than the prosecutor's *words* sounded in aggravation at McClain's trial.

C. The Requirement of Reversal

Reversal is required here because the crown jewel of the prosecutor's argument was based on a false factual basis that the prosecutor created through an artful manipulation of the evidence. By first successfully excluding any evidence or defense reference to the prosecutorially-approved non-capital dispositions of Bailey and Bowen, the prosecutor then hypocritically argued to the jury with impunity that only death was a fair and just punishment for the perpetrators of the horrible crimes for which the defendants were convicted. Bailey and Bowen were convicted of the same crimes, and at least according to the prosecution's theory as set forth in the indictment, their culpability was equal or greater than McClain. This combination of judicial error and prosecutorial misconduct cannot be deemed harmless beyond a reasonable doubt, given the closeness of the penalty decision in this case. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 306-307.)

Moreover, in light of the favorable dispositions given to his codefendants with equal or greater culpability, McClain's death sentence must be vacated under the principles of proportionality and consistency inherent in the Eighth Amendment. (*Furman v. Georgia*, *supra*, 408 U.S. 238; *Enmund v. Florida*, *supra*, 458 U.S. 782.)

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XIX.
McCLAIN WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND AN INDIVIDUALIZED AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF A VIDEOTAPE OF CODEFENDANT HOLMES' PROFANE OUTBURST

A. Summary of Facts

On December 22, 1995, the first jury returned its guilt verdicts after 16 days of deliberation. The court first read the verdicts as to Newborn (45 RT 4734); then the verdicts as to McClain (46 RT 4743); and finally as to Holmes (46 RT 4752). The clerk began, "We the jury in the above entitled action find the defendant, Karl Holmes, guilty of the crime of murder in violation of Penal Code section 187," at which time defendant Holmes interjected: "Fuck you, you mother fuckers. P-9 rules." (*Ibid.*) Holmes's outburst was recorded on videotape by an authorized media cameraman in the courtroom. The jury that returned the guilt verdicts eventually hung on penalty as to McClain. (7 CT 1861, 1863; 59 RT 5757.)

At the penalty retrial, the defense moved to exclude evidence of Holmes' outburst at an in limine hearing held on September 30, 1996. (65 RT 6325.) The prosecutor argued that the profane statement to the jury "would be admissible to rebut mitigating evidence of remorse," and that the "latter portion where he claims P-9 affiliation is admissible as a circumstance of the crime." (65 RT 6328.) The prosecutor stated, "This outburst and display by Mr. Holmes demonstrates his P-9 affiliation and, therefore, is a relevant aggravating factor because it helps to establish that he was part of the P-9 gang that retaliated for the earlier killing of Fernando

Hodges, which is the heart and soul of the People's theory of the case and is thus a legitimate factor as a circumstance of the crime." (65 RT 6329.)

Counsel for Holmes argued that the obscenities were not admissible to "show lack of remorse," which is "not an aggravating factor," and that the statement "P-9 rules" had "very little to do with anything other than his displeasure at being found guilty." (*Ibid.*)

In ruling to allow the prosecution to play the videotape, the court acknowledged that the evidence was to be admitted against Holmes only (65 RT 6330), as well as acknowledging that the videotape would be prejudicial to all three defendants (65 RT 6336-6337, 6339). However, no limiting instruction was given that the evidence could be considered against Holmes only. In fact, the trial court told the defendants that "[i]f you say something or do something, all of you will suffer for it, that's it." (65 RT 6339; see also 74 RT 7354-7355 [trial court stated that actions by each defendant "reflect[] on the other defendants"].)

The prosecutor alerted the jury in his opening statement preceding penalty retrial that "In addition to the evidence of Mr. Holmes' crime there, we will also show you a videotape of Mr. Holmes' reaction and threats to the jury after the guilty verdicts were read." (65 RT 6371.) The prosecutor's first piece of evidence at the penalty retrial was Exhibit 117, the video of the guilt verdicts. (65 RT 6411.) After the videotape was played to the jury, the prosecutor read the text of the outburst from the reporter's transcript, because "There is a bleep in the tape." (*Ibid.*)

The prosecutor argued based on McClain's testimony that the three defendants "went out to smoke and kill Crips and you are here today as a result of that. Why did they do it? Because they are P-9 gang members intent on retaliating for the death of a fellow P-9." [At that point, the

prosecutor played the videotape of Holmes' guilt verdict outburst.] The prosecutor continued arguing: "P-9. I won't repeated the deleted expletives uttered by Mr. Holmes, but it's all about P-9." (73 RT 7377-7378.) Holmes' counsel argued with respect to the tape of the guilt phase outburst that while the prosecutor "initially called that a threat," they were "not calling it a threat any longer" because Holmes "was just angry that from that point on he knew that for his entire life he would be behind bars or he would be killed. (73 RT 7457-7458.) The trial court instructed the jury, but nothing in the instructions restricted the jury's consideration of Holmes' outburst to Holmes alone. Rather, the court instructed that "In determining which penalty is to be imposed on each defendant, you shall consider the murders for which these defendants have been convicted, *as well as all the evidence which has been received during the trial of this case.*" (75 RT 7501.)

The trial court did instruct that "evidence has been admitted against one or more of the defendants and not admitted against the others," and noting that "At the time this evidence was admitted you were admonished that it could not be considered by you against the other defendants," such that the jury should "not consider such evidence against the other defendants." (75 RT 7520.) However, there was no such instruction given at the time of either the prosecutor's opening statement description of the videotape, nor at the time it was played to the jury. The jury began deliberating on October 22, 1996, and on October 30 asked to again see the videotape of Holmes' outburst. (8 CT 2283; 75 RT 7550.)

B. The Trial Court's Errors

The trial court erred in permitting the prosecution to present the videotape to the penalty jury. It did not qualify under any statutory

aggravating factor. The prosecutor's asserted reasons for admission—a preemptive strike as to lack of remorse and affirmative evidence of P-9 affiliation—are both unsupportable. The tape was first item of prosecutorial evidence at penalty phase, long before Holmes had any opportunity to present any evidence of remorse, and which he in fact never did. With respect to Holmes' membership in the P-9 gang, the prosecution presented ample evidence of that at the earlier trial, without the benefit of Holmes' post-verdict outburst. The evidence had a primarily prejudicial effect, i.e., showing Holmes as an angry Black male spewing profanity at the civic minded citizens who served on the first jury. Even if proof of Holmes' gang affiliation was a relevant factor at penalty retrial, this particular episode should have been excluded because of its prejudicial impact as to Holmes and its prejudicial spillover as to appellant McClain. There is case law that permits a prosecutor to comment on a defendant's courtroom demeanor in support of a lack of remorse argument, but only where the defendant "put the question of his remorse an issue" prior to the prosecutor's argument. (See *People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 114; *People v. Jurado* (2006) 38 Cal.4th 72, 141 ["A prosecutor in a capital case may not argue that a defendant's postcrime lack of remorse is an aggravating factor..."].) There, the defendant argued that the prosecutor improperly argued a lack of remorse as an aggravating factor, but rejected the contention because "Three defense witnesses...all testified on the subject of his remorse." Under these circumstances, "The prosecutor did not introduce the subject and was entitled to comment on the testimony."

