No. S042660
Fresno County Superior Court
(No. 467951-0)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RONNIE DALE DEMENT,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

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

(HONORABLE STEPHEN R. HENRY, JUDGE, of the Superior Court)

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

FEDERAL STATUTES

CONSTITUTIONS

TABLE OF AUTHORITIES

Pages

STATE STATUTES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Pages

COURT RULES

TEXT AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

Pages

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RONNIE DALE DEMENT, Defendant and Appellant.	S042660 Fresno County Superior Court (No. 467951-0)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code §1239.)[1/]

STATEMENT OF CASE

By information filed August 31, 1992 in the Superior Court of Fresno County, appellant RONNIE DALE DEMENT was charged as follows:

Count One: violation of section 187, murder, with an allegation under section 12022, subdivision (b), of personal use of deadly and dangerous weapon (ligature). As a First Special Circumstance, it was alleged under section 190.2, subdivision (a)(2), that appellant had suffered a previous conviction of 2nd degree murder. As a Second Special Circumstance, it was alleged under section 190.2, subdivision (a)(17), that the murder occurred while appellant was engaged in the commission and

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

attempted commission of the crime of oral copulation in a local detention facility in violation of section 288a, subdivision (e). As a Third Special Circumstance, it was alleged under section 190.2, subdivision (a)(17) that the murder occurred while appellant was engaged in the attempted commission of the crime of attempted sodomy in a local detention facility in violation of section 664 and section 286, subdivision (e).

Count Two: violation of section 288a, subdivision (e), participating in oral copulation in a local detention facility.

Count Three: violation of section 664 and section 286, subdivision (e), attempt to participate in sodomy in a local detention facility. (CT 171-173.)

On September 3, 1992, appellant was arraigned, entered pleas of not guilty to each count, and denied the use and special circumstance allegations. (CT 174.)

On December 24, 1992, an amended information was filed, adding a fourth special circumstance allegation to Count One, alleging a prior conviction of second degree murder for which appellant had served a prior prison term within the meaning of section 190.05, subdivision (a), and adding allegations of prior convictions under sections 667, subdivision (a), 667.5, subdivision (b), 667.7, subdivision (a), 667.7, subdivision (a)(1), and 1192.7, subdivision (c). (CT 181-184.)

On March 15, 1993, appellant filed a motion to set aside Counts Two and Three and the Second and Third Special Circumstance Allegations pursuant to section 995. (CT 203-216.) On May 12, 1993, that motion was

denied. (CT 237.)[2] On May 23, 1993, the trial court ordered the First Special Circumstance, the Fourth Special Circumstance, and the allegations of prior convictions to be bifurcated from the guilt trial. (CT 365-366; RT 102, 152-154.)

On May 24, 1994, jury selection commenced in Department 18 of the Fresno County Superior Court, Honorable Stephen R. Henry, judge presiding. (CT 369.) On June 2, 1994, the jurors were sworn to try the case. (CT 412-414.) On June 6, 1994, four alternate jurors were selected, one juror was excused, and an alternate substituted in her place. (CT 430-431.) On June 20, 1994, a second juror was excused, and an alternate substituted in her place. (CT 473.)

On June 21, 1994, a defense motion for mistrial based upon the testimony of Albert Martinez was denied. (CT 476-478.) On June 23, 1994, a defense motion for mistrial based upon the testimony of Bradley Nelson was made. (CT 482-484; 488-491.) It was denied, after further hearing, on July 12, 1994. (CT 500-503.) On July 13, 1994, a defense motion pursuant to section 1118.1 to dismiss the Third Special Circumstance allegation and Count Three was denied. (CT 504-505.) On July 15, 1994, a defense motion for mistrial based upon prosecutorial misconduct was denied. (CT 508-509.)

On July 14, 1994, the trial court granted the prosecution's motion to strike the section 12022, subdivision (b) allegation of personal use of deadly and dangerous weapon as to Count One. (CT 507; RT 2985.)

The jury began its guilt phase deliberations on July 15, 1994. On

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[2] The original Minute Order recorded that the motion was granted. (CT 236.) That Minute Order was amended to record that the motion was denied. (CT 237.)

July 20, 1994, the jury returned the following verdicts: Guilty on Count One; the Second Special Circumstances was found to be true, the Third Special Circumstance was not found to be true; Guilty on Count Two; Not Guilty on Count Three. (CT 513-516, 849-852.) The jury further answered special interrogatories submitted to them by the trial court, indicating that, as to Count One, the jury was unanimous in finding that the murder was committed with premeditation and deliberation, and that it occurred during the commission of the crime of unlawful oral copulation by a prisoner and during the commission of the crime of attempted unlawful sodomy by a prisoner. (CT 557-558.) Upon inquiry by the trial court before the verdict was accepted, the jury indicated that, as to the attempted sodomy, its written response was intended only to indicate that it was unanimous in rejecting the attempted sodomy. (CT 513-515; RT 3182-3194.)

On July 20, 1994, the trial court granted the prosecution's motion to strike the Fourth Special Circumstance, alleged pursuant to section 190.05, subdivision (a), as well as the first, second, third and fourth prior convictions alleged in the First Amended Information. (CT 516; RT 3204-3205.)

On July 21, 1994, the jury heard a stipulation as to the First Special Circumstance, and after deliberation, found the First Special Circumstance, a prior conviction of second degree murder, to be true. (CT 527-529, 854.) Thereafter, on the same day, the penalty phase began. (CT 529.) On July 28, 1994, a third juror was excused, and an alternate substituted in his place. (CT 541.) That same day, the jury began deliberations in the penalty phase. (CT 543.) On August 1, 1994, the jury returned a verdict of death. (CT 546-547, 853.)

On September 26, 1994, defense motions for modification of the

penalty and for a new trial were denied, and the trial court sentenced appellant to death. (CT 891-897.)

STATEMENT OF FACTS

GUILT PHASE

A. Introduction

Four inmates in the Fresno County Jail, John Benjamin, Jimmy Lee Bond, appellant and Greg Andrews, were placed in a 3-person, 17½ x 6 ½ foot cell the night of April 8-9, 1992. The first three inmates contacted the jail guards and asked that the fourth inmate, Andrews, be moved to another cell, which only had two occupants. The guards refused. The cells were locked down for the night at about 11:00 p.m. At about 3:30 a.m., the cells were unlocked. Appellant, Benjamin and Bond left the cell. Sometime over the next 45 minutes, another inmate, Brad Nelson, entered the cell, remained for a time, and departed. At about 4:13 a.m., Benjamin and Bond returned to the cell, and by intercom, reported to the guards that Andrews, who had not left the cell, was a "cold body" in the cell.

A nurse who responded to the cell found a towel tied around Andrews' neck. The towel was tied so tightly that the nurse required the assistance of a guard to untie it, and even then it took two minutes to do so. The nurse, upon examining Andrews, thought she detected a faint pulse. CPR was begun, then taken over by emergency medical personnel, who took further steps to resuscitate Andrews. Their efforts were unsuccessful.

Benjamin and Bond testified that at the time they and appellant had left the cell at 3:30 a.m., there was no towel tied around Andrews' neck. They could not explain how the towel got there. They testified that during the night, appellant had hit and kicked Andrews, and had wrapped a towel around his neck and pulled on the ends, but that no one had tied a towel

around Andrews' neck, and the towel that appellant had used had been flushed down the toilet before the three cellmates ever left the cell that morning.

Shortly before the end of the prosecution's case, the trial court stated, out of the presence of the jury,

> [the s]tatus of this case is this, that one of three men could have performed this killing. One of four men could have performed this killing, at least the final touches of it, according to the evidence. [¶] And those who have testified are at least suspect in their testimony. They have been impeached from wall to wall on a variety of subjects. They could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury.

(RT 2796.)

B. Prosecution Case

1. Andrews' Body Found

At about 4:13 a.m., Correctional Officer Michael Demes, security officer on duty on the fourth floor of the Fresno County Jail, received an intercom call from cell 8 on F-pod. (RT 2021-2022.) Someone in that cell told Demes over the intercom that they had a cold body in the cell and he had better get somebody up there. (RT 1949-1950, 2022-2025.)

Officers Delgado and Gonzales went to cell 8. Bond and Benjamin were standing there, and Andrews was face down underneath the bunk on a mattress, his head turned towards the wall of the cell, covered up to the shoulders by either a blanket or sheet. (RT 1945-1952, 1958, 1965, 1970-1972.) Delgado asked Bond and Benjamin what was the matter. One of them said that the body was cold. The other said "get him out of here." Delgado told them to stand away from the bunk, along the wall, and they complied. (RT 1973.) Delgado felt for a pulse at Andrews' wrist and neck,

and felt none. He turned the head slightly to the side, and noticed he was bruised all over the face, that his eyes were black and his fingertips blue. (RT 1953, 1976-1977.)

Opal Lewis, the charge nurse on the night shift at the Fresno County detention facility, responded to cell 8 with other infirmary staff. She observed Andrews lying on a mattress under the bottom bunk, covered with a blanket, facing the door of the cell, apparently asleep. (RT 1894-1896, 1909-1910, 1931.) With the assistance of Officer Delgado, the mattress was pulled out from underneath the bunk and the blanket removed. Andrews was naked, face down, with a jumpsuit laying across his body. When Andrews was turned over to get vital signs, Lewis noticed a towel around his neck, tied in the back. They had to turn the body back over to the stomach to untie it. The towel was tied once, but was extremely tight. Lewis could not untie it by herself, and determined that she would not be able to cut it off. It took both Lewis and Officer Delgado, working at it together for either 15 to 20 seconds (according to Lewis) or two minutes (according to Officer Delgado) to loosen the towel enough to get it off. It was a typical jail-issue towel, which Lewis described as damp and dingy, although Officer Delgado described it as dry. It was twisted, as when a towel is held by opposite corners and twisted, about three times. (RT 1897-1898, 1913-1918, 1920-1922, 1933-1934, 1953-1954, 1957, 1980-1984.)

Lewis determined that Andrews was unconscious, and that there were no vital signs, although Lewis thought she detected a faint pulse when she listened for a heartbeat. CPR was then started. (RT 1899-1900, 1924-1925, 1935.)

The neck and head area were both purple and bruised. The neck was very wrinkled from having the towel around it, and had marks all around

the neck. The face was swollen, the eyes were swollen shut, and the jaw was clamped. They had to pry the jaw open in order to start CPR. (RT 1902-1904, 1926-1927, 1932-1933; Exhibits 8, 9.) Emergency medical personnel responded, took over CPR, started intravenous fluids, intubated Andrews, and took other emergency measures. (RT 1904-1905, 1929-1930.) Lewis put the towel in a bag and gave it to Sgt. Mills, who later gave it to Deputy Wilson. (RT 1905-1907, 1923-1924, 1936-1938.) About ten minutes after taking over, the emergency medical technicians ceased treatment and left. (RT 1930.)

Deputy Wilson of the Fresno County Sheriff's Office handled the general crime scene until the detectives arrived. (RT 2030-2032.) He then had everybody removed from the pod, including inmates, correctional officers and sheriff's personnel, to preserve the scene until the detectives arrived. (RT 2035-2037) Outside the cell, Sgt. Mills gave Wilson the brown paper bag containing a towel, which Mills told Wilson had been tied around Andrews' neck. From the emergency personnel, Wilson received another brown bag. (RT 2032, 2039-2041, 2049.) Wilson later turned over the two bags to I.D. Tech Brown. Wilson never looked in the bags. (RT 2033, 2042-2044, 2047-2048.)

I.D. Tech Robert Brown immediately turned the two bags over to I.D. Tech Fox. Shortly thereafter, Brown saw the contents of the bags -- one had two towels in it, the other had miscellaneous used medical equipment. The bag with the two towels was marked JF17 by Fox. (RT 2196-2201.)

Only two towels other than the two towels in the bag marked JF17 were found in cell 8. (RT 1847-1849, 1855, 1857-1865; Exhibits 22, 24, 26, 27.) Each inmate was issued two towels, so there should have been

eight towels in the cell. (RT 1922-1923.) No black plastic garbage bags were found in the cell. (RT 1879-1880.) I.D. Tech Fox collected swabs of possible blood at various places on the floor of the cell, and on the east and west walls. (RT 1834-1835, 1841-1845.) However, no forensic evidence concerning those swabs or any other materials collected by Fox was introduced.

Inmates on the pod other than Bond, Benjamin and appellant had at first been locked down in their cells. (RT 1993-1995, 2002, 2012.) When Sheriff's deputies from outside the jail were summoned to process the scene as a crime, those deputies took over the crime scene (RT 1995), and the inmates were removed from the pod. (RT 2035-2037.)

Benjamin, Bond and appellant were taken to the gymnasium. They were then separated and strip searched. No contraband or weapons were located on any of the three. (RT 2013-2016, 2018.)

2. The Autopsy

Dr. Michael Chambliss conducted an autopsy on Andrews later that day. (RT 1254, 1258.) He was unable to determine a specific time of death or even a time range for death with which he felt comfortable. (RT 1304-1309.) He concluded that the cause of death was ligature strangulation, based upon abrasions on the front and sides of the neck and hemorrhage in the light portion of the eye. (RT 1258-1260 1262-1263, 1315, 1331- 1332, 1339, 1355-1356.) Chambliss did not determine what type of object was used as a ligature. (RT 1333, 1335.) Nor could he determine the number of times Andrews' neck was constricted. (RT 1341.)

There was also evidence of trauma from a blunt object to the head, but Chambliss could not determine the number of blows it would have taken to cause the injuries. (RT 1267-1269.) He could not determine if the

blunt trauma injuries were sufficient of themselves to cause death in the absence of medical help. (RT 1355-1356.)

There were fractures of the left fourth through sixth ribs, and an obvious fracture of the right 8th rib, which Chambliss considered to be the result of blunt trauma. (RT 1269-1270, 1314-1315.) These injuries were more consistent with a kick then a fist. (RT 1284-1285.)

There were bruises on the outside of the left shoulder, on the top of the left shoulder, and on the upper left side of the back. (RT 1270-1271.) There was bruising on the top of both hands consistent with defensive wounds. Internal examination showed areas of bruising on the right and left forearms just above the wrist and on the right and left leg just above the knee. (RT 1272-1273.) All of the injuries were inflicted during the same time frame, either before death or almost immediately after death. (RT 1274-1277.) There were no injuries to Andrews' penis or scrotal sac or to his anal area. (RT 1341-1343.) There was no semen apparent in the mouth, around the gums, or around the teeth. (RT 1351-1352.)

There was vomitus present on the external exam and in the airway leading to both lungs, which is consistent with the strangulation process. It was not tested by any lab. (RT 1279-1281, 1351.) The blood in Andrews' mouth and on his face could have come from either the strangulation, or from blows to his face, or from falling on the jail house floor. (RT 1325-1328.)

Toxicological exams of Andrews' blood and urine indicated that Andrews was under the influence of drugs at the time he died. Methamphetamine, amphetamines, cocaine, and cocaine metabolites were found in both the blood and urine. (RT 1281-1284, 1286-1287, 1289-1302.)

3. Cell 8 Cellmates

Jimmy Lee Bond had previously been convicted of receiving stolen property, car theft, possession of methamphetamine, and petty theft with a prior. He was in custody in the Fresno County jail on the latter offense on April 8 and 9, 1992. He was in custody on a violation of parole at the time of his testimony at this trial. (RT 2370-2410, 2441-2444.) Bond and appellant had been cellmates for a while as of April 8. He did not know appellant prior to being cellmates. (RT 2371-2373.)

John Leo Benjamin, who had been convicted of murder, felony drunk driving, felony sexual assault, and felony possession of drugs in a correctional facility,[3] was housed in the Fresno County Jail pending federal bank robbery charges. He was moved to cell 8 in F-pod on April 8, 1992. Bond and appellant were already housed in that cell. Bond and Benjamin were both from Kern County, and knew people in common, whom they discussed. (RT 1431-1433, 1510-1511, 2370-2373.)

Benjamin acknowledged that he had been in custody off and on since 1960, when he was 12. The longest period he'd been out of custody since then had been approximately 14-16 months. (RT 1493-1495.) He had cooperated with law enforcement a number of times as an informant, including being a confidential informant at San Quentin between 1974 and

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[3] At the time of his testimony at trial, Benjamin was serving a federal sentence of 11 years, eight months. He was aware of federal sentencing rule 35, under which the U.S. Attorney can recommend a reduction of sentence if an individual cooperates with either the U.S. attorney or a state prosecutor. Benjamin was hoping to have his sentence reduced. (RT 1490-1493.) At the time of his statement to the detectives, Benjamin was awaiting re-sentencing on his bank robbery charges. (RT 2779, 2784.)

1982. He had learned, during his time in custody, how to talk his way out of an incident report. (RT 1499-1502,1507, 1632-1634.)

Michael Giberson, a criminalist for the Fresno County sheriff's department Forensics Lab, examined appellant's body at 10 a.m. the morning of April 9. (RT 2202, 2205-2206.) On the back of appellant's right hand, on the right middle knuckle, was a 1½ inch circular reddened and swollen area. This was the most prominent injury of those he saw on appellant's body. On the back of the right hand, at the web of the thumb, there was an abrasion and a small incision. On the back of the webbing of the left hand, there was a small abrasion. On the outside edge of the big toe, there was a bluish colored bruise. There was also a small bruise on the left shin, about six inches below the knee. Giberson recommended that appellant be examined by a physician. (RT 2206-2209, 2228-2232.)

Giberson also examined Bond, at about 1:07 p.m. that day. He observed a 1½ inch scratch on the top of Bond's shoulder, a half-inch scratch on his left temple, a red spot inside his right wrist, and 3/4 inch abrasion on his left knee. There was also a small smear of what might have been blood on Bond's right big toe. Giberson did not analyze it to determine if it was blood. (RT 2209-2210, 2214-2218, 2223.)

Giberson also looked at Benjamin's body at 11:40 a.m. that day. Discoloration on Benjamin's top right foot appeared to be similar to a bruise. There were small smears of what appeared to be blood on Benjamin's right thumbnail and across the top of all his left toes, consistent with many things, including kicking someone and drawing blood. No one tested that blood to determine the source. (RT 2209, 2226, 2233, 2235.)

Detective Christian examined appellant's hands to determine whether or not there were any injuries. Christian described the middle

knuckle of the right hand and the back of that hand as red and swollen. (RT 2669-2670.) Christian testified that there was nothing noteworthy about appellant's left-hand. There was no injury or abrasion to the palms of his hands. (RT 2694.) Christian later took appellant to Valley Medical Center, for x-rays of his hand. While his hand was being x-rayed, appellant complained of pain in his right foot. The right foot was x-rayed, and wrapped with an ACE bandage. (RT 2670-2671.)

A blood sample drawn from Bond at 11:10 a.m. on April 9, was determined to have an alcohol level of .07 percent; a blood sample drawn from Benjamin at 11:13 a.m. on that date was determined to be negative for alcohol; and a blood sample drawn from appellant at 11:54 a.m. on that date was also negative for alcohol. (RT 2571-2572; Exhibits 28, 29, 30.)

A blood-alcohol level from .05 to .09 will cause decreased inhibition, increased self-confidence, decreased attention span, and alteration of judgment for time and distance. A blood level of .08 percent is legally drunk. A blood-alcohol level of .4 percent is a very high toxic level, and may result in coma. There are various stages between those levels - the stage of excitement, the stage of stupor, and the stage of coma. (RT 2577.) The body degrades or burns off alcohol at an average rate of about 15 milligrams percent per hour, or .015 grams percent per hour, varying from person to person. If someone has consumed a lot of alcohol, the burn off rate could be even higher, .20, .30, or even .40 grams percent per hour. (RT 2572, 2575-2576.)

Extrapolating from Bond's blood-alcohol level of .07 at 11 a.m., and using a degradation rate of .015 per hour, which would be reasonable for Bond, Bond's blood-alcohol level would had been .09 higher, or .16, at 5 a.m. that day, although there is some variance from individual to individual

in the degradation rate. (RT 2577, 2581-2584.) If Bond did all his drinking between midnight and 2 a.m., and had no more to drink after that, at 2 a.m., his blood-alcohol level would have been .045 higher than at 5 a.m., for a total of .20. (RT 2585-2586.) At such a blood alcohol level, an individual will have symptoms such as alteration of judgment, time and distance, decreased attention span, impaired memory, and he could be stuporous, with incoordination of his movements. A .20 is a significant level of alcohol in the blood, associated with impaired judgment, decreased ambition and impaired memory. (RT 2587-2591.)

Assuming a burn off rate of .015 per hour, and the last drink having been consumed by 3:00 a.m., it would be possible for someone to have a blood-alcohol level of .12 at 3:00 a.m. and a blood-alcohol of zero 8 hours later. (RT 2595-2598.)

Benjamin's toxicology report showed an effective level of a prescription anti-anxiety drug, Meprobamate, which is a central nervous system depressant, as is alcohol. It should not be taken with alcohol. Taken in combination with alcohol, it could affect the person's ability to perceive and comprehend what is going on, may give a false sense of well-being, impaired judgment, increased self-confidence, and later stupor. (RT 2578-2581, 2600.)

4. Overcrowding in Cell 8

Cell 8 on F-pod in the Fresno County Jail is 17 ½ feet long, and about 6 ½ feet across. (RT 1825-1826; Exhibits 19,20.) It is designed to house three inmates, in three bunks, one atop the other. (RT 1827, 2446-2447.)

Andrews arrived on F-pod on the evening of April 8, 1992. He was assigned to cell 8, to which Benjamin, Bond and appellant were already

assigned. When Andrews came up looking for cell 8, Bond talked to him. Andrews told Bond he was in custody on a parole violation, had been on a methamphetamine run, and was tired. When it came time for lockdown, Benjamin, Bond and appellant wanted Andrews moved to another cell because the cells were designed for only three inmates at a time. Bond contacted the guards to tell them they already had three persons in the cell, while there was a "White" cell[4] on the lower tier with only two inmates. They were told Andrews would stay in cell 8. Benjamin was agitated that the jail was not moving Andrews. (RT 1435-1438, 2372-2374, 2445-2447, 2455-2456, 2460-2463.) The problem was discussed openly in the cell. It was a matter of space in the cell. (RT 1443-1444.)

Prior to Andrews having been assigned to cell 8, Bond was brewing a batch of pruno[5] (1½ to 2½ gallons) in a plastic garbage bag on the top bunk, which added to the problem with space in the cell. Benjamin's mattress was already on the floor rather than the top bunk. (RT 1435-1436, 1511, 2371, 2436-2439, 2463-2465.)

5. Events in Cell 8 After Lockdown

Andrews laid his mattress along the wall between the bed and the desk, laid down and appeared to go to sleep. Bond took the pruno down from the top bunk and opened it to see if there was alcohol in it. He determined it was "good to go." (RT 1448-1449, 1669, 2374-2376, 2380, 2444.) Bond, Benjamin and appellant began drinking at about midnight,

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[4] The cells in F-Pod were segregated by race. There were "Black cells," "Mexican cells," and "White cells." (RT 1433-1434.) Cell 8 was a "White cell."

[5] An alcoholic brew made in jail by fermenting fruit with sugar until alcohol is formed. (RT 1414, 1879.)

and drank for an hour or two. (RT 2374-2376, 2380, 2444, 2472.) Bond indicated that he, Benjamin and appellant each drank about the same amount that morning. (RT 2465-2469, 2518.) He estimated the amount at about 8 to 15 cups. Bond thought that appellant was intoxicated, and that Benjamin was a little bit intoxicated. (RT 2569.) Bond described himself as drunk. (RT 2559.) Benjamin thought Bond and appellant each drank about the same amount of pruno, about 1½ to 2 quarts. Benjamin claimed at trial that he only took three sips of the pruno, although he had told the detectives on April 9 that he had three cups. (RT 1455-1457, 1623-1625, 2680, 2703.)

At some point, around when they stopped drinking, appellant said that he was going to ask Andrews some questions about someone they both knew, and said something to the effect that he would know him if he gave the wrong answers. However, appellant did not threaten Andrews or say he was going to do anything to him. (RT 2556-2557.) He then woke Andrews up, by slapping him on the face, not hard, but just enough to wake him up. (RT 1449-1452.) Benjamin said appellant asked Andrews about some woman, and whether he knew her, and how well. Andrews did not say anything bad about the woman, and asked appellant to leave him alone. Appellant got angry and began slapping Andrews harder, calling him a piece of shit. He then punched Andrews in the face, more than a few times. (RT 1449-1455.) Bond did not hear all of the conversation between appellant and Andrews, just pieces of it. He heard something about appellant's wife. (RT 2376-2379, 2473-2474.)

Appellant began slapping Andrews, who was just covering up, trying to keep from getting hit, saying he was sorry or something to that effect. At this point, appellant was kneeling down, and Andrews was laying down.

(RT 2379-2380.) Appellant began hitting Andrews with his fists in the face and stepping on Andrews' head on the floor. Andrews was trying to cover up, asking what he'd done, and why he was getting beaten. Appellant said something, but Bond did not recall what. This went on for 15 to 20 minutes. (RT 2381-2382, 2407.) Benjamin described appellant as very emotional, and "rambling on" about his mother's and brother's deaths during the assault on Andrews. Benjamin testified that at times he could not understand what appellant was saying. (RT 1463, 1470.)

At some point the intercom came on and one of the cellmates asked the guard what time it was, but Bond could not remember which one asked. (RT 2402, 2541.) He told the detectives later that he thought Andrews had pushed the intercom button. (RT 2516.)

At some point, according to Bond, Bond stopped appellant. Bond got Andrews up off the floor, cleaned him up and tried to talk to him about defending himself. Bond slapped Andrews during this talk.[6] (RT 2383-2384, 2412-2413, 2483, 2517.)

Bond and Benjamin told appellant to leave Andrews alone. Appellant started talking to Andrews again, calling him a punk, saying he was "going to fuck him." Appellant said, "watch this, the guy's a punk. Watch him kiss my dick," or something to that effect. (RT 2385-2386, 2477-2480.) Andrews was on his mattress, trying to cover up. Andrews said he was not a punk, and asked appellant to leave him alone. He asked

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[6] However, at the preliminary hearing, Bond testified that he never touched Andrews. (RT 2413-2417.) In questioning later the day of the homicide, after first denying it, Bond told detectives that he had slapped Andrews a couple of times. (RT 2418-2420.) He admitted to the detectives that he had slapped Andrews only after they told him Benjamin had already said appellant did the whole thing. (RT 2421.)

why appellant was doing this to him. (RT 1459.) At this point appellant was on his knees, and Andrews was on the mattress on the floor. All four inmates were wearing just boxer shorts at this point. Appellant's penis was exposed through the fly of his boxers. (RT 1458-1459, 2386-2387.) Andrews declined to kiss appellant's penis. He said he did not want to do it, that he was not like that. Appellant said, "if you just kiss it, I'll leave you alone." Andrews kissed it. The penis was flaccid at the time. Both Bond and Benjamin said the kiss was fast. It was not a sex act. Appellant then backed away and said to Bond, "I told you he was a punk, a piece of shit."

Bond then proceeded to jump on Andrews, and punched him hard and kicked him. Benjamin later described it to a defense investigator as "[Bond] was fucking this guy up." Benjamin pulled Bond off of Andrews. (RT 1460-1461, 1514-1516, 1521-1522, 1568, 1570, 1661, 2480, 2680, 2703.)

Appellant asked if either Benjamin or Bond wanted to fuck Andrews or get their dicks sucked. Both Benjamin and Bond said no. Benjamin described this as just talk, stating that no one tried to sodomize Andrews. (RT 1474-1476, 1514-1515, 1521, 2387-2388, 2482.)

Appellant then started punching and kicking Andrews, who was still on his mattress, trying to get away and cover up. (RT 1461-1462.) Shortly after that, appellant got behind Andrews and wrapped a towel around Andrews' neck. Appellant twisted the towel and pulled on both ends, saying he was going to kill Andrews. Andrews was choking. Benjamin described the process as appellant letting up on the pressure and then tightening the towel back up, as "like a taunting thing." (RT 1605-1607, 2388-2391, 2505-2508.) This lasted for between 20 seconds and one minute. Benjamin said Andrews passed out. (RT 1465-1467, 1564, 1608.)

However, during an interview with detectives the day of the homicide, Benjamin said he could not tell whether Andrews ever lost consciousness. (RT 1589.)

At some point, appellant said he was doing what he was doing because Andrews was a punk and could not handle business being here. (RT 2395-2396.) Bond pulled appellant off of Andrews. According to Bond, appellant and Benjamin told Bond to mind his own business. Appellant said that the same thing can happen to Bond. (RT 2392.) Bond agreed to mind his own business. (RT 1462, 1658-1659 2393.) Bond said that every time he tried to pull appellant off Andrews, Benjamin tried to pull Bond off of appellant. (RT 2508.) Bond told the detectives that he was fighting both Benjamin and appellant. (RT 2544-2545.)

About five to ten minutes after letting go of the towel,[7] appellant began to pull on the towel around Andrews' neck again. Bond tried to pull appellant off, and then Benjamin tried to pulled Bond off of appellant. Bond got appellant halfway off, then appellant proceeded to "choke [Andrews] out" again. Andrews passed out. Appellant let go, and said "I killed him." (RT 1473-1474, 1479, 1566-1567, 1569, 1589, 2395-2396.)

Bond started getting emotional, saying "You killed him. You killed him." Benjamin looked and saw that Andrews was not dead, that his leg was moving, the blood was coming out of his mouth and going back in, and that Andrews was choking on it. Appellant was getting emotional along with Bond, and Benjamin said "no, he's alive, he's not dead. You guys didn't kill him. It's all right." Then appellant jumped back on Andrews

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[7] When first interviewed by the detectives, Bond told them it was about 30 minutes between the first time appellant pulled the towel around Andrews' neck and the second time he did so. (RT 2514.)

and started pulling on the towel around Andrews' neck again. (RT 1479-1480, 1591, 1629.) Although Bond had told the detectives that appellant had only pulled the towel around Andrews' neck twice, at trial, he added a third time, saying that appellant had one end of the towel under his foot and was pulling on the other end with both hands. Finally, appellant said, "Fuck it, I'm through with it." He released the towel. (RT 2396-2397.)[8]

Andrews was placed on his mattress. Benjamin covered him from his neck down with a blanket, and Benjamin and appellant moved Andrews under the bottom bunk. Benjamin did not think Andrews was dead. Appellant, Bond and Benjamin then wiped up the blood on the floor and the wall using towels and boxers, and flushed the boxers and towels, including the towel that appellant had been pulling around Andrews' neck, down the toilet. Benjamin flushed his own boxers down the toilet because he thought they had blood on them. Bond also flushed the plastic garbage bag in which he'd made the pruno. (RT 1480-1482, 1525, 1565, 1584-1585, 1592, 1642-1643, 1662-1663.) During the next hour before the doors were unlocked for breakfast, Bond did not hear anything from Andrews. Benjamin did not observe Andrews regain consciousness during that time. Nobody went to sleep after Andrews was placed under the bunk. Bond claimed that appellant made plans about what he was going to say and do, but Bond could not remember any of it. According to Benjamin, appellant said that when the police asked about it, to just say that he and Andrews got into a fight, that Bond and Benjamin went to bed and did not know what happened. (RT 1481-1483, 1646-1647, 2401, 2403, 2527, 2564.)

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[8] This took place about 40 minutes to an hour before the cell doors were unlocked for breakfast. (RT 1481.)

Bond never saw a towel tied around Andrews' throat in any type of knot. (RT 2423-2424, 2429.) Benjamin testified that no one had tied a knot in a towel around Andrews' neck. No towel was around Andrews' neck when Benjamin helped appellant put him under the bunk. (RT 1525, 1578-1580.)

When the cell doors were opened, the three cellmates exited the cell, appellant first. Benjamin and Bond went to the day room area, then to another cell. Appellant went to a Hispanic cell and to a cell on the first tier. Appellant came to the cell Bond and Benjamin had gone to, and said something along the lines of it was none of anybody's business, it was him [appellant] that did it, and somebody did not like it, they can deal with it. (RT 1483-1484, 1524, 1580, 1628-1629, 1630-1631, 2403.)

Bond testified that when they left the cell, he did not know and had not checked to see if Andrews was alive or dead. (RT 2425, 2505, 2511, 2525.) He later told the detectives that he did not think appellant killed Andrews. At trial, he confirmed that he was telling the truth about that to the detectives. (RT 2505, 2517.) He told the detectives Andrews was still moving when they went for breakfast. (RT 2510-2512.) He also told them he did not think appellant knew Andrews was dead. (RT 2526.)

When interviewed by the detectives on April 9, Benjamin told them that he did not believe Andrews was dead when he and appellant put Andrews under the bunk, that he had seen Andrews' legs move at the time. He told the detectives that he did not think Andrews was really in danger of his life. However, at trial he testified that he thought Andrews was dead at the point that appellant left the cell, but that Benjamin did not know whether he was dead. (RT 1525, 1574-1576, 1578-1580.)