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C. The Resulting Prejudice

Pursuant to California state law, the issue of whether a defendant was prejudiced by the erroneous admission of evidence is evaluated under the standard applicable to ordinary state law error under *People v. Watson*, *supra*, 46 Cal.2d 818, 836-837. This Court has held that an error of this type requires reversal only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, supra, 46 Cal.2d at p. 836.) In this case, however, the error was also a violation of McClain's federal constitutional rights and the *Chapman* harmless error standard should apply. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Arizona v. Fulminante, supra,* 499 U.S. at pp. 306-307 [the *Chapman* standard applies to "ordinary trial errors" implicating the federal constitution].) Under *Chapman*, the State has the burden to prove beyond a reasonable doubt the error did not contribute to the verdict obtained. (*Chapman, supra*, 386 U.S. at p. 24.) In addition, the prejudicial impact of this particular error must be viewed in conjunction with that of other errors for a determination of cumulative prejudice. (See *United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 210, fn. 3 ["We hold that the cumulative effect of all the errors bearing on the issue of whether Tory had a gun requires a new trial on Count 1."].)

The prejudice to appellant McClain is evident from the combined factors that (1) there was no instruction limiting the consideration of the evidence to Holmes; (2) the prosecutor argued it as relevant to demonstrating the future dangerousness of *all* three defendants (see 74 RT 7377-7378); and (3) the jury asked to see the videotape again during jury deliberations and before reaching its death verdict as to McClain.

Particularly where the prosecutor replayed the tape during his penalty argument to the jury; used it to emphasize his theme that three defendants "went out to smoke and kill Crips and you are here today as a result of that"; and argued that "they are P-9 gang members intent on retaliating for the death of a fellow P-9," prejudice is apparent. The prosecutor clearly intended that the jury consider Holmes' courtroom outburst as indicative of the violent gang mentality shared by all three defendants.[141]

Moreover, the prosecutor himself bundled that argument about the meaning of the Holmes' outburst with an argument regarding adverse inferences based on the holding cell graffiti, as well as attributing McClain's threat against Deputy Browning as the foundation for the rhetorical question, "What is fair for *people like this*?" (74 RT 7378, emphasis added.) The prosecutor made no effort to compartmentalize the evidence introduced to the jury's determination as to Holmes only to consideration of Holmes's penalty. Rather, the prosecutor lumped together all the improperly admitted evidence together as a reason for imposing the death penalty against all three codefendants.[142]

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[141] The prosecutor also attributed McClain's actions as expressed in his testimony to the other defendants, remarking "As if their minds would be any different than Mr. McClain's." (74 RT 7376.)

[142] The prosecutor repeatedly encouraged the jury to hold aggravating evidence that was admissible against only one defendant against all of the defendants as a group. Although no evidence was presented that McClain had "beaten women," in argument, the prosecutor sought to portray all of the defendants as a unit, speaking in one voice.

> *It gives the defendants an opportunity to tell you* that "despite the fact that we killed three boys, despite the fact that we have caused untold grief to so many people . . . despite the fact that an entire generation of kids in Pasadena will never have Halloween, will never know that sort of joy but will only

In addition, this argument was made with the apparent permission of the trial court. When, out of the presence of the jury, the prosecutor argued that there was evidence of a "threat made by Mr. Newborn," Newborn's counsel argued that "There is no evidence in this case of any threat by Mr. Newborn against anybody." The prosecutor referred to page 7336 of the transcript, and argued that appellant Newborn's response to Deputy Browning's question as to what McClain had said constituted a threat by Newborn. (75 RT 7365.) Newborn's counsel objected, arguing that "There was an instruction drafted by Mr. Myers where the last line said this evidence is being admitted against McClain and not against Newborn and not against Holmes," but "then to stand up here and cite that without an acknowledgment of that limiting instruction and then to indicate a desire to argue that is admissible evidence against Newborn and to use it as a justification..." (*Ibid.*) The prosecutor responded cryptically, "That is not something I can argue to the jury, but is something the court can consider as future dangerousness," to which the court responded, "I understand," but cautioned, "As to Mr. Newborn you put him in a position on that that would be inappropriate." (74 RT 7366.)

The prosecutor skirted the apparent intent of the trial court's ruling by referring to the evidence admitted against Holmes individually and McClain individually, and then immediately arguing that the evidence taken

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> know fear and death, despite the fact that *I have led a life where I have beaten women regularly, repeatedly, where I have attacked inmates in custody, where I have been caught with guns, despite all those things I want you to spare my life because I think it's fair.*"

(74 RT 7370-7371, emphasis added.)

as a whole showed the gang affiliation, gang mentality, and gang violence common to all three. Under these circumstances, McClain was deprived of due process and a reliable and individualized penalty determination. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 603-605; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328, abrogated on other grounds *Atkins v. Virginia*, *supra*, 536 U.S. 304.) The result produced a gross unfairness amounting to a denial of due process and a fair trial in violation of McClain's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and requiring reversal of his judgment of death. (*Chapman v. California*, *supra*, 386 U.S. 18.)

XX.
McCLAIN WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND A RELIABLE PENALTY DETERMINATION BECAUSE HIS DEATH SENTENCE RESTED ON HIS UNRELIABLE CONVICTION FOR THE ATTEMPTED MURDER OF ROBERT PRICE

A. Proceedings Below

At penalty phase, the prosecutor introduced evidence that McClain was convicted of the attempted murder of Robert Price. (71 RT 7027-7033.) In closing, the prosecutor asked the jury to consider the attempted murder of Price in its penalty determination. (74 RT 7385.)

B. Argument

As explained in Claims III, V and VII, *ante*, the attempted murder conviction is invalid and must be reversed.[143]

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[143] These three claims are incorporated by reference herein.

Because of the special need for reliability in capital sentencing, an invalid prior conviction is not a legitimate basis for a death sentence. (U.S. Const, Amends. 8, 14; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-586.) Even in a non-capital proceeding, a sentence based on materially untrue assumptions about defendant's criminal record violates due process. (*Townsend v. Burke* (1948) 334 U.S. 736, 741; *United States v. Tucker* (1972) 404 U.S. 443, 447; *Zant v. Stephens* (1983) 462 U.S. 862, 888, fn. 23.) Furthermore, Penal Code section 190.3 prohibits introduction at penalty phase of criminal activity for which defendant was prosecuted and acquitted. (Pen. Code § 190.3.)

Because the attempted murder conviction is invalid, the death verdict must be reversed.

C. Prejudice

In *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590, the Supreme Court reversed without applying harmless error analysis because "the jury was allowed to hear evidence that [had] been revealed to be materially inaccurate." As explained in Claims III and V, *ante*, McClain's conviction for shooting Price was obtained in violation of his right to confrontation. Moreover, the evidence that McClain shot Price was legally insufficient. Each ground requires reversal of McClain's conviction for the attempted murder. Thus, like the prior conviction in *Johnson*, the evidence of McClain's conviction was "materially inaccurate." (*Ibid.*)

In addition, the State cannot prove that the admission of the Price conviction at McClain's capital penalty phase was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.)

The Price conviction was critical to the prosecutor's argument for death because it was the only evidence in aggravation that McClain actually

shot or physically harmed another human being. Even the evidence of McClain's conviction for and participation in the Halloween killings did not show that McClain ever injured another by his own hand. Assuming for this argument that the prosecutor's contentions are true, McClain's maximum participation in the Halloween killings was to drive a getaway car. The guilt jury's failure to find Overt Act 5, alleging that McClain and others caravanned to the crime scene true, suggests that it did not credit McClain with even that most minimal participation. It is thus likely that evidence that McClain tried to shoot and kill Price persuaded the jury that McClain was a future danger – a concept the prosecutor argued forcefully. (74 RT 7397.) Where future dangerousness is at issue, misleading information about the defendant's potential for danger "inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death." (*Deck v. Missouri*, *supra*, 544 U.S. 622, 633.)

This is especially true in close case like McClain's in which the jury took three days to determine McClain's penalty and approached the trial court with lingering questions about McClain's culpability in the Halloween crimes. (75 RT 7545, 7552-7555.) For these reasons, the death verdicts must be reversed.

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XXI.
THE TRIAL COURT'S REFUSAL TO SEVER McCLAIN FROM HIS CODEFENDANTS AT HIS PENALTY RETRIAL DEPRIVED HIM OF DUE PROCESS, INDIVIDUALIZED SENTENCING, AND A RELIABLE PENALTY DETERMINATION

A. Introduction

The trial court's denial of severance deprived McClain of due process and a fair trial, impermissibly diminished the reliability of McClain's capital penalty phase, and deprived him of individualized sentencing for at least three reasons: First, codefendant Newborn assumed the role of second prosecutor by trying to impute to McClain or Holmes responsibility for the holding cell graffiti in the absence of any evidence of the author's identity. Second, the far more serious aggravating evidence attributed to Newborn was imputed to McClain by association. Conversely, the minimal aggravation introduced against Holmes made McClain look more death-worthy by comparison – even though Holmes was a shooter and McClain was not. In each case, the aggravation pertaining to a codefendant prevented the jury from fulfilling its obligation under the Eighth Amendment to consider McClain's case for life on its own merits. Third, the cases in mitigation presented by Newborn and Holmes which focused on cognitive disabilities and negative life experiences had the effect of aggravating evidence as to McClain who did not present similar evidence. This too prevented the jury from making the individualized sentencing determination the Eighth and Fourteenth Amendments require.

The trial court also erred in failing to consider the actual prejudice of joinder, relying on his early decision to resist severance from the start of the proceedings. This failure to exercise discretion was an abuse of discretion which requires reversal. (Claim VII.D is incorporated by reference herein.)

B. Proceedings Below

1. Objections and rulings

On January 3, 1996, McClain unsuccessfully requested severance from codefendants Newborn and Holmes at his first penalty trial.[144] (45 RT 4787-4788.) On January 24, 2006, after the start of penalty phase testimony, Newborn's counsel indicated to the trial court his intention to compare the behavior of Newborn at the guilt phase with the behavior of McClain and Holmes. (53 RT 5235.) McClain renewed his severance motion and requested a mistrial on grounds that Newborn's counsel would be acting as a second prosecutor. (53 RT 5236.)

At the penalty retrial, Newborn and Holmes requested severance, because they did not wish to go forward with McClain who was representing himself. (60 RT 5831-5832.) In addition, they were prepared to proceed, while McClain's standby counsel and the prosecutor wanted more time. (*Ibid.*) McClain also objected to delays in the proceedings. (60 RT 5833.) The trial court denied severance, explaining, "this Court told you from the beginning this case would not be severed either in the penalty phase or the guilt phase." (61 RT 5865.) The trial court instructed McClain, "You have a responsibility to the other defendants." (64 RT 6314.) In light of the denial of severance, Newborn's counsel indicated that he would be joining the prosecutor in motions. (64 RT 6316.)

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[144] During the guilt phase, the trial court agreed that any defense objection would be deemed joined by all defendants unless stated otherwise. (32 RT 3317.) The trial court repeated this ruling during the penalty retrial. (65 RT 6342.)

2. The holding cell graffiti

Newborn again requested severance when over defense objection the trial court permitted the prosecutor to present evidence that P-9 gang graffiti was present in the holding cell in which McClain, Newborn, and Holmes were held during breaks in the proceedings. (65 RT 6323-6327.) Counsel for Newborn argued unsuccessfully:

> It creates an absolute necessity on the part of two of these defendants to testify that they didn't write it, because I think it would be ineffective assistance to have this kind of evidence come in, obviously written by one person and we have three people here. There is an obligation on the part of the two non-writers to put on that evidence and start pointing the fingers and have the whole trial disintegrate.

(65 RT 6323.)

Deputy Carlos Lopez testified that three names appeared in the holding cell in the following order: "Boom," "Sunday Shoes," and "Monsta Herb 1." (66 RT 6463.) Boom is Holmes's nickname and Sunday Shoes is Newborn's nickname. (66 RT 6463-6464.) Lopez never heard the nickname "Monsta Herb 1" prior to testifying. (66 RT 6464.)

On cross-examination, Newborn attempted to elicit from Lopez an opinion that the person named first or last was more likely to have authored the graffiti than the person named in the middle. (66 RT 6472.) Lopez opined that the author might have wanted to throw off law enforcement by placing his name in the middle or in another position. (*Ibid.*)

Newborn's counsel argued in closing that Newborn, whose nickname appeared between "Boom" and "Monsta Herb 1" was not the author of the graffiti, because his name appeared neither first nor last. (74 RT 7466.)

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3. Other Aggravating Evidence

The prosecutor presented aggravating evidence specific to each defendant.

a. Aggravating evidence pertaining to Newborn

The prosecutor presented strong evidence that Newborn committed serious acts of violence against women on at least five occasions. (67 RT 6559-6588, 6661-6679; 68 RT 6695-6701, 6703; 69 RT 6936-6940, 6946-6948.) During these incidents, Newborn injured women – including one who was pregnant with his child, one who was holding a two week old baby, and another who was the mother of one of his children – by hitting, dragging, kicking in a car window, spraying in the face with Lysol, Raid, and Windex, pushing the face into rose bushes, and other methods. (*Ibid.*) The prosecutor also presented evidence that Newborn threatened a woman because she "knew" he had killed her son (68 RT 6768-6791) and that he had an altercation with another ward when he was incarcerated at the California Youth Authority. (69 RT 6855-6860, 6894-6901.) With the exception of the threat incident, Newborn did not dispute that these incidents took place. He did suggest that the domestic violence incidents involved mutual aggression.

b. Aggravating evidence against McClain

The prosecutor presented evidence that, while in jail, McClain, with hands lifted above his head, ran towards another prisoner. When deputies threw McClain to the ground, they found a shank underneath him. (68 RT 6648-6660.) A woman accused McClain of snatching chains from her neck. One half hour after the incident, she identified McClain based on his clothing alone. No chains were found on McClain. (69 RT 6833-6843.) In addition, the prosecutor introduced evidence that McClain was arrested with

severed codefendant Bowen in possession of a gun (68 RT 6685-6691), robbed two men of a car at gunpoint (68 RT 6722-6732, 69 RT 6829-6831, 6844-6849), McClain shot himself in a park bathroom (69 RT 6816-6821), and that, simultaneous with his conviction for the Halloween killings, McClain was convicted of the attempted murder of Robert Price.[145] (71 RT 7029-7032.)