Benjamin testified that at some point, while Bond was trying to get

appellant to stop, Benjamin slid his back against the intercom call button in the cell and pushed it. Pushing the call button in each cell lights up a light in the control center and makes a little sound to let the officer know you need to talk to him. At some point the officer came on the speaker box. Appellant asked him what time it was, which was a common request at night. They may have exchanged another few words, and that was it. Andrews did not say anything; he was semi-conscious.[9] Neither Bond nor Benjamin said anything. (RT 1468-1470, 1561, 1604-1605, 1608-1609, 1612.)

Benjamin thought the call button was pressed a couple of times that evening. He claimed he had pushed it (although when he was interviewed by the detectives on April 9, he was not sure that he had), and he believed Bond pushed it once or twice, and appellant pushed it once. (RT 1559-1561, 1563.) Benjamin thought the guard came on the speaker once while the scuffle was going on, and one or two times before the scuffle began. (RT 1561.)

Officer Demes testified that there had been two intercom calls from cell 8 that night, although Demes did not remember what time they occurred. The first call, which was after lockup, was a question of whether there were any "routers" (buses going to other prisons) going out of the pod that night. The second call asked the time. Demes did not recognize the voice on either call, and heard no noise or commotion in the background that would alert him on either call. (RT 2026-2028.)

Sometime after the cells were unlocked, and after appellant,

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[9] However, when he was interviewed by the detectives on April 9, Benjamin told them that Andrews tried to yell for help. (RT 1615.)

Benjamin and Bond had all left cell 8, but before breakfast was served, Brad Nelson went into cell 8. After he came out, he went to his own cell, where Benjamin and Bond were at the time. He told them he had wanted to talk to Andrews. Benjamin did not know how long Nelson had been in cell 8. Nelson was pretty upset, according to Benjamin. The three of them talked about what had happened. (RT 1581-1583, 1585-1586, 1648-1649.) Appellant came in and told Nelson he'd better keep his mouth shut. (RT 2529-2531, 2562, 2564.) Bond testified that when appellant was talking to Nelson appellant did not boast about having done anything to Andrews. (RT 2524.)

At breakfast, Benjamin and Bond sat together, but not with appellant, and discussed what to do. Bond wanted "to get [his] story straight with Benjamin." Bond told Benjamin that he was worried about being arrested and charged with murder. Benjamin testified that Bond also made a comment about using this situation for his own benefit. (RT 1631,1637, 2426 2435-2436.) Bond also talked to some inmates from the cell below theirs about there being a body in the cell, and that he was worried about being arrested and charged with murder. (RT 2435-2436.)

After breakfast, about 20 to 45 minutes after leaving the cell, Benjamin and Bond went back to the cell, having agreed to determine whether Andrews was alive or dead, and to notify the guards that the body was there. (RT 1485-1488, 2424-2427, 2431-2432.) Benjamin checked Andrews. (RT 2432-2434.) Bond denied that when they checked Andrews, either he or Benjamin tied the towel around Andrews' neck. (RT 2428.) He testified that he did not know how the towel got tied around Andrews' neck. (RT 2433.)

After Benjamin said Andrews was dead, he told Bond to push the

intercom, which Bond did. Benjamin reported the dead body, and two deputies arrived in about 5-10 minutes. Bond and Benjamin waited in the cell. (RT 1485-1488.) The guards came running in. After that, Bond, Benjamin and appellant were taken to the gym, and then separated after about 30 minutes. (RT 1485-1488, 2451-2452.)

That morning, Benjamin was interviewed by Detectives Christian and Burke. They told Benjamin that he was not under arrest and that he was not a suspect. (RT 2679.) Benjamin stated to Detective Christian that after the third time appellant pulled the towel around Andrews neck, Benjamin knew that Andrews was not dead, that he saw Andrews moving. Detective Christian asked if he only saw involuntary movement, but Benjamin said no. Benjamin said that he believed Andrews was dead after breakfast, not at the time before they left the cell. (RT 2681-2685, 2688, 2699-2700.)

After being separated from Benjamin, Bond was taken to the Sheriff's Department, where he was later interviewed by Detectives Christian and Burke. He was told at the outset of the interview that he was not under arrest for homicide, and that they already knew what happened, and were looking at appellant. (RT 2451, 2453, 2476-2477, 2707.) Bond made various statements which contradicted his trial testimony, as set out above. At trial, he claimed he might have lied dozens of times to the detectives. (RT 2503.) He testified he had decided to try to take care of himself. (RT 2505.)

The detectives told Bond that they knew appellant had Andrews kiss his penis, before Bond mentioned it to them. (RT 2477.) They also told Bond they knew appellant had choked Andrews before Bond told them that. (RT 2488-2489.) At some point, the detectives turned off the tape

recorder, and brought Bond some cigarettes, which was against the rules in the Fresno County Jail. (RT 2480-2481.) More than once, they told Bond that he was not the person they were after. (RT 2490.) Bond denied, however, receiving any favors, payment, reimbursement, assistance, or help of any sort, but agreed that he had asked the prosecution for assistance with the parole violation for which he was in custody at the time of trial, and for which he had not yet had a hearing. (RT 2492-2495.) He also disclosed that the trial prosecutor, Mr. Oppliger, had talked to someone about obtaining a job for Bond. (RT 2498.)

Detective Christian agreed that neither Benjamin nor Bond ever said that the towel was tied around Andrews' neck. (RT 2687-2688.)

Benjamin testified that on the day of the homicide, Bond made a comment to Benjamin about how the incident could be good for his case, and about possibly dealing his way out of the charges then pending against him. (RT 1600, 1631.) Benjamin claimed he did not have any thoughts of using it to his own advantage. (RT 1631.)

Prior to their testimony at the preliminary hearing in this case, Bond and Benjamin were transported to Fresno from Tehachapi State Prison together in a van. The two sat together for the next six or seven hours. They talked about April 8 and 9, 1992. (RT 2729-2730, 2732-2734.) Bond told Benjamin that he did not remember parts of what took place. Benjamin did not recall what parts Bond said he did not remember, and claimed he did not refresh Bond's recollection. (RT 2731, 2735, 2781.) Bond claimed they did not talk about their testimony. He also claimed he never asked Benjamin if he was getting a deal for his testimony. (RT 2546-2548.)

6. Later Statements Attributed to Appellant as Admissions

a. The Hospital Statement

Either just prior to taking appellant to Valley Medical Center for x-rays, while there, or just after leaving, Detective Christian mentioned appellant's wife, Patricia, to appellant. Detective Christian and appellant had a short conversation with respect to Patricia Dement and an associate of hers by the name of Tom Rutledge. Christian asked appellant if he knew Tom Rutledge. Appellant stated that he knew him, that the two of them were enemies, and that Tom Rutledge had disrespected him. Appellant said that if they were to get Tom Rutledge into the jail with him, they would not have to worry about taking him to trial. (RT 2671-2673.) Following that, appellant asked Christian what the name of the subject was that had gone to sleep. Christian told him the subject's name was Greg Andrews. Appellant nodded his head yes and said, "He was a friend of Tommy's." (RT 2673-2674.)

b. Trinidad Ybarra and the "Kites"

According to a stipulation entered into by the parties and read to the jury, Trinidad Ybarra was housed in Fresno County jail in March and April, 1993, two cells away from Appellant. The two communicated with each other by sending handwritten notes ("kites") back and forth on a line. Ybarra was facing two separate cases involving possession of drugs, and facing a state prison commitment. He had previously been convicted of the felonies of auto theft and residential burglary. Ybarra collected a number of the kites he received from appellant and contacted Detective Christian. Ybarra requested a deal on his pending charges in exchange for the letters. Detective Christian told Ybarra he would contact the D.A.'s office and

present the offer. On April 21, 1993, Ybarra handed over to Detective Christian a group of 17 to 20 kites which were written by either himself or Appellant. The original kites were immediately photocopied by Christian who kept the first generation photocopies in his case file. Following a positive handwriting analysis on the kites, a contract was signed and Ybarra was immediately released on his own recognizance to be sentenced following his testimony in this case. The original kites were booked into the Fresno County sheriff's office evidence locker. They were thereafter examined by an expert in handwriting analysis. The original kites were thereafter re-booked into the evidence unit and then misplaced by unknown individuals. Based on examination of the looks, style, content and subject matter of the photocopies by Ybarra and Christian, as well as expert handwriting analysis of both the photocopies and the original kites, it was agreed that the original kites were written by appellant or by Ybarra. (RT 2814-2815.)

It was also stipulated that Exhibits 35 and 36 represented typed and prepared paragraphs extracted from two separate kites originally handwritten by appellant, using exactly the same words as the originals, but adding some punctuation "to agree with the typewritten form." It was further stipulated that as used in the kites, the word "vato" means "dude," "gava" means "white." "carnales" means " brother," "kites" means "jail house letter," and "tu sabes" means "do you understand?" (RT 2815-2816.)

Exhibits 35 reads as follows: "I'm doing 29 to life for the first one. Dude was my brother but was on the other side of the fence. On this other trip, hey, shit happens, homey. The shit ain't over but I'll say this, dude had it coming, both of them. I feel no different. It don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway."

(RT 2816.)

Exhibit 36 reads as follows: "The vato here was a gava. On my carnales, he was a runner.[10] See, I'm a half-breed myself so there's more to that story than the paper says. Tu sabes? Mikio pulled me down for his trial. That's why I was here. Ain't no thing, brother. Before its over, I'll tag a few more. Got to keep these fools in check at times." (RT 2816.)

The contract between Ybarra and the prosecution, in exchange for turning over the kites and providing testimony about appellant, called for Ybarra to plead guilty to one count on each of his two cases, for the prosecution to dismiss any remaining charges and lesser counts and enhancements, and Ybarra would receive concurrent sentences and a "paper commitment" to state prison. (RT 2817-2818; Exhibit K.)

7. Other Inmate Witnesses

a. Anthony Williams

Anthony Williams, a convicted rapist, thief, and crack seller, in custody for sales of crack cocaine, testified that he was standing next to appellant in the day room of F-pod at the time new inmates arrived on April 8, 1992. Another inmate said, about one of the new inmates, a guy named Greg that Williams knew as a drug user from the streets, "I hope they don't move him in my cell."

When Williams spoke to an investigator the next day, he said he knew who killed Andrews, and that the guy had said, "I know that motherfucker. I'm going to do his ass. You watch, I'm going to do his ass." However, he never gave the investigator the name of the person who said that, because he was attempting to secure a deal with the prosecution in

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[10] No explanation or definition of "runner" in this context was provided to the jury.

return for that information. (RT 1383-1386, 1405-1408, 1422, 1426-1428, 2891-2898.) At trial, however, Williams testified that he heard appellant say, "they move him in my cell, I'm going to do him. I'm going to kill him," or something like that. Williams testified that he did not believe it, not from appellant. Williams described it as just a way people in jail have. (RT 1372-1378, 1382-1383, 1414-1415.) He testified he heard nothing unusual that night after the cells were locked. (RT 1379-1380.)

b. Eric Johnson

Detective Sherman Lee testified that he interviewed Eric Johnson on the morning of April 9. According to Lee, Johnson wanted a deal prior to discussing any details of the events of the previous night. Lee told him they already had one deal in the works with another inmate, and they did not need to make another deal. However, Lee offered to speak on Johnson's behalf at sentencing. (RT 2716-2717.) Lee testified that Johnson then said that after Andrews arrived on F-pod, Johnson heard an inmate, described as a white male housed in cell 8 that acts and speaks like a Hispanic, with a tattoo on his neck that said E-14 [sic], say he was going to take care of the homeboy that had just been put into his tank. (RT 2719-2721.) Lee described "homeboy" as a slang term, used in many different ways, but Lee could not say what it means. (RT 2723.) Johnson, who had convictions for robbery, assault and petty theft, denied making any statement to Lee or any investigating officers. (RT 2241-2242, 2245-2246.)

c. Bradley Nelson

Bradley Nelson, a convicted robber, incarcerated on burglary charges, testified that Andrews was a friend of his, and that he had known him since 1990. (RT 2112.) When Andrews showed up on F-pod the night of April 8, Nelson spoke with him and gave him some food. Andrews told

Nelson he was under the influence, and that was what he had been arrested for. Nelson said Andrews looked tired, and like he had been through a lot. At about 10:30 p.m., Andrews went to his cell, to go to sleep. (RT 2080-2082.) Nelson testified he saw appellant look at Bond and start hitting his fist into his own hand. Nelson looked at appellant and told Bond to leave Andrews alone because he was a friend of Nelson's. (RT 2082-2083, 2127.)

At some point during the night, one of Nelson's cellmates woke him up. (RT 24-2085.) Nelson heard laughing from various people in the pod, including appellant and Bond in the cell right above him. He also heard yelling, and a sound like a fight going on upstairs, like someone was getting thrown around in there, and a lot of jumping around. He also heard appellant "yelling like an Indian." He heard Andrews say, "somebody please get me out of this cell." He heard appellant talking to the "Mexican guys" in the cell next to him, but could not hear what he was saying. He heard an officer come on the intercom and ask if there was a problem. Nelson could hear some scuffling, and appellant said, "no, there's not a problem in here." Nelson went to the window in the door and saw the officer walk away from the control panel. It sounded to Nelson like the scuffling continued. Then he heard Andrews say, "you might as well go ahead and kill me." (RT 2085-2088, 2116-2119, 2131.)

Nelson thought about pushing the intercom button in his cell but did not do so. He did not hear anybody in the cell above him asking what time it was or anything about a bus picking up inmates or how long it was to breakfast. (RT 2114-2116, 2134-2135.)

When the cell doors were unlocked, at around 4:30 a.m., Nelson left his cell. Bond was coming down the stairs and Nelson went over and asked

him "what did you guys do to Greg?" Bond was "kind of like crying." He smelled like pruno. Nelson went upstairs to the cell that Andrews was assigned to. There was nobody in the cell when he entered. He saw Andrews under the bottom bunk and said, "Greg, get up. Time for breakfast." He shook him but Andrews did not respond or move. Nelson lifted the blanket, which Nelson said covered him completely, including his head. Andrews' feet were toward the wall and he was laying on his face, head down. Nelson could see smears of blood on his face. His face was swollen. He realized Andrews was dead and got out of there. He did not see anything around Andrews' neck. He told one person about it and that person said, "Man, I'm not going to mess with it. Just get out of here." (RT 2090-2092, 2127-2132, 2136-2137.)

Nelson then went to his own cell and talked to his other cellmates, telling them what he'd observed. He walked out of his cell and talked to Bond and Benjamin for a minute about what happened and then went back in his own cell. Appellant came in, upset because he found out Nelson had gone into appellant's cell. Appellant told Nelson that was his cell and for Nelson to stay out. Nelson at first thought they were going to end up fighting, but then appellant changed his attitude and asked Nelson if he would go upstairs and drag the body out of the cell onto the tier. Nelson told him that he was not going to help him in any way. Nelson described appellant as "jumping around a little bit." (RT 2092-2095, 2132-2133.) Appellant put his hand on Nelson's chest, was shaking his finger in Nelson's face and said that it did not mean anything for him to take a human life, and that Nelson would be through "like that," drawing a finger across his throat. Nelson told appellant he would not say anything. (RT 2107-2108.) He was not afraid of appellant. (RT 2113.) When appellant

put his hand on Nelson's chest, Nelson could smell pruno on his breath. Appellant appeared to be a little bit drunk. (RT 2137-2138.) At the time, he thought appellant and Bond had beat Andrews. (RT 2136-2138.) He did not think Benjamin had. Benjamin did not smell or look like he'd been drinking pruno. (RT 2138-2139.)

When he was first interviewed by detectives soon after Andrew's body was discovered, he told the detective that he had not seen or heard anything during the night. (RT 2110-2112.) He did not tell the detective any of the things that he testified to trial. (RT 2120.)

On April 13, 1992, the day he was being sentenced on his burglary charge, Nelson talked to Detective Christian and another detective. He did not tell those detectives that appellant had been striking his open hand with a fist the night before Andrews was found dead. Nor did he tell the detectives that his cellmates had awakened him. He told them he just woke up around 1:30. He told the detectives it was hard to hear from his cell, although he testified in court that it was easy to hear. (RT 2120-2124, 2145.) Nelson did tell the detectives that appellant had been shaking his finger in Nelson's face, but did not tell them that appellant had made a motion across his throat. (RT 2139-2140.)

d. Albert Martinez

Detective Christian testified about certain alleged statements by another inmate, Albert Martinez, concerning the events of the morning of April 9. According to Detective Christian, in an interview on April 13, 1992, Martinez stated the following:

> After the inmates were released for breakfast on April 9, appellant was bragging about having killed somebody. Appellant approached Martinez as he was laying on his bunk in his cell. Appellant smelled like alcohol. He asked

Martinez to help drag a body downstairs, but Martinez responded that he did not want anything to do with it. (RT 1789-1790, 1804-1805.) Appellant was telling him and other people in the pod that if he got rolled up, the two people that knew what happened were his two cellies, and that they needed to do something to him. (RT 1791.)

Appellant had a confrontation with a big white guy with a goatee who had gone up to Andrews' cell to wake him up to bring him down for breakfast. Martinez heard appellant tell the guy with the goatee, "you ain't got no business in my cell. You know, what the fuck you doing?"[11] (RT 1791-1792.) Appellant kept reaching into his pants, and said "I'll take your wind and I'll do the same to you." Martinez guessed that appellant had a knife.[12] (RT 1792.) Martinez told Christian that the white male responded, "Get the fuck away from me, man. I got nothing to do with you, nothing to say to you." Appellant responded, "You go get the body out of my cell." The white male than made a statement refusing to do that. (RT 1796-1797.)

Martinez heard appellant make a statement that he was trying to go up in the guy, which Martinez told Christian "means trying to fuck him." Martinez also heard appellant say that "the guy greased his butt up." (RT 1798.) Martinez gave two versions of what was said about fucking, and said he could not hear exactly which version it was, and said that other inmates told him about it. (RT 1809, 1814.)

Martinez heard appellant ask some black inmates to remove

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[11] Detective Christian agreed with defense counsel that is not out of the ordinary for an inmate in Fresno County Jail to get upset about a stranger going into his cell and looking around while nobody is there. (RT 1805-1806.)

[12] The parties stipulated that appellant did not have a knife, and that this speculation by Martinez was admitted as "impeachment . . . which would tend to discredit the witness's believability, and to give context to his statement." (RT 1792-1793.)

> the body from his cell as well. Appellant said he had beat the person and Martinez thought that appellant mentioned he was choking him, strangling him, but did not mention how he had done so, or what he used. (RT 1797-1798, 1807-1808.)

Detective Christian agreed that Martinez never said that appellant admitted strangling Andrews or anybody else, and that according to Martinez, appellant just confessed to hitting him. In fact, Detective Christian introduced the subject of strangling into the interview, not Martinez. (RT 1797-1798, 1807-1808.)

Albert Martinez, however, testified differently. Martinez, who had felony convictions for receiving stolen property, false imprisonment, and petty theft with a prior, and also had convictions for giving false information to the police, testified that he was arrested for violation of parole on April 8, 1992, and housed in an area of the Fresno County jail called 4-F. His cell was on the second floor. He slept almost all that night and through breakfast the next day. (RT 1684-1686, 1693-1694, 1727-1728.) The morning of April 9, he became aware that an inmate in F-pod had been killed. The jail locked everybody up and started questioning them. He was asked if he knew anything, and he told them no. (RT 1688-1690, 1699, 1706-1707, 1754.) He did not remember being interviewed a second time on April 13, 1992. He said he'd been shown a copy of a report that was supposed to be statements he'd made that day, but he did not remember saying any of it. (RT 1713-1750.) He had told a defense investigator in July, 1992 that he had not said the things in a report. (RT 1717, 1755.)

C. Defense Case

Donald Moore, a parole agent for the California Department of Corrections, testified that Anthony Williams had been released from state

prison on parole in June, 1994. Williams was seeking a transfer of his parole to Palmdale. On June 14, 1994, an investigator from the district attorney's office came by the parole office. Williams also came in. Moore talked to Williams when he came in, told him there was a D.A. investigator there to talk to him. Williams had a private discussion of about 25 minutes with the DA investigator. Moore then had a brief conversation with Williams about his testimony. At trial, Moore claimed that he only told Williams that if a subpoena was issued, Williams had certain obligations and that it would be in his best interest to take care of his obligations before leaving for Southern California. He claimed he did not tell Williams that he could not leave for Palmdale until he testified. He admitted, however, that in his notes he wrote, "Advised would not release suspect to Palmdale area if he did not cooperate with their investigation." Moore claimed he only told that to the DA investigator, not to Williams. (RT 2855-2858.) Moore also told Williams that as soon as he finished testifying, he should come back to the parole office and they would give him the paperwork so that he could head to Palmdale. After testifying, Williams came back to the parole office, and received a travel permit from the officer of the day. (RT 2859.)

Dr. Eric Hickey, a criminologist at California State University at Fresno, with a Ph.D. in social psychology, testified regarding prison slang and culture. (RT 2861-2866.) He testified that in prison, inmates must learn to get along with each other while learning their position within inmate society and the inmate power structure. Specialized language can give a special sense of power and control. Slang in prison operates as an internal language which helps to exclude outsiders. It changes over time and depends upon ethnic background or race. (RT 2867-2869.)

Hickey looked at the language in some of the prison kites exchanged

between appellant and Ybarra. He testified that the term "tag" can mean a number of different things, depending upon the victim's relationship within the institution. It can mean to kill, to physically assault, to hurt in some way, or to get to. It could be a means of letting a stranger know who's in charge. It could be a sexual assault. The threat of sexual attack is sometimes used to intimidate another inmate, with no intent to carry it out. There's a great deal of machismo and bravado within prison slang, attempting to establish a certain level of control. (RT 2869-2871.) Since there's not much left for inmates, they often assert control through written language, body language, and tattoos. They puff themselves up to let other inmates know how powerful they are. It's not uncommon to find smaller inmates with a lot of tattoos in order to show off their colors, ward off other people, and show that they are dangerous. It provides psychological power. (RT 2871-2874.) Some tattoos are personal, some are attractive, some are meant to be feared, sometimes words are written, intending to intimidate. (RT 2874-2875.) Inmates often make sexual threats to other inmates without the intent to actually carry out a sexual act, sometimes just to play with them or to frighten them without doing anything. It is very common among inmates to make sexual reference to each other without intent of having any sexual activity. "I'm going to do him" can have a sexual connotation, but does not always have a sexual connotation. It can be merely intimidation or bravado. Hickey testified that bravado was often just venting, and those who do not vent are the ones more likely to act out. (RT 2876-2879.)

Notes, messages, or letters passed from one inmate to another are called "kites." Inmates often try to puff themselves in kites to other inmates, depending upon the relationship. Inmates are constantly

overstating or understating why they're in prison, depending on their crimes. A child molester will often minimize or reconstruct the past while someone with a history of robberies or violence may embellish what he has already done, to gain status within the institution. (RT 2880-2882.) The phrase "Ain't no thing brother before it's over I'll tag a few more" could be interpreted three or four ways. "Ain't no thing brother" could be simply bravado, saying that he really did not care, which may not be true. It could be an attempt to show that he's tough, he can handle it. (RT 2882-2883.) The phrase "hey, shit happens homey, the shit ain't over but I'll say this, dude had it coming, both of them" indicates machismo and bravado. He "had it coming" is typical rationalization, a technique of neutralization in the parlance of criminology. (RT 2885.) "I'm looking at the chair" shows a sense of bravado, meaning he is not afraid. It is a simple way of transmitting information to another inmate in a very machismo way. (RT 2886.) It is common for inmates to exaggerate or falsify past exploits in order to make themselves appear more fearful, as a survival technique. They know if they can establish a certain superiority, other people will not bother them, and they will have more respect in the inmate social structure. Inmates have to establish their right to be left alone. (RT 2886-2887)

A "punk" in prison usually means someone not only on the lower rung of the scale, but somebody used sexually. In an all-male prison, "I'm going to fuck him" could mean literally to have sexual intercourse or oral copulation, or it could mean "I'm going to mess with him." (RT 2888-2889.)

Detective Linda Lee interviewed 17 inmates in the jail the morning of Andrews' death, including Anthony Williams. Williams asked Detective Lee for a deal on two occasions. He said he did not want to say anything

unless she could help with his case. He said he had knowledge of the homicide, that he knew who had done it, but never said the name Ronnie or Pico.[13] (RT 2891-2898.)

Irvin Basquez, an inmate with felony convictions for armed robbery, assault on a police officer and resisting arrest with force and violence, was in custody in the Fresno County jail at the time of trial. He testified that a few days earlier while in a holding cell, Jimmy Lee Bond was in a neighboring holding cell. The guards brought some women through the area, and one asked Bond what he was in for. Bond replied "Killing my cellie." The woman responded "Scared of you." (RT 2904-2908, 2915-2918, 2920, 2922.)

It was stipulated that Exhibits 16 and 17 showed two views of appellant's hands taken by the Fresno County sheriff's office at approximately 10 a.m. on the day that Andrews' body was found. (RT 2926.)

PRIOR MURDER CONVICTION
SPECIAL CIRCUMSTANCE

The parties stipulated, in a bifurcated trial on the special circumstance allegation of a prior murder conviction, that appellant was previously convicted of the crime of second-degree murder on or about September 26, 1991 in the Fresno County Superior Court, in violation of section 187 of the Penal Code. The victim was David Raymond Dement. The crime occurred at 10:40 p.m. at 4568 East Tyler, Fresno, California, on June 2, 1991. (RT 3208-3209.)

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[13] Various inmates knew appellant only as "Pico." (See, e.g., RT 1373-1374, 2106.)

PENALTY PHASE

PROSECUTION CASE

1. Prior Convictions

Documentary evidence was presented reflecting that appellant had been convicted on March 3, 1983, by plea of guilty, for three counts of violation of section 221, robbery, with an enhancement under section 12022.5 for use of a firearm (RT 3312-3316; Exhibit 39), and on July 11, 1986, by plea of guilty, for violation of section 12020, possession of a concealed weapon. (RT 3316-3317.)

The parties stipulated that on or about September 26, 1991, appellant was convicted of violation of section 273.5, the willful and unlawful infliction of corporal injury on a spouse, in the Fresno County Superior Court. (RT 3289.) The parties further stipulated to facts underlying that conviction, i.e., that appellant's wife, Lisa, had received facial injuries consisting of a swollen nose and black and blue eyes which she told the police had been caused by appellant when he punched her, and that the assault occurred several hours before the shooting on the evening of June 2, 1991, set forth below. (RT 3290-3291.)

Both by stipulation and by witness testimony, facts underlying appellant's second degree murder conviction, which was the basis for the First Special Circumstance, were presented. There had been an ongoing dispute over money between appellant and his brother David. Appellant claimed that David had stolen appellant's paycheck and spent it. David had apparently used the money to buy drugs. (RT 3291-3292, 3299-3301, 3333-3334.) On June 2, 1991, David was at the home of a friend, Joe Parker, in Fresno. David had been out that day with David's wife, Parker, and Robin Rynes. David had been drinking beer that day, and continued drinking at

Parker's house. When David drank too much, he became argumentative and abusive with other people. (RT 3321-3324.) Appellant dropped by and happened to discover his brother there. (RT 3291-3292.)

Over the next few hours, appellant came to the Parker residence a number of times, shouting at David from a car to come out and apologize for taking his money. David would not do so, and yelled back at appellant from Parker's porch each time appellant came by. As the evening wore on, appellant continued to return to try to talk to David, and was getting increasingly intoxicated. Parker saw a dramatic increase in appellant's intoxication each time appellant came by. On one occasion, while talking to Parker about why his own brother would take his money and use it on drugs, appellant broke down and cried, sitting in his car. (RT 3300, 3302-3304, 3330-3331, 3334-3338.)

On the last occasion appellant came by, he yelled at David, "You ain't man enough to talk to me and apologize. You apologize and I'll leave." Robin Rynes made an unsuccessful effort to persuade David to stay in the house. She also had convinced appellant to unload a rifle he had with him, but he later re-loaded it. (RT 3291-3292.)

David had come off the porch, and appellant was still in his car. Appellant had the rifle with him. Parker put his hand across appellant's lap, to keep appellant's hands down. The two brothers were yelling at each other. The more appellant saw his brother, the more nervous appellant got. It looked to Parker like what David was saying was scaring appellant, and that appellant didn't know what to do, but he didn't want to be sitting in his car while his brother was walking towards the front of the car. Appellant said to Parker. "Don't do this. Don't stop me." Appellant nudged the door and knocked Parker back for a second and got out of the car with his gun.

(RT 3304-3306, 3338-3342.)

Appellant had the rifle down to his side, and walked around the back of the car. The arguing between appellant and David continued. Appellant was saying, "I'm going to kill you." David said, "Go ahead and kill me if that's what you want to do." Appellant saw David, aimed the rifle above his head, then "dropped the weapon to about half his body" and fired. David was about 18 feet away. Prior to the shot, David looked, realized appellant was aiming, turned and ducked, when he was hit with the bullet in the left arm. David dropped to the ground. Appellant turned, ran, and jumped in the car. He spun out and drove off. (RT 3306-3309, 3340, 3343-3345, 3349.) Parker testified that at the time of the shooting, appellant was close enough that if he had wanted to, he could have shot David in the head. He also could have aimed right at his brother's heart. Parker saw appellant aim higher and then lower the gun, aiming at the arm. (RT 3346-3347.)

Parker testified that during the entire dispute, appellant never threatened him, pointed a weapon at him, threatened anyone else in his household, or even came on Parker's property. (RT 3350-3351.)

David Raymond Dement died at 1:11 a.m. on June 3, 1991 as a result of a gunshot wound to the trunk of the body. A .22 caliber bullet passed through his arm and entered the left side of his chest. (RT 3292-3293.)

2. Jail Incidents

Albert Rodriguez, a correctional officer at the Fresno County jail, was escorting appellant from the elevators back to his cell on Nov. 17, 1992. Appellant was handcuffed and chained with shackles on his legs. (RT 3223-3224.) In front of appellant's cell door, Rodriguez took from appellant an accordion folder with his paperwork. Before handing it back, he noticed that it didn't bend. (RT 3224-3226.) Rodriguez searched the

contents and found a piece of metal, which he described as a shank, stuck on the bottom part of papers. He confiscated it. (RT 3226-3227; Exhibit 37.) Rodriguez testified that appellant never threatened him with the shank or otherwise. He transported appellant in the jail on other occasions, and never had any problems with him. (RT 3227-3228.)

On February 1, 1993, Correctional Officer Ben Flores, went with Officers Delgado, Jamanez, Esparza, and Jackson, for the purpose of searching appellant's cell at the Fresno County jail. Appellant was in the cell. (RT 3239-3241.) Flores informed appellant that his cell was going to be searched. Appellant asked what they were looking for. Flores said they were looking for contraband, and asked appellant if he had a shank. Appellant said, "Well, is that all you're looking for?" Appellant walked into the cell, went to his sleeping area, reached underneath the pillow, and pulled out a sharp object which he brought back to the door and handed to Officer Delgado. (RT 3242-3244, 3249-3250; Exhibit 38.) The officers searched the cell anyway, finding a bag containing some fruit and water, and some torn sheets. Prior to searching, the only thing the officers had asked about was a shank, and appellant immediately turned that over. (RT 3246-3247.) At the time, no one else was housed in that cell besides appellant. (RT 3245.) Flores had never had any problems with appellant, and had never been threatened by him. He testified that he hears about shanks being found in the Fresno County jail about every month. (RT 3247-3248.)

A day or two before September 3, 1993, Officer Joseph Burgen, a correctional officer trainee, had taken it upon himself to search appellant's cell while appellant was taking a shower. He didn't find any knives, pruno, or narcotics. Instead he found "excessive milk cartons" stuck to the wall

with toothpaste, used as shelves. He took the milk cartons from the wall. He also removed some photographs that were stuck to the wall with toothpaste, a jail-made box, and a jail-made necklace, made from jail-issue linens. He also found excessive bedding. (RT 3263-3267, 3270-3271.) He hadn't received any instructions to search the cell, or to remove the milk cartons, photographs, box or necklace. He did it on his own initiative. (RT 3270.)

Later, Burgen was transporting appellant for an attorney interview, and noticed that appellant had a string earring. He had the string earring removed by medical staff assigned to the floor while forcing appellant's attorney to wait. Burgen agreed at trial that there was no particular reason why the attorney had to sit and wait while the string was taken out of appellant's ear instead of having it done after the attorney interview. (RT 3271-3273.) On the way to the attorney interview after the string was removed, appellant verbally threatened Burgen. (RT 3273-3275.)