During the penalty retrial, witness Joseph Petelle accused McClain of threatening to kill him. The jury heard a stipulation that standby counsel who was present when McClain spoke to Petelle, heard McClain say, "you're a dickhead," and did not hear any threats on Petelle. (69 RT 6922-6925.)

The trial court also took judicial notice that of McClain's three previous convictions for being a felon in possession of a firearm and one for grand theft auto. (69 RT 6850.)

Finally, after the close of penalty phase evidence, the trial court introduced evidence that McClain, who was wearing a stun belt, made threatening remarks to a deputy who did not fear for his safety.[146] (73 RT 7316, 7331-7341.)

c. Aggravating Evidence against Holmes

When the first jury announced its guilt verdict against Holmes, he exclaimed, "Fuck you, you mother fuckers. P-9 rules." (46 RT 4752.) A cameraman caught this on video. (65 RT 6328; see Claim XIX.)

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[145] McClain asserts in this brief that the Price conviction was improper for several reasons. Claims III, V and VII are incorporated by reference herein.

[146] McClain believes this aggravation was admitted in error. Claim XV is incorporated by reference herein.

The prosecutor also introduced evidence that Holmes went to a carnival carrying a gun. (68 RT 6795-6797.)

4. Mitigating Evidence

a. Newborn's Mitigating Evidence

Newborn presented evidence of childhood trauma, exposure to domestic violence, the loss of male figures in his life, possible brain injury, cognitive and physical disabilities, his subjection to ridicule, and his history of substance abuse. In addition, he presented evidence to contest the allegation that he threatened a woman who knew that he killed her son and the allegation that he was involved in a shooting at Willie McFee's house shortly before the Halloween crimes. (72 RT 7194-7198, 7241-7246, 7264.)

Newborn's mother testified that she and his father were together for the first five years of his life. (72 RT 7201.) Newborn's father physically and sexually abused her; the police were involved more than once. (*Ibid.*) After the divorce, Newborn's father ignored a restraining order and continued to abuse his mother. (72 RT 7202.) After the divorce, Newborn's father was hostile to him. (72 RT 7203.) Although his father was not present, Newborn became close with one of his father's other sons, who was killed. (72 RT 7203-7204.) Newborn was also close with half-brother Alonzo Hamilton who went to prison. (72 RT 7204.) Newborn then became very close with Hodges, and was godfather to Hodges's child. (72 RT 7205, 7215.) Hodges was killed on Halloween 1993. (72 RT 7205.)

In addition to family trauma and the loss of important male figures, Newborn was ridiculed because of his disabilities. When he was young, peers and older children teased Newborn because of his noticeable limp.

(72 RT 7207-7208.) Newborn had learning disabilities and a speech impediment. (72 RT 7208.) He was labeled "retarded" and placed in a special school, which did not help him. (*Ibid.*) He eventually switched schools. (72 RT 7209.) Newborn was "hyper" and developed a tolerance to his medication. (*Ibid.*) His mother continued to increase the dosage, until Newborn was no longer "there." (72 RT 7210.) Newborn had a bed wetting problem until he was 13 or 14 years old which caused other children at the juvenile camp to ridicule him. (72 RT 7210.) Newborn's mother punished his bedwetting by forcing him to stay in his room, hanging the soiled sheets out the window of his room, and making him sleep in soiled sheets until she was ready to clean it up. (72 RT 7211.) At the Youth Authority, Newborn was ranked 490th of 500 students. (*Ibid.*)

In addition, Newborn suffered head injuries which required medical treatment three times during his childhood. (72 RT 7211-7213.) And, when he was a small child, Newborn ate Tide detergent constantly if his mother did not keep it off the floor. (72 RT 7216.) At age 17 or 18, Newborn developed problems with alcohol and marijuana. (72 RT 7215.)

Finally, Newborn presented evidence of his attempts to overcome these hardships. Newborn received a basketball trophy and a school certificate for his service as "ball monitor." (72 RT 7214.) In addition, he attempted a job picking up trash at the Rose Bowl. (72 RT 7216.)

b. McClain's Mitigating Evidence

To the extent permitted by the trial court, McClain's case in mitigation focused on lingering doubt.[147] Holmes called Gabriel Pina who

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[147] McClain sought to call severed codefendants Bailey and Bowen who entered guilty please before the start of the penalty retrial on grounds that they could exonerate him. The trial court denied this motion. Claims

McClain examined to impeach Pina's purported identification of him as the driver of the getaway car.[148] (71 RT 7122-7131.) For the same reasons, McClain also examined Detective Uribe about the identification procedures implemented in obtaining Pina's identification. (71 RT 7148-7151, 7153.)

Doris Russell, McClain's mother, testified that his execution would be hard on the entire family. (73 RT 7293.) It is especially difficult because McClain has reached this point for a crime he did not commit. (73 RT 7294.) The trial court instructed the jury that it could not consider Russell's testimony for McClain's guilt or innocence. (73 RT 7295.)

Earlean Shamburger, the mother of McClain's daughter, testified that McClain's execution would hurt her and her daughter and that life would not be the same. (73 RT 7286.) McClain does what he can for his daughter. (73 RT 7291.)

McClain called Clarence Jones to rebut aggravating evidence about a jailhouse shank incident described in section B.3.b., *ante*. Jones testified it was not uncommon for someone to throw a weapon out onto the tier. (73 RT 7272.)

c. Holmes's Mitigating Evidence

Holmes called Pina to refute Pina's identification of him as a shooter in the Halloween crimes. (71 RT 7064-7116, 7130.) In addition, Holmes elicited from Detective Uribe information that called into question the reliability of Pina's identification of Holmes. (71 RT 7136-7146, 7151.) Finally, Holmes called officers Chavira and Ireland, also to refute the

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XVII and XVIII are incorporated by reference herein.

[148] The circumstances of Pina's identification are analyzed in detail in Claim II, *ante*, which is incorporated by reference herein.

reliability of Pina's identification of Holmes. (71 RT 7157-7159, 7162-7168, 7172-7173.)

Willie Wimberly, Holmes's father, testified that Holmes's mother died suddenly in 1990 when he was 14 or 15 years old. (71 RT 7176.) Her death changed Holmes's life and marked the start of his problems. (71 RT 7176-7177.) Holmes's death would have an impact on the entire family who are very close. (71 RT 7177.)

Holmes's aunt, Donna McCallum, an employee of California's Heath and Human Services Department, testified that Holmes was nicknamed "Boom" as a toddler because he frequently bumped his head against things. (71 RT 7183-7184.) In 1990, Holmes's mother died suddenly and abruptly. (71 RT 7184.) Her death had an impact on Holmes. (71 RT 7185.) McCallum loves Holmes and his death would impact her, his grandparents, and his great-grandmother. (71 RT 7185.)