On September 3, 1993, Burgen, with Officer Guerra, transported appellant from his cell to the gym area where he was to have his recreation time. (RT 3253-3255, 3262, 3269.) Burgen removed the leg shackles from appellant, and proceeded to remove the handcuffs which were behind appellant's back. Guerra was standing in front of appellant, Burgen behind him. At that point, appellant turned around, struck Burgen in the face twice and then grabbed him by the throat. (RT 3256-3258, 3282-3283.) Burgen was pushed back about 10 feet, knocking over a desk. Officer Guerra grabbed appellant by the back of his jumpsuit. Burgen pushed appellant into the wall and they fell to the ground. Burgen got control of appellant and had Guerra replace the shackles. (RT 3259-3260, 3286-3288.) Burgen received some bruising, a swollen lip, but no bleeding. (RT 3260-3262.)

Officer Guerra testified that appellant never tried to swing at him. Appellant had never given Guerra any problem other than what he saw that day with Burgen. (RT 3286-3288.)

DEFENSE CASE

Dr. Eric Hickey, a criminologist who had also testified at the guilt phase, testified concerning classification, security and housing issues facing a prisoner sentenced to life without possibility of parole. (RT 3373- 3399.) Given appellant's record, Hickey was of the opinion that, if not sent to death row, appellant would be placed in a level-four, high security prison, either Corcoran or Pelican Bay, because he would be considered a threat to other inmates. Pelican Bay is considered to be the most restrictive of all institutions in California. If Hickey were the prison administrator, he would deny appellant prison industry or work detail. (RT 3375, 3384.) In terms of classification, an attack on an officer, even one with fists only, will normally result in being placed in a Security Housing Unit (SHU), segregated from the rest of the prison population, locked down 23 hours a day, with an hour to exercise. (RT 3379-3381.) Assuming that appellant was sent to a SHU, it would be difficult to tell whether he would ever get out of the SHU and into mainline. To be removed from the SHU would require considerable evaluation and considerable time would have to be spent there prior to the removal. (RT 3389, 3399.)

Dr. Howard Terrel, M.D., board-certified in psychiatry and a part-time clinical instructor in psychiatry at UCSF, testified regarding the effects of overcrowding upon behavior and about appellant's background and its effects upon his behavior.

Dr. Terrell testified that literature published on the subject of overcrowding shows that the more individuals are crowded, the greater

likelihood exists of violent behavior. If alcohol is added, there is a greater propensity for violence. If the people being crowded have a tendency to violent criminal behavior, the potential for violence, even killing, is enhanced further the longer they are crowded. (RT 3435-3438, 3440-3442.)

Studies of human populations showed that the general trend is that the more people are crowded, the more they progressed from being relaxed, socially appropriate and nonviolent to an increased incidence of violence with serious assaults and potential for murder. (RT 3439.) There appears to be a biological aspect as well as a social aspect to this reaction. Blood pressure goes up, and other biological changes occur just from overcrowding, and the propensity for shortened tempers and violent behavior is increased. (RT 3440.) Overcrowding can manifest in violent or aggressive behavior within minutes, hours, or days. Many times it's within the first day or so. (RT 3450-3452.)

Dr. Terrell is familiar with the cells in the Fresno County Jail. He opined that spending any period of time in one of the cells with three other people would be a very unpleasant experience, and it would not be very long before people were arguing about who got to sit where, who got to sleep where, and various other things. With the addition of alcohol, to which many people react in a violent and hostile manner, the potential for violence and aggressive behavior is increased, especially if one or more the people has a prior history of violent behavior when intoxicated. (RT 3442-3444.) However, both times that Dr. Terrell interviewed appellant, appellant denied killing Andrews. (RT 3453-3454.)

Dr. Terrell interviewed appellant about the circumstances surrounding the killing of his brother David, including appellant's use of controlled substances. Appellant had been continuously using alcohol,

cocaine and heroin, and had been quite intoxicated for a number of days leading up to the shooting death of his brother. (RT 3425-3427.)

Based upon interviews of appellant and review of information about his background, Dr. Terrell determined that appellant's substance abuse and personality were influenced in large part from his family, both as a result of genetic predisposition and by the circumstances of his upbringing. Dr. Terrell opined that appellant is a drug addict, and linked appellant's substance abuse problem to the significant amount of substance abuse in appellant's family. Appellant had four older siblings, all of them from a different father than his. The siblings, Larry, David, Lorraine and Theresa, all had substance abuse problems. Larry was in prison at the time of trial. Lorraine was on SSI due to mental health problems. Appellant's mother had been incarcerated for a substance abuse offense. Dr. Terrel stated that the fact that all of appellant's siblings had substance abuse problems is significant. It would not be expected unless something quite overwhelming was the cause. It is established in the medical literature that there is a strong genetic predisposition toward substance abuse. (RT 3419-3421, 3499, 3508-3510, 3529-3531.)

Dr. Terrell also diagnosed appellant as suffering from an antisocial personality disorder, a mental disorder recognized in DSM-IV. Such a disorder is caused, according to Dr. Terrell, by a combination of genetics and environmental factors. Dr. Terrell testified that people with an antisocial makeup often have first-degree biological relatives with a similar style of dealing with the world. Part of that is environmental, but genetics also appears to be a very significant influence. (RT 3414-3417, 3457-3459.) The overwhelming majority of the persons with antisocial personality disorder seen by Dr. Terrell over the years came from the kind

of environment that appellant comes from, with biological parents who are lawbreakers, who deviate from societal norms and standards, and grow up in environments that encourage breaking the law. (RT 3419, 3457-3459.)

Dr. Terrell stated that antisocial personality disorder tends to remit by the fourth decade, meaning that as the person gets into his 40's and 50's, he tends to be less prone to violence, law breaking and substance abuse. (RT 3446-3449.)

Appellant came from an impoverished and chaotic childhood and family environment. Appellant's mother, Laverne, was a drug user who was in and out of the criminal justice system and otherwise on welfare. She was a large woman, and physically abusive to appellant when he was a child. She allowed all sorts of unsavory people around her son -- criminals, drug addicts, biker types, people who indulged in inappropriate sexual behavior, in front of the children. Appellant never knew his father, and never had a healthy paternal role model. Instead, he had the criminal types who came to their home. (RT 3410-12, 3464-3470, 3655-3657.)

Laverne's home was filthy and chaotic. While appellant was only about six or seven years old, there were people going in and out, drinking, doing drugs, even parking motorcycles in the living room. (RT 3502-3503.) Between 1971 and 1974, appellant lived in about ten different residences. (RT 3470-3471.)

A stepfather, George Disbrow, married Laverne when appellant was seven years old. Disbrow was unemployed and a drug user and alcoholic, supported by Laverne's SSI and AFDC checks. He gave drugs to appellant's sister Theresa when she was only ten years old. (RT 3462-3468, 3472.) When appellant's mother ended up in jail for selling barbiturates, Disbrow, who had been released after a year in prison, had charge of

appellant, age eight, and Theresa, age twelve. They ended up homeless, living in a campground, stealing food from other campsites. (RT 3462-3468, 3505-3506, 3510-3511.) Theresa was placed in an emergency foster home when she talked to social services after Disbrow encouraged her to have sex with a man in whose house they were staying. Child Protective Services left appellant with Disbrow. (RT 3515-3516.)

Disbrow then took appellant to Los Angeles, where Disbrow was arrested. Appellant ended up with Disbrow's aunt. When appellant's mother got out of jail, he was put on a bus, unescorted, to return to Fresno and his mother. (RT 3472-3475.)

From fourth through sixth grade, according to some teachers, appellant was a pleasant, normal child, not a troublemaker, a good athlete, and popular with other boys. (RT 3365-3373.) To Dr. Terrell, this indicated that an early age of his life he was able to follow social norms, but then as time went on, the circumstances of his upbringing had more and more influence, and the genetics he inherited finally caught up with him. (RT 3413-3414.)

When appellant was 11, his mother left him with a neighbor, Susan Cabrera, for days or weeks at a time while she disappeared to party elsewhere. At the Cabrera's home, he was fed well, had clean clothes and attended school regularly, none of which happened when he was with his mother. He wanted Mrs. Cabrera to adopt him, and Mrs. Cabrera wanted to have him live with them. Appellant's mother refused, because appellant was her only source of support, through the AFDC payments she received. Eventually, appellant's mother left, taking appellant. Mrs. Cabrera looked for them, but could not find them. (RT 3654-3664.)

When appellant was 13 or 14, he lived with his brother, David, and

David's wife, Patricia, for about a year. David may have had temporary custody of appellant. Appellant was helpful around the house and with David and Patricia's newborn. (RT 3534-3540.)

Growing up, appellant's family was one of the few Caucasian families in an area which was mostly black and Hispanic, where street gangs were a way of life. Appellant became close friends with many Hispanic neighbors who happened to be members of gangs, and became a Hispanic gang member himself. (RT 3422.) The gangs and the people he lived with were replacements for the father he never had. He learned the social values of the gang, and learned that it was normal to deal with the world through illegal means. (RT 3423.) This caused some conflict with appellant's older brother, Larry, a member of the Aryan Brotherhood, a white supremacist prison gang. (RT 3422, 3449.)

When appellant was 15, he started a relationship with his future wife, Lisa, who was 14. A year or two later, Lisa was pregnant. Their first child, was born in 1980, while appellant was incarcerated in the California Youth Authority. When appellant was released, he moved into Lisa's parents house, living there until he went to prison. He was in prison for about 7½ years. Lisa and appellant had two more children, both conceived on conjugal visits. (RT 3541-3543, 3615-3618, 3629-3630.)

Substance abuse, including alcohol, street drugs, heroine, methamphetamine, and cocaine, where significant factors in appellant's life. Appellant was a very heavy drinker of alcohol. He used cocaine both intravenously and by snorting, even while on parole and knowing he'd be tested. He got into trouble for testing positive for drugs while on parole. He used heroin intravenously, and sometimes in combination with either cocaine or methamphetamine. He used methamphetamine intravenously.

Earlier in his life, he did some sniffing of paint or gasoline. His behavior was much like his mother, brothers, sisters, and the people who surrounded him as he grew up. (RT 3423-3424, 3427-3428, 3626-3628.)

While out of custody appellant lived with Lisa and her parents, Ruth and Solomon Escobedo. Appellant helped around the house and with the Escobedo's business, held down various jobs, and contributed for household expenses. (RT 348-3482, 3667-3669.)

The day David was shot, Lisa was with appellant all day, although they had broken up by then. He was very intoxicated. She didn't know what he was on, but he hadn't slept. It was the most intoxicated she had ever seen him. He drank three 32-ounce bottles of beer. While they were in the car, they had an argument and Lisa hit appellant in the face with her fist. He hit her back, once. She was in the car when he shot David. (RT 3619-3620, 3626-3628, 3550, 3552-3562, 3619, 3621-3625, 3631-3635.)

While awaiting trial in this case, appellant had weekly visits in jail from Al Medina, a member of Jehovah's Witnesses. They would spend about an hour praying and Medina would counsel him. Medina thought appellant showed a lot of remorse about everything he'd done in the past. He also saw a very positive change in appellant's attitude toward correctional officers over the time they had been meeting. (RT 3567-3575.)

Appellant also counseled others, in custody and out, on avoiding prison gangs, on getting an education or vocational training, and to do something with their lives. (RT 3577-3585, 3592-3595, 3603-3606, 3638-3642, 3682-3684, 3686-3690, 3694-3687.)

A Fresno County Correctional Officer who had numerous contacts with appellant in the Fresno County Jail testified that he had no difficulties in transporting appellant to and from court or within the jail. He has seen

the inmate shelving in appellant's cell and did not think it was excessive at all. Appellant's cell was very organized and clean. (RT 3671-3679.)

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I.

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTION'S EXERCISE OF PEREMPTORY CHALLENGES ON THE BASIS OF GENDER

A. Introduction

In selecting the jury, the prosecution exercised thirteen peremptory challenges. Ten of the thirteen were exercised to excuse women from the jury. The trial court found that a prima facie case of sex-based use of peremptory challenges by the prosecution had not been made because the jury as sworn was made up equally of men and women, and because of perceived differences in the manner in which men and women had expressed their views during voir dire. The trial court's finding of no prima facie case was constitutional error, and requires reversal of the judgment of conviction and sentence in this case. (*Johnson v. California* (2005) __ U.S. __ [125 S.Ct. 2410]; *J.E.B. v. Alabama ex rel. T.B.*(1994) 511 U.S. 127; *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *People v. Snow* (1987) 44 Cal.3d 216, 226-227; U.S. Const. Amend XIV; Cal. Const., Art. 1, §§ 7, 16.)

B. Proceedings Below

Before the jury was sworn (RT 941-942, 946-954; SCT4 28), counsel for appellant made a motion pursuant to *People v. Wheeler*, *supra*, 22 Cal.3d 258 and *Batson v. Kentucky*, *supra*, 476 U.S. 79, alleging the prosecution had exercised its peremptory challenges in a discriminatory manner against women, specifically, that the prosecution exercised ten of its

thirteen peremptory challenges against women[14], including six peremptory challenges exercised in a row to remove women.[15] (RT 948-949.) Defense counsel noted that throughout the exercise of peremptory challenges, the gender mix of prospective jurors seated in the jury box against whom peremptory challenges were to be exercised, was generally equal. (RT 949.)

The trial court, prior to any response by the prosecution, noted that the jury as sworn was comprised of six men and six women[16], and stated:

> THE COURT: I doubt there's been a prima facie showing here because of that fact, and because it's been my evaluation that women seem to be more certain in the expression of their views both ways in this case and their leaning in this case than men have.

(RT 951.)

Prior to the court's ruling, with the explicit understanding that the court had not yet found a prima facie case, the prosecution argued that the balanced makeup of the jury negated a prima facie case.

> MR. OPPLIGER: I think what we have here -- if we go back to the basis of all the *Wheeler* and its progeny type of claims, it is invariably based on a consideration that a particular cognizable group has been excluded from hearing a case. And although Ms. Hart's numbers are correct, that is what is it, three versus -- is it nine?

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[14] I.e., prospective jurors Mohler, McDermott, Martin, Holik, Horn, Ourlian, Shepard, Gillitzer, Sanders, Taylor.

[15] Prospective jurors Mohler, McDermott, Martin, Holik, Horn, Ourlian.

[16] Ms. Mohler's questionnaire is found at 7SCT2 1818-1838. At the time the motion was raised (RT 941-942, 946-954), the defense had not yet exercised its final two peremptory challenges, which were later used to remove one man and one woman. (RT 941.) Thus, the proportion of men and women was not changed by the time the jury was sworn.

THE COURT: Ten.

MR. OPPLIGER: Ten, it would be my assertion that given the fact that there are six women on the jury and six men on the jury, that if women are to be considered a cognizable group, they are as fairly represented as they possibly can be. I mean, we have -- if we're making -- if we start with the assumption that there are roughly half men and half women in the world and that carries forward to about half the people available for jury service are women and men, then the numbers are literally perfect. [¶] The raw numbers of ten versus three given the ultimate outcome of the jury I don't feel is a sufficient number to raise a prima facie case of group bias. [¶] Now clearly, individual bias by the prosecutor is permissible, and clearly, and I could cite cases where a lenient or light attitude on the death penalty is clearly a -- an acceptable reason for an individual bias on the part of a prosecutor. In other words, a prosecutor who -- and maybe I'm jumping the gun because when you talk about individual bias, when you start talking about -- you are now past the prima facie case in talking about justification. But I guess I should confine my arguments right now to the first prong of this -- the *Wheeler* test. And given the numbers of three versus ten, the fact that we have a -- six members of the remaining members of the jury are women from all -- all walks of life, Hispanic, African American, white women, I just don't think you can make a viable claim of group bias.

(RT 951-952.)

Defense counsel responded by distinguishing between the right to have a jury from a fair cross-section of the community and the right to have a jury chosen free of peremptory challenges exercised on the basis of group bias.

Now, there's obviously two rights here. My client has a right to have a fair cross-section of the community decide his case, has a right to a jury of his peers of whatever races and to have both sexes represented. I believe that my client also has a right to have the challenges exercised in a manner that does not exclude cognizable subgroups even though he ends up with a jury that may be reflective of the community.

(RT 953.) Without any further explanation of its reasoning, the trial court ruled that the defense had failed to establish a prima facie case, and denied the motion without requiring the prosecution to explain its challenges to women in this case. (RT 954.)

C. The Applicable Law

In *Wheeler*, *supra*, this Court held that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a representative cross-section of the community under Article I, section 16 of the California Constitution." (22 Cal.3d at pp. 276-277.) Group bias is defined as "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People* v. *Gonzalez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 and *Wheeler, supra*, 22 Cal.3d at p. 276.) Similarly, the Fourteenth Amendment to the federal Constitution prohibits prosecutors from intentionally striking potential jurors on the basis of gender. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129; *Batson* v. *Kentucky*, *supra*, 476 U.S. at p. 97.)[17] The party objecting to the exclusion of jurors need not be a member of the group excluded to raise the objection. (*Powers v. Ohio* (1991) 499 U.S. 400, 415 ["a defendant in a criminal case can raise the

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[17] In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge, and thus an objection on the basis of *Wheeler* is sufficient to preserve both state and federal constitutional claims. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d. 1073, 1075; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Gomez* (9th Cir.1999) 190 F.3d 985, 987 (citing *People v. Jackson* (1992) 10 Cal.App.4th 13, 21 n. 5); *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

third-party equal protection claims of jurors excluded by the prosecution because of their race"]; *Wheeler*, *supra*, 22 Cal.3d at p. 281 ["the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule"].)

The defendant has the initial burden of raising an inference that peremptory challenges are being exercised for discriminatory reasons. (*Batson*, *supra*, 476 U.S. at pp. 93-97; *Johnson v. California*, *supra*, 125 S.Ct. at p. 2416-2417; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) That burden is satisfied, and a prima facie case of discrimination established, by evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2417.) Once the defendant has made a prima facie showing that the prosecution has excluded one or more jurors on the basis of group or racial identity, the burden then shifts to the prosecution to show that it had genuine nondiscriminatory reasons for the challenges in question. (*People v. Fuentes* (1991) 54 Cal.3d 707, 714; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; see *Batson*, *supra*, 476 U.S. at pp. 97-98.)

Prior to *Johnson v. California*, *supra*, 125 S.Ct. 2410, California had required that, to establish a prima facie case, the defendant show it was more likely than not that the prosecutor engaged in discrimination. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1316.) *Johnson v. California* held that this "strong likelihood" test was an "inappropriate yardstick by which to measure the sufficiency of a prima facie case" for equal protection purposes (*id.* at p. 2416), and was "at odds" with the determination of a reasonable inference of discrimination under *Batson*. (*Id.* at p. 2419.)

The inference of a discriminatory purpose is not a high burden. In *Johnson v. California*, *supra*, 125 S.Ct. at p. 2418, the United States

Supreme Court emphasized that the *Batson* framework is designed to produce answers to "suspicions and inferences that discrimination may have infected the jury selection process." In other words, a prima facie case of discrimination must be found if there are reasonable grounds to suspect that a prosecutor may have discriminated on the basis of race, ethnicity, or other improper class factors in the exercise of peremptory challenges. (See *id.*, at pp. 2418-2419.) The Court has emphasized in other contexts that the burden for establishing a prima facie case of discrimination is low. (See *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506 [describing it as "minimal"]; *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253 ["not onerous"].) Appellant met that burden in the present case with regard to the ten women challenged and removed from the jury by the prosecution.

People v. Howard (1992) 1 Cal.4th 1132, 1155, directs a reviewing court, in cases where the trial court denies a *Wheeler/Batson* motion without finding a prima facie case of "group bias," to "consider 'the entire record of voir dire'" and to "not limit [its] review solely to counsel's presentation at the time of the motion," because "'other circumstances' readily apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel." "That view is consistent with the high court's recent reiteration of the applicable rules, which require the defendant to attempt to demonstrate a prima facie case of discrimination based on the 'totality of the relevant facts.' (*Johnson v. California*, *supra*, – U.S. at p. — , 125 S.Ct. at p. 2416.)" (*People v. Gray* (2005) 37 Cal.4th 168, 186.) In its review of the trial court's decision, this Court considers the record of voir dire (see, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 135) as well as juror questionnaires. (See *People v. Boyette* (2002) 29

Cal.4th 381, 419, 423.)

The fact that members of the relevant group remain on the jury is insufficient, standing alone, to defeat a prima facie showing of discriminatory challenges. (*People v. Snow* (1987) 44 Cal.3d at p. 225 ["Nor does the fact that the prosecutor 'passed' or accepted a jury containing two Black persons end our inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion."]; see also *People v. Motton* (1985) 39 Cal.3d 596, 607-608 [same].) While that fact is a relevant circumstance for the trial court to consider, it does not negate an inference of discrimination in the prosecution's exercise of peremptory challenges against other prospective jurors of the relevant group. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807 (overruled on other grounds by *Tolbert v. Page* (9th Cir.1999) 182 F.3d 677 (en banc); *Cochran v. Herring* (11th Cir. 1995) 43 F.3d 1404; *United States v. Omoruyi* (9th Cir. 1993) 7 F.3d 880; *Abshire v. State* (Fla. 1994) 642 So.2d 542.)

This Court has traditionally utilized a deferential standard of review when a trial court denies a *Wheeler/Batson* motion without finding a prima facie case of group bias; the Court considers the entire record for evidence to support the trial court's ruling. (See *People v. Howard, supra,* 1 Cal.4th at p. 1155.)[18] Appellant urges this Court to conduct a de novo review of the

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[18] The federal courts have been divided on this question. The Ninth Circuit Court of Appeals, in a divided en banc opinion, adopted a deferential standard for evaluating a trial court's refusal to find a prima facie case under step one. (See *Tolbert v. Page, supra,* 182 F.3d at p. 685.) Both the Seventh and Tenth Circuits, however, have held that the proper standard of review for a prima facie case ruling under *Batson* is de novo

(continued...)

trial court's denial of appellant's motion. De novo review of the type of mixed question of fact and law presented at the step one inquiry is contemplated by both *Batson* and *Johnson v. California*, *supra*, 125 S.Ct. 2410, is the appropriate standard for the fundamentally legal, rather than factual, question at issue, is needed to insure uniformity of decisions, and is most appropriate to this Court's role in safeguarding the constitutional rights embodied in *Wheeler* and *Batson*.

In contrast, a deferential "substantial evidence" standard appears based on dicta regarding a trial judge's ability to make close judgments based on observations of the proceedings, understanding of trial techniques, and knowledge of local prosecutors. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281.) [19] However, reliance on the trial court's ability to observe the events at trial as supporting a deferential standard of review is misplaced at the step one stage of inquiry.

The facts the reviewing courts have traditionally looked at in determining whether the defense has met its initial burden of production are not so individualized as to require deference to the trial court's determination. The facts that are relevant to the step one determination include the removal of most or all of an identifiable group from the venire,

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[18] (...continued)
review. (See e.g., *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 484; *United States v. Hartsfield* (10th Cir. 1992) 976 F.2d 1349, 1355-56.) Several state courts have also adopted de novo review as the proper standard. (See e.g., *State v. Sledd* (Kan. 1992) 825 P.2d 114, 119; *State v. Butler* (Tenn. Crim. App. 1990) 795 S.W.2d 680, 687; *State v. Pharris* (Utah Ct. App. 1993) 846 P.2d 454, 459; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 591.)

[19] The vantage point of the trial judge also caused the Ninth Circuit to favor deferential review. (*Tolbert v. Page*, *supra*, 182 F.3d at p. 684.)

a disproportionate number of strikes against the group, the fact that the stricken jurors shared only their membership in the group but were otherwise as heterogenous as the community as a whole, and the failure to engage group members in more than desultory voir dire. (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281; *Batson v. Kentucky, supra*, 476 U.S. at pp. 96-97; *Johnson v. California, supra*, 125 S.Ct. at pp. 2416-2417.) Such facts are not dependent upon credibility determinations or observation of the proceedings and participants which the trial court is in the best position to decide. (See *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1203.) Instead, these are historical facts which are readily apparent and which lend themselves to preservation in the appellate record. Once documented in the record, the trial court is in no better position than an appellate court to decide the mixed question of law and fact as to whether the defense met its burden under step one. (*Id.* at p. 1202-1203.)

By contrast, the *Batson* step three analysis, i.e., whether the opponent of the strike has proved purposeful discriminatory use of a peremptory challenge, is properly subject to deferential review if the trial court fulfills its duty to conduct a sensitive inquiry at stage three of the *Batson* process. (*Batson v. Kentucky, supra*, 476 U.S. at p. 93; *United States v. Alanis, supra*, 335 F.3d at p. 969, fn. 5; *People v. Silva, supra*, 25 Cal.4th at pp. 385-386; see also *Hernandez v. New York, supra*, 500 U.S. at p. 364; *People v. Arias, supra*, 13 Cal.4th at p. 136.) That determination, which relies on an evaluation of the race-neutral justifications offered by the prosecution, is more typically bound to observable facts unfolding at trial. The trial court is in the best position to assess the credibility and good faith of the prosecution as it exercises and attempts to justify its peremptory challenges. (See *Arias, supra*, at p. 136.) Since the step three

determination is primarily a factual evaluation of the prosecution's credibility, a deferential standard of review is appropriate. (*Hernandez v. New York, supra*, 500 U.S. at p. 365.)

However, the *Batson* step one analysis warrants a different standard of review because of the different burdens of persuasion at work. Step one entails a shift in the burden of production effectuated by a reasonable inference of the discriminatory use of a peremptory challenge. (*Johnson v. California, supra*, 125 S.Ct. at p. 2417-2418.) The purpose of *Batson's* series of burden-shifting mechanisms is to facilitate the factfinder's inquiry "into the elusive factual question of intentional discrimination" (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, fn. 8), and help courts and parties answer, "not unnecessarily evade[,] the ultimate question of discrimination *vel non*." (*Aikens v. United States Postal Service* (1983) 460 U.S. 711, 715.)

These principles warrant a prima facie burden that is not onerous to ensure a full record and accurate determination on the "elusive" question of discrimination. Acknowledging that the moving party will usually be without any direct evidence of discrimination at the prima facie stage, the Supreme Court has repeatedly emphasized that the prima facie burden is low, describing it as "minimal" (*St. Mary's Honor Center v. Hicks, supra*, 509 U.S. at p. 506), and "not onerous" (*Texas Dept. of Community Affairs v. Burdine, supra*, 450 U.S. at p. 253; see also *Johnson v. California, supra*, 125 S.Ct. at p. 2417.)

It is not the function of a reviewing court, especially at step one of the *Batson* analysis, to determine if the prosecutor might have had race-neutral reasons. (*Id.* at p. 2418; see *Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2332.) Nor does it entail an evaluation of the prosecution's credibility.

Rather, the reviewing court must, as this Court did in *People v. Cornwell* (2005) 37 Cal.4th 50, and as the Supreme Court did in *Johnson v. California, supra,* 125 S.Ct. at p. 2419, "resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on the basis of gender. (*People v. Cornwell, supra*, 37 Cal.4th at p. 73; *Johnson v. California, supra*, 125 S.Ct. at p. 2419.)

The burden of production at step one does not entail an evaluation of the prosecution's credibility, but only a determination of whether the facts support a reasonable inference of the improper use of the strike. Indeed, at step one, the prosecution may remain silent and let the facts speak for themselves. (*Batson v. Kentucky, supra,* 476 U.S. at pp. 96-97.) Thus, the step one burden of production "was intended to significantly reduce" the proof needed to raise a claim of discriminatory use of peremptory challenges, and is not the type of credibility and observation-based determination which should by necessity be yielded to the trial judge. (See *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1197.)

Appellate courts should reserve the ultimate resolution of this issue to themselves in order to create uniformity of decisions. This Court recently applied this standard to evaluate a mixed question of fact and law as to whether a defendant received effective assistance of counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 248.) The United States Supreme Court settled on this standard for reviewing whether reasonable suspicion or probable cause support a warrantless search in cases on direct review. (See *Ornelas v. United States* (1996) 517 U.S. 690, 699.) Varied results based on similar facts is inconsistent with a unitary system of law and "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." (*Id.* at p. 697.)

These concerns have lead other courts to apply a de novo standard of review to the prima facie case determination. (See *Mahaffey v. Page, supra*, 162 F.3d at p. 484; see also *United States v. Hartsfield, supra*, 976 F.2d at pp. 1355-1356; *State v. Sledd, supra*, 825 P.2d at p. 119; *State v. Butler, supra*, 795 S.W.2d at p. 687; *State v. Pharris, supra*, 846 P.2d at p. 459; *Valdez v. People, supra*, 966 P.2d at p. 591.)

Reserving the ultimate determination of whether a prima facie case has been established is consistent with this Court's obligation to afford capital defendants meaningful appellate review. Transforming this threshold question into an intense "factual inquiry" merges the first and third prongs of *Batson* and insulates from review a trial court's decision to reject a *Batson* challenge. (*Tolbert v. Page, supra*, 182 F.3d at p. 686 (dis. opn. of McKeown, J.).) Because the step one decision precedes the prosecution's duty to come forward with a neutral explanation for the challenge, it must be based on the historical facts which occur at trial, not on the credibility or perceived good faith of the prosecution. Facts which affect credibility and good faith come into play *after* the prosecution has tendered a race-neutral reason for a strike. (*Id.* at p. 690; *Purkett v. Elem, supra*, 514 U.S. at pp. 768-769.) The trial court's ability to perceive such facts and rule on those issues need not be accorded deference until the step three ruling.

Moreover, where the trial court's findings are based upon an erroneous legal standard, no deference is accorded those findings, and independent, or de novo, review is conducted. (*Wade v. Terhune, supra*, 202 F.3d at p. 1199; *People v. McGlothe* (1987) 190 Cal.App.3d 1005, 1015; see *United States v. Singer Mfg. Co.* (1963) 374 U.S. 174, 195 [where trial court's finding "derived from the court's application of an improper

standard to the facts, it may be corrected as a matter of law"]; *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.* (1982) 456 U.S. 844, 855 ["if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."] Similarly, where the evidence is undisputed, this Court conducts independent review. (See *People v. Sims* (1993) 5 Cal.4th 405, 440 [independent review of uncontradicted evidence in determining whether statements taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436].)

Accordingly, this Court should hold that as to the mixed question of fact and law involved in the prima facie determination, de novo review of the legal question is appropriate, and give due deference only to findings of historical fact made by a trial court.

The unlawful exclusion of members of a cognizable group from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing to *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].)

D. Review of Juror Voir Dire and Questionnaires

1. Prospective Juror Mohler[20]

Ms. Mohler indicated in her questionnaire that a close friend or member of her family is a police officer of some rank. (7 SCT2 1824, 1830.) She indicated she would consider the death penalty, and was neither for it or against it. (*Id.* at p. 1826.) She felt that the death penalty was used

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[20] Ms. Mohler's questionnaire is found at 7SCT2 1818-1838.

"too often on non-white persons," which she blamed on the media showing "dark color people in crimes much more often than white." (*Ibid.*) Ms. Mohler also disclosed that she and her mother had been the victims of theft four times in the past. (*Id.* at p. 1832.) Ms. Mohler indicated she had a hard time assessing credibility solely from demeanor, but could assess it from all the evidence. (RT 527-529, 532-533.)

Ms. Mohler said she would not vote automatically for death. She thought the background of the defendant is important. She stated that she had an open mind as to both penalties. (RT 530-532.) In response to prosecution questions[21], Ms. Mohler said she'd given it a lot of thought, and thought she wanted to be on jury, although it was a hard decision. She assured the prosecutor that she could personally impose death. (RT 618.)

Ms. Mohler was the prosecution's first peremptory challenge. (RT 633.)

2. Prospective Juror Martin[22]

In her questionnaire, Ms. Martin indicated that she supported the death penalty "for very serious criminals, ie: [sic] serial killers, people who can not be rehabilitated – but it should be a very serious crime." (6SCT2 1742.) Her views had changed as she got older, so that she no longer felt that the death penalty was the only option. (*Ibid.*) Her father was a Deputy Sheriff in the town in which Ms. Martin grew up. (6SCT2 1746.) Her brother had been arrested in 1981, and pled guilty to an assault on a homosexual man. She was upset by the crime he committed. (6SCT2 1747.) Her husband, mother and sister had been victims of theft, arson,

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[21] The prosecution asked Ms. Mohler only six questions.

[22] Ms. Martin's questionnaire is found at 6SCT2 1734.

mugging and vandalism. (6SCT2 1748.)

During voir dire by the defense, Ms. Martin stated:

> I think that everything is important. I do believe that people need to take responsibility for their actions, but also that there are circumstances that can cause you to be what you are.
>
> Now, it's very hard to sit here and say things like this, you know, you just kind of off the top of your head think about them and it's a very important decision to make, but I would not have a problem with listening to everything that was put before me. I think that you need to have all the facts, everything about every aspect of the case I think to be fair and objective.

(RT 502.) Ms. Martin had signed the Three Strikes Initiative petition and had donated to MADD[23]. (RT 503.) She agrees with the death penalty, but thought it did not have to be for everybody. (RT 505.)

In response to prosecution questioning, Ms. Martin stated that she could base a verdict to convict upon the testimony of one witness whom she believed. (RT 604.) The prosecution asked about her aunt (a heroin addict who had died of AIDS) and her brother, and whether anything about those situations would affect her ability to sit in impartial judgment in this case. Ms. Martin responded that there was not. (RT 615.) She assured the prosecution that she could return a verdict of death, and affirm it upon being polled individually. (RT 617-618.)

Ms. Martin was the prosecution's second peremptory challenge. (RT 719.)

3. Prospective Juror McDermott[24]

In her questionnaire, Ms. McDermott indicated that while she was raised to oppose the death penalty, her views had changed, and she now

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[23] Mothers Against Drunk Driving.

[24] Ms. McDermott's questionnaire is found at 6SCT2 1608-1628.

supported the death penalty, and would consider it as an option. She believed the death penalty is used too randomly. (6SCT2 1616.) Her brother was a police officer. (6SCT2 1620.) She "somewhat agreed" that law enforcement officers were more believable and credible than the average person. (6SCT2 1623.)

During prosecution voir dire (RT 767-773), the prosecutor did not address a single question directly to Ms. McDermott. Rather, his questions were initially addressed to a number of newly seated jurors, and Ms. McDermott did not orally respond to any of them. Thereafter, the prosecutor directly addressed five of those jurors by name, not including either Ms. McDermott and another woman who was to be removed from the jury by the prosecution, Ms. Holik. To them, he said, "I'm not leaving you ladies out by mistake. I'm going to be frank with you. You said things in your questionnaires that I'm probably going to exercise peremptories on you." (RT 771.)

Ms. McDermott was the prosecution's third peremptory challenge. (RT 779.)

4. Prospective Juror Holik[25]

In her questionnaire, Ms. Holik indicated that she supported the death penalty, strongly in some circumstances. (5 SCT2 1343-1346.) She and her husband had worked as security guards. (*Id.* at p. 1347.) Her uncle had been arrested when she was very young, but she was unsure if he had been prosecuted. (*Id.* at p. 1348.) She somewhat agreed that law enforcement officers are more credible and believable than the average person. (*Id.* at p. 1350.)

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[25] Ms. Holik's questionnaire is found at 5SCT2 1335-1355.

During defense voir dire, Ms. Holik indicated that, by virtue of sitting through jury selection, she had a better understanding of life without possibility of parole, and could return such a verdict. (RT 737-738.) She also indicated she had experience in evaluating people's credibility, and would be able to do so in this trial. (RT 738-740.)

During the prosecution's voir dire of another juror, Ms. Holik asked if the jurors would be given guidelines to follow in assessing penalty. (RT 773-774.) The trial court responded by, inter alia, reading CALJIC No. 8.85. (RT 774-777.)

The prosecutor asked her no questions. Ms. Holik was the prosecution's fourth peremptory challenge. (RT 779.)

5. Prospective Juror Horn[26]

In her questionnaire, Ms. Horn indicated that she had mixed feelings about the death penalty, but felt it was probably not used often enough. (5 SCT2 1385.) She noted that Justice Marvin Baxter was a school friend, whom she hadn't seen in years. (5 SCT2 1390.) She also related that her husband had been falsely arrested on a robbery charge in 1987 in Fresno, and that the guilty party later committed suicide when being apprehended by the police. (*Ibid.*) She had also been the victim of a "house robbery." (5 SCT2 1391.) She strongly disagreed that law enforcement officers are more credible than the average person. (5 SCT2 1392.)

During defense voir dire, Ms. Horn indicated that while she believed a person's background could have an influence on that person, she felt that adults were responsible for their actions, and should be held responsible. (RT 807.) In her questionnaire, she indicated that she might have some

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[26] Ms. Horn's questionnaire is found at 5SCT2 1377-1397.

trouble considering background, but on voir dire, stated she could consider it. (RT 807- 809; 5SCT2 1386.) She also stated that when it came to actually sentencing someone to death, she might have a problem returning such a verdict. (RT 809-810.)

In response to prosecution questioning, Ms. Horn indicated she didn't know how she would vote on penalty, but that she probably leaned toward life without parole. (RT 826-827.) In response to follow-up questioning by the trial court, Ms. Horn indicated that she could probably return a verdict of death, but would prefer not to have to make the choice. (RT 833-834.)

Ms. Horn was the prosecution's fifth peremptory challenge. (RT 839.)

6. Prospective Juror Ourlian[27]

In her questionnaire, Ms. Ourlian indicated that she would consider the death penalty after hearing all the facts of the case. (7 SCT2 1973.) She believed very strongly that the death penalty was used when necessary, "[b]ecause some people deserve it and others do not. [I]t depends on the case and the facts." (*Ibid.*) While she did not believe in the adage "an eye for an eye," she agreed with it somewhat. (7SCT2 1975.)

Ms. Ourlian worked serving process and filing papers with the court. (RT 343-345.) Her boyfriend, with whom she lives, is a bailiff with the Fresno County Sheriff, working in the Fresno County courthouse. (RT 812; 7 SCT2 1968.) She stated that she had served papers on the Fresno County jail on occasion, and was disappointed to see that the inmates were not shackled, but could walk around in the jail, and that they were allowed

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[27] Ms. Ourlian's questionnaire is found at 7SCT2 1965.

apparently large servings of food at mealtime. She felt that conditions in jail were better than a lot of "bad areas" of Fresno where she had served process, and "could see why these people would want to be in prison." (RT 831-832.) She stated that her familiarity with the Fresno courts would not affect her ability to be fair in this case. (RT 812.) She assured the prosecution that she would be able to return a verdict of death. (RT 828.) On voir dire, the prosecution directed only two questions to Ms. Ourlian. (RT 828, 831.)

Ms. Ourlian was the prosecution's sixth peremptory challenge, and the sixth woman in a row so challenged by the prosecution. (RT 840.)

7. Prospective Juror Shepard[28]

In her questionnaire, Ms. Shepard indicated that she would consider the death penalty depending on the nature and circumstances of the crime. (10 SCT2 2833.) She "somewhat agreed" that an intentional killing not in self-defense or defense of another deserved the death penalty. (10 SCT2 2835.) Her brother had been a police reserve officer several years before. (10 SCT2 2837.) Her ex-spouse had been arrested and prosecuted over seven years prior. She had not spoken to him since it happened. (10 SCT2 2838.) She strongly disagreed that law enforcement officers are more credible than the average person. (10 SCT2 2840.)

In response to defense voir dire, Ms. Shepard discussed her prior experience on a jury in 1986, with a holdout juror who would not apply the

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[28] Ms. Shepard's questionnaire is found at 10 SCT2 2825-2845. While she put her name down on the questionnaire as "True-Shepard," and was initially addressed by that name in court, during voir dire, she requested that the name "Shepard" be used. (RT 814.) She is referred to by that name thereafter in the Reporter's Transcript.

law. She indicated that she attempted to mediate with the holdout juror, but finally got frustrated, and the jurors complained to the trial court about the holdout. The holdout juror "went completely bonkers" and ripped up her own papers. Eventually, at 9:00 or 10:00 at night, the holdout gave in and voted to convict. (RT 815-817; 10 SCT2 2832.)

She also assured the defense that nothing about her ex-husband's activities would affect her decision in this case. (RT 817.)

She asked the trial court about life without possibility of parole, asking why Sirhan Sirhan and Manson keep coming up for parole. The Court explained that they were convicted under a different law which has been repealed. (RT 825.)

She assured the prosecution that she could make the decision regarding penalty. (RT 828.)

Ms. Shepard became the prosecution's eighth peremptory challenge. (RT 881.)

8. Prospective Juror Gillitzer[29]

In her questionnaire, Ms. Gillitzer indicated neither support nor opposition to the death penalty, stating she would "listen to everything on both sides pro & con [and] draw my own conclusions." (4 SCT2 1175.) She indicated that she didn't think the death penalty was used often enough, because "I don't feel they should remain on death row for years and years." (*Ibid.*) Other questionnaire answers indicated support for the death penalty. (*Id.* at pp. 1176-1178.) She also noted appellant's tattoos, but on voir dire stated they would not affect her decision. (*Id.* at p. 1179; RT 859.) She also indicated that someone close to her had been arrested 3 - 4 years

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[29] Ms. Gillitzer's questionnaire is found at 4 SCT2 1167-1187.

previously. Ms. Gillitzer didn't like the experience and felt intimidated. (4 SCT2 1180.) She had also been the victim of a burglary of her home and an auto theft. (*Id.* at p. 1181.)

Ms. Gillitzer assured the court that she would not base her vote at the guilt phase upon a desire to avoid the penalty phase. (RT 846-847, 868.) While agreeing with the prosecution that having to make the penalty decision is not pleasant to think about, Ms. Gillitzer stated, "I could do it. I'm for the death penalty." (RT 870.)

Ms. Gillitzer became the prosecution's ninth peremptory challenge. (RT 883.)

9. Prospective Juror Sanders[30]

In her questionnaire, Ms. Sanders indicated that she would consider the death penalty. She had been strongly in favor of it in the past, but now had "mixed emotions." She felt the death penalty was used too randomly, but noted this was not a strong view, but an uneducated observation. (9 SCT2 2435.) When asked by the prosecution whether she still believed sufficiently in the death penalty to be a fair juror in this case, she responded, "Yes, I do." (RT 874.)

Ms. Sanders had taken two semesters of classes at Fresno City College from Judge Quashnick of the Fresno County Superior Court. (9 SCT2 2440.) She, or someone close to her, had been arrested in Madera County in 1984. She found the experience "frightening, however in the end very fair." (9 SCT2 2440.) No one asked her any questions about this experience during voir dire. She had also been the victim of date rape. (9 SCT2 2441.) Her ex-husband was a drug addict and alcoholic whose

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[30] Ms. Sanders' questionnaire is found at 9 SCT2 2427-2447.

behavior continues to cause her present family problems. (9 SCT2 2442.)

Ms. Sanders was a case typist and CLETS[31] operator at the juvenile division of the probation department, with hopes to eventually move to the District Attorney's office as an investigator. (RT 853-854; 9 SCT2 2431.) Nevertheless, she assured the defense that she could return either verdict in a penalty phase. (RT 854.) Similarly, she assured the prosecution that she could return a verdict of death in an appropriate case. (RT 872.)

Ms. Sanders became the prosecution's eleventh peremptory challenge. (RT 884.)

10. Prospective Juror Taylor[32]

In her questionnaire and in voir dire by the defense, Ms. Taylor discussed her experience as an armed robbery victim, along with 7 other people, in 1977, in a case which received some publicity, and concerning which she testified in court proceedings. She agreed that during that robbery, she considered whether she was going to die. However, she assured the defense that it would not have any effect on her as a juror in this case. (RT 905-907; 10 SCT2 2755.) In her questionnaire, she indicated she would consider the death penalty, and did not feel strongly either way. (10 SCT2 2749.) She strongly agreed that convicted murderers should be swiftly executed once they are convicted. (10 SCT2 2751.) Someone close to her had been arrested about eight years previously. She was not directly involved. (10 SCT2 2754.)

In voir dire, she assured both the defense and the prosecution that she could return either verdict in a penalty phase. (RT 907, 935.) She

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[31] California Law Enforcement Telecommunications System.

[32] Ms. Taylor's questionnaire is found at 10 SCT2 2741-2761.

indicated that she had a casual friendship, not a personal friendship, with Linda Lee, a detective with the Fresno County Sheriff's Office who is also an adjunct faculty member where Ms. Taylor works, and who testified in this trial. (10 SCT2 2758; RT 908.)

Ms. Taylor became the prosecution's thirteenth peremptory challenge. (RT 940.)

E. The Trial Court Erred In Finding that A Prima Facie Case Had Not Been Established

1. The Trial Court Applied an Erroneous Standard in Ruling That a Prima Facie Case Had Not Been Established

By the time of appellant's trial, this Court's *Wheeler* cases had clearly established the "strong likelihood" standard as governing the determination of a prima facie case of improperly discriminatory exercise of peremptory challenges. In *People v. Sanders* (1990) 51 Cal.3d 471, 500-501, this Court concluded that even though the prosecution's "removal of all members of a certain group may give rise to an inference of impropriety," the defendant still "failed to demonstrate a strong likelihood" of discrimination and therefore no prima facie case had been established.

Similarly, in *People v. Howard* (1992) 1 Cal.4th 1132, 1156, this Court observed that "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." (citing *Sanders*, *supra*, 51 Cal.3d at p. 500). Applying the prima facie standard that the defendant must show "from all the circumstances in the case ... a *strong likelihood*" of discrimination *(id.* at p. 1154 [emphasis in original]), the Court concluded that the trial court had not erred in finding no prima facie case. (*Id.* at p. 1156; see also *People v. Sims* (1993) 5

Cal.4th 405, 428; *People v. Garceau* (1993) 6 Cal.4th 140, 170-173.) In short, in both *Howard* and *Sanders*, which were controlling at the time of appellant's jury was selected in 1994, this Court had indicated that a demonstration of an "inference of impropriety" was not "dispositive" of a prima facie case.

In *People v. Box* (2000) 23 Cal.4th 1153, at 1188, fn. 7, this Court held that "reasonable inference" and "strong likelihood" denoted the same standard. In *People v. Johnson* (2003) 30 Cal.4th 1302 (reversed, *Johnson v. California*, *supra*), this Court reiterated that holding, and noted that "[t]his has always been true. . . ." (30 Cal.4th at pp. 1314, 1318.) *People v. Johnson* also explained that what "reasonable inference" and "strong likelihood" have meant in the *Wheeler/Batson* context is that "to state a prima facie case, the objector must show that it is more likely than not the other party's challenges, if unexplained, were based on impermissible group bias." (30 Cal.4th at p. 1318.)

The trial court did not cite any particular test when it found that appellant had failed to establish a prima facie case of discriminatory exercise of peremptory challenges. Yet its ruling to that effect held appellant to such a high standard that it is apparent that the trial court followed California precedent and applied the "strong likelihood" test. (See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [trial court presumed to follow the law without explicit statement to the contrary]; *People v. Castaneda* (1975 52 Cal.App.3d 334, 3432 ["trial court is presumed to know and follow the law"].) Accordingly, this Court should review the issue de novo without deference to the trial court's findings. (See *Wade v. Terhune*, *supra*, 202 F.3d at pp. 1195,1199 [de novo review conducted after California courts applied *Wheeler* standard to *Batson*

claim]; *People v. McGlothen* (1987) 190 Cal. App.3d 1005, 1015 [ruling that was erroneous as a matter of law was not entitled to deference].)

2. The Record Establishes a Inference of Discrimination in the Prosecutor's Exercise of Peremptory Challenges

Considering the record in its entirety, it is clear that a prima facie case of discrimination was in fact established, i.e., an inference was raised that the ten women were peremptorily challenged by the prosecution on a discriminatory basis. This is so for a number of reasons.

First, exercise of peremptory challenges on the basis of gender violates Equal Protection under *Batson*. (*J.E.B. v. Alabama ex rel. T.B.*, *supra*, 511 U.S. 127, 129.)

Second, the prosecutor asked no questions of prospective jurors McDermott or Holik, and little of Mohler, Shepard, Sanders and Taylor. At one point, the prosecutor stated, apparently to Ms. McDermott and Ms. Holik, "I'm not leaving you ladies out by mistake. I'm going to be frank with you. You said things in your questionnaires that I'm probably going to exercise peremptories on you." (RT 771.) In *Wheeler*, this Court observed that the "failure of [the proponent of the strike] to engage these same jurors in more than desultory voir dire, or indeed to ask any questions at all," was a consideration in determining whether the defendant had established a prima facie case. (22 Cal.3d at pp. 280-281; see also *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97 [prosecutor's conduct during voir dire relevant to whether a prima facie case was established].)

Third, "challenging particular members of a protected group who might otherwise be expected to favor the proponent of the challenge because of their backgrounds might raise an inference of discrimination." Gershman, *Trial Error and Misconduct* 266 n.163 (Lexis 1997) (citing

People v. Bolling (N.Y. 1992) 591 N.E.2d 1141) (two of four black potential jurors removed by prosecutor had favorable prosecution backgrounds).

The questionnaires of most of the excused female jurors do not demonstrate any specific bias which might explain the prosecution exercise of peremptory challenges. Most of the female prospective jurors excused by the prosecution gave answers which suggested they would normally be considered pro-prosecution jurors. Nine of the women stricken by the prosecution had family or close friends in law enforcement, or were themselves involved in law enforcement,[33] as were 3 of the seated male jurors.[34] As this Court has recognized, the fact that a juror has police officer friends is not a reason that the *prosecution* would be expected to cite for peremptorily excusing such juror. (*People v. Turner*, *supra*, 42 Cal.3d at p. 719.)

Eight of these women had close family who had been victims of

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[33] Mohler (close friend of family (7 SCT2 1824, 1830)); McDermott (brother (6 SCT2 1620)); Martin (father (6 SCT2 1746)); Holik (self and husband are security guards, and her mother was in law enforcement in college (5 SCT2 1347)); Horn (1st cousin (5 SCT2 1389)); Ourlian (boyfriend with whom she lived is a bailiff with Fresno County Superior Court (7 SCT2 1968; RT 812)); Shepard (brother (10 SCT2 2758; RT 908)); Gillitzer (uncle (4 SCT2 1179)); Sanders (CLETS operator for Fresno County Probation Department, hoped to become an investigator with District Attorney's Office (9 SCT2 2431, 2439; RT 853-854)); see also Taylor (casual friendship with a law enforcement witness in this case (10 SCT2 2758; RT 908)).

[34] Cuttler (self (3 SCT2 856-857); Fief (father, and hopes to become CHP officer himself, has taken reserve officer training (4 SCT2 1044, 1046); Allen (son and son-in-law (1 SCT2 163, 167).

crime, or themselves had been victims of crime,[35] as had two of the seated male jurors.[36] (See *People v. Turner*, *supra*, 42 Cal.3d at p. 719 [crime victims not likely to be stricken from jury by prosecution]; *People v. Johnson*, *supra*, 47 Cal.3d at p. 1215 ["a *defendant* may suspect prejudice on the part of one juror because he has been the victim of crime" [emphasis added].)

Three of these jurors agreed that law enforcement witnesses would be more credible than the average person,[37] as did four of the seated male jurors.[38] Ms. Martin noted that she had signed the "3 Strikes" initiative and donated to Mothers Against Drunk Driving. (6 SCT 1740; RT 503.) Ms. Ourlian expressed disagreement and disapproval at what she considered lenient treatment of inmates at the Fresno County Jail. (RT 831-832.) Ms. Shepard described her experience on a prior criminal jury with a juror who held out for acquittal by refusing to apply the law, before eventually agreeing to convict. (10 SCT2 2832; RT 815-817.) She also asked a question during voir dire which indicated some distrust of a sentence of life without possibility of parole. (RT 824.)

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[35] Mohler (self and mother (7 SCT2 1832)); McDermott (self (SCT2 1622)); Martin (family (6 SCT2 1748)); Holik (self, family (5 SCT2 1349)); Horn (self (5SCT2 1391)); Gillitzer (family (4SCT2 1181)); Sanders (self (9 SCT2 2441-2442)); Taylor (self (10 SCT2 2755; RT 905-907).

[36] Cuttler (self (3 SCT2 867)); Perez (self, daughter (7 SCT2 2064)).

[37] Mohler (7 SCT2 1833); McDermott (6 SCT2 1623); Holik (5 SCT2 1350); Gillitzer (4 SCT2 1182.)

[38] Cuttler (3 SCT2 868); Perez (7 SCT2 2065); Valles (10 SCT2 2945); Allen (1 SCT2 176).

To the extent that any answers in those questionnaires suggested views potentially problematic for the prosecution, they do so through ambiguity. Yet the prosecution failed to address or clarify these ambiguities through questions of the potential jurors.

Fourth, the ten excluded jurors had only their group membership in common. (See *Wheeler, supra*, 22 Cal.3d at p. 280; *People v. Turner, supra*, 42 Cal.3d at p. 719.) Their ages ranged from 21 to 59. Two were in their 20's,[39] four were in their 30's,[40] one was in her 40's,[41] and 3 were in their 50's.[42] Six were married,[43] and four of them had been previously divorced.[44] One was separated,[45] one had never married,[46] and two were

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[39] Ms. McDermott (6SCT2 1610); Ms. Holik (5SCT2 21).

[40] Ms. Martin (6SCT2 1736); Ms. Ourlian (7SCT2 1967); Ms. Shepard (10SCT2 2827); Ms. Sanders (9SCT2 2429).

[41] Ms. Mohler (7SCT2 1820).

[42] Ms. Horn (5SCT2 1379); Ms. Gillitzer (4SCT2 1169); Ms. Taylor (10SCT2 2743).

[43] Ms. Mohler (7SCT2 1820); Ms. Martin (6SCT2 1736); Ms. McDermott (6 SCT2 1610); Ms. Holik (5SCT2 1337); Ms. Shepard (10SCT2 2827); Ms. Gillitzer (4SCT2 1169).

[44] Ms. Mohler (7SCT2 1820); Ms. Holik (5SCT2 1337); Ms. Shepard (10SCT2 2827); Ms. Gillitzer (4SCT2 1169).

[45] Ms. Horn (5SCT2 1379).

[46] Ms. Ourlian (7SCT2 1967)

divorced.[47] Three owned a gun,[48] the husband of one owned a gun,[49] the boyfriend of another owned a gun,[50] and five had no guns in their homes.[51] Their employment ranged from process server[52] to freelance writer,[53] to customer service representative at the Internal Revenue Service,[54] to an office assistant at the Fresno County Probation Department,[55] to a personnel assistant at a community college,[56] to a medical operator,[57] to clerical work in various fields.[58] Five had some college education,[59] four

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[47] Ms. Sanders (9SCT2 2429); Ms. Taylor (10SCT2 2743).

[48] Ms. Mohler (7SCT2 1830); Ms. McDermott (6 SCT2 1620); Ms. Taylor (10SCT2 2753)

[49] Ms. Gillitzer (4SCT2 1179).

[50] Ms. Ourlian (7SCT2 1977)

[51] Ms. Martin (6SCT2 1746); Ms. Holik (5SCT2 1347); Ms. Horn (5SCT2 1389); Ms. Shepard (10SCT2 2837); Ms. Sanders (9SCT2 2439).

[52] Ms. Ourlian (7SCT2 1969).

[53] Ms. McDermott (6 SCT2 1612).

[54] Ms. Horn (5SCT2 1381).

[55] Ms. Sanders (9SCT2 2431)

[56] Ms. Taylor (10SCT2 2745).

[57] Ms. Holik (5SCT2 1339).

[58] Ms. Mohler (7SCT2 1822); Ms. Martin (6SCT2 1738); Ms. Shepard (10SCT2 2829).

[59] Ms. Mohler (7SCT2 1823); Ms. McDermott (6 SCT2 1613); Ms. Ourlian (7SCT2 1970); Ms. Shepard (10SCT2 2830); Ms. Sanders (9SCT2 2432).

of the others were high school graduates,[60] and one had some high school education.[61]

Fifth, a reasonable inference that the prosecutor used his peremptories in a discriminatory manner can be established by statistics alone. (See *Miller-El, supra*, 537 U.S. 322, 342.[62]) The specific question is whether the circumstances of the prosecutor's challenges "raise an inference" of exclusion based on race, such that inquiry into the prosecution's motives is required. A pattern of exclusionary strikes is not necessary for finding an inference of discrimination. (See *United States v. Vasquez-Lopez* (9th Cir.1994) 22 F.3d 900, 902 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.") But "[a] pattern of exclusion of minority venire persons provides support for an inference of discrimination." (*Turner v. Marshall, supra*, 63 F.3d at p. 812. In *Turner*, the court found a prima facie *Batson* violation where the prosecution exercised peremptory challenges to exclude

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[60] Ms. Martin (6SCT2 1739); Ms. Holik (5SCT2 1340); Ms. Horn (5SCT2 1382); Ms. Taylor (10SCT2 2746).

[61] Ms. Gillitzer (4SCT2 1172).

[62] In *Miller-el*, the Supreme Court noted:

> In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

(537 U.S. at p. 342.)

five out of a possible nine (56%) African-American jurors. (*Ibid.*) In a number of other cases, with less striking disparities, the Ninth Circuit has assumed the existence of a prima facie case. (See, e.g., *United States v. Lorenzo* (9th Cir.1993) 995 F.2d 1448, 1453-54 [three of nine Hawaiian jurors stricken]; *United States v. Bishop* (9th Cir.1992) 959 F.2d 820, 822 [two of four African-American jurors stricken].) Other circuits have found an inference of discrimination under similar circumstances. (See *United States v. Alvarado* (2d Cir.1991) 923 F.2d 253, 255 [finding prima facie case of discrimination when prosecutor struck four of seven minority venire persons].)

The *Turner* court relied not only on the high proportion of African-Americans stricken, but also on the disproportionate rate of strikes against African-Americans. (*Turner*, *supra*, 63 F.3d at p. 813.) Although only about 30% of those called for voir dire had been African-American, the prosecution had used 56% of its peremptory challenges against African-Americans. In *Alvarado*, the prosecution used 50% of its challenges against minority venire persons, who represented only 29% of the pool. (*Alvarado*, *supra*, 923 F.2d at pp. 255-256.) In *Turner*, that court held that "[s]uch a disparity also supports an inference of discrimination." (*Turner*, *supra*, 63 F.3d at p. 813.) Indeed, the court relied only on the statistical disparities described above in finding a prima facie *Batson* violation. (*Ibid.*; see also *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 [prosecution struck 4 out of 7 (57%) Hispanic potential jurors, using 4 out of 14 (21%) of its challenges, while Hispanics constituted only 12% of the venire, raising inference of discrimination]; *Hernandez v. New York* (1991) 500 U.S. 352, 362 [demonstration of "disparate impact should be given appropriate weight in determining whether the prosecutor acted with

forbidden intent."]; *United States v. DeGross* (9th Cir. 1992) 960 F.2d 1433, 1442 (en banc) [prima facie case of gender discrimination established where defense had exercised seven of eight peremptory challenges against males, ten women and two men were then seated in the jury box, and only one man remained in the venire.[63]

In this case, the prima facie case is statistically stronger than the showing made in *Turner*. Of the 38 prospective jurors against whom peremptory challenges could have been exercised as of the point that appellant's *Batson/Wheeler* motion was made, 19 of them were women, 19 were men.[64] Yet the prosecutor had used ten of 13, or 77%, of his peremptory challenges against women, excusing 53% of the women, but only 16% of the men.

Sixth, as shown above, there is nothing in the record which

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[63] In *DeGross*, after the district court disallowed a defense challenge to a male juror based on *Batson*, the defense challenged, under *Batson* the prosecution's peremptory challenge of the only Hispanic juror on the venire. The prosecutor, after the district court ruled that a prima facie case had been established, stated that "his main reason for challenging [the juror] was to achieve 'a more representative community of men and women on the jury.' [fn. omitted.]" (960 F.2d at p. 1436.) The district court allowed the prosecution's peremptory strike to stand. (*Ibid.*) The Ninth Circuit held that the prosecutor's justification both established a prima facie case of gender discrimination and constituted an admission of purposeful gender discrimination in violation of *Batson*. The court reversed the conviction based upon the district court's erroneous acceptance of the prosecution's discriminatory strike. (*Ibid.*)

[64] At the time of appellant's motion, the defense had exercised 13 peremptory challenges, as had the prosecution. (1 SCT 489.) Two more prospective jurors (one male, one female) were excused by defense peremptory challenge after the motion was made. (RT 941, 946.) The remaining twelve jurors were then sworn. (RT 943.)

establishes any differentiation between the 10 women excused by the prosecution and the men the prosecution accepted as jurors who actually sat on the jury which convicted appellant and sentenced him to death.[65]

Seventh, appellant is entitled to rely in establishing a prima facie case upon the fact, "as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson*, *supra*, 475 U.S. at p. 96 [citation omitted].)

Considered together, these factors – the prosecutor's use of 77% of his peremptory challenges against women, the disproportionate use of peremptories directed at the constitutionally cognizable group (53% of potential female jurors), the prosecutor's failure to meaningfully question the female prospective jurors, the exclusion of prospective female jurors with views presumably favorable to the prosecution, and the fact that the

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[65] The juror questionnaires for the six male jurors originally sworn to try the case are located as follows:

Juror	Questionnaire	Voir Dire Responses (RT pages)
Cuttler	3 SCT2 853-873	472-474, 483-490, 614-617
Konze	6 SCT2 1524-1544	465, 475-478, 542-546, 595-597, 610, 618
Fief	4 SCT2 1041-1061	695-696, 849-850, 855, 861, 867-871
Perez	7 SCT2 2050-2069	561-566, 612-613, 619
Valles	10 SCT2 2930-2950	917-919, 933-934
Allen	1 SCT2 161-181	762-764, 772

excluded jurors had only their group membership in common – established an "inference" of discrimination under *Batson*. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2417.)

3. The Grounds Relied Upon by the Trial Court in its Ruling Were Inadequate Both Legally and Factually to Overcome the Inference of Discrimination

The primary basis for the trial court's ruling that the final makeup of the jury, equally divided between men and women, precluded a finding of a prima facie case of discriminatory exercise of peremptory challenges, was error. The secondary basis for the ruling, the trial court's "evaluation" of how potential women jurors expressed their opinions in this case, is similarly erroneous.

The fact that some members of the relevant group remain on the jury is insufficient, standing alone, to negate a prima facie showing of discriminatory challenges. While that fact may be a relevant circumstance for the trial court to consider, it does not bar a finding of discrimination in the prosecution's exercise of peremptory challenges against other prospective jurors of the relevant group. (*Turner v. Marshall*, *supra*, 63 F.3d 807 [four African-American jurors remaining on jury did not defeat prima facie case of discrimination]; *Cochran v. Herring* (11th Cir. 1995) 43 F.3d 1404, 1412 [two African-American jurors, one of whom was an alternate, did not defeat evidence that race was a determining factor in prosecution's exercise of peremptory strikes]; see also *United States v. Battle* (10th Cir. 1987) 836 F.2d1084, 1086.)[66] The trial court's principal

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[66] Cf. *J.E.B. v. Alabama ex rel. T.B.*, *supra*, 511 U.S. 127, 129. In holding that exercise of peremptory challenges on the basis of gender was a (continued...)

reliance on the makeup of the sworn jury was therefore erroneous.

The trial court's secondary basis for finding no prima facie case, that "it's been my evaluation that women seem to be more certain in the expression of their views both ways in this case and their leaning in this case than men have" (RT 951), lends no support for the trial court's ruling. While the relevance of this "evaluation" to the trial court is far from clear, what is clear is that it is either irrelevant as a justification for the prosecution's exercise of its peremptory challenges, or is itself indicative of an application of a "group bias" standard by the trial court. Further, when tested against the questionnaires and voir dire responses of the ten women challenged peremptorily by the prosecution, a reasonable inference is raised that the prosecutions use of each challenge was based upon impermissible group bias.

"More certain[ty]" in expression of one's views simply does not

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[66] (...continued)
violation of Equal Protection under *Batson*, the Court explained further that

> [i]t is irrelevant that women, unlike African-Americans, are not a numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. Cf. *United States v. Broussard*, 987 F.2d at 220 (declining to extend Batson to gender; noting that "[w]omen are not a numerical minority," and therefore are likely to be represented on juries despite the discriminatory use of peremptory challenges). Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.

(511 U.S. at p. 142, fn. 13.)

explain any basis for peremptory challenges, without reference to the views expressed. Certainty in favor of the death penalty would hardly explain a prosecution peremptory challenge. "Certainty" alone, without reference to the views expressed, would be expected to lead to a similar rate of challenges of women by both the prosecution and defense, which did not happen here.

Moreover, rather than evaluating the "certain[ty]" of the ten women excused by the prosecution, the trial court applied an evaluation of *all* the female prospective jurors, treating them as sharing a common characteristic, then implicitly assigned that characteristic to the responses of the ten women at issue without finding that they shared the characteristic. Thus, the trial court's denial of the motion was erroneously based upon "group bias" rather than any perceived "specific bias"[67] on the part of any of the challenged jurors, and suffers from the very impropriety against which *Wheeler* and *Batson* sought to protect jurors and defendants.

Review of the questionnaires and voir dire responses of the ten women does not reveal any certainty of a greater degree than male prospective jurors. To the extent certainty is shown, it appears primarily as to pro-prosecution views. Nothing in the prosecution's questioning – or non-questioning – of these prospective jurors suggests any attempt to probe any worrisome expressions of certainty. (Cf. *Miller-el v. Dretke* , *supra*, 125 S.Ct. at p. 2327 ["Perhaps [the prosecutor] misunderstood, but unless he had an ulterior reason for keeping [the excluded juror] off the jury we think he would have proceeded differently. In light of [the excluded juror]'s

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[67] "Specific bias" is defined in *Wheeler* as "a bias relating to the particular case on trial or the parties or witnesses thereto." (22 Cal.3d at p. 276.)

outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike."].)