C. The Denial of Severance Violated McClain's Eighth and Fourteenth Amendment Rights to Reliable Penalty and Individualized Sentencing Determinations and Resulted in Gross Unfairness

Penal Code section 1098 requires that jointly charged criminal defendants be tried together unless the trial court orders severance. Generally, the trial court has discretion to grant severance. (*People v. Cummings*, *supra*, 4 Cal.4th 1233, 1286.) However, while joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (citing *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, 451-452.) As this Court has noted, severance is appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a

separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917; see also *People v. Champion, supra*, 9 Cal.4th 879, 904.) In *People v. Keenan* (1988) 46 Cal.3d 478, this Court noted that "[s]everance motions in capital cases should receive heightened scrutiny for potential prejudice." (*Id.* at p. 500; *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

In *Zafiro v. United States* (1993) 506 U.S. 534, the United States Supreme Court held that under the federal rules, which are similar to California law, severance is proper "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Id.* at p. 539.) This rule should also govern a penalty phase, because where the issue is life or death, there is a "constitutional mandate of heightened reliability." (*Sumner v. Shuman, supra*, 483 U.S. 66, 85.) As this Court noted in *People v. Massie* in assessing a claim of improper denial of severance, an appellate court " . . . must weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." (*People v. Massie, supra*, 66 Cal.2d 899, 923.)

The trial court's first error was in allowing Newborn to act as a second prosecutor with respect to the gang graffiti. The Ninth Circuit reversed a conviction for failure to sever, where, as here, a codefendant acted as a second prosecutor, thereby diminishing the jury's ability to "render a fair and honest verdict[,]" and assess the outcome for each defendant "on an individual and independent basis." (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082.) As in *Tootick*, Newborn's attempt to shift the blame for the gang graffiti created a "separate forum" in

which McClain had to again prove his life-worthiness. (*Ibid.*) Further, it provided windfall to the prosecutor because Newborn reinforced the prosecutor's claim of McClain's authorship of the graffiti. (*Ibid.*) Finally, it suggested to the jury that if it could not decide who was the author of the graffiti, it should use the aggravation against both of them. (*Ibid.*) These "fringe benefits" to the prosecutor violated McClain's rights to a fair and reliable penalty retrial. (*Ibid.*) The second and third errors here stem from the qualitatively and quantitatively different aggravating and mitigating evidence presented with respect to each defendant. When two defendants of differing levels of culpability are tried together, there is a risk that the jury will impute the misconduct of a codefendant to the defendant, just as evidence of prior misconduct may affect a jury's ability to fairly consider the evidence against a defendant. (*United States v. Green* (D. Mass 2004) 324 F.Supp.2d 311, 319, fn.14, reversed on other grounds by *United States v. Green* (1st Cir. 2005) 407 F.3d 434.) In *Green*, the federal district court severed the capital penalty trials of two defendants because potentially conflicting evidence meant that "an aggravating factor for one defendant [was] a mitigating factor for another." (*Id.* at pp. 325-326.) The court noted that one defendant was likely to present evidence of a good family upbringing, while the other defendant was likely to present evidence of a deprived family upbringing. Under these circumstances, "virtually every argument for mitigation made by one defendant [would] be in effect an argument against mitigation as to the other defendant if that defendant [could not] claim the same attribute," undermining the jury's ability to make individual sentencing determinations. (*Id.* at p. 326.)

The trial court in McClain's case should have considered and granted severance because it had notice that the prosecutor would introduce

qualitatively and quantitatively different evidence against each defendant and each defendant had a different mitigation theory. Newborn's aggravating evidence which involved repeated acts of violence against women was the most inflammatory. In contrast, the evidence against McClain mostly involved gun possessions and – with the exception of the Price attempted murder conviction, which McClain asserts was improper (see Claims III and V) – robberies without allegations of physical injuries to the victims. Holmes, on the other hand, was accused only of illegal gun possession in public. The risk was that the jury would assign blame for Newborn's violent behavior to McClain and would compare McClain unfavorably with Holmes in violation of the Eighth Amendment guarantee of reliable, individualized capital sentencing proceedings.

McClain made clear that his theory in mitigation was lingering doubt.[149] (64 RT 6314.) Newborn presented evidence of his cognitive impairments, exposure to violence as a small child, and repeated loss of significant male figures in his life, culminating with the death of Hodges hours before the Halloween killings. Holmes also presented lingering doubt evidence, but also evidence that his mother's death thrust him onto a downward trajectory. Newborn's and Holmes's mitigation presentations invited the jury to find McClain's case in mitigation deficient by comparison.

In sum, the very different cases in aggravation and mitigation presented against and for each defendant created the risk that (1) the jurors would find that the aggravation against any defendant applied to all defendants, and (2) the defendants' cases in mitigation would undercut each

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[149] See Claim XVII.

other. Thus, rather than facilitate the jury's individual consideration of the mitigating evidence, the joint penalty phase prevented the jury from fully considering and giving effect to each defendant's mitigation in violation of the Eighth Amendment. (*Penry v. Johnson* (2001) 532 U.S. 782, 796-797.) The errors also rendered the penalty proceeding fundamentally unfair in violation of due process. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) As shown below, the prejudice flowing from these errors requires reversal.

D. The Failure to Sever Requires Reversal

This Court reviews a trial court's denial of severance for "an abuse of discretion based on the facts as they appeared at the time the court ruled on the motion." (*People v. Avila*, *supra*, 38 Cal.4th 491, 575.) Even if the trial court's ruling was proper, this Court must reverse where, as here, the denial of severance ultimately deprived the defendant of due process. (*Ibid.*) Here, the trial court's ruling was an abuse of discretion which ultimately deprived McClain of due process and a fair, reliable, and individualized penalty determination. Because the trial court's errors violated McClain's federal constitutional rights, the State must prove they are harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 23-24.) However, McClain demonstrates there is a reasonable probability that the trial court's error in permitting this evidence affected the jury's verdict. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

As McClain has argued throughout, the prosecutor's case against him was weak. The first penalty jury, which heard all the guilt phase evidence against McClain was unable to reach a verdict. (See *People v. Gonzalez*, *supra*, 38 Cal.4th 932, 962 [the fact of a prior mistrial was a factor demonstrating prejudice].)

At the outset of closing, the prosecutor urged that "[t]his case is about what do we as a community do with people who commit crimes such as *these defendants* have committed." (74 RT 7369, emphasis added.) The use of "defendants" instead of McClain, Newborn, and Holmes invited the jury to consider the evidence against each of them as evidence against all of them. Later, when the prosecutor did use their names, he implied that the three of them were one and the same when he argued, "We are dealing with people like Newborn and McClain and Holmes." (74 RT 7401.) At another point, the prosecutor challenged, "anybody who speaks in this courtroom to guarantee that Newborn or McClain, based upon their past conduct, based upon the evidence that you've heard, guarantee that they won't harm again." (74 RT 7397.) These arguments suggested to the jury that it irrelevant whether Newborn or McClain committed the alleged conduct introduced in aggravation – whether it was acts of violence against women or the author of the graffiti in the holding cell.

In *United States v. Tootick, supra*, 952 F.2d at p. 1082, the Ninth Circuit explained that a risk of joinder is that codefendants will bolster the prosecutor's case in their arguments. This risk was realized here. Newborn argued that the evidence showed he was not the author of the graffiti, leaving the jury to find that either McClain or Holmes was the culprit, or that it should forgo that analysis and hold the incident against all three. (74 RT 7466.)

Both Newborn and Holmes asked the jury to compare them to McClain in other ways, creating a situation in which their mitigation was McClain's aggravation. (*United States v. Green, supra*, 324 F.Supp.2d at pp. 325-326.) Newborn argued that the jury should consider in mitigation the absence misconduct in the Los Angeles County Jail, an observation that

could only highlight the shank incident introduced against McClain. Holmes argued that the jury should consider in his favor the paltry gun possession evidence the prosecutor introduced against him, referencing the allegations against McClain and Newborn:

> With respect to convictions or acts, that was it. And as I stated to you previously, the people are not confined to convictions. They can find any incident that deals with threats of violence or the violence itself and bring it before you, an attack, a fight with a girlfriend, misbehavior towards a guard, anything. But that was the only thing that they could find, and that was the only thing that you were presented with.
>
> So to call Karl Holmes the worst of the worst, I think Mr. Myers should seriously consider that particular statement.

(74 RT 7456-7457.)

Not only did Holmes's argument suggest that he was more worthy of life than McClain or Newborn, but it lumped McClain and Newborn together, leaving the impression that they were responsible for each other's acts.

Moreover, the case in aggravation against Newborn which involved extensive violence against women was the kind of inherently inflammatory evidence that interferes with a jury's ability to separate one defendant's conduct from another. Domestic abuse is the kind of evidence "'likely to incite a jury to an irrational decision.'" (*United States v. Hands* (11th Cir. 1999) 184 F.3d 1322, 1328 [citation omitted].) This is in part because of the significant "public stigma" attached to men who beat women. (*State v. Zamudio* (1982) 57 Or. App. 545, 551.) It is precisely the kind of evidence that the jury may incorrectly impute to all defendants even thought it is introduced against one. (*United States v. Green, supra,* 324 F.Supp.2d at p. 319.) In light of evidence that Newborn beat not one, but four women –

two of whom were mothers of his children, one of whom was pregnant, and one of whom was holding an infant during the altercation – on multiple occasions, it is fair to assume that the acts attributed to Newborn effectively "blackened [McClain's] character in the mind of the jury." (*Zamudio*, *supra*, 57 Or. App. at p. 551.)

For all these reasons, the trial court's failure to sever McClain from his defendants at his capital penalty phase impermissibly prejudiced him under any standard. The death verdicts must be reversed.

XXII.
THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED McCLAIN'S CONSTITUTIONAL RIGHTS

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 each 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.

(75 RT 7539-7541; 8 CT 2226-2227.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and were misleading and vague in crucial respects. Whether considered singly or together, the flaws in these pivotal instructions violated McClain's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. 367, 383-384.)

A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on McClain hinged on whether the

jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (75 RT 7541; 8 CT 2226-2227.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens*, *supra*, 462 U.S. 862, 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded:
>
> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we

> are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[150]

McClain acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

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[150]The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amends.), the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For McClain

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion*, *supra*, 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir.

2001) 255 F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to

the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (75 RT 7540 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence McClain to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process (U.S. Const., 14th

Amend.; *Hicks v. Oklahoma, supra*, 447 U.S. 343, 346), and must be reversed.

C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code § 190.3.)[151] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. 370, 377.)

This mandatory language is not included in the instruction pursuant to CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were

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[151] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra*, 40 Cal.3d 512, 544, fn. 17.)

merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

Thus, reasonable jurors deliberating McClain's sentence might not have understood that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction given to McClain's jury violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and McClain respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore*, *supra*, 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18,

21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States*, *supra*, 157 U.S. 301, 310.)[152]

People v. Moore, *supra*, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

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

(*Id.* at pp. 526-527, internal quotation marks omitted.)

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[152] There are due process underpinnings to these holdings. In *Wardius v. Oregon*, *supra*, 412 U.S. 470, 473, fn. 6, the United States Supreme Court 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. (See also *Washington v. Texas*, *supra*, 388 U.S. 14, 22; *Gideon v. Wainwright*, *supra*, 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in McClain's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, McClain can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial

because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States*, *supra*, 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated McClain's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instructions Failed To Inform The Jurors That McClain Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes*, *supra*, 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion."] That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, McClain's death judgment must be reversed.

XXIII.
THE TRIAL COURT ERRONEOUSLY FAILED TO DEFINE THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

The trial court had a sua sponte duty to instruct the jury on the true meaning of a life without parole sentence, and its failure to do so requires reversal of McClain's death verdicts.

The trial court is obligated to instruct sua sponte on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair,

capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320.)[153]

In *Simmons v. South Carolina, supra*, 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.)

The *Simmons* rule has been reaffirmed repeatedly by the United States Supreme Court. In 2001, the Supreme Court reversed a South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Supreme Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52, citation omitted.) Most recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Supreme Court again reversed a South

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[153]Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon, supra*, 50 Cal.3d 1223, 1277; *People v. Thompson, supra*, 45 Cal.3d 86, 130-131), this Court should nevertheless reconsider this issue based on recent United States Supreme Court rulings.

Carolina death sentence in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Id.* at p. 256.)

In *Simmons*, the state had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the petitioner to be released into society. (*Simmons*, *supra*, 512 U.S. at p. 166.) In rejecting this argument, the United States Supreme Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading. (*Id.* at pp. 166-168.)

This Court erroneously has concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People v. Arias*, *supra*, 13 Cal.4th 92, 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a sentence. One study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venirepersons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point.

(Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.) The results of a telephone poll commissioned by the Sacramento Bee showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (Sacramento Bee (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons*, *supra*, 512 U.S. at p. 168, fn. 9.) In addition, the information given California jurors is not significantly different from that found wanting by the Supreme Court.

In the present case, McClain's jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were not informed that life without possibility of parole means that defendant will not be released. The bare words "life without possibility of parole" simply did not respond to the common misunderstanding that defendants sentenced to life without the possibility of parole are not eligible for release from prison.

The trial court's failure to define the sentence of life without the possibility of parole is constitutionally improper under *Kelly*, *Shafer* and *Simmons* which addressed inadequate instructions. In *Kelly*, the Supreme Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Supreme Court also recognized that the trial court told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly*, *supra*, 534 U.S. at p. 257.) Nevertheless, these efforts did not serve to adequately explain the defendant's parole

ineligibility. Similarly, in *Shafer*, the defense argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer*, *supra*, 532 U.S. at p.52.) Again, the Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.) Moreover, in *Simmons*, the Supreme Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons*, *supra*, 512 U.S. at p. 170.)[154] In this case, the instruction that the sentencing alternative to death was life without possibility of parole – absent any explanation– did not adequately inform McClain's jurors that a life sentence for McClain would make him ineligible for release on parole from prison.