Nor do the questionnaires and voir dire responses of these ten women reveal any "certain[ty]" markedly different from the questionnaire and voir dire responses of the six male jurors who the prosecution accepted for the jury.[68] Rather, the ten women gave, for the most part, "routine, acceptable responses." (*People v. Snow*, *supra*. 44 Cal.3d at p. 223.)

Moreover, the trial court's "evaluation" amounts to improper speculation about the prosecutor's reasons for challenging those jurors.

> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, and n. 20, 106 S.Ct. 1712. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino v. Castro*, 371 F.3d 1083, 1090 (C.A.9 2004) ("[I]t does not matter that the prosecutor might have had good reasons ... [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (C.A.3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike).

(125 S.Ct. at p. 2418.)

Thus as an abstract principle, as well as a reality of this record, the "certainty of expression of one's views" fails to undercut the inference of discrimination . The trial court's reliance upon this factor itself raises an inference that the ruling was based in part upon group bias.

F. Conclusion

In light of the facts available to the trial court, the trial court had "a

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[68] See fn. 65, *ante*.

duty to determine if the defendant has established purposeful discrimination." (*Batson*, 476 U.S. at p. 98.) The factors discussed above raise a reasonable inference that the prosecution had excluded the ten women on account of their gender. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2417; *Batson*, *supra*, 476 U.S. at p. 96.) The trial court's decision that there was no prima facie case of discrimination with respect to the challenges of these ten women, based upon the makeup of the jury as sworn and upon an "evaluation" of responses of all the female prospective jurors rather than the ten at issue, was based on an improper and even discriminatory considerations. It was also based upon an erroneous standard which held the defense to a higher burden in establishing a prima facie case than is permissible under *Batson*. The record establishes a reasonable inference that the prosecution's challenges of each of the ten women discussed herein was discriminatorily based on their gender. The trial court's finding that appellant failed to establish a prima facie case was therefore erroneous.

The prosecution's discriminatory use of peremptory challenges against women, and the trial court's erroneous denial of appellant's motion deprived appellant of his rights under the Equal Protection Clause of the federal Constitution, *Batson v. Kentucky*, *supra*, 476 U.S. 79, as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler*, *supra*, 22 Cal.3d 258.) The error constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing to *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury

constitutes structural error].) The remedy for such an error is reversal of the conviction and death sentence. (*Batson v. Kentucky*, *supra*, 476 U.S. 79; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; *People v. Wheeler*, *supra*, 22 Cal.3d 258; *People v. Turner* (1986) 42 Cal.3d 711; *People v. Snow* (1987) 44 Cal.3d 216, 226-227; *People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

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II.

ADMISSION OF EXTRAJUDICIAL STATEMENTS OF INMATE WITNESSES MARTINEZ AND JOHNSON VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION

A. Introduction

The trial court erred by allowing testimony of prior inconsistent extrajudicial statements by two inmate witnesses who did not confirm having made those statements, denied knowledge of the facts set forth in those statements, and had never been subject to cross-examination by the defense about the underlying truth or accuracy of those statements. This denied appellant his rights to due process and to confrontation of the witnesses against him, and his rights to a fair jury trial and a reliable verdict on both guilt and penalty, in violation of the United States Constitution and the California Constitution, and requires that the guilt verdict and special circumstance findings, as well as the penalty verdict, be reversed. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const. Art. 1, sections 7, 15, 16; *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); *Douglas v. Alabama* (1965) 380 U.S. 415; *Lee v. Illinois* (1986) 476 U.S. 530; *Chapman*, *supra*, 386 U.S. at p. 24; *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

B. Facts

1. Eric Johnson

Eric Johnson, who had felony convictions for robbery, assault and petty theft within the previous ten years, was housed in F-pod in the Fresno County Jail at the time of the homicide. (RT 2237-2238, 2250-2251.) He did not recognize appellant as being in F-pod at the time, and denied

knowing him. (RT 2238, 2248.) He recalled being interviewed by a plainclothes officer the same morning after the homicide. He denied giving any statement about anybody in F-pod, and denied giving the statement attributed to him by Detective Lee. (RT 2241-2242, 2245-2249.)

2. Detective Sherman Lee

Detective Sherman Lee testified that he interviewed Eric Johnson the morning of April 9. Prior to discussing any details, Johnson said he wanted a deal. Detective Lee told him that they had one in the works already with an inmate that was being interviewed, but that Detective Lee was willing to speak on his behalf to the judge when it came time for him to be sentenced on the charge on which he was being held. (RT 2716-2717.) Johnson told Detective Lee that Andrews had arrived at F-pod at 9:00 p.m. on April 8, and that about 10:00 that same night, Johnson knew there would be trouble. He heard an inmate say he was "going to take care of the home boy that had just been put into his tank." He described the person who said that as a white male, housed in cell eight, that acts and speaks like a Hispanic, with a tattoo on his neck of E-14 [sic]. (RT 2719-2720.) He told Detective Lee that individual's name was Ronnie Dement. (RT 2721.)

Johnson also told Detective Lee that during the course of the evening, he heard fighting, but could not tell where it was coming from. (RT 2721.) He said that the next morning, appellant grabbed a broom and started sweeping up like a trustee, and that he had never done that before. (RT 2722.) He told Detective Lee that appellant never went back to cell eight that morning. (RT 2724.)

On cross-examination, Detective Lee said that "home boy" is a slang term that is used in many different ways. He agreed that twenty years ago, it would refer to someone you hang with, somebody that's from your neck

of the woods, somebody that you see eye to eye with. He was not sure what it meant today. (RT 2723.)

3. Detective Brad Christian

Detective Christian testified that on April 13, 1992, he and Detective Burke interviewed Albert Martinez, and tape recorded the interview.[69] A transcript of the tape was marked as Exhibit 18.[70] (RT 1765-1766, 1787-1788; 2 SCT1 340-357.) Detective Christian testified that Martinez had stated the following:

Martinez had been put in Fresno County jail on April 7, 1992, and had contacted a detective about this case on April 9 four days before Detective Christian interviewed him. (RT 1768.) He identified photos of appellant, Bond, Benjamin and Andrews. (RT 1768-1769, 1784-1785.) He stated that he knew appellant as Pico, and said he was the guy with the F-14 tattoo on the back of his neck. He said he had known him from the streets prior to being placed in F-pod. (RT 1768-1769, 1799.) Martinez was housed in cell 4-F-12, on the bottom level of the tier, near the center. Cell 4-F-8, in which appellant, Bonds, Benjamin and Andrews were housed is on the top right of the tier. (RT 1801.)

Martinez stated that on the night of April 8-9, he heard somebody calling for help and screaming "Just leave me alone," and heard what

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[69] Detective Christian testified outside the presence of the jury that he obtained information that Martinez worked for Garcia Construction Company from Martinez prior to turning on the tape. (RT 1779.) In his testimony, Martinez denied that he had ever worked for Garcia Construction Company. (RT 1723-1725.)

[70] Exhibit 18 was not provided to the jury. (CT 360; 2SCT 340.) Nor was the tape recording of the interview played for the jury, or provided to them.

sounded like a body being thrown against a wall and the toilet. (RT 1786-1787.) He heard a second voice saying, "Hey homes, you hear that?" and something to the effect that he "wanted to fuck him and stuff."[71] (RT 1788-1789.)

Martinez stated that when appellant came out for breakfast, he came to Martinez's cell. Martinez overheard him whispering to another person in the cell about having killed somebody, that he killed the punk. Martinez said he was lying down in his cell at the time. Appellant smelled of alcohol. Martinez said appellant asked him to help drag a body downstairs, and that he (Martinez) told appellant he did not want to have anything to do with it. (RT 1789-1790, 1804.) Martinez also stated that appellant was telling him and others in F-pod that if he got rolled up, the two people that knew what had happened were his two cellies and that they needed to do something to him. (RT 1791.)

Martinez also stated that he saw a confrontation between appellant and a big white guy with a goatee. The latter had gone up to Andrews' cell to wake him up for breakfast. Appellant told the big white guy, "You ain't got no business in my cell. You know, what the fuck you doing?" Martinez then said that he guessed appellant had a knife on him because he kept reaching into his pants and said, "I'll take your wind and I'll do the same to

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[71] The trial court excluded testimony from Detective Christian that Martinez identified the voice as appellant. (RT 1780-1781.) The defense had objected that the they had no way to cross-examine or otherwise challenge the reliability of that identification due to Martinez's denial of the statement. (RT 1770-1771, 1774-1775, 1777-1778.) However, the prosecutor, in his questioning of Martinez, asked if Martinez stated that he had heard appellant say those things. (RT 1692.)

you."[72] (RT 1791-1792, 1795.) The big white guy told appellant, "Get the fuck away from me, man. I got nothing to do with you, nothing to say to you." Appellant responded, "You go get the body out of my cell." (RT 1796-1797.)[73]

Martinez further stated that appellant asked some black male inmates to remove the body from his cell. (RT 1797.) Detective Christian asked Martinez if appellant had told anybody what he had done to the victim, whether he had strangled him or just beat him. Martinez responded that appellant "said that he had beat him, and, uh, I'm pretty sure he mentioned that he was choking him, strangling him." Detective Christian then asked Martinez, "Did he say with what?" Martinez said appellant did not say with what. (RT 1797-1798, 1807-1808.) Martinez said appellant "said that he was trying to go up in the guy. That means trying to fuck him, and I can't recall – I can't – I remember, but I couldn't actually hear whether said that he had fucked the guy or that he had killed him because he didn't want to let him fuck him." (RT 1798, 1813.) Martinez also said, "Dement had actually did – I even heard him say that he had – the guy greased up his butt. I heard him say that." (RT 1814.)

Martinez told Detective Christian that he had talked to other inmates

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[72] The parties stipulated, and the jury was instructed, that there was no knife, and that Martinez's "speculation is merely being admitted for impeachment and to – which would tend to discredit the witness's believability, and to give context to this statement." (RT 1794.)

[73] Detective Christian testified it would not be out of the ordinary for an inmate in Fresno County Jail to be upset about another inmate going into their cell and looking around while nobody's there. Inmates refer to their cells as their house, and other inmates do not come in unless welcome. (RT 1805-1806.)

about the homicide, and mentioned some of what others had said about it. Detective Christian did not ask specific questions to tie down what Martinez knew versus what he had heard from others, but thought Martinez was specific in his responses about what he had heard himself. (RT 1801-1802.)

4. Albert Martinez

Albert Martinez, who at the time of trial had three felony convictions (receiving stolen property, false imprisonment and petty theft with a prior), and had served two prison terms, testified that on the night of the homicide, he was incarcerated on the Fresno County Jail in Pod 4-F. (RT 1684, 1727-1728.) He recognized appellant at trial as someone he had seen before, but did not know whether it was from that time. (RT 1685, 1691-1692, 1694.)

He had slept through the night of the homicide, did not get up for breakfast, and finally awoke only when F-pod was cleared of all inmates for investigation of the homicide. It was only then that he learned of the homicide. (RT 1688-1689, 1694, 1698-1699, 1706-1707.) He was interviewed, and told the investigating deputy that he did not know anything. He was pretty sure he told the deputy that he had been asleep until they woke him up to clear the pod. He had been pretty out of it since his arrest. (RT 1689-1690, 1707-1708, 1713, 1718-1722, 1754-1755.) When the inmates were brought back to the pod, everybody was talking about it. (RT 1706.)

He testified that appellant never talked to anyone in his presence that morning because everyone was taken away. (RT 1696.)

He denied ever contacting detectives thereafter about having information about the homicide. (RT 1758.) He did not recall ever meeting with the Detectives Christian and Burke or giving them a statement. (RT

1715, 1756-1758, 1760.) He did not recall seeing or hearing the things that Detective Christian's testimony attributed to him, and testified he could not have because he did not wake up until the guards cleared everybody off of F-pod. (RT 1690-1691.)

Martinez testified that prior to testifying, he met with the prosecutor and a District Attorney Investigator. They gave him a copy of a report which was supposedly some statements Martinez had given law enforcement a few days after the homicide, on April 13, 1992. (RT 1713-1714, 1734.) He started to read the report the prosecutor gave him, but it did not refresh anything in his mind. He did not think it was right to do that. He asked the prosecutor, "Why are you – were [sic] why am I going to do this, and put something in my head? Do you want me to say something?" The prosecutor said, "No, that wouldn't be right." Martinez said "Why am I going to go through all this getting myself into something that I don't feel I even belong in?" The prosecutor told him that his case is more important than his witnesses. Martinez got the impression that the prosecutor did not care about him, or what would happen to him if he testified to "something that either I didn't say or did say." (RT 1716-1717, 1736.) The report which he had been given, Exhibit 18 (2 SCT1 340-357), had his name and date of birth on it, and his grandmother's home address and phone number on it. He was angry with law enforcement because he did not recall saying any of what was in the report, and his name and address and everything was given out like it was nothing. (RT 1735-1736.) He did not recall any interview on July 13th, did not remember ever talking to Detective Christian, and denied contacting detectives about having information about the homicide. (RT 1756-1758-1760.)

Martinez also testified that he had never worked for Garcia

Construction, and had never told any officer that he did. He had never heard of Garcia Construction. He worked for California Roof Savers. His parole officer had checked on his employment before releasing him for his parole violation. (RT 1723-1725.) He told his parole officer he did not know anything about the homicide. (RT 1725.)

Around July, 1992, a defense investigator came by and showed him a document, asking if Martinez was the person who gave that statement. Martinez denied it. The investigator had the wrong birth-date or booking number. Martinez told the investigator that there was another inmate with the same name who had been getting his money orders. The investigator took back the document and left. (RT 1717-1718.)

Martinez also testified that he had been arrested for giving false information to police officers once or twice. (RT 1731-1732.) He agreed that it would be fair to say that sometimes he tells law enforcement officers the truth and sometimes he does not. (RT 1762.)

5. Proceedings in the Trial Court

Counsel for appellant made no objection to Detective Lee's testimony regarding Johnson's statement as a whole.[74] Defense counsel did object to specific portions of Detective Lee's testimony on various grounds.

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[74] Appellant has not waived his right to argue the Confrontation Clause argument on appeal. Where trial counsel could not reasonably anticipate a dramatic change in the law, failure to object is excused. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) So in a recent case, the Court of Appeal held that the failure to object on confrontation grounds was excusable where the governing law, *Ohio v. Roberts* (1980) 448 U.S. 56, provide scant ground for objection. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411 n.2.)

As to the portion of the statement that Johnson "knew there was going to be trouble," defense counsel objected on grounds of lack of foundation and speculation. (RT 2718.) The prosecution stated it was offered only for the context of what Johnson said next, regarding the "taking care of the homeboy" comment he attributed to appellant. (*Ibid.*) Defense counsel renewed the objection later in Detective Lee's testimony. (RT 2721.) The trial court initially struck the portion of the statement that Johnson "knew there was going to be trouble," and instructed the jury to disregard it. (RT 2718, 2722.) Defense counsel repeated the objection when the prosecutor asked further questions about that portion of the statement. (RT 2724-2725.) After further argument outside the presence of the jury, the trial court indicated that he was "inclined now to leave it in for its context only." (RT 2726-2727.) However, no instruction to the jury retracting the initial instruction to disregard it was given. The prosecution quoted, and relied upon, that portion of the statement in argument to the jury. (RT 2995-2996.) As to the portion of the statement that Johnson heard appellant say he was "going to take care of the homeboy," defense counsel objected on hearsay grounds, which objection was overruled. (RT 2719.)

The defense did object to Detective Christian's testimony regarding Martinez's statements on the grounds of denial of confrontation, arguing there was no way to cross-examine Martinez about the statement which he denied having made. (RT 1770-1771.) The Court found that any lack of recollection of the statement by Martinez was feigned. (RT 1773, 1780.) The Court limited Detective Christian's testimony to "statements attributed to Martinez that call for his personal observations." (RT 1780-1782.) As to those statements, the trial court stated that they would come in for the truth of the matter asserted if the jury believed that the statements were made.

(RT 1774.) The Court also excluded as untrustworthy any testimony that Martinez identified the voice that he heard during the night as appellant's. (RT 1778-1781.)

The jury was instructed according to CALJIC No. 2.13 that prior inconsistent statements by a witness could be considered "as evidence of the truth of the facts as stated by the witness on such former occasion. [¶] If you disbelieve a witness' testimony that he or she no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him or her describing that event." (RT 3113; CT 649.)

C. Admission of the Testimony of Detectives Lee and Christian Relating the Alleged Extrajudicial Statements of Johnson and Martinez Violated Appellant's Right to Confrontation

A criminal defendant's right to confrontation and cross-examination of the witnesses against him is guaranteed by the Sixth Amendment's Confrontation Clause (*Pointer v. Texas* (1965) 380 U.S.400, 403-404), and has been long established as essential to due process. (*In re Oliver* (1948) 333 U.S. 257, 273; *Chambers v. Mississippi* (1973) 410 U.S.284, 294.)

In *Douglas v. Alabama* (1965) 380 U.S. 415, the Supreme Court held that prior testimony of a separately-tried codefendant who is called to the stand but refuses to testify on Fifth Amendment grounds, can not be introduced as evidence against the defendant without violating the defendant's right to confrontation. The Court stated,

> [The declarant] could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers [who testified that the declarant had made the statement] adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of [declarant] and [declarant's] refusal to

> answer as proving the truth of [declarant's] alleged confession. But since their evidence tended to show only that [declarant] made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of [declarant] to test the truth of the statement itself. [¶] Hence, *effective confrontation of [the declarant] was possible only if [the declarant] affirmed the statement as his.*

(380 U.S. at p. 419-420 [emphasis added]; see also *People v. Shipe* (1975) 49 Cal.App.3d 343, 346-349[75] [confrontation violation where codefendant who had pled guilty invoked the Fifth Amendment at the defendant's trial, refused to answer questions concerning the events of the evening in question, and prosecutor continued to question him about the details of his confession, including references inculpating the defendant].)

In *Crawford*, *supra*, 541 U.S. 36, the United States Supreme Court set forth a clear standard, precluding the admission of testimonial statements of an absent declarant against a criminal defendant at trial unless counsel for the defendant has had an opportunity at a prior proceeding to cross-examine the declarant regarding the statement. (541 U.S. at p. 68.) The statements of Martinez and Johnson, made during questioning by law enforcement, are clearly testimonial statements within the meaning of *Crawford*. (*Id.*, at p. 53.) As will be shown below, admission of those statements without a prior opportunity by defense counsel to cross-examine Martinez and Johnson on the contents of the statements violated the Confrontation Clause where Martinez and Johnson, although witnesses at trial, nonetheless did not affirm the statements as theirs at trial.

In a footnote in *Crawford*, the Supreme Court stated:

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[75] *Shipe* was cited by the trial court during argument on the defense objections to Martinez's testimony. (RT 1782.)

> [W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). . . . The Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it.*

(*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9 [emphasis added].)

The first sentence of *Crawford*'s footnote 9 overstates the holding of *California v. Green* regarding the admission of a an extrajudicial statement "when the declarant appears for cross-examination at trial." *Green*'s holding, and the general rule developed in Supreme Court cases on the subject, focuses not merely upon whether a declarant is present at trial, but also whether the declarant has affirmed making the statement, and attempted to defend or explain it, as the second sentence quoted above correctly recognizes. As in *Douglas v. Alabama*, *supra*, and as shown below, where a declarant is present in court, testifying under oath, but does not, at the very least, affirm having made the extra-judicial statement at issue, admission of the statement into evidence for the truth of the matters asserted therein violates the defendant's right to confrontation.

California v. Green expressly limited itself to the issue before it, i.e., the effect on a defendant's confrontation rights of the admission of an extrajudicial statement of a witness available to testify and subject to cross-examination, who affirms making the extrajudicial statement but has no memory of the matters addressed therein. (399 U.S. at p. 164.) The Court held that

> the Confrontation Clause does not require excluding from evidence the prior statements of a witness *who concedes making the*

> *statements*[76]. and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.

(399 U.S. at p. 164 [emphasis added].)

In coming to this conclusion, the Court reasoned that "the question as we see it must be . . . whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." (399 U.S. at pp. 160-161 [emphasis added].)

In *Green*, the Supreme Court expressly reserved ruling on the question of whether a declarant's loss of memory between a prior statement and testimony at trial would require the exclusion of the prior statement due to the impairment or destruction of the defendant's ability to effectively test the truth of the prior statement through cross-examination at trial. (399 U.S. at pp. 168-170 ["Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case [FN omitted] is an issue which is not ripe for decision at this juncture."]) The Court did note,

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[76] The evidence in *Green* was admitted pursuant to California Evidence Code sections 770 and 1235, which provide for admissibility of prior inconsistent statements where the declarant has had an opportunity to "explain or deny" the prior statement. The Supreme Court in *Green*, however relied explicitly upon the fact that the declarant had confirmed, not denied, making the statement. Since then, through footnote 9 in *Crawford*, the Supreme Court has consistently relied upon the declarant's confirmation of having made the statement where upholding use of such prior statements under the Confrontation Clause. *Crawford* specifically stated the requirement as the declarant being available to "explain or defend" the prior statement. (541 U.S. at p. 59, fn. 9.)

however,

> that even some who argue that "prior statements should be admissible as substantive evidence" believe that this rule should not apply to "the case of a witness who disclaims all present knowledge of the ultimate event," because "in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." [399 U.S.] at 169, n. 18 (citations omitted).

(*Delaware v. Fensterer* (1985) 474 U.S. 15 (*per curiam*)[77].)

In *United States v. Owens* (1988) 484 U.S. 554, the Supreme Court examined a similar question left open in *Green*, i.e., whether "the Confrontation Clause . . . bars testimony concerning a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification." (484 U.S. at pp. 555-556.) *Owens* involved "an out-of-court identification that would traditionally be categorized as hearsay" (*id.* at p. 560), which was affirmed by the declarant at trial. (*Id.* at p. 556.) The Court held that there was no violation of the Confrontation Clause.

In *Owens*, as in *Green* and *Fensterer*, the declarant/witness testified to, and confirmed, the extrajudicial statement, and was held to be thus subject to cross-examination regarding the contents of the statement sufficient to satisfy the Confrontation Clause. However, none of those cases addressed the situation presented here, where the testifying witness

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[77] In *Delaware v. Fensterer*, the Supreme Court, addressing a question akin to that left open in *Green*, held that the Confrontation Clause was not violated when an expert witness testified as to what opinion he had formed, but could not recall the basis on which he had formed it. *Fensterer*, however, did not involve introduction of a prior statement, per se. The expert witness testified to his own opinion, thus confirming it as his, but simply could not recall the basis for that opinion. (474 U.S. at p. 21.)

either denied, or at least failed to confirm having made the extrajudicial statement which was introduced as substantive evidence against appellant.

In *Nelson v. O'Neil* (1971) 402 U.S. 622 (*Nelson*), the Supreme Court examined the effect of the Confrontation Clause upon a factual scenario closer, but still distinguishable from the case here. In *Nelson*, the question presented was

> whether cross-examination can be full and effective where the declarant is present at the trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the statement and claims that its substance is false.

(*Nelson*, *supra*, 402 U.S. at p. 627.) In *Nelson*, "the witness, Runnels, denied ever making an out-of-court statement but testified at length, and favorably to the defendant, concerning the underlying facts." (402 U.S. at pp. 622, 628.) The Supreme Court concluded that

> where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, *and proceeds to testify favorably to the defendant concerning the underlying facts*, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments.

(402 U.S. at pp. 629-630 [emphasis added].)

While closer than *Green* or *Owens* to the scenario presented by appellant's case, *Nelson* is distinguishable in that the witnesses here were not codefendants (i.e., had no joint or common interest with appellant in this matter), testified neutrally regarding appellant (i.e., testified to neither exculpatory nor inculpatory information concerning appellant), but denied, or failed to confirm, having made the prior extrajudicial statements implicating appellant. Appellant was thus denied his rights under the Sixth and Fourteenth Amendments to confront witnesses who would confirm

having given evidence against him.

In *United States v. Brown* (2nd Cir. 1983) 699 F.2d 585, the prosecution, during a joint trial, used an extrajudicial statement of a codefendant in its cross-examination of the codefendant. The prosecutor "made it apparent to the jury that he was reading from [the codefendant's] statement when he converted every sentence of the statement into a question, which began, 'Do you remember telling Agent Shea that ...' or 'Do you remember advising Agent Shea that ....'" (699 F.2d at p. 591.) The portions of the statement so presented included portions which implicated the defendant. The codefendant denied involvement in the crime, denied the statement, and denied implicating the defendant. (*Ibid.*) The prosecutor then presented the agent who took the statement, and who testified to its contents, including portions which incriminated the defendant. (*Ibid.*) The Second Circuit found a violation of the right to confrontation, distinguishing *Nelson* because there had been no common defense presented, and in the codefendant's testimony, he "made no attempt to exculpate" the defendant. (*Id.* at pp. 592-593.)

In *People v. Simmons* (1981) 123 Cal.App.3d 677, the declarant had given an oral statement to the police recounting an admission by the defendant, which statement was then reduced to writing by the police, which writing the declarant then signed. The declarant thereafter also remarked to a third party that the defendant had asked the declarant to go with him to the crime. Before the preliminary hearing, the declarant suffered a head injury, and retrograde amnesia, and had no recall of the defendant's supposed admission, the statement to the police or the remark to the third party. The declarant recognized his signature on the written statement, but could not confirm the truth of the contents, or even that he

had made any statement to police. Mirroring the Supreme Court's concern expressed in footnote 18 of *Green*, *supra*, discussed above, that cross-examination in such a situation might "significantly diminish[]" "the opportunities for testing the prior statement through cross-examination at trial" (*Green*, *supra*, 399 U.S. at p. 169, n. 18), the Court of Appeal in *People v. Simmons* found that admission into evidence of the written statement and the remark to the third party violated the Confrontation Clause. (123 Cal.App.3d at pp. 681-682.)

Douglas v. Alabama, *supra*, established that presence of the declarant on the stand is not per se sufficient to permit the admission into evidence of prior testimonial statements of the declarant without violating the Confrontation Clause. *Green*, *Fensterer* and *Owens* establish that cross-examination, albeit limited by circumstance of the witness's memory, satisfies the confrontation Clause if the declarant concedes or affirms having made the statement at trial. *Nelson* established that the declarant's in-court denial of having made the statement and claim that its substance is false, does not preclude admission of the declarant's extrajudicial statement where the declarant testifies fully and favorably to the defendant in keeping with a joint defense.

The question remains whether cross-examination is sufficient to satisfy the Confrontation Clause where the declarant does not confirm, or denies, having made the statement inculpating the defendant, i.e., does not "explain or defend" the statement, and denies knowledge of the underlying facts contained in the statement. The Supreme Court, in *Green*, acknowledged the concern that in such a situation, "the opportunities for testing the prior statement through cross-examination may be significantly diminished." (*Green*, *supra*, 399 U.S. at p. 169, n. 18.)

"The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." (*Lee v. Illinois* (1986) 476 U.S. 530, 540 (*Lee*).) The inherent unreliability of the statements at issue in appellant's case enhances the need for confrontation and a reasonable opportunity for meaningful cross-examination as a means of providing the jury a "satisfactory basis for evaluating the truth of the prior statement[s]." (*Green, supra*, 399 U.S. at p. 161.) The Supreme Court has been vigilant in its enforcement of the Confrontation Clause where inherently unreliable, or "presumptively suspect" extrajudicial statements have been at issue. Primarily, this has arisen regarding codefendant statements, as in *Douglas v. Alabama*. The Court has regularly excluded such statements for denial of confrontation unless the codefendant testifies, affirms having made the statement, and is subject to cross-examination regarding the statement. The rationale for exclusion of such statements applies equally to extrajudicial statements by jailhouse informers, such as Johnson and Martinez in this case.

> As explained in *Lee*, *supra*,
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> > Because the accomplice in [*Douglas v. Alabama*], while called to the witness stand, invoked his privilege against self-incrimination and refused to answer questions put to him, we held that the defendant's 'inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.' *Id.*, at 419, 85 S.Ct., at 1077. *This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.*
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> (476 U.S. at p. 541 [emphasis added].)

An accomplice's extrajudicial statements or confessions which

inculpate the defendant are recognized as presumptively unreliable and untrustworthy despite nominally fitting within a recognized hearsay exception, because of the inherent incentive of the accomplice to shift the blame, to minimize the accomplice's own culpability by inculpating the defendant. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 130-134 (*Lilly*) and cases cited therein.) Substantially similar incentives are inherent in the situation of a jailhouse informant, where the desire for lenient or preferable treatment in the informant's own case can be served by creating or distorting evidence of a separate defendant's guilt, and presenting it to the prosecution.

The presumptive unreliability of such statements, whether made by accomplices, codefendants or jailhouse informers, is not the sole danger from admitting the statements against a criminal defendant without a meaningful opportunity for cross-examination of the declarant about the truth, accuracy and reliability of the statements. In *Lilly*, *supra*, the Supreme Court explained,

> [i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice--that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

(527 U.S. at p. 137.)

As evidence of the unreliable nature of such evidence, the Court noted that the codefendant's unsworn statements were given in response to questioning by the police, "who no doubt knew what they were looking for." (476 U.S. at p. 544.) The Court also noted that the statement was not tested "by contemporaneous cross-examination by counsel, or its

equivalent." (*Ibid.*)

Similarly, the statements of Martinez and Johnson in this case were given in response to questioning by police, who "no doubt knew what they were looking for." The interviewing detectives did not test the statements in any way similar to cross-examination, as shown by their failure to ask any questions specifically to test whether the source of Martinez's information was his own personal knowledge or from gossip about the homicide in F-pod in the four days between the homicide and Martinez's statement. (RT 1801-1802.) In Martinez's statement, Detective Christian even provided critical facts of the method used to kill Andrews which had not been previously mentioned by Martinez, but which were immediately adopted by Martinez. Martinez had not mentioned appellant saying anything about strangling or choking the victim until Detective Christian asked him specifically whether appellant said he had strangled the victim or just beat him. Only then did Martinez state that appellant "said that he had beat him, and, uh, I'm pretty sure he mentioned that he was choking him, strangling him." (RT 1797-1798, 1807-1808.) The inherent unreliability of Martinez's statement here parallels that of a codefendant's confession, which the Supreme Court has regularly found to be presumptively unreliable.

Lee, *supra*, involved a joint trial in which the extrajudicial confession of a non-testifying codefendant was used as evidence against the non-testifying defendant. The Supreme Court stated that

> Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession 'is hearsay, subject to all the dangers of inaccuracy which

> characterize hearsay generally.... More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.' *Bruton v. United States*, 391 U.S., at 141, 88 S.Ct., at 1631 (WHITE, J., dissenting) (citations omitted).

(476 U.S. at p. 541.) Moreover, the Court stated that

> [t]he true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.

(*Lee*, *supra*, 476 U.S. at p. 545.)

Similarly, the testimony of Johnson and Martinez, and the evidence of statements made by them to investigating officers, demonstrates a reality of the criminal process, recognized in section 1127a[78] and CALJIC No.

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[78] section 1127a, states, in relevant part:

> (a) As used in this section, an "in-custody informant" means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.
>
> (b) In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury as follows:

(continued...)

3.20[79], that jail and prison inmates, incarcerated with other criminal defendants, will often fabricate evidence, especially of statements by a defendant, in order to trade such evidence to the prosecution in exchange for some benefit in their own case. That this practice has led to the conviction, imprisonment, and even execution of innocent people cannot be doubted. That Johnson sought such a deal in making the statement at issue here is demonstrated by Detective Lee's testimony. (RT 2716-2717.) Whether or not whoever made the statement attributed to Martinez was expecting some benefit from his statement to the police is not explicit on this record, but apparent fabrications of evidence in the statement, as shown below, suggest a motivation other than an intent to be a good citizen.

Martinez's apparent manufacture of prejudicial details strongly suggests a motive and willingness to fabricate evidence against appellant in order to get some kind of a deal from the prosecution. The statement, according to Detective Christian, included the suggestion that appellant had a knife, which was demonstrated by stipulation to be unsupported by any facts. Similarly, it attributed to appellant a statement that "the guy greased up his butt," which is inconsistent with the physical evidence. It further

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[78] (...continued)

> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

[79] CALJIC 3.20 instructs the jury in the terms mandated by section 1127a subdivisions (a) and (b), *ante*.

shows Martinez's willingness to take cues from Detective Christian regarding strangling, which Martinez had not mentioned until Christian's leading and suggestive questioning prompted Martinez to provide another "admission" by appellant.

Prior to making their statements, if in fact they did so, both Johnson and Martinez had access to information, speculation, and gossip from other inmates of F-pod which could have been used to manufacture the sorts of "details" provided in their statements. Martinez had additional time to embellish his statement before speaking to Detective Christian, four days after the homicide, and showed an apparent willingness to add details when they were suggested by Detective Christian.