Further, the inadequate instruction violated the principles of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without instructional guidance on the meaning of life without possibility of parole, there was a reasonable likelihood that the jurors deliberated under the mistaken, but common misperception, that the choice they were asked to

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[154] The reliance in *Simmons* on *Gardner v. Florida*, *supra*, 430 U.S. 349, to reject the state's "plain and ordinary meaning" argument indicates that the federal Constitution will not countenance a false perception, whether resulting from incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. (See *Simmons*, *supra*, 512 U.S. at pp. 164-165.)

make was between two inherently different alternatives: death and a limited period of incarceration. (See *Simmons*, *supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was simplified.

The prejudicial effect of the instruction's failure to define the sentencing options is clear. Here, there is a substantial likelihood that at least one of McClain's jurors[155] concluded that the non-death option offered was neither real nor sufficiently severe and chose a death sentence because of the fear that McClain would someday be released if he received any other sentence.[156] Given the prosecutor's extensive evidence and arguments about McClain's present and future dangerousness (see Claims XIV, XV and XVI) and the fact that the trial court allowed disclosure to the jury that McClain wore a stun belt McClain's jurors should have been given an

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[155] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ("in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692).

[156] California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994), 170-71; accord, Ramos, *et al.*, *Fatal Misconceptions*, *supra*, at p. 45.)

explicit instruction that a sentence of life without the possibility of parole meant that McClain would never be eligible for release from prison on parole.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio*, *supra*, 438 U.S. 586, 605.) Had the jury been instructed concerning McClain's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith*, *supra*, 539 U.S. 510, 537; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

XXIV.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT McCLAIN'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, McClain presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that McClain's sentence be set aside.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. McClain's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a)

other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[157] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[158] or having had a "hatred of religion,"[159] or threatened witnesses after his arrest,[160] or disposed of the victim's body in a manner that precluded its recovery.[161]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California*, *supra*, 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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[157] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[158] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[159] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S.Ct. 3040 (1992).

[160] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

[161] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.*, 496 U.S. 931 (1990).

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[162] or that the defendant killed with a single execution-style wound.[163]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[164] or that the defendant killed the victim without any motive at all.[165]

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[162] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[163] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[164] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[165] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

c. That the defendant killed the victim in cold blood[166] or that the defendant killed the victim during a savage frenzy.[167]

d. That the defendant engaged in a cover-up to conceal his crime[168] or that the defendant did not engage in a cover-up and so must have been proud of it.[169]

e. That the defendant made the victim endure the terror of anticipating a violent death[170] or that the defendant killed instantly without any warning.[171]

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[166] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[167] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[168] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[169] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[170] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[171] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

f. That the victim had children[172] or that the victim had not yet had a chance to have children.[173]

g. That the victim struggled prior to death[174] or that the victim did not struggle.[175]

h. That the defendant had a prior relationship with the victim[176] or that the victim was a complete stranger to the defendant.[177]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

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[172] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[173] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[174] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[175] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[176] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[177] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[178]

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[179]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[180]

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[178] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[179] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[180] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No.

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[181]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[182]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable

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S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[181] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[182] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[183]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright*, *supra*, 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia*, *supra*, 446 U.S. 420].)

B. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a

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[183] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating.

reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. McClain's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, McClain's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh

mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona, supra,* 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*].

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. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 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. (*Ring, supra,* 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra,* 542

U.S. 296, 299.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 303, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. In the Wake of *Apprendi*, *Ring*, and *Blakely*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[184] Only

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[184] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim.

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[185] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to McClain's jury (75 RT 7539-7541; 8 CT 2226-2227),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[186] These factual determinations

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[185] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown*, *supra*, 46 Cal.3d 432, 448.)

[186] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a

are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[187]

In *People v. Anderson, supra*, 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[188] indicates, the maximum penalty for *any* first degree murder conviction is death.

State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460)

[187] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[188] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at p. 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Pen. Code § 190.3; CALJIC 8.88 (7th ed., 2003).) It cannot be assumed that a special circumstance suffices as the aggravating

circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 863-864 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[189] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[190] There is no meaningful difference between the processes followed under each scheme.

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[189] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[190] Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at p. 275; *Snow*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or

California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California*, *supra*, 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*Prieto*, 30 Cal.4th at p. 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan*, *supra*, 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the

Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az., 2003) 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring, supra*, 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[191])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, McClain submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the

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[191] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 542 U.S. at p. 305.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[192]

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[192] In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (*Griffin*, *supra*, 33 Cal.4th at p. 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

(*Leatherman*, *supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (532 U.S. at pp. 437, 440.) *Leatherman*

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to

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thus supports McClain's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

> define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring, supra*, 536 U.S. at p. 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[193] As the high court stated in *Ring, supra*, 536 U.S. at pp. 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one.

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[193] The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, (1979) 441 U.S. 418, 423-424.)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to McClain's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of

historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[194] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra*; *Blakely, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[195]) Particularly given the "acute need for reliability in capital

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[194] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

[195] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 732;[196] *accord, Johnson v. Mississippi, supra,* 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring,* 536 U.S. at p. 609).[197]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the

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[196] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra,* 524 U.S. at pp. 731-732.)

[197] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

requirement did not even have to be directly stated.[198] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina, supra*, 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk*

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[198] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

> *(present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson, supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*; *People v. Hayes, supra*, 52 Cal.3d 577, 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which McClain is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida*, *supra*, 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both

the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general, and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," (*Speiser*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick*

(1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" (*Santosky, supra*, 455 U.S. at p. 755), the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky*, 455 U.S. at p. 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the

subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California*, *supra*, 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 [quoting *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis

added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

McClain is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that

> judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want,

without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1856) 59 U.S. 272, 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346.)

Accordingly, McClain respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, McClain's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question

whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing McClain to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra.*) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[199] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana, supra.*)

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[199] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

6. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived McClain of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia, supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without at least 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.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons

for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm, supra,* 11 Cal.3d at 269.)[200] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure,

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[200] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[201]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is

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[201] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting

Proffitt v. Florida, supra, 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see § C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see § A of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no

such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia*, *supra*, 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma*.(1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida*, *supra*, 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238 . . ." (*Gregg v. Georgia*, *supra*, 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida*, *supra*, 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[202]

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[202] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945 .) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by McClain and devoted a considerable portion of its closing argument to arguing these alleged offenses. (See Claims XV, XX & XXI.)

The United States Supreme Court's decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*,

supra, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See § A.1, *ante*.) The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See § A.1.b., *ante*.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. McClain's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by McClain's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; (*Lockett v. Ohio*, *supra*, 438 U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were

aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, 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; *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport*, *supra*, 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585.)

The likelihood that the jury in McClain's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. (See, e.g., 75 RT 7371-7372, 7379, 7413.) It is thus likely that McClain's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated McClain "as more deserving of the death

penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black*, *supra*, 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California*, *supra*, 512 U.S. 967, 973 quoting *Gregg v. Georgia*, *supra*, 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.)