As was stated by the Supreme Court in *Lilly*,

> [T]he absence of an express promise of leniency to [a confessing codefendant] does not enhance his statements' reliability to the level necessary for their untested admission. The police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage.

(527 U.S. at p. 139 [re: codefendant's extrajudicial confession which inculpated defendant.]) Neither does a jailhouse informant need an express promise of leniency to know that providing evidence against another inmate (whether true or not) can inure to his advantage in his own case, even to the point of freedom.[80]

The Court in *Lee* noted that the voluntariness of a statement such as that of Martinez or that of Johnson is irrelevant to its reliability.

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[80] See, e.g., testimony of Trinidad Ybarra: "after [appellant] told me he was in for 187, then I got the idea of he's giving me all these names, maybe I can work him on confessing, and I knew that if I could get that, I pretty much knew that I'd get a deal from the D.A." (RT 2348.).

> Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive, or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders. ... This record evidence documents a reality of the criminal process, namely, that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.

(476 U.S. at pp. 544-545.)

The circumstances here gave appellant no reasonable opportunity to effectively probe through cross-examination the truth, reliability or accuracy of the statements or the details contained therein, since neither Johnson nor Martinez confirmed having made the statements. Therefore, they could not, and did not, explain or defend the statements. Thus, appellant was deprived of his ability to confront highly suspect testimony upon which the prosecution relied heavily.

In *People v. Rios* (1985) 163 Cal.App.3d 852, two witnesses who had made statements prior to trial refused to answer questions when called to testify at trial. The Court of Appeal found that introduction of the prior statements in such circumstances violated the Confrontation Clause. The court relied on the holding of *California v. Green*, *supra*, which it stated

> "rests on the assumption a meaningful trial confrontation will provide 'most of the lost protections [of contemporaneous cross-examination such as oath, observance of demeanor and cross examination].' (*Id.* [399 U.S.], at p. 158 ... [90 S.Ct. at p. 1935].)" (*People v. Simmons* (1981) 123 Cal.App.3d 677, 681, 177 Cal.Rptr. 17.) There was no evidence presented from which the jury could evaluate the circumstances surrounding the making of the previous statements by Torres and Carrillo; no way to test the truth of the statement itself. "Nor was the opportunity to cross-examine the law enforcement officers adequate to redress this denial of the essential

> right secured by the Confrontation Clause." (*Douglas v. Alabama, supra,* 380 U.S. 415, 419-20, 85 S.Ct. 1074, 1077, 13 L.Ed.2d 934.) *On this record the jury had no basis for evaluating the truth of the prior statements.* (*California v. Green, supra,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489.)

(163 Cal.App.3d at pp. 865-866 [emphasis added].)

As in *Rios*, there was no way for appellant to probe the truth, accuracy or reliability of the statements of Johnson and Martinez, and no way for the jury to effectively evaluate the truth, accuracy or reliability of the statements. Moreover, given Detective Christian's testimony that Martinez's statement was tape recorded (RT 1765-1766), even though the tape was never played for the jury, Martinez's disavowance of the statement would not reasonably be believed. Even if the jury determined that this Martinez was not the person who made the statement, it would probably assume that another Martinez did make the statement, and continue to consider its contents whether or not they had heard testimony from the actual declarant. If the jury believed the statement had been made by somebody, whether by Martinez who testified or another Martinez who did not, it was effectively compelled to accept the statement as true. As the trial court stated, "If it's coming in, it's coming in for the truth of the matter asserted if the jury believes that's said." (RT 174.)

Because appellant had no prior opportunity to cross-examine Johnson or Martinez on the contents of these extrajudicial statements, the Confrontation Clause required that before these testimonial statements could be admissible as prior inconsistent statements, Johnson and Martinez must not only have appeared to testify, but must have confirmed, and explained or defended, the statements. Because they did not do so, admission of the statements into evidence for the truth of the matters stated

therein, inculpating appellant, denied appellant a meaningful opportunity to confront the witnesses against him, and violated appellant's rights under the Confrontation Clause of the Sixth Amendment. (*Douglas v. Alabama*, *supra*, 380 U.S. 415; *Lee v. Illinois*, *supra*, 476 U.S. 530; *Crawford v. Washington*, *supra*, 541 U.S. 36.)

D. Prejudice

Because the admission of this evidence denied appellant rights guaranteed by the federal constitution, reversal is mandated unless respondent can establish that it was harmless beyond a reasonable doubt. (*Chapman*, supra, 386 U.S. at p. 24.) "Under the *Chapman* test, the question is 'whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) On this record, the evidence that appellant strangled Andrews and tied the towel around his neck, as opposed to Bond, Benjamin or Nelson having done so, or that an oral copulation occurred or was attempted, is closely balanced, given the suspect credibility of the primary prosecution witnesses on those subjects. The trial court acknowledged this point out of the presence of the jury:

> [The s]tatus of this case is this, that one of three men could have performed this killing. One of four men could have performed this killing, at least the final touches of it, according to the evidence. [¶] And those who have testified are at least suspect in their testimony. They have been impeached from wall to wall on a variety of subjects. They could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury.

(RT 2796.)

That the jury also considered the case a close one, especially as to the special circumstance, is shown by the fact that jury deliberations took four

days, during which the jury required readback of testimony and asked to review the autopsy report[81] (RT 3154), and demonstrated some confusion regarding the instructions involving the Second Special Circumstance. (RT 3159-3168; see, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours of deliberations indicates case not open and shut, and that jury had misgivings about guilt]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine hours of deliberations indicates case not clear-cut]; CT 508-516; RT 3145, 3154-3157, 3159-3168.) That the prosecutor considered the case a close one is indicated by his offer to dismiss the two special circumstance allegations on which the jury was deliberating if inquiry showed that the jury had already reached a verdict as to Count 1.[82] (RT 3173-3179.)

Given the closeness of the case, the erroneous admission of the statements of Johnson and Martinez cannot be considered harmless beyond a reasonable doubt. This is demonstrated in part by the value attributed to the statements by the prosecution. In his argument to the jury, the prosecutor relied substantially upon the extrajudicial statements of Johnson and Martinez. Four times he cited Lee's testimony recounting Johnson's story of a supposed threat to Andrews by appellant. (RT 2953, 2975, 2996, 3100.) He repeatedly discussed Detective Christian's testimony recounting the statement by Martinez. (RT 2953, 2957, 2989, 2991, 3100.)

The prosecutor relied upon the extrajudicial statements as statements

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[81] The autopsy report had not been admitted into evidence, and was therefore not provided to the jury upon their request.

[82] This offer was rejected by defense counsel due to concerns that they might be considered ineffective in post-conviction proceedings if they agreed to an inquiry as to the status of deliberations on Count 1. (RT 3179-3180; see Arg. VIII, *post*.)

of prior intent, and as admissions of guilt. Without that evidence, the prosecution would have been left with the testimony of Benjamin, Bond, Nelson and Williams.

Williams' testimony was suspect. His descriptions in his testimony of statements which he attributed to appellant, allegedly made prior to the four cellmates being locked into cell F-8, changed from his initial statement to Detective Lee, where he attempted to sell a story in exchange for a deal. (RT 1375, 1406-1407, 1420, 1426.) In his statement the morning after the homicide, Williams never told Detective Lee the name of the person he had supposedly heard. Nor did he provide any information at that time which might identify the person who supposedly said what Williams recounted. Instead, he held that "information" until after appellant had become the focus of the investigation and had been charged, by which time he could adjust the "details" of his story to fit the prosecution's theory. (RT 2891-2898.)

Nelson's testimony regarding the events of April 8-9 was similarly suspect. When first interviewed on April 9, Nelson did not tell the detectives any of the circumstances to which he testified. The first time he told the detectives anything about the night of the homicide was four days later, when he was going to be sentenced on his burglary charge (RT 2110-2112, 2120), by which time he had the same opportunity to manufacture details to fit the prosecution case as Martinez (or whoever made that statement) had. In his testimony at trial, Nelson further embellished his story with "details" he had not mentioned to the detectives. (RT 2120-2124, 2145, 2139-2140.)

Furthermore, even if it was believed by the jury, Nelson's testimony did not establish that appellant had killed Andrews. While Nelson testified

that appellant confronted him about going into cell 8 on the morning of the 9th (RT 2093-2095), going into a cell uninvited as Nelson did was contrary to accepted behavior in the jail, according to Detective Christian, and it would not be out of the ordinary for an inmate to get upset about such behavior. (RT 1805-1806.) Nelson also testified that appellant asked him to go upstairs and drag the body out of the tier. (RT 2094.) That testimony, however, does not establish that appellant, rather than Bond, Benjamin, or Nelson killed Andrews. Rather, it demonstrated, if the jury believed Nelson, only that appellant wanted Andrews' body out of the cell.

Bond's and Benjamin's testimony was inherently suspect. The trial court intended to instruct the jury that Bond and Benjamin were accomplices as a matter of law, until defense counsel withdrew the request for those instructions. (4SCT 153; RT 2943-2945.) Bond and Benjamin had every reason to minimize their own culpability and instead lay off the entire crime on appellant. (See, e.g., *Lee v. Illinois*, *supra*, 476 U.S. at pp. 541, 544-545.) While there was some physical corroboration of their testimony that appellant hit Andrews, there was no physical evidence or testimony other than Christian's testimony regarding Martinez's statement which in any way corroborated Bond's and Benjamin's testimony that appellant, rather than one or both of them, or Nelson, had strangled Andrews, or done so fatally.

Thus, while there was other evidence to support the conclusion that appellant was involved in beating Andrews, the evidence that appellant strangled Andrews, or that any sexual activity occurred or was attempted, was dependent upon the credibility of Bond and Benjamin. The evidence of Johnson's and Martinez's statements, and the supposed admissions by appellant contained therein, unreasonably provided the only corroboration

of any kind to Bond's and Benjamin's version of events. Had this evidence been excluded, it is reasonably probable that more favorable verdicts on Counts 1 and 2 and the Second Special Circumstance would have resulted. There is, therefore, no basis for concluding that the erroneous admission of these statements was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

E. Conclusion

On the facts presented in this case, appellant was denied his right to confront Johnson and Martinez on the truthfulness, accuracy and reliability of the statements purportedly made by them to law enforcement during the investigation of the homicide. Appellant was also thereby denied his constitutional rights to a fair trial and to a reliable determination of facts by the jury and a reliable verdict of guilt and the truth of the special circumstances, as well as of penalty. There are ample bases for questioning the truthfulness, accuracy and reliability of the statements, but because neither informant confirmed making the statements, appellant had no practicable means to test those statements or the persons who made them, if Johnson and Martinez did not. Johnson and Martinez did not defend or explain the statements. The orphaned statements were thus left effectively unassailable through cross-examination. The jury was denied any "satisfactory basis for evaluating the truth of the prior statement[s]." (*Green v. California*, *supra*, 399 U.S. at p. 161.)

The admission of this evidence rendered appellant's trial fundamentally unfair and violated his rights to due process of law, to a fair trial, and to reliable determinations of guilt and special circumstance allegations. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process

violation]; *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1001; *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465.) It also violated the Eighth Amendment. The death penalty's qualitatively different character from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, at p. 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349 [penalty phase].)

The error, and the effect of such prejudicial and suspect evidence, cannot reasonably be determined to be harmless beyond a reasonable doubt. Moreover, with regard to the penalty phase, had the jury not heard this inadmissible evidence, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510.) Since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneous admission of this evidence (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

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III.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF STATEMENTS MADE BY APPELLANT IN RESPONSE TO DETECTIVE CHRISTIAN AFTER APPELLANT HAD INVOKED HIS FIFTH AMENDMENT RIGHTS UNDER *MIRANDA V. ARIZONA*

The trial court erroneously admitted into evidence statements of appellant which were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and its progeny after appellant had invoked his right to consult with an attorney prior to any questioning, and before appellant had been provided with counsel. The admission of these statements violated appellant's rights under both the California and United States Constitutions (U.S. Const. Amends. V, XIV; Cal. Const. Art.1, §§ 7, 15; *Miranda v. Arizona*, *supra*, 384 U.S. 436; *Rhode Island v. Innis* (1980) 446 U.S. 291 (*Innis*); *People v. Sims* (1993) 5 Cal.4th 405; *People v. Crittenden* (1994) 9 Cal.4th 83) and require reversal of the judgment as to both guilt and penalty.

A. Proceedings Below

According to the testimony of Detective Christian, taken outside the presence of the jury, when initially questioned about this case, and after being read his *Miranda* rights, appellant stated, "I'd like to see an attorney." (RT 2361, 2627.) Detective Christian then terminated the interview, at 12:17 p.m. on April 9. (RT 2361, 2627.) Detective Christian had noticed that the middle knuckle on appellant's right hand was red and swollen. He and Detective Burke then took appellant to Valley Medical Center as part of the investigation, looking for evidence connecting appellant to the homicide of Andrews. They had his right hand and right foot x-rayed. (RT 2628-2635, 2638, 2642-2643.) Detective Christian thought that they were at

Valley Medical Center for about two hours, although he did not remember exactly. (RT 2635.) During that period, Detective Christian attempted, he said, to make "conversation" with appellant. (RT 2364, 2625, 2636, 2638.) The only example of such "conversation" other than the exchange discussed below, was that Detectives Christian and Burke spent "[a] lot of time . . . kidding him about his F-14 tattoo and him being a fighter pilot."[83] (RT 2649-2650.)

At some point while waiting to have appellant's foot x-rayed,[84] Detective Christian told appellant that he

> had interviewed [appellant's] wife, Patricia Dement, regarding a homicide that was under investigation and had occurred in February of 1992. Ronnie then stated that he knew that, and that he was going to take care of Tom Rutledge for getting her involved in that incident. [¶] I then asked Ronnie if he knew Tom Rutledge, and he stated that he did and that he and Tom were enemies, stating that Tom had disrespected him. Ronnie stated he knew Tom was under investigation for murder and that he had heard a rumor that Tom was involved in that matter, and if we were able to get Tom into the jail with him, we would not have to worry about the murders anymore. [¶] Ronnie then asked me what the name of the subject was, and I asked him who he was referring to, and he stated, "You know, the guy that went to sleep." I then advised Ronnie that the subject's name was Greg Andrews, and Ronnie merely nodded his head yes,

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[83] Detective Christian did not include in his written report any other details of his "conversation" with appellant at the hospital, instead including in the report only that which he thought he could use against appellant as evidence. (RT 2648, 2651.)

[84] Detective Christian's report did not reflect the time lapse to which he testified. The report, which he read into the record, stated that "After suspect Ronnie Dement had invoked his right to counsel and the interview was terminated, I told Ronnie that I had interviewed his wife, Patricia Dement, regarding a homicide. . . ," then continuing as stated in the following text. (RT 2363.)

and stated, "He was a friend of Tom's." Ronnie would say no more regarding the incident.

(RT 2363-2364.)

In objecting to the admission of this evidence, defense counsel argued that Detective Christian's "conversation" was not merely small talk, but a successful interrogation conducted while the detectives had appellant in custody at the hospital for the purpose of gathering evidence against him. Counsel argued that the subject matter – appellant's wife and her involvement with another man – was designed to elicit information, and succeeded in doing so. (RT 2653-2654, 2658-2659.)

The prosecution conceded that the statements by appellant were "a product of a statement by the detective" (RT 2657), but argued that it was not an interrogation, but merely small talk. (RT 2657-2658.) The prosecution also submitted a short memo, which had been prepared in a different case, citing *People v. Siegenthaler* (1972) 7 Cal.3d 465, 470 (*Siegenthaler*), and *People v. Amos* (1977) 70 Cal.App.3d 562, 568 (*Amos*), regarding custodial interrogation. (RT 2626; 3SCT 55.)

The trial court, citing *Innis*, *supra*, 446 U.S. 291, *Amos*, *supra*, 70 Cal.App.3d 568, and *Sigenthaler*, *supra*, 7 Cal.3d 465, overruled the defense objection, stating that Detective Christian's statements did not appear to be interrogation, and that "[i]t was the defendant's volunteered statement to my mind that when he brought up the name of – that is the person of Mr. Andrews, that brings that statement to the Court's attention, it appears to be voluntary." (RT 2660.)

In front of the jury, Detective Christian testified regarding appellant's statements as described above, but without mentioning the murder investigation in which Rutledge and Patricia Dement had been

involved. (RT 2671-2674.)

These facts demonstrate that appellant had invoked his right to have an attorney present during interrogation, that Detective Christian, soon thereafter and with no break in custody, initiated a conversation with appellant during which appellant made statements which the prosecution sought to use, and did use, against appellant in this case. The statements by appellant were, as conceded by the prosecution, the "product of a statement by" Detective Christian. (RT 2657.) Furthermore, the conversation initiated by Detective Christian was of such a nature that the detective should have known that it was reasonably likely to elicit a statement which the prosecution could use against appellant at trial. As will be explained below, contrary to the trial court's ruling, the conversation initiated by Christian, and extended by Christian by asking appellant questions, and supplying information about this case to appellant, constituted interrogation under *Innis*, *supra*, 446 U.S. 291. Admission of those statements therefore amounted to constitutional error requiring reversal of the judgment in this case.

B. The Applicable Law

Under *Miranda*, *supra*, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. (384 U.S. at pp. 444-445, 473-474.) Once having invoked these rights, as appellant did here, the accused "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.)

> If, subsequently, assuming there is no break in custody, the police initiate a meeting in the absence of counsel, the suspect's statements are presumed involuntary and are inadmissible as substantive evidence at trial, even if the suspect executes a waiver and the statements would be considered voluntary under traditional standards. [Citations.]

(*People v. Crittenden, supra,* 9 Cal.4th at p. 128.)

A suspect's request for counsel precludes questioning even about investigations separate from that involved in the original questioning, for "the presumption raised by a suspect's request for counsel – that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance – does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." (*Arizona v. Roberson* (1988) 486 U.S. 675, 683.)

> [I]t is clear that a conversation may be resumed in the absence of counsel only if the "accused himself initiates further communication, exchanges, or conversations with the police" (*Edwards v. Arizona*, *supra*, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1885) and the circumstances indicate that the defendant has made a knowing and intelligent waiver of the right to an attorney. (*Oregon v. Bradshaw*, *supra*, 462 U.S. 1039, 1044-1045 [103 S.Ct. 2830, 2834-2835].)

(*People v. Bradford* (1997) 15 Cal.4th 1229, 1311.) Not every question or communication necessarily means such a conversation has been "initiated."

> There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards.*

(*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 10445.)

Prohibited interrogation encompasses both express questioning and its "functional equivalent." (*Innis*, *supra*, 446 U.S. at pp. 300-301.)

> That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to *any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.* The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.

(*Innis*, *supra*, 446 U.S. at p. 301 [footnotes omitted][emphasis added].) Even when the suspect initiates a conversation, if the police extend the conversation or interject questions of their own where that is reasonably likely to elicit an incriminating response, any incriminating statements made thereafter are obtained in violation of *Miranda*. (*U.S. v. Montgomery* (1st Cir. 1983) 714 F.2d 201, 202.)

An "incriminating response" as defined by *Innis* is not limited to a confession or direct admission of culpability. Rather an "incriminating response" is "any response – whether inculpatory or exculpatory - that the *prosecution* may seek to introduce at trial." (*Innis*, *supra*, 446 U.S. at p. 302, fn. 5 (emphasis in original).)

In reviewing a claim that statements were obtained in violation of *Miranda*, this Court applies federal standards. (*People v. Sims*, *supra*, 5 Cal.4th at p. 440.) This Court has stated that the trial court's findings on whether there was interrogation are generally reviewed for substantial evidence or clear error, i.e., the findings are upheld if supported by substantial evidence. (*People v. Mickey* (1991) 54 Cal.3d 612, 649.

However, "when there is no factual dispute as to whether *Miranda* warnings were given, what questions were asked and what answers were given, whether the defendant was subjected to interrogation is a mixed question of law and fact reviewed de novo. *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986); cf. *United States v. Thierman*, 678 F.2d 1331, 1334 (9th Cir. 1982) (whether police conduct constitutes 'interrogation' is reviewed for clear error)." (*U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1168; *United States v. Padilla* (9th Cir. 2004) 387 F.3d 1087, 1093, fn. 4; *United States v. Foster* (9th Cir. 2000) 227 F.3d 1096, 1102.) This Court has recognized that where the evidence is uncontradicted, independent review is warranted. (*People v. Sims*, *supra*, 5 Cal.4th at p. 440; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 128; *People v. Johnson* (1993) 6 Cal.4th 1, 25; *People v. Mattson* (1990) 50 Cal.3d 826, 857- 858; *People v. Boyer*, *supra*, 48 Cal.3d at p. 263.)

Moreover, if trial court findings are based upon an erroneous legal standard, no deference is accorded those findings, and independent, or de novo, review is conducted. (See *United States v. Singer Mfg. Co.* (1963) 374 U.S. 174, 195 [where trial court's finding "derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law"]; *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.* (1982) 456 U.S. 844, 855 ["if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."]; see also *People v. McGlothen*, *supra*, 190 Cal.App.3d at p. 1015 [ruling that was erroneous as a matter of law was not entitled to deference].)

C. Detective Christian Interrogated Appellant Within the Meaning of *Miranda* and *Innis*

Under the standards set forth above, in this case, the question of whether Detective Christian's conduct constituted interrogation is properly determined by independent review. It was undisputed below that appellant was in custody, and that after being admonished per *Miranda*, he invoked his right to an attorney. All questioning therefore had to cease at that point, and Detective Christian testified that he terminated the interview at that point. (RT 2361.) There is also no dispute that Detectives Christian and Burke accompanied appellant to the hospital, rather than correctional officers from the jail doing so, because the detectives expected to obtain evidence at the hospital to be used in prosecuting appellant for the Andrews homicide. (RT 2628-2635, 2637-2638.) There was also no dispute that Christian, not appellant, initiated conversation about appellant's wife's involvement with another man and a homicide investigation. Appellant did not initiate any part of the conversation. Thus, "there is no factual dispute as to whether *Miranda* warnings were given, what questions were asked and what answers were given." (*United States v. Moreno-Flores*, *supra*, 33 F.3d at p. 1168.) Therefore, this Court's review is properly conducted as independent or de novo review.

Independent review is further compelled by the trial court's use of an erroneous legal standard. In determining whether Christian's actions constituted interrogation, the question is whether Detective Christian "should have known" that his comments and questions were "reasonably likely to elicit an incriminating response from" appellant. (*Innis*, *supra*, 446 U.S. at p. 301.) The trial court's conclusion that appellant's responses were not the product of interrogation was based upon the application of an

erroneous standard. Review of the two cases submitted by the prosecution on the issue of interrogation, i.e., *Amos*, *supra*,70 Cal.App.3d at p. 568, and *Sigenthaler*, *supra*, 7 Cal.3d at p. 470, upon which the trial court specifically relied, demonstrates the error. Both of these cases predated *Innis*, and stated a standard for determining whether a suspect's statements were the product of interrogation which was incompatible with the standard later enunciated by the United States Supreme Court in *Innis*.

In *Siegenthaler*, *supra*, 7 Cal.3d at p. 470, and *Amos*, *supra*, 70 Cal.App.3d at p. 568, the focus was on the intent of the police, a focus which was rejected by the United States Supreme Court in *Innis*. (446 U.S. at p. 301.) The prosecution similarly focused on this erroneous standard in its argument to the trial court: "the proof that is here is that this was small talk, not interrogation, not a statement by the detective *designed to elicit incriminating information* on the case at hand." (RT 2658 [emphasis added].) The trial court's ruling, citing *Siegenthaler* and *Amos*, adopted this erroneous focus.

The trial court's ruling, consequently, resulted from the application of an improper and erroneous standard to the facts of this case, and failed to address the relevant considerations necessary to a proper result, i.e., the trial court did not address or determine whether or not Detective Christian should have known that his "conversation" was reasonably likely to result in responses from appellant which the prosecution could use against appellant at his trial. As a result of the application of an erroneous standard, the trial court reached an erroneous conclusion, i.e., that Detective Christian's conduct "does not appear to me to be interrogation." (RT 2660.)

As a further result of basing its conclusion upon an erroneous standard, no deference is due to the trial court's finding. For this reason as

well, review of the question of whether or not Detective Christians conduct constituted interrogation is properly conducted as independent review.

Moreover, review of the facts presented on this record, as explained below, demonstrates that the trial court's conclusion that Detective Christian's conduct did not constitute interrogation is not supported by substantial evidence.

While Christian testified that his comments and questions were simply "conversation," that characterization is not determinative, if such "conversation" was reasonably likely to elicit an incriminating response from appellant. It is clear that the conversation did not "relat[e] to the routine incidents of the custodial relationship." (*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 10445.) It "served no legitimate purpose incident to [appellant]'s arrest or custody." (*People v. Sims*, *supra*, 5 Cal.4th at p. 443.) This "conversation" was initiated by the arresting officer, within an hour or two after appellant had invoked his right to have an attorney present during questioning, and without a break in custody. Moreover, this "conversation" focused on a criminal investigation involving appellant's wife and her involvement with another man.

It is ludicrous to characterize discussing appellant's wife, and her involvement with another man and a murder investigation while appellant was incarcerated, as mere "conversation."[85] Unquestionably, such a topic is likely to induce an emotional response, e.g., anger, sadness, humiliation – not the usual purpose of simple "conversation." "It is almost axiomatic in

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[85] Defense counsel put it this way: "I was taught early on in my life that the fastest way to get a rise out of another person is to start making reference to their wife. Well, that's exactly what was going on here." (RT 2654.)

criminal investigation that if a suspect is induced to talk at all, he is likely to hurt his case." (*United States v. Brown* (9th Cir. 1984) 720 F.2d 1059, 1068 (*Brown*). As was recognized in *Brown*, where a suspect is induced to talk by police action which provokes an emotional response by the suspect, the likelihood of a reckless, and inculpatory (as that term is defined in *Innis*) response is increased.

In *Brown*, *supra*, a police officer engaged the defendant in a verbal confrontation while the defendant was detained for investigation of a hit-and-run violation. The officer intentionally baited the defendant with provocative statements and questions, and the exchange became heated, with the defendant making various incriminating statements. (720 F.2d at pp. 1063-1064, 1068-1069.) As the Ninth Circuit stated, in holding that this constituted interrogation,

> The trial court found that [the officer] *did* intend to get a response from [the defendant]. [The officer] said so in plain words. He believed, reasonably, that in the prevailing circumstances, provocative statements would prompt reckless responses. After the initial verbal attack did have the expected result, [the officer] repeated it to make certain that the response was confirmed. The prohibition, as clearly stated in *Miranda* and *Innis*, applies without distinction whether the words intended to be elicited are or are not incriminating. If truly exculpatory, of course, they would not on their face be useful to the prosecution. If the prosecution can use them as part of its case, then by definition that use is probably adverse to the defendant. It is almost axiomatic in criminal investigation that if a suspect is induced to talk at all, he is likely to hurt his case. Here [the officer] baited [the defendant] to obtain an incriminating response and [the defendant] took the bait.

(720 F.2d at p. 1068.) The Ninth Circuit held that the fact that this exchange did not take place in "coercive" custody, nor was it the product of formal, high-pressure police interrogation did not exempt it from the

proscriptions of *Miranda* and *Innis*. Instead, the court determined that

> [the officer's] words constituted custodial interrogation or its functional equivalent, and in either case were impermissible. After first asking an express question–"you got any dope?"-- he taunted Jackson with being a "pimp and doper," and then twice charged "you're the one who sells dope to little black children." It seems to us reasonably beyond argument that the conduct was designed and reasonably likely to evoke response in kind, damaging, in this instance, and quickly recorded by [the officer] for later use. . . .The responses were not an uninvited volunteer, as in *Innis*. It was not the random turn of fortune's wheel that netted the policeman his prize, but a calculated ploy. We hold rather that the conduct could reasonably be expected to elicit, as it did, incriminating responses from the subject in custody. That evidence therefore should have been excluded under *Miranda* and *Innis*.

(*Id.* at p. 1069.)

Detective Christian was not as overtly aggressive or hostile as the officer in *United States v. Brown*. Nor did he forthrightly admit his intent to provoke appellant into making reckless and incriminating responses. Yet the "conversation" which Detective Christian initiated was similarly "reasonably likely" to provoke reckless responses helpful to the prosecution. More subtly than the officer in *United States v. Brown*, but just as surely, Detective Christian baited appellant and appellant took the bait.

This was not, contrary to the trial court's statement, "remarkably like" *Innis*. (RT 2659.) In *Innis*, the conversation was between two officers, not directed at the defendant, as it was in this case. (446 U.S. at pp. 294-295.) Moreover, in *Innis*, the trial court found that it was "'entirely understandable that [the officers] would voice concern [for the sake of the handicapped children] to each other.'" (*Id.* at p. 303, fn.9.)

Whether or not the investigation of Tom Rutledge and his

involvement with appellant's wife appeared to Detective Christian on its face to be unrelated to the events in cell F-8 that morning is not dispositive of the issue at hand. The involvement of appellant's wife with another man on the outside, while appellant was incarcerated, is a subject which any reasonable person would have, and Detective Christian should have, known was reasonably likely to provoke a reckless response by appellant, and subvert his ability to rationally and intelligently consider his responses to Christian. (See *In re Albert R.* (1980) 112 Cal.App.3d 783, 792-793 [officer's "chitchat" while transporting minor to jail, after minor chose to remain silent, was reasonably likely to evoke incriminating response]; cf. *People v. Honeycutt* (1977) 20 Cal.3d 150, 160-161 [waiver of *Miranda* rights obtained "from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation" held involuntary]; *Brewer v. Williams* (1977) 430 U.S. 387 [no waiver of right to counsel after "Christian burial speech" from police officer transporting defendant to face charges].)

In fact, as in *United States v. Brown*, *supra*, it did induce such a response. Appellant's initial response to Christian's "conversation" was that he knew about the incident and "was going to take care of Tom Rutledge for getting her involved in that incident." (RT 2363.) Appellant went further and made comments which were more clearly threatening to Rutledge, saying that if Rutledge was put in the jail with him, Christian wouldn't have to worry any more about the murders for which he was investigating Rutledge. (RT 2363-2364.)

Despite this rather straightforward expression of appellant's negative feelings towards Rutledge, and with the knowledge that the subject matter did elicit an inculpatory response by appellant vis-a-vis his threat to harm

Rutledge, Christian extended the interaction with appellant. At this point, pursuing the subject matter by questioning appellant was clearly not mere "conversation," and Christian should have known that his comments were reasonably likely to undermine appellant's ability to rationally or intelligently consider his responses to Christian, and make it more likely that appellant would unwittingly make some other incriminating statement, i.e., some statement which the prosecution might seek to use at trial against appellant. (*Innis*, *supra*, 446 U.S. at p. 302, fn. 5.)

The subject matter of Detective Christian's other "conversation" with appellant further demonstrates that the conversation was not merely "small talk." The only "conversation" at the hospital which Detective Christian could recall, other than that about Rutledge's involvement with appellant's wife, was Detectives Christian and Burke making fun of appellant's tattoo. (RT 2649-2650.) Clearly, this "conversation" was not friendly or intended to make appellant comfortable, or even to maintain a neutral or non-coercive atmosphere. Rather, it appears to have been more like the baiting of the defendant in *United States v. Brown*, *supra* – essentially hostile, and intended to provoke an ill-considered incriminatory response which could be used in prosecuting appellant.

As stated above, an "incriminating response" in this context is not limited to a confession or direct admission of culpability for the Andrews homicide. Rather it is "any response . . . that the *prosecution* may seek to introduce at trial." (*Innis*, *supra*, 446 U.S. at p. 301, fn. 5.) While Christian may not have been expecting this interaction to elicit appellant's confession to the homicide of Andrews, his "conversation" with appellant became increasingly likely to produce a response which the prosecution could seek to introduce at trial. A discussion of a suspect's enemies

immediately after the arrest of that suspect for murder under the circumstances present in this case, must have been understood by Christian as reasonably likely to elicit information the prosecution could use, e.g., to suggest a motive for the killing, as it did in this case.

Assuming arguendo that Detective Christian had no basis to believe that discussing appellant's wife's involvement with another man and with a homicide investigation might make it reasonably likely that appellant would make some remark which the prosecution might be able to use in prosecuting him in this case, once appellant, in response to Christian's question about Rutledge, asked about the victim in this case[86], Christian immediately should have known that there was a connection between his "conversation" and this case. Whether he had intended to discover such a connection or not, it had arisen, and he was on notice that he had, by his "conversation" elicited a response from appellant which made it reasonably likely that any further "discussion" along these lines could elicit an incriminating response. He thus had an obligation to terminate the discussion at that point or re-admonish appellant per *Miranda* and seek a waiver of appellant's rights to remain silent and to the presence of an

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[86] Appellant asked Christian the name of the subject, "the guy who went to sleep." Christian assumed that appellant meant Andrews, and responded with that name. Given that Christian's "conversation" involved investigation of a different homicide, his assumption that appellant meant Andrews undercuts his contention that he had no idea the subject of his "conversation" had anything to do with his investigation of the Andrews homicide. (RT 2625.) In any case, it demonstrates that Detective Christian recognized that the conversation had a connection to the case against appellant, yet he extended the conversation by giving Andrews' name, but without repeating any warnings to appellant as required by *Miranda* and *Innis*.

attorney. (*Oregon v. Bradshaw*, *supra*, 462 U.S. at 1044; *People v. Sims*, *supra*, 5 Cal.4th at p. 441.) Yet Detective Christian again extended the discussion by stating Andrews' name. Only at that point – after initiation of the conversation by Detective Christian, including questions directed to appellant, on a subject likely to provoke a reckless response, and extended by Detective Christian after it was abundantly clear that the subject had raised some connection to this case for appellant – did appellant make the statement that Andrews was a friend of Rutledge.

That an officer's response to a developing "conversation" can turn even a "routine incident of the custodial relationship" into a prohibited interrogation is exemplified in *United States v. Montgomery*, *supra*, 714 F.2d 201, relied upon by this Court in *People v. Sims*, *supra*, 5 Cal.4th at pp. 442-443. In *Montgomery*, the accused had refused to waive his *Miranda* rights until he had spoken with an attorney. While being fingerprinted, he asked about the charges against him, involving possession of illegal firearms. After asking an ATF agent if all the guns fired, the agent responded, "Yes. Why do you want to know?" The accused indicated that a sawed-off shotgun had been in pieces. The agent indicated it only took a minute to put it together, and the State police test fired the gun and it worked. The agent then asked "Did you have any problems with it?" The accused responded that he couldn't get it to work. (*Id.* at p. 202.) The First Circuit held that, although the accused initiated the conversation, his inquiry was solely concerning the charges against him, and that no incriminating statement was made until the agent "extended the conversation with express questions of his own." (*Ibid.*) The court therefore held that it amounted to custodial interrogation. (*Ibid.*)

Prior to appellant's statement that Andrews was a friend of Rutledge,

whom appellant had said was his enemy, none of appellant's responses to Detective Christian would have been admissible or relevant in appellant's trial. The statement that Andrews was a friend of appellant's enemy supplied the incriminating motive for the instant crime, since, just as the enemy of one's enemy is one's friend, the corollary is that the friend of one's enemy is one's enemy. That statement was only made after Detective Christian extended the discussion, which he, not appellant, had initiated, and after a connection to this case was presented, which connection Detective recognized before extending the interaction. As in *U.S. v. Montgomery*, *supra*, this amounted to custodial interrogation. As in *Montgomery*, Detective Christian did not at any time during this interaction remind appellant of his *Miranda* rights, nor obtain an explicit waiver of those rights. (RT 2644-2645.) Nor, as in *Montgomery*, was there any evidence "that would support a finding of a 'knowing and intelligent' abandonment of the position taken so clearly so recently." (*Id.* at p. 204.)

Moreover, Detective Christian apparently attempted to solicit additional responses from appellant. In his report, he commented that after appellant made the statement about Andrews, "Ronnie would say no more regarding the incident." (RT 2364.) This strongly suggests that Detective Christian attempted to get appellant to say more, and is inconsistent with Detective Christian's testimony that this was mere "conversation." Instead, it was part of an attempt to elicit statements from appellant which the prosecution could use against him at trial.

This is not a situation, such as in *People v. Mickey* (1991) 54 Cal.3d 612, where a suspect initiated a conversation with an officer, became emotional, and made various inculpatory statements while the officer "was passive, saying and doing nothing." (54 Cal.3d at p. 645.) Rather, in this

case, Detective Christian initiated the conversation and the provocative subject matter, interjected questions, and extended the discussion when the subject of the instant homicide arose. As argued by defense counsel to the trial court, Detective Christian's activities constituted a successful, and unlawful, interrogation.

The fundamental facts of what occurred prior to this "conversation" are undisputed. The prosecution conceded that the statements by appellant were "a product of a statement by the detective." (RT 2657.) The ultimate conclusion reached by the trial court, that this was not interrogation, was dependent upon the application of an erroneous legal standard, as shown above. The only "findings" were that (1) Detective Christian had a reason for taking appellant to Valley Medical Center, and (2) that appellant's wife and her involvement with another man and a homicide investigation was something Detective Christian had "in common" with appellant. (RT 2659-2660.) Neither of these findings, even if they were entitled to any deference from this Court, provided any substantial basis for determining that this was not an interrogation within the meaning of *Innis*. The trial court's limited focus on Detective Christian's "reasons" for prolonging contact with appellant, and discussing appellant's wife with another man, was erroneous, for the intent of the police does not govern the determination of the matter. Rather, the question is whether Detective Christian *should have known* that his initiation of the conversation about appellant's wife's involvement with another man, his interjection of questions, and his extension of the conversation when the subject of Andrews came up, was reasonably likely to elicit or provoke a response which the prosecution might seek to introduce at trial against appellant. (*Innis*, *supra*, 446 U.S. at pp. 301-302.) That Detective Christian should have known that such a response was

reasonably likely cannot reasonably be disputed in this case. Whether reviewed independently or for clear error, the trial court's conclusion that Detective Christian's conduct did not constitute interrogation was erroneous. The statements should have been suppressed as having been obtained in violation of *Miranda*. (*People v. Sims*, *supra*, 5 Cal.4th at pp. 441-444; *United States v. Brown*, *supra*, 720 F.2d at pp. 1068-1069: *United States v. Montgomery*, *supra*, 714 F.2d 201.)

D. Prejudice

Erroneous admission of a defendant's statements in violation of the *Miranda* requirements is reversible error unless it is harmless beyond a reasonable doubt. (*People v. Sims*, *supra*, 5 Cal.4th at p. 447; *Chapman*, *supra*, 386 U.S. at p. 24.) The erroneous admission of these statements cannot be held harmless beyond a reasonable doubt. (*Chapman*, *supra.*, 386 U.S. at p. 24.)

The prosecution argued that these statements constituted evidence of the motive for an otherwise seemingly inexplicable crime. (RT 2975-2977.) The presence of motive also supported an inference that appellant, rather than Bond, Benjamin or Nelson had killed Andrews. The prosecution further used the statements to promote speculation by the jury that appellant's wife, Patricia, was the subject of the conversation between appellant and Andrews before appellant first began hitting Andrews (RT 2976), in an attempt to buttress the reliability of the testimony of Bond and Benjamin. Moreover, the statements also introduced the prejudicial implied threat to Rutledge which was separately inadmissible and irrelevant to the charged crimes in the absence of appellant's statement apparently connecting Andrews to Rutledge. Under either the *Chapman* or *Watson* standard, whether considered alone or in conjunction with the other errors

in this case (see, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622), the erroneous admission of this evidence was undoubtedly prejudicial.

Given the closeness of the case, as set out above (see Argument II, *ante*), it cannot be established that the jury's verdicts were surely not attributable to these erroneously admitted statements. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman*, *supra*., 386 U.S. at p. 24.) Therefore, the guilt judgment, and, a fortiori, the penalty judgment must be reversed. Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneous admission of this evidence (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

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IV.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL BASED UPON NELSON'S STATEMENT THAT APPELLANT HAD BOASTED ABOUT KILLING HIS BROTHER

Prosecution witness Brad Nelson, another inmate housed in F-pod of the Fresno County Jail on the night of the homicide, testified in violation of an explicit court order that appellant had bragged about having killed his own brother. The failure of the trial court to grant the defense motion for mistrial which followed that testimony resulted in a trial which violated appellant's rights to due process of law and to a fair and reliable adjudication at all stages of a death penalty case. (U.S. Const., Amend. 5, 6, 8, 14; Cal. Const. Art. 1, sec. 1, 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 67; *In re Winship* (1970) 397 U.S. 358, 364; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *McKinney v. Rees* (9th Cir. 1993) 993 F.3d 1378.)

Outside the presence of the jury prior to testifying, Brad Nelson was admonished by the trial court, "Do not volunteer or answer a question that would relate any of your knowledge about Ronnie Dale Dement being involved in a prior murder." (RT 2075.[87]) Nevertheless, during his direct testimony concerning an encounter with appellant after Nelson had gone into cell F-8 the morning of April 9, the following exchange took place:

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[87] The prosecutor, joined by defense counsel, requested the admonishment "to avoid the subject matters that we discussed with respect to Mr. Martinez." (RT 2074.) Albert Martinez had been admonished similarly prior to his testimony. (RT 1680-1681.) At that time, the prosecutor indicated the issue had been discussed pretrial, and the request for the admonishment was on behalf of both the prosecution and the defense. (RT 1677-1679.)

> MR. OPPLIGER: Q. Did -- during this course of events where you felt you were being threatened, did Mr. Dement take -- was he doing anything physically?
>
> [NELSON]: A. Well, he was kind of jumping around a little bit and stuff, and, you know, he was – he told me that – you know, he'd bragged before about killing his brother and stuff – oop[88] – and anyway he said that -- he said that it didn't mean anything for him to take a human life.

(RT 2095.)

Defense counsel asked for a conference outside the presence of the jury, and requested a mistrial due to the prejudice inherent in Nelson's statement. (RT 2096, 2098-2099, 2102.) The prosecutor argued that the court should defer ruling on the mistrial motion in that admission of the "kites" (see Arg. V, *post*), which had not yet been litigated at that time, would make Nelson's testimony relevant. (RT 2097-2098.) Defense counsel responded that the portion of the kites purportedly referring to the prior killing were not necessarily going to be admissible, and that ruling should be made on the motion on the basis of the record as it stands. Defense counsel argued that to leave this prejudicial evidence in while deferring ruling might "condition" the trial court in a way which would lead to favorable rulings for the prosecution as to the later evidence. (RT 2098-2100, 2103-2104.) The trial court deferred ruling on the mistrial motion pending decision on the admissibility of the "kites." (RT 2101, 2104.)

Before the trial court finally ruled on the motion for mistrial, defense counsel submitted a written motion requesting a mistrial. (CT 488-491.) In that motion, defense counsel cited *People v. Allen* (1978) 77 Cal.App.3d

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[88] Nelson was seen to put his hand up over his face at the time of his mention of appellant's "bragging." (RT 2096-2097.)

924, *People v. Ozuna* (1963) 213 Cal.App.2d 338, and *People v. Figueiredo* (1955) 130 Cal.App.2d 498 as demonstrating that the prejudice from the improper revelation of a prior uncharged crime cannot be reliably dissolved by an admonition to the jury to ignore it where the case is closely balanced, as in this case.

After the trial court ruled that the kites were admissible, at the end of the prosecution's case-in chief (RT 2796-2797), there was further argument on the motion for mistrial. Defense counsel argued that Nelson's statement that appellant had bragged about killing his brother was extremely prejudicial, and had now been in evidence for almost two weeks, and had "grown tentacles and taproots, and we can't just strike it. . . ." (RT 2843.) Defense counsel argued that if the mistrial were denied, some type of instruction was necessary. (*Ibid.*) The trial court denied the mistrial, indicating regret that it had not taken appropriate action at the time Nelson made the statements. (RT 3845.) The court further stated:

> I agree however that this kind of evidence, sometimes the decision making is a little easier for them. I don't think it's so much of a disposition but if the evidence of guilt is there, I agree with you, that it may make it a little easier for them and that's an influence. I agree with that. [¶] *In view of the other evidence they have on that subject, I believe that a fair trial may still be had.* I don't think -- I believe that's the only issue. And I will do my utmost to give a fuller explanation, and an informal one if you want on that very subject and I think we need to call attention to that so they know how to deal with it. Not to hope it goes away all together.

(RT 2845-2846 (emphasis added).) The jury was eventually instructed on this matter as follows:

> Referring to striking of testimony, the witness Brad Nelson testified that the defendant had bragged about committing a crime other than the crime for which defendant is on trial in the current case. Mr. Nelson's testimony on a separate crime is hereby stricken and you

> are hereby instructed to disregard such testimony. Do not allow Mr. Nelson's testimony on an uncharged alleged crime to enter into your deliberations. Mr. Dement's guilt or innocence must be determined without regard to any alleged prior conduct.

(RT 3110.) The issue was again raised in appellant's motion for new trial (CT 866-867), which was denied by the trial court. (RT 9/26/94, at p. 11.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Wharton* (1991) 53 Cal.3d 522, 566 [quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.]) Denial of a motion for mistrial is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

"The term ['judicial discretion['] implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.' [Citation.]" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Here, the trial court failed to properly exercise its discretion in ruling on appellant's motion for mistrial for several reasons. While acknowledging that the testimony was prejudicial, and that it should have been taken care of at the time it came before the jury, the trial court discounted the prejudice due to a misperception or misunderstanding of "the other evidence they have on that subject . . . ." (RT 2846.) Nor did the trial court adequately consider the effect of its delay in telling the jury not to consider this testimony.

As was argued by defense counsel to the trial court, Nelson's testimony that appellant bragged about having killed his brother was far

more prejudicial than simply referring to a defendant as an ex-convict (see *People v. Ozuna*, *supra*, 213 Cal.App.2d 338), or stating that he had done time at San Quentin. (See *People v. Figueiredo*, *supra*, 130 Cal.App.2d 498.) It was compounded by Nelson's reaction – saying, "oops" and putting his hand to his mouth – indicating to the jury that this information was intended to be concealed from them.

"[E]vidence of other crimes always involves the risk of serious prejudice. . . ." (*People* v. *Griffin* (1967) 66 Cal.2d 459, 466; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; cf. *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified if it is exposed, even inadvertently, to the fact that the defendant was previously convicted in a related case].)

Where there is no separate relevance of an uncharged crime, such as motive, identity, or common scheme or plan, evidence of uncharged crimes is inadmissible due to the undue risk that it will serve, unfairly, and unconstitutionally, as evidence of criminal propensity. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1384 [inadmissible "other acts" evidence deprived defendant of fair trial and amounted to denial of due process; *People v. Guizar* (1986) 180 Cal.App.3d 487,491-402 [prejudicial error requiring reversal where transcript of taped statement of witness containing reference to defendant having "committed some murders before" submitted to jury, where no evidence of such offense presented]; *United States v. Bradley* (9th Cir. 1993) 5 F.3d 1317, 1322 [evidence of prior homicide with minimal probative value not harmless error where it became focus of later stages of trial, including prosecution argument]; *United States v. Brown* (9th Cir. 1989) 880 F.2d 1012, 1016 [evidence of prior offenses involving firearms not relevant to motive held not harmless in murder trial where prosecution relied on those acts in argument to jury.])

As defense counsel argued to the trial court,

> in a case like this, that any type of testimony regarding our client's having committed some other type of killing or killing his brother, that the jury, in spite of what you tell them, tell them not to do, that you can't consider that as evidence of predisposition, that a jury just inescapably is going to use that type of evidence as predisposition to commit the offense for which the person is now on trial.

(RT 2844.)

Whether Nelson intentionally attempted to bias the jury by his disclosure, or simply made a mistake, does not affect the prejudice arising from his testimony. The disclosure that appellant had bragged about killing his brother could serve no purpose in this case other than to suggest to the jury a criminal, even homicidal, propensity.

Even an immediate admonition to the jury to disregard Nelson's disclosure would have been futile, given the substantial prejudicial effect of such information. (*People v. Roof*, *supra*, 216 Cal.App.2d 222.) In *Roof*, as soon as a testifying police officer improperly revealed that the defendant in a trial on grand theft charges had previously been charged with contributing to the delinquency of a minor, the trial court said, "All right, we can forget about that. Let us proceed." The Court of Appeal stated:

> The court very properly did not wait for a motion to strike the officer's statement and a request for an admonition to the jury. The more that is made of such incidents the more the harm that is likely to result. . . . If the testimony of Officer Frank had not cut so deep the court's casual treatment of it would probably have been just as effective as a more forceful admonition, but the harm had been done and could not have been undone.

(216 Cal.App.2d at 226.) Here, the harm was done, and was further compounded by the jury's consideration of the evidence, including all the

witnesses presented by the defense, for almost three weeks[89] before the trial court instructed the jury not to consider Nelson's disclosure. That the jury's consideration of the evidence was inevitably colored by that prejudicial information served to ensure that the harm could not be undone short of granting a mistrial.

The time lag between Nelson's improper testimony and the instruction striking the testimony compounded the substantial prejudice arising from that testimony. As was stated regarding the improper revelation that the defendant was an ex-convict in *People v. Ozuna*, *supra*, "It is self-deceptive to assume that the jurors could put out of their minds defendant's statement. 'Ex-convict' is a hateful word and the jurors would have read it in defendant's features as he sat before them as clearly as if it had been written there. The human mind is not so constructed as to permit a registered fact to be unregistered at will." (213 Cal.App.2d at p. 342; see also *People v. Roof*, *supra*, 216 Cal.App.2d at 225-226 ["It is, of course, well recognized that facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court. Among the facts which are generally considered to be incapable of obliteration from the minds of the jurors by the court's direction is the fact that the accused has been previously charged with or convicted of a crime."].) Similarly, during the three weeks between Nelson's testimony

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[89] Nelson testified on June 23, 1994, the 16th day of trial. (CT 482-484.) The trial court denied the mistrial motion on July 12, the 21st day of trial. (CT 500-503.) The trial court's admonishment to the jury, that Nelson's testimony on an uncharged alleged crime was stricken and to disregard it, was given at the time it instructed the jury immediately before deliberations, on July 15, the 24th day of trial. (CT 508-509; RT 3110.)

and the admonishment, the jury heard and considered further evidence being presented in the belief that Nelson's testimony was properly before them. As defense counsel argued to the trial court, the inadmissible and prejudicial testimony had "grown tentacles and taproots, and we can't just strike it...." (RT 2843.) The trial court's admonition served only to call further attention to Nelson's testimony, and was not reasonably likely to be dispelled by the instruction given to the jury. (See *United States v. Bradley*, *supra*, 5 F.3d 1317, 1322.).

Nor was the evidence of the "kites" and the purported admissions of appellant contained therein sufficient to ameliorate the prejudicial effect of Nelson's testimony. The trial court, in denying the mistrial, relied upon the fact that the kites introduced evidence of appellant's prior conviction for killing his brother – "In view of the other evidence they have on that subject, I believe that a fair trial may still be had." (RT 2846.) In fact, there was no such "other evidence they have on that subject." As shown in Argument V, *post*, the admission into evidence of the kites was error. Moreover, assuming arguendo this Court disagrees with appellant's claims of error regarding the admission of kites, the sections of the kites which were admitted into evidence as Exhibits 35 and 36 do not mention a prior killing by appellant. Rather they only mention that appellant was serving a sentence for some unspecified offense against his brother. There was no evidence before the jury that appellant had killed his brother other than Nelson's testimony.

The instruction to the jury to disregard Nelson's testimony was rendered utterly ineffective by the prosecutor's argument concerning the admissions contained in the kites procured by Ybarra. Rather than a fleeting reference by one witness who was an alternate suspect with a

possible motive to lie, by the time the jury heard the instruction, the jury had heard from the prosecutor repeated references to appellant having murdered his brother. In his argument to the jury, the prosecutor made the following statements in reference to the kites: "The only reason that you can tell that it is a confession to the second murder is by considering it with respect to the first one" (RT 2997); "So if you didn't know we were dealing with the subject matter of murder, 'I'm doing 29 to life for the first one,' you wouldn't know what we were talking about. 'Dude had it coming, both of them.'" (*Ibid.*); "Now again, we're talking about the two murders." (*Id.* at 2998.)

In fact, Nelson only referred to appellant having killed his brother. He made no mention of murder. Even assuming that the kites did refer to appellant having killed his brother, they made no mention of murder. Thus, rather than lessening any prejudice from Nelson's stricken testimony, the prosecutor's argument enhanced the prejudice by his unsupported characterization of the killing as murder,[90] and equating it to the homicide in this case.

Consequently, appellant was not only prejudiced by the inherent prejudice of Nelson's statement that appellant had bragged about killing his brother, but the prosecution's repeated emphasis of the prior killing as a

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[90] The prosecution relied heavily upon the kites in argument to the jury, characterizing them as a confession, based upon the erroneous characterization of the kites as stating that appellant had murdered his brother. (See Argument V, *post*, pp. 183-190.) Once Nelson's testimony was stricken, however, there was no evidentiary support for that argument. Despite the instruction striking the testimony, the prosecution not only kept it in the jury's mind but emphasized it, albeit by erroneously attributing it to the kites. (See *United States v. Brown*, *supra*, 880 F.2d at p. 1016.)

murder not only maintained the inflammatory and prejudicial effect of Nelson's testimony fresh in the jurors' minds, but enhanced that effect. In the face of that argument, the instruction striking the evidence and admonishing the jury to disregard the evidence was not reasonably likely to have any success dispelling the prejudicial effect from the juror's minds or preventing it from affecting the consideration of the evidence in this case. (See *United States v. Brown*, *supra*, 880 F.2d at p. 1016.) The trial court acknowledged the prejudicial effect - making it "easier" for the jury to convict (RT 2845) - but thought, erroneously, that Nelson's testimony was not the sole source of the jury's knowledge of the killing of appellant's brother. Any small chance that the jury might have been somehow able to "unring the bell" from Nelson's testimony was eliminated by the prosecution's argument.

Nelson's testimony, taken by itself, introduced prejudicial considerations into the jury's consideration of the evidence until just before its deliberations. Thus, the testimony necessarily affected the juror's view of the evidence as it was presented. No instruction could counter that effect, nor did the trial court's instruction do so here. The resulting distortion of the fact-finding process deprived appellant of due process and a fair trial by this jury and deprived him of a reliable determination of both guilt and penalty. (U.S. Const., Amends. V, VIII, XIV; Cal. Const., art. 1 §§ 7, 15, 17.) Nothing short of a mistrial, especially after the delay in giving the jury any admonition about the evidence, would have adequately protected appellant's rights to a fair trial and reliable verdict.

Nelson's testimony that appellant had bragged about killing his brother, compounded by the delay in the admonishment to the jury not to consider that testimony, violated appellant'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*, 397 U.S. 358, 364 (1970).) The stricken testimony, which the jury was allowed to consider for three weeks before being given a futile admonishment to ignore it, lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (*See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 520-524 (1979).) Moreover, for the reasons stated above, this testimony so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation]; *see also McKinney v. Rees*, *supra*, 993 F.2d at p. 1384.)

Nelson's disclosure also deprived appellant 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* (1980) 447 U.S. 625, 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, *abrogated on other grounds*, *Atkins v. Virginia* (2002) 536 U.S. 304.) Nothing short of a mistrial would have been adequate to protect those rights in this case. The trial court erred in denying the motion for mistrial.

Under either the *Chapman* or *Watson* standard, the effect of Nelson's testimony on the jury's guilt verdicts was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally

unfair.].)

As shown above (see Arg. II, *ante*), the jury saw the case as close. Moreover, the prosecution's case that it was appellant who killed Andrews and tied the towel around Andrews' neck was not strong, relying as it did upon the testimony (or alleged prior statements) from jailhouse informants of dubious credibility, and upon the self-serving testimony of Bond and Benjamin, who also implicated each other in the attack on Andrews, who, according to the evidence were as likely to have killed Andrews as appellant was, and whose stories became more self-serving over time while simultaneously becoming increasingly adverse to appellant.

No physical evidence pointed more strongly to appellant as the killer than to Bond or Benjamin or Nelson. On the other hand, physical evidence was presented which did not comport with the testimony of Bond and Benjamin. In their testimony, they could not explain the towel tied around Andrews' neck. In fact, from the testimony of Bond and Benjamin, it appears that appellant was the least likely to have tied the towel around Andrews' neck, for appellant was never in the cell after the doors were opened, yet, at the time appellant exited the cell, the towel was not tied around Andrews' neck.

In the face of such equivocal evidence as to the identity of the killer, the disclosure by Nelson was reasonably likely to have made it "easier" for the jury to convict appellant. The jury was improperly given the information that appellant had killed his brother, which not only provided inadmissible and prejudicial evidence of criminal, even homicidal propensity, but also unwarranted character evidence suggesting an even more heartless killing than the homicide of Andrews involved. That evidence necessarily distorted the jury's consideration, whether consciously

or not, of the evidence it continued to receive before the instruction to disregard Nelson's testimony was given. The instruction had no reasonable likelihood of curing the prejudicial effect, especially when countered by the prosecution's argument about the prior killing, which characterized it as murder. A mistrial was the only effective remedy, but the trial court denied it due to a misunderstanding of the evidence.

Considered alone or combined with the prosecution's use of the stricken evidence to bolster the (limited, even non-existent) probative value of the kites, it is reasonably likely that in the absence of the prejudice introduced into this trial by Nelson's testimony, even with the admonishment given by the trial court, a result more favorable to appellant at the guilt trial would have resulted. Reversal is therefore required even under the *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.) Since the prejudicial nature of this evidence, and the argument it spawned, deprived appellant of his right to a fair trial and a reliable determination of guilt, the error must be assessed under the *Chapman* standard. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; U.S. Const. Amend. 6, 8, 14.) Respondent cannot demonstrate that Nelson's testimony was harmless.

Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to prejudicial effect of Nelson's testimony that appellant bragged about killing his brother (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const.. Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Accordingly, appellant's conviction and judgment of death must be reversed.

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V.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF WRITTEN STATEMENTS BY APPELLANT OBTAINED BY THE PROSECUTION IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS

The trial court committed reversible and prejudicial error by admitting evidence of written statements by appellant obtained by the prosecution through violations of appellant's Sixth Amendment right to counsel. (*Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*); *United States v. Henry* (1980) 447 U.S. 264 (*Henry*); U.S. Const., Amend. 6, 14; Cal. Const. Art. 1, sec. 1, 7, 15.) Admission of the written statements was also state law error. (Evid. Code §§ 210, 350, 351, 352, 1101.) In argument to the jury, the prosecution heavily relied upon the written statements as a "confession" to the murder of the victim. (RT 2997-2999, 3089-3090, 3100-3101.) Moreover, the prosecutor argued in penalty phase that the statements were evidence supporting a verdict of death. (RT 3749-3750.) Thus, the admission and use of this evidence also denied appellant due process, a fair trial and a reliable adjudication at all stages of a death penalty case. (U.S. Const., Amend. 5, 6, 8, 14; Cal. Const. Art. 1, sec. 1, 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 67; *In re Winship* (1970) 397 U.S. 358, 364; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *McKinney v. Rees* (9th Cir. 1993) 993 F.3d 1378.) As a result, both guilt and penalty judgments must be reversed.

A. Introduction

The prosecution sought to introduce a purported "confession" by appellant contained in handwritten notes ("kites") solicited and obtained by Trinidad Ybarra, an inmate in the Fresno County jail. Ybarra was housed two cells from appellant while appellant was awaiting trial in this case, and

initiated communication with appellant through an exchange of kites. Ybarra testified that he had initiated the exchange of kites with the intention of gaining information from appellant concerning gang activity, which he intended to turn over to California Department of Corrections (CDC) gang investigators in order to continue a program of "debriefing" which he had begun during his previous prison stay, and to obtain less onerous housing during his expected next stay in prison. Ybarra felt he could elicit a confession to the charged murder from appellant in the same manner. He arranged to meet with Detective Christian, who was investigating the Andrews homicide, and informed him of his activities in relation to appellant. Detective Christian told Ybarra that if he obtained information about the homicide, to contact him, and a deal might be worked out. Thereafter, Ybarra continued to seek a confession from appellant, and obtained what he considered to be a confession. Ybarra received from the prosecution a favorable deal on his own pending charges in exchange for the written messages he had elicited from appellant both before and after meeting with Detective Christian. Portions of those kites, including a portion obtained after meeting with Detective Christian, were admitted in evidence, and characterized by the prosecution in argument to the jury as "confessions."

As set forth below, the evidence demonstrates that Ybarra was acting as an agent of the state in his interrogations of appellant, rendering the statements obtained thereby inadmissible under *Massiah* and *Henry*. Further, the portions of the kites upon which the prosecution relied had little or no probative value, but were substantially prejudicial and inflammatory, amounting to inadmissible evidence of criminal propensity. The admission into evidence of the kites, and the argument by the prosecution which that evidence spawned requires reversal of the judgment.

B. Proceedings below

1. Trinidad Ybarra's Testimony

Trinidad Ybarra testified outside the presence of the jury that he began the CDC debriefing process[91] in 1990 or 1991, while serving a prison term at Corcoran State Prison. (RT 2282-2283.) He was told that to debrief he should obtain information about gang members and provide it to CDC. (RT 2298.) He was told that he was to continue to provide such information to CDC for as long as he lived. (RT 2298.) He started the written process of debriefing, by writing out what he knew of the gang he was in, while housed in the Security Housing Unit ("SHU") in Corcoran State Prison. He then submitted the information to the CDC institutional gang coordinator at Corcoran. (RT 2286-2287.) Ybarra was told he had to provide more up-to-date names of people in the gang. (RT 2344.) The gang coordinator instructed Ybarra to infiltrate, undercover, the members of gangs in his section of the prison. Ybarra was unable to do so because another gang member revealed to the other inmates that Ybarra was trying to debrief. (RT 2288-2289.) However, Ybarra continued to write what he knew of the gang, and submitted it to CDC. (RT 2290.) He was paroled from Corcoran to Fresno in February, 1991. (RT 2294.) While on parole, he discussed his debriefing with his parole officer and the gang coordinator for the Fresno

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[91] "Debriefing" is the process by which CDC, in exchange for information about an inmate's gang activities and the gang to which the inmate belonged, removes the inmate's prison classification as an active gang member and provides improvement in prison housing and protection from gang retaliation against the inmate. (RT 2607-2610.) A primary motivation for gang members who choose to debrief is to avoid being housed at Pelican Bay State Prison, where restrictions and isolation are considerably harsher for prisoners classified by CDC as gang members than housing which is available to prisoners not classified as gang members. (RT 2613, 2618, 2621-2623.)

parole office, Mike Castro. (RT 2294-2295.)

Ybarra was again arrested in January, 1993 for possession for sales of methamphetamine and battery on a police officer. (RT 2296, 2332.) He was then housed in Fresno County jail, in "administrative segregation" due to his gang affiliation, in a cell two cells from that in which appellant was housed. (RT 2297, 2346-2347.) The day after he was arrested, he began writing "kites" to appellant, in an attempt to "interrogate" him, to obtain information which he could provide to CDC as part of debriefing. (RT 2299-2300, 2338-2339, 2344, 2346, 2348.) He was "looking out for my protection of [sic] when I got to Wasco." (RT 2345.) Once he knew appellant was charged with murder, Ybarra got the idea of working on getting appellant to confess, knowing that he could get a deal on his case from the District Attorney. (RT 2348.)

At some point either before or after jail guards "shook down" the tier on which Ybarra and appellant were housed, Ybarra contacted law enforcement about the kites. (RT 2300-2301, 2341.) During the shake down, the guards found the kites, and at Ybarra's request, gave the original kites back to Ybarra to allow him to debrief. (RT 2300-2301.) When Ybarra contacted law enforcement about providing information about the Andrews homicide, Detective Christian met with him. (RT 2301-2302, 2341.) Ybarra told Christian that he could obtain information from appellant about the homicide, and asked for a deal. (RT 2302-2304, 2340-2342.) He didn't turn over any of the kites at that time. (RT 2302.) Ybarra had obtained only a few of the kites he eventually turned over to Detective Christian at that time. (RT 2302, 2326-2330.) Christian told Ybarra that he couldn't tell Ybarra to obtain information from appellant about the homicide, but that if he did obtain information, to write a request to see Christian and turn the information in. It would then be shown to the district

attorney, and a deal could possibly be worked out on Ybarra's case. (RT 2302-2303, 2341.) Thereafter, Ybarra kept writing to appellant, "trying in a roundabout way for him to confess to me that he did the murder." (RT 2303, 2309, 2313.) Ybarra was hoping he could get a confession so that he could make a deal and get out, or lower his charges. (RT 2304.)

At the time he first met with Christian, he did not have any kite which he thought amounted to a confession. (RT 2304.) After he talked to Christian, he obtained a kite that he thought was some type of confession. (RT 2305.)

Ybarra met with Christian twice before meeting with the District Attorney in this case, Mr. Oppliger. At the second meeting with Christian, Ybarra turned over the kites that he had from appellant. Christian said he would turn them over to the District Attorney, but there was no guarantee he was going to get back to Ybarra. (RT 2314.) People's Exhibit 32 contains photocopies[92] of the kites he turned over to Christian at that time. (RT 2280-2281, 2314.) Ybarra identified pages 1, 2, 4, 9, 10 and 15 of Exhibit 32 as kites that he received before meeting with Christian the first time. The other pages he either received after meeting with Christian or he wasn't sure. (RT 2326-2330.) He thought page 3 of Exhibit 32 was one he received after meeting with Christian the first time. (RT 2327.) He never turned over any more kites to Christian, and stopped writing kites to appellant. (RT 2315.)