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11. The Failure To Delete Inapplicable Sentencing Factors Violated McClain's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[203] However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of McClain's rights under the Sixth, Eighth, and Fourteenth Amendments. McClain recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, McClain raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule*, *supra*, 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the

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[203]Those inapplicable factors included: factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"); factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"); factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"); factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); factor (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 of the effects of intoxication"); and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (See 75 RT 7502-7503; 8 CT 2169-2170.)

"whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against McClain. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence McClain to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived McClain of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414;

Beck v. Alabama, *supra*, 447 U.S. at p. 637.) Reversal of McClain's death judgment is required.

C. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court 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." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "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) 327 N.E.2d 662, 668.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental

interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[204] as in *Snow*,[205] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

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[204] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at p. 275; emphasis added.)

[205] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See §§ B.1-B.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See § B.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the

decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida*, *supra*, 458 U.S. 782; *Ford v. Wainwright*, *supra*, 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See § 190.4; *People v. Rodriguez*, *supra*, 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a

chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida*, *supra*, 430 U.S. 349, 357-358; (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[206] The qualitative difference

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[206] The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*,

between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000)

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at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

531 U.S. 98, 105-106.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[207]

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[207] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst*, *supra*, 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

D. McClain's Death Sentence Violates International Law, Which Is Binding on This Court, as Well as the Eighth Amendment

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary

> crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, McClain raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

1. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980) 630

F.2d 876, 885.) When asserted, those rights must be considered and administered in United States courts. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) International human rights are secured through treaties and customary international law. The rights secured by ratified treaties apply domestically under the Supremacy Clause. (U.S. Const., art. VI, § 1, cl. 2.) A state statute or policy will be struck down if it conflicts with a treaty obligation. (*Antoine v. Washington* (1975) 420 U.S. 194, 201 [state game laws could not be applied to Indians where treaty gave them right to hunt and fish on lands ceded to the United States]; *Kolovrat v. Oregon* (1961) 366 U.S. 187, 190 [state law on inheritance by aliens must yield under federal Supremacy Clause to treaty rights].)

Similarly, customary international law, i.e. the "law of nations," is enforceable as "part of our law." (*The Paquete Habana*, *supra* at p. 700 [recognizing customary law prohibition against seizure of an enemy's coastal fishing boats during wartime]; *Martinez v. City of Los Angeles* (9th Cir. 1998) 141 F.3d 1373, 1384 [recognizing the "clear international prohibition against arbitrary arrest and detention"]; *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238 [holding that plaintiff had stated claims under the Alien Tort Claims Act because defendant's conduct violated well-established norms of customary international law]; *Filaratiga v. Pena-Irala*, *supra*, 630 F2d at p. 885 [recognizing the customary international law right to be free from torture]; *Restatement (Third) of Foreign Relations Law*, *supra*, § 701 cmt. e ["The United States is bound by the international customary law of human rights."].) In addition, the principle of *jus cogens* applies in the United States. (*Kadic v. Karadzic*, *supra* at p. 238

[recognizing that the prohibition against torture has gained status as *jus cogens* because of widespread condemnation of the practice].[208]

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise are obliged under *jus cogens* to apply fundamental rights their own citizens. Accordingly, this Court has not only the right, but the obligation to enforce these international standards.

The International Covenant on Civil and Political Rights, was adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976. The United States ratified the treaty on April 2, 1992, and the President deposited instruments of ratification on June 8, 1992. (See Sen. Res. 49, 138 Cong. Rec., pp. 4781-4784.) The ICCPR applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[209] The

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[208] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512; Restatement Third of the Foreign Relations Law, *supra*, §102.k.)

[209] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude McClain's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the

United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

McClain's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal as well as the fact that McClain was neither alleged to be nor found by the jury to be a triggerman in the Halloween crimes, the imposition of the death penalty on McClain constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, McClain requests that the Court reconsider and, in the context of this case, find McClain's death sentence violates international law. (See *Smith v. Murray* (1986) 477

Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

2. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 (plur. opn. of Stevens, J.)). Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[210]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded 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* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159

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[210] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for

extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot, supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[211] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra*; *Atkins v. Virginia, supra.*)

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[211] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

Thus, California's use of death as a regular punishment, as in this case, violates both international law and the Eighth and Fourteenth Amendments. McClain's death sentence should be set aside.

XXV.
REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333, *en banc* ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764 [same].)[212] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22

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[212]Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Aside from the insufficiency of the evidence, which requires a per se reversal, the guilt phase errors in this case include, inter alia, Claims I through II and IV through XII. The cumulative effect of these errors so infected McClain's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and McClain's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt*, *supra*, 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of McClain's trial. (See *People v. Hayes*, *supra*, 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that

evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137, overruled on other grounds by *People v. Morse*, *supra*, 60 Cal.2d 631, 638, fn. 2; see also *People v. Brown*, *supra*, 46 Cal.3d 432, 464-466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the deprivation of counsel which requires a per se reversal, the penalty phase claims include Claims XIV through XXIV. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v.*

South Carolina (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi, supra*, 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of McClain's convictions and death sentence.

CONCLUSION

For the reasons stated above, the judgment must be reversed.

Dated: September 26, 2006

Respectfully submitted,

DEBRA S. SABAH PRESS

CERTIFICATE OF WORD COUNT

I certify that Appellant McClain's Opening Brief consists of 151,631 words.

McClain's APPLICATION FOR LEAVE TO FILE OVERSIZED OPENING BRIEF is filed separately.

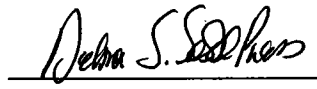
Dated: September 25, 2006

DEBRA S. SABAH PRESS

CERTIFICATE OF WORD COUNT AS TO CLAIMS JOINED PURSUANT TO CALIFORNIA RULES OF COURT, RULE 13

I certify that the claims joined by McClain from Appellant Newborn's Opening Brief consist of 17,458 words.

Dated: September 25, 2006



DEBRA S. SABAH PRESS

DECLARATION OF SERVICE

RE: *People v. McClain*; S058734
Los Angeles County Superior Court No. BA092268

I, Debra S. Sabah Press, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 1442A Walnut Street #311; Berkeley, CA 94709-1405. I served the attached:

APPELLANT McCLAIN'S OPENING BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Berkeley, California, addressed as follows:

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I declare under penalty that the foregoing is true and correct.

Executed on September 25, 2006 at Berkeley, California.

Debra S. Sabah Press

DEBRA S. SABAH PRESS

DECLARATION OF SERVICE

Re: *People v. McClain*; No. S058734

I, DEBRA S. SABAH PRESS, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442a Walnut Street #311; Berkeley, CA 94709-1405 I am serving a true copy of the attached:

APPELLANT McCLAIN'S OPENING BRIEF

on the following, in person at San Quentin, California, on September 26, 2006:

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P.O. Box K-38600
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I declare under penalty that the foregoing is true and correct.

Executed on September 25, 2006 at Berkeley, California.

Debra S. Sabah Press

DEBRA S. SABAH PRESS