At some point, Christian met with Ybarra and his lawyer and said the prosecution was willing to enter into some type of deal with him. (RT 2315.) It was eventually agreed that in exchange for his testimony, Ybarra, who was facing a sentence to state prison, would get a "paper commitment"

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[92] The original kites were lost by the Fresno County Sheriff's Department. The defense objection to the use of photocopies in place of the originals was overruled after hearing. (RT 2750.)

to prison, and signed an agreement with the prosecution to that effect, and was released from custody on April 14, 1994. (RT 2316-2319, 2321-2323, 2331-2335; Defendant's Exhibit H.) Ybarra's intent, should he ever be arrested again, was to continue to pursue the debriefing process. (RT 2325, 2335.)

2. Mike Castro's Testimony

Mike Castro, the gang institutional coordinator for the Fresno parole unit of the California Department of Corrections (CDC) (RT 2606-2607), testified out of the presence of the jury that the debriefing process which the CDC conducts requires an inmate who wishes to dissociate him- or herself from a prison gang or street gang to provide information about their experiences and membership in the gang. The information is given verbally, to an institution's gang coordinator, then in a written history documenting the inmate's involvement. (RT 2607-2608.) The information is reviewed and evaluated, and the inmate is sometimes given a polygraph test. If the information is adequate, CDC will consider the inmate unaffiliated. If it is inadequate, CDC continues to assign active gang status to the inmate. (RT 2608.)

Assignment of gang status versus unaffiliated status carries with it substantial effects upon the inmate's prison classification and housing, as well as the level of supervision on parole. (RT 2608-2609.) An inmate to whom CDC has assigned gang status will be housed in maximum-security, Level 4 institutions such as Pelican Bay, where, for prison gang members, restrictions are significantly harsher, and the inmates are substantially isolated, with very little movement outside their cells. Inmates, as a rule, don't want to be housed at Pelican Bay, and avoiding it is generally the main motivation for debriefing. (RT 2613, 2618, 2621-2623.) CDC will provide an inmate who successfully debriefs protection from retaliation by the gang,

in protective custody, with the possibility of being assigned to the mainline prison population after some time has passed. (RT 2609-2610.)

Castro had met with Ybarra once while he was on parole, before he was arrested on the charges which resulted in his incarceration two cells from appellant in Fresno County jail. (RT 2610-2611.) The purpose of the meeting, which was at Ybarra's request, was to conduct the first step of the debriefing process. Ybarra provided Castro with a photocopy of the written history he had previously submitted in debriefing while in state prison. (RT 2612.) Castro indicated that the information Ybarra provided was a good history, but a lot of it was old information, and Castro questioned why Ybarra wasn't providing any new information. (RT 2612, 2619-2620.) Castro advised Ybarra that, "in the event he went back into custody, into the Department of Corrections, that he should contact an institutional investigator and make it known to him that he wanted to provide specific and additional information" about gang activity. (RT 2614, 2620.)

3. Detective Brad Christian's Testimony

Detective Brad Christian testified outside the presence of the jury that Ybarra arranged to meet with him on or about April 1, 1993. At that time, Ybarra informed Christian that he and appellant had been writing to each other on almost a daily basis, and that he had obtained "a bunch of letters" from appellant, and asked if anything could be done about his present charges if he turned them over to Christian. (RT 2159-2161.) Christian told him that would be up to the District Attorney, and that Christian could make him no promises. (RT 2160.) Christian claimed he had told Ybarra not to ask appellant anything specific about this case. (RT 2161-2162.) He also told Ybarra to retain anything he received from appellant. (RT 2160.) Ybarra did not bring any of the alleged "kites" which he claimed to have solicited from appellant to the meeting with Christian, nor did he then turn

over to Christian any "kites," wanting his attorney to first explore a deal with the prosecution in exchange for turning them over. (RT 2162.) Christian did not write a report or keep any notes documenting his first meeting with Ybarra. (RT 2165.)

Detective Christian discussed the matter with Ybarra's attorney about a week later, and on April 21, 1993, met with Ybarra and his attorney, at which time Ybarra turned over "kites" which he had elicited from appellant since meeting with Christian on or about April 1, as well as those he claimed to have already obtained at the time of that April 1 meeting. (RT 2163-2168.)

4. Argument in Trial Court

a. *Massiah/Henry*

In the trial court, the prosecution conceded that "the statements are a product of interrogation in terms of the second prong of *Massiah*, that the person asked questions with the purpose in mind." (RT 2741.) Instead, the prosecution relied solely upon the argument that Ybarra was not an agent of the government in interrogating appellant, that the process of debriefing did not transform Ybarra into a government agent (RT 2741-2744), and that he interrogated appellant "for his own benefit ... acting out of a personal purpose." (RT 2733.)

Defense counsel argued that the debriefing process, in which Ybarra was directed by CDC to act as an undercover informant, clearly established a lifelong responsibility in Ybarra's mind. This was reinforced by CDC gang coordinators who, Ybarra testified, told him that the information Ybarra was giving in his attempt to debrief was insufficient, "that I would have to give up-to-date names." (RT 2661.) Ybarra's initial motivation in interrogating appellant was to aid in that debriefing process, but he then determined that if he could get appellant to confess to murder in this case, "I pretty much knew

that I'd get a deal from the DA." (RT 2661.)

Defense counsel argued that Ybarra was acting as an agent of law enforcement pursuant to the debriefing process, which promised him more desirable treatment in state prison by CDC. (RT 2662.) Citing *Henry*, *supra*, defense counsel argued that a *Massiah* violation did not require that either CDC or Detective Christian encouraged Ybarra to conduct this interrogation. (RT 2664.) Defense counsel noted the parallel between the federal agent in *Henry*, whose advice to the informant that "I can't tell you to initiate conversations" was found not to insulate the informant's activity from Sixth Amendment concerns, and Detective Christian's advice to Ybarra that he couldn't tell Ybarra to obtain information from appellant about the homicide, but that if he did obtain information, to write a request to see Christian and turn the information in. (RT 2665-2666.)

In denying appellant's *Massiah/Henry* objection, the trial court ruled that CDC's debriefing process did not compromise appellant's right to counsel. Nor was Ybarra "encouraged" by Christian according to the trial court. "So, it appears to the Court that the claim of compromise of right to counsel because of government activity does not apply and the objection for the receipt of the letters or communications are denied as of that -- for that basis." (RT 2749-2750.)

b. Evidence Code §§ 210, 350, 351, 352 and 1101

After the trial court denied the defense motion to exclude the kites pursuant to *Massiah*, the prosecution indicated that it wished to introduce only two portions of the kites, one from page 3[93] of Exhibit 32 and one from

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[93] "I'm doing 29 to life for the 1st one Dude was my brother but was on the other side of fence. On this other trip hey shit happens Homme the shit ain't over but I'll say this. Dude had (continued...)

page 4[94] of that exhibit, as a confession. (RT 2752-2753; see CT 436.) The prosecution argued that the passage from page 3 of Exhibit 32, referred to having killed his brother in the statement "I'm doing 29 to life for the 1st one Dude was my brother, but was on the other side of the fence." (RT 2793.) That "this other trip" referred to the Andrews homicide was shown by the subsequent statement that "Dude had it coming both of them." The prosecution argued that the first sentence was necessary to explain that the passage was referring to the two homicides, and admitting that appellant had committed the Andrews homicide. (*Ibid.*)

The prosecution further argued that with the understanding that the passage from page 3 of Exhibit 32 referred to appellant having killed his brother, the passage from page 4 of Exhibit 32 is understood also to be talking about his brother ("On my carnal. he [sic] was an AB runner."), and Andrews ("The vato here was a gava."). From that interpretation, the prosecution argued that the final sentence of the passage from page 4 of Exhibit 32, "Ain't no thing brother before its over I'll tag a few more, got to keep these fools in check," is again an admission of appellant having committed the Andrews homicide. (RT 2760-2761, 2767-2768.) Taken together, the prosecution argued, the two passages constituted an

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[93] (...continued)
it coming both of them I feel no different it don't bother me I'm looking at the chair but I don't think they will get me on this trip anyway." (CT 436; Exhibit 32.)

[94] "The vato here was a gava. On my carnal. he [sic] was an A.B. runner. See I'm a half breed myself so there's more to that story than the paper says tu sabes Mikio pulled me down for his trial that why I was here. Ain't no thing brother before its over I'll tag a few more, got to keep these fools in check." (CT 436; Exhibit 32.)

interlocking confession to the homicide of Andrews. (RT2741, 2761, 2763, 2787, 2793.)

The defense then raised additional objections to the admission into evidence of those two passages. The defense objected based upon relevance, a lack of foundation, and Evidence Code section 352 as to the entirety of the two passages as well as to specific portions of them. (RT 2750-2751, 2759, 2789-2790, 2794.) More specifically, the defense objected to the references to the prior crime involving appellant's brother, for which appellant was then serving an indeterminate life sentence. Defense counsel argued that it would be prejudicial to let the jury hear that information, and those statements were not so inextricably entwined with the statements relating to the charges in this trial as to require their admission. (RT 2756.) These references included "I'm doing 29 to life for the 1st one. Dude was my brother but was on the other side of the fence," "both of them," and "on my carnal. he [sic] was an A.B. runner." Defense counsel further argued that the prejudice from allowing the jury to hear the references to the prior homicide could not be cured by a limiting instruction. Defense counsel cited *People v. Ewoldt* (1994) 7 Cal.4th 380 and *People v. Balcom* (1994) 7 Cal.4th 414 as recognizing the extreme prejudice of evidence of uncharged offenses, and requiring that admission of such evidence requires extremely careful analysis. (RT 2763-2764.) Counsel argued that admission of this evidence would lead to its use by the jury as evidence of criminal or homicidal predisposition. (RT 2764-2765.)

Defense counsel also argued that the reference to "this other trip" in the passage from page 3 of Exhibit 32 should be excluded because there was no evidence that it actually referred to the charges in this trial. (RT 2756-2757.)

Defense counsel argued that "It don't bother me. I'm looking at the

chair, but I don't think they will get me this time anyway" was more prejudicial than probative in that it does not reflect on guilt or innocence of the crime, but rather reflects the "attitudes of inmates," "part of the machismo and braggadocio of inmates in jail to put up a good front that it doesn't bother them to do time." This would then require the defense to put on a witness to explain those attitudes. (RT 2757-2758.) Although objecting to the entirety of the two passages sought to be admitted, defense counsel proposed that, if the trial court were to allow anything in, the first passage should be redacted to read, "On this other trip, hey, shit happens, homey [sic]. The shit ain't over but I'll say this, dude had it coming. I feel no different. Don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway." (RT 2758.)

As to the passage from page 4 of Exhibit 32, defense counsel objected to "See, I'm a half-breed myself so there's more to that story than the paper says," and "Mikio pulled me down for his trial. That's why I was here." Defense counsel argued that the former statement requires some context not provided in either of the two passages at issue or otherwise in the evidence, and is therefore irrelevant. Similarly, the latter statement is irrelevant without some explanation not present in either of the passages or otherwise in the evidence. (RT 2759.)

Defense counsel also objected to another portion of the passage from page 4 of Exhibit 32: "Ain't no thing, brother. Before it's over, I'll tag a few more. Got to keep these fools in check at times." Counsel argued that the term "tag" has many meanings, some sinister, some not, and that without context, those statements are irrelevant and prejudicial, and would require expert testimony and undue consumption of time to explain the possible meanings within the prison system. (RT 2759-2761.)

The prosecution acknowledged the prejudice inherent in the

statements, but argued that it was outweighed by the probative value. He argued that the two passages taken together constituted a confession, a roundabout way of saying, "I did it." (RT 2752-2754, 2760-2762, 2766-2768.) He argued that the references to the prior homicide, especially, "I'm doing 29 to life on the first one," were necessary for context, and that understanding of the passage from page 4 of Exhibit 32 was dependent upon knowing that appellant had killed his brother. (RT 2793-2794.)

The prosecution argued that the statements were not offered as Evidence Code section 1101, subdivision (b)[95] evidence, but rather as a confession. (RT 2766, 2787.) He represented to the trial court that the statement about appellant's brother in the passage from page 4 of Exhibit 32, that "On my carnales, he [sic] was an AB runner" was probably not the motive for the prior homicide. (RT 2795-2796.)

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[95] Evidence Code section 1101 states:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence 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.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

The prosecution also suggested that cautionary instructions could prevent any prejudice from these two passages. (RT 2762-2763, 2787.)

The trial court overruled the defense objections, finding that, although the evidence was "very prejudicial," the probative value outweighed the prejudice. The trial court stated as to the passage from page 3 of Exhibit 32,

> I tried to read this without the reference to the brother, and it doesn't make sense. It doesn't show that they were talking about a killing when they were talking about trips and tags. If it does, that point is for the jury to decide whether you have varying interpretations. That makes it a jury issue.

(RT 2796-2797.) As to the passage from page 4 of Exhibit 32 , the trial court indicated that the merely replacing "AB" with "blank" would invite speculation, and that the entire sentence containing "AB" should be left out, although the court would consider further argument about whether to leave the entire sentence in. The trial court also indicated that the second sentence added nothing, and would not be admitted. (RT 2797.)

5. Evidence Presented to the Jury

Two typed, partially redacted excerpts from the kites were admitted as People's Exhibits 35 and 36, and read to the jury. (RT 2816.) People's Exhibit 35 (SCT1 379) is an excerpt from page 3 of People's Exhibit 32. (SCT1 364.)[96] People's Exhibit 36 (SCT1 380) is an excerpt from page 4 of

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[96] Exhibit 35 reads as follows:

> I'm doing 29 to life for the 1st one, dude was my brother but was on the other side of the fence. On this other trip, hey shit happens Homme. [sic] The shit ain't over but I'll say this. Dude had it coming, both of them. I feel no different, it don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway.

People's Exhibit 32. (SCT1 365.)[97] A stipulation as to the circumstances by which the kites were obtained, and some definitions for use in translating some of the language in the kites was also read to the jury.[98] (RT 2813-2816.) A copy of a contract for testimony between Ybarra and the Fresno County District Attorney's Office was also admitted as Defendant's Exhibit K, and read to the jury. (RT 2817-2818.) Ybarra did not testify in front of the jury.

Upon the reading of Exhibits 35, 36 and K to the jury, the trial court read an instruction limiting the use of the evidence of the prior criminal conduct "for the limited purpose of providing context and meaning to the written statement made by the Defendant." (RT 2818-2819.)

Appellant renewed the objections to the admissibility of the "kites" in the Motion for New Trial. (CT 868-870; RT 9/26/94, p.9.) The trial court denied that motion. (RT 9/26/94, p. 10.)

C. Applicable Law

1. *Massiah/Henry*

In *Massiah*, *supra*, the United States Supreme Court held that once a defendant's Sixth Amendment right attaches, that right is violated when state agents "deliberately elicit" incriminating statements from him in the absence

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[97] Exhibit 36 reads as follows:

> The vato here was a gava. On my carnales. he [sic] was a runner. See I'm a half-breed myself so there's more to that story than the paper says, tu sabes. Mikio pulled me down for his trial, that [sic] why I was here. Ain't no thing brother before its over I'll tag a few more, got to keep these fools in check at times.

[98] It was stipulated that as used in the kites, the word "vato" means "dude," "gava" means "white," "carnales" means " brother," "kites" means "jail house letter," and "tu sabes" means "do you understand?" (RT 2816.)

of his counsel. (377 U.S. at p. 206.)

In *Henry*, *supra*, the Supreme Court addressed the issue again. In *Henry*, a federal agent contacted an inmate "who for some time prior to this meeting had been engaged to provide confidential information to the Federal Bureau of Investigation as a paid informant." (447 U.S. at p. 266.) The informant (Nichols) told the agent that he was on the same cellblock as Henry, who had been indicted. (*Ibid.*)

> The agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery. In early December, after Nichols had been released from jail, the agent again contacted Nichols, who reported that he and Henry had engaged in conversation and that Henry had told him about the robbery of the Janaf bank. [fn. omitted] Nichols was paid for furnishing the information.

(*Ibid*, see also p. 268.)

The Supreme Court described three factors as important. "First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third. Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." (*Id.* at p. 270.)

The government argued that because the agent had instructed Nichols not to question Henry about the charges, the matter was distinguishable from *Massiah*. The Supreme Court rejected that distinction. "[A]ccording to his own testimony, Nichols was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.' " (*Id.* at p. 271.)

"By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." (*Id.* at p. 274.)

In *Maine v. Moulton* (1985) 474 U.S. 159 (*Moulton*), the Supreme Court reiterated the prosecution's "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (474 U.S. at p. 171.) The Court held that, after initiation of formal charges, the Sixth Amendment right to counsel imposes upon the State an "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." (*Id.* at p. 176.) "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." (*Ibid.*) "As in *Henry,* the fact that the police were 'fortunate enough to have an undercover informant already in close proximity to the accused' does not excuse their conduct under these circumstances. 447 U.S., at 272, n. 10, 100 S.Ct., at 2187, n. 10." (*Id.* at p. 177.)

In *Kuhlmann v. Wilson* (1986) 477 U.S. 436, the Supreme Court again addressed the constitutional limits on police use of undercover informants after a defendant's Sixth Amendment right to counsel had attached. The Court distinguished an informant actively involved in eliciting incriminating statements, which is clearly prohibited, from one who acted as a mere "listening post."

> [T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. ... [T]he defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

(*Id.* at p. 459.) However, "proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the

absence of counsel suffices to establish a Sixth Amendment violation. (*Maine v. Moulton*, *supra*, 474 U.S. at p. 176, fn. 12.)

2. Evidence Code sections 210, 350, 351 and 352

"No evidence is admissible except relevant evidence." (Evid. Code §350.) "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code §351.) Evidence is relevant 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.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Under Evidence Code §352, evidence should be excluded if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has little effect on the actual issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588; overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative 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 of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]" (*People v. Smallwood* (1986) 42 Cal.3d 415, 428 [228 Cal.Rptr. 913, 722 P.2d 197]; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109 [246 Cal.Rptr. 245, 753 P.2d 37].) "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318 [165 Cal.Rptr. 289, 611 P.2d 883], italics in original, fn. omitted.)

(*People v. Ewoldt*, *supra*, 7 Cal.4th 380, 404.)

Where there is no separate relevance of an uncharged crime, such as motive, identity, or common scheme or plan, evidence of uncharged crimes is inadmissible due to the undue risk that it will serve, unfairly, and unconstitutionally, as evidence of criminal propensity. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1384 [inadmissible "other acts" evidence deprived defendant of fair trial and amounted to denial of due process; *People v. Guizar* (1986) 180 Cal.App.3d 487,491-402 [prejudicial error requiring reversal where transcript of taped statement of witness containing reference to defendant having "committed some murders before" submitted to jury, where no evidence of such offense presented]; *U.S. v. Bradley* (9th Cir. 1993) 5 F.3d 1317, 1322 [evidence of prior homicide with minimal probative value not harmless error where it became focus of later stages of trial, including prosecution argument]; *U.S. v. Brown* (9th Cir. 1989) 880 F.2d 1012, 1016 [evidence of prior offenses involving firearms not relevant to motive held not harmless in murder trial where prosecution relied on those acts in argument to jury.])

Trial court rulings on the admission or exclusion of evidence under §352 are reviewed for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 973.) "The term [']judicial discretion[']implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.' [Citation.]" (*In re Cortez*, *supra*, 6 Cal.3d at pp. 85-86.)

D. Argument

1. The "Kites" and the Admissions Contained Therein Were Obtained in Violation of Appellant's Right to Counsel.

a. Ybarra Was a State Agent by Virtue of His Lifelong Commitment to the CDC Debriefing Process.

The statements in the kites, admitted into evidence as Exhibits 35 and 36, were obtained through unconstitutional circumvention of appellant's right to counsel as guaranteed by the Sixth Amendment, and require reversal of the entire judgment in this case.

There was no dispute that, at the time of Ybarra's interrogation of appellant, appellant was in custody, and his Sixth Amendment right to counsel had attached. (*Henry*, *supra*, 447 U.S. at p. 270.) Similarly, there was no dispute but that Ybarra was ostensibly no more than a fellow inmate of appellant. (*Ibid.*) The prosecution conceded that the statements were the product of interrogation of appellant by Ybarra. (RT 2741.) The prosecution's primary argument was that Ybarra was not an agent of the prosecution during the interrogation he conducted, and that he interrogated appellant for his own benefit . . . acting out of a personal purpose. (RT 2733.) Of course, in each of the *Massiah/Henry* cases, the informant had a personal interest and expected benefit from their actions on behalf of the government. More relevant is the government's involvement in the expectation of benefit and personal interest.

The evidence establishes that, at the time he initiated communication with appellant, Ybarra was intent upon obtaining information from appellant which Ybarra could later turn over to CDC gang coordinators. It is also clear that he was doing so because of CDC's debriefing process, and the instructions he had received from the gang coordinators. CDC had directed

him to act as an undercover informer while in Corcoran State Prison, and prior to and after his release on parole from Corcoran, had directed him to obtain and provide "specific and additional information" about gang activities if he found himself facing a new prison term. Ybarra testified that he understood his responsibilities to provide such information to be lifelong.

While the State, through CDC, may have a legitimate interest in tasking prison inmates and parolees to obtain and report information about gangs for use in general law enforcement and prison security, any information so obtained from an inmate concerning pending charges may not be used in the prosecution of those charges. Nothing in *Massiah*, *Henry*, or any of the cases following them has held that there is anything wrong with such use of undercover informants, where legitimate law enforcement and prison security concerns are well served by such intelligence gathering. However, while such a process may be well suited to a prison setting, where convictions are generally final, different concerns are applicable to the pretrial detention setting where the Sixth Amendment right to counsel has attached regarding pending criminal charges. CDC is free to set informers in both settings, but where statements are obtained in a manner which implicates Sixth Amendment rights, the Supreme Court has specified that those statements cannot be used by the government against the defendant.

> The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime. [fn. omitted.] In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of

> evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, *incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.*

(*Moulton, supra*, 474 U.S. at p. 179-180 [emphasis added]; see also *Massiah, supra*, 377 U.S. at p. 207.)

The prosecution cited *People v. Dominick* (1986) 182 Cal.App.3d 1174 (*Dominick*), as supporting their contention that Ybarra was not an agent of law enforcement while interrogating appellant. In *Dominick*, the informer at issue had been a "reliable informant concerning street narcotic activity." (*Id.* at p. 1198.) When he was incarcerated, about a month before Dominick was incarcerated, the informer had discussions with a District Attorney Investigator in which the informer mentioned possibly getting a deal on his charges if he turned up any useful information while in jail. The investigator had no connection with Dominick's case. No specific target of interest was mentioned, and the investigator merely told the informer to keep in touch. (*Ibid.*) After Dominick made statements to the informer, the informer wrote them down in code and offered the information to the investigator in return for payment. He was paid and received 30 days off of his sentence in exchange for his testimony. (*Id.* at p. 1199.) The Court of Appeal held that there was no evidence in the record that the informer "was

acting on instructions from law enforcement officials to 'deliberately elicit' incriminating information from Dominick or from any other county jail inmate. Dominick's confession appears to have been spontaneous and voluntary." (*Ibid.*)

In contrast, Ybarra had a specific agreement with CDC to receive compensation by way of less onerous prison housing in return for new information about gang activities. Rather than serving as a mere "listening post" as the informer in *Dominick* had, Ybarra specifically began a program to elicit information from appellant, first relating to gang activity, and later to elicit incriminating information about appellant's pending charges. While the *Dominick* informer did not consult further with any law enforcement until he had obtained incriminatory information, Ybarra consulted Detective Christian, and told him of his focus on appellant. Detective Christian then told Ybarra to retain whatever he got from appellant.

These facts demonstrate a much more direct relationship between law enforcement and Ybarra's activities in the Fresno County Jail than in *Dominick*. Not only was Ybarra interrogating appellant pursuant to his debriefing assignment from CDC, but the homicide investigator in this case gave his imprimatur to Ybarra's scheme before Ybarra had obtained anything that he considered as amounting to a confession, in the hope that Ybarra would obtain incriminating information or statements by appellant. Ybarra was acting for the benefit of, and encouraged by, law enforcement, in eliciting the statements from appellant and was acting, therefore, as an agent of law enforcement in circumvention of appellant's right to counsel.

b. Assuming Arguendo That Ybarra's Process of Debriefing for CDC Did Not Make Him an Agent for Law Enforcement for Purposes of *Massiah/Henry* at the Time of His Initial Interrogations of Appellant, the Proscriptions of *Massiah*, *Henry*, and Their Progeny Render Inadmissible the Results of Ybarra's Interrogations of Appellant *after* Ybarra's First Meeting with Detective Christian

Aside from the CDC debriefing process, Detective Christian's "knowing exploitation ... of an opportunity to confront the accused without counsel being present" (*Moulton*, *supra*, 474 U.S. at p. 176) was in clear breach of the proscriptions of *Massiah*, *Henry* and their progeny.

While Detective Christian told Ybarra that he couldn't make any promises regarding a deal in exchange for any statements Ybarra obtained, Christian did tell Ybarra to retain anything he received from appellant.

> Direct proof of the State's knowledge will seldom be available to the accused. However, as *Henry* makes clear, proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation. [citation omitted].

(*Moulton*, *supra*, 474 U.S. at p. 176, fn. 12.)

Detective Christian knew that appellant was target of Ybarra's interrogation, knew that appellant's Sixth Amendment rights had attached, and "must have known" that Ybarra would continue to elicit potentially incriminatory statements from appellant. With that knowledge, Christian sought to reap the benefits with a wink and a nod, telling Ybarra that he could not tell him to obtain information about this case, but also instructing Ybarra to retain any statements he obtained from appellant.

The prosecution below sought to distinguish its activities from *Massiah* because Detective Christian claimed that he had instructed Ybarra not to ask appellant anything specific about this case. The trial court

apparently agreed: "And it was clear that this was not encouraged by Officer Christian." (RT 2750.) However, as in *Henry* and *Moulton*, this argument is without merit. "[U]nder the circumstances of this case, the instructions given . . . were necessarily inadequate. The Sixth Amendment protects the right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present. This right was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him." (*Moulton*, *supra*, 474 U.S. at p. 177, fn. 14; see also *Henry*, *supra*, 447 U.S. at pp. 271-272.)

It is noteworthy that Christian did not tell Ybarra to stop writing to appellant. In *United States v. Geitmann* (10th Cir. 1984) 733 F.2d 1419, the court held that even where law enforcement asked that the informant stop tape recording discussions with the defendant, that request did not insulate law enforcement's involvement in the denial of counsel where the informant continued the recordings. (733 F.2d at 1427.) Of course, Detective Christian did not ask Ybarra to stop writing to appellant. (RT 2162.) Instead, he told Ybarra to retain anything he received from appellant. (RT 2160.)

Nor does Christian's claim that he told Ybarra that he couldn't promise a deal absolve this circumvention of appellant's Sixth Amendment rights. In *Randolph v. People of the State of California* (2004 9th Cir.) 380 F. 3d 1133, a case coincidentally involving the actions of the prosecutor in appellant's case, the Ninth Circuit stated,

> For purposes of our holding, we accept as true the State's contention that Moore was told not to expect a deal in exchange for his testimony. However, *Henry* makes clear that it is not the government's intent or overt acts that are important; rather, it is the "likely ... result" of the government's acts. *Henry*, 447 U.S. at 271,

> 100 S.Ct. 2183. It is clear that Moore hoped to receive leniency and that, acting on that hope, he cooperated with the State. Oppliger and Chavez either knew or should have known that Moore hoped that he would be given leniency if he provided useful testimony against Randolph. (Indeed, that is precisely what happened. After providing useful testimony against Randolph, Moore received a sentence of probation instead of a prison term.)

(380 F. 3d at p. 1144.)

In *In re Wilson* (1992) 3 Cal.4th 945, this Court found an agency formed for *Massiah/Henry* purposes from contact between an inmate informer and the police from facts similar to those in this case. In *Wilson,* the defendant initiated contact with another inmate, Loar, who had been used as an inmate informant by the Los Angeles County District Attorney's Office in other cases, unbeknownst to Wilson. Loar then contacted the District Attorney's Office and arranged for a phone call between Wilson and an undercover District Attorney investigator posing as a "hit man." During that and subsequent phone calls, Wilson made incriminating statements, which were recorded and presented to the jury. (*In re Wilson*, *supra*, 3 Cal.4th at p. 948; *People v. Wilson* (1992) 3 Cal.4th 926, 933-934.) This Court held that prior to contacting the district attorney's office, Loar was not acting as a government agent. (3 Cal.4th at p. 952.) However, any testimony by either Loar or the district attorney investigator concerning statements made by Wilson after Loar's contact with the District Attorney's office, were rendered inadmissible by *Massiah* and its progeny. (*Id.* at pp. 952-953.)

According to Ybarra's testimony, page 3 of Exhibit 32, from which Exhibit 35 was excerpted, was received from appellant after Ybarra's meeting with Detective Christian. (RT 2326-2330, 2327; 2813-2818.) Ybarra testified that at the time he first met with Christian, he did not have anything from appellant which he considered a confession, but that he did receive one after meeting with Christian. (RT 2304-2305.)

In the prosecution's arguments in support of admission of these two passages, the prosecution argued that Exhibit 36 was almost entirely dependent for meaning upon the fact that appellant had killed his brother, which is not mentioned in Exhibit 36, but only in Exhibit 35. "If you read that without that knowledge, it doesn't mean a lot." (RT 2794.)

Therefore, even if Ybarra's debriefing didn't make him an agent for purposes of *Massiah*, that would not render Exhibits 35 and 36 admissible. Exhibit 35 was obtained in violation of Appellant's Sixth Amendment rights after Ybarra met with Detective Christian, and should have been excluded. Since Exhibit 36 depends upon Exhibit 35 for any arguable probative value. Both exhibits should therefore have been excluded from evidence.

2. The Statements Contained in Exhibits 35 and 36 Were More Prejudicial than Probative, Contained Irrelevant and Prejudicial Evidence, and Should Have Been Excluded from Evidence or Further Redacted to Prevent Undue Prejudice to Appellant

> Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]" (*People v. Smallwood* (1986) 42 Cal.3d 415, 428 [228 Cal.Rptr. 913, 722 P.2d 197]; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109 [246 Cal.Rptr. 245, 753 P.2d 37].) "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318 [165 Cal.Rptr. 289, 611 P.2d 883], italics in original, fn. omitted.)

(*People v. Ewoldt, supra*, 7 Cal.4th 380, 404.)[99]

Assuming arguendo that neither Exhibit 35 or 36 should have been excluded as a violation of *Massiah*, still the prejudicial nature of otherwise

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[99] The prejudicial effect of evidence of prior uncharged crimes is discussed more fully in Argument IV, *ante*. Rather than repeat the argument and authorities presented there, appellant incorporates them herein.

inadmissible information contained in those Exhibits so outweighed the probative value of the purported admissions as to require either complete exclusion of the statements or redaction of those inadmissible and prejudicial portions.

a. Exhibit 35

The trial court's analysis of the probative value of the passage from page 3 of Exhibit 32, reflected in Exhibit 35,[100] was founded on two fundamental errors, which skewed the court's balancing of probative value versus the substantially prejudicial effect of the statement.

First, the trial court concluded that without the reference to the brother, that passage "doesn't show that they were talking about a killing when they were talking about trips and tags." (RT 2796.) This conclusion rests on an assumption that is not borne out by the actual language of the statement, i.e., that the mention of appellant's brother constitutes a reference to a homicide.

In fact, the statement only says that appellant is serving 29 years to life for an unspecified crime concerning the brother. While the trial court and counsel may have known that crime was a homicide, the statement does not say that. Nor was there any independent evidence of that homicide before the jury. The only explicit indication that appellant had killed his brother which was actually presented to the jury was through Brad Nelson's improper disclosure thereof (RT 2095), which was itself the subject of an unsuccessful defense motion for mistrial. (RT 2096; see Arg. IV, *ante*.) However, that evidence was stricken by the trial court (RT 2929; CT 643) and was thus unavailable to support any inference that appellant was serving 29 years to life for killing his brother.

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[100] See fns. 93, 96, *ante*.

Therefore, without any evidence before the jury that appellant had killed his brother, or that his sentence of 29 to life was for murder of his brother, the reference to appellant's brother in the passage from page 3 of Exhibit 32 does not "show that they were talking about a killing when they were talking about trips and tags." Yet this was the purpose for which the trial court ruled it was admissible. The trial court's balancing of the prejudicial value of the reference to an uncharged crime was based upon a misreading or misperception of the actual probative value of the reference. As such, the analysis conducted by the trial court was fundamentally flawed, and constituted an abuse of discretion.

Moreover, the trial court's view, that "without reference to the brother . . . it doesn't make sense" (RT 2796), is simply incorrect. The redaction proposed by defense counsel makes as much sense, and would have had as much probative value as Exhibit 35, but without the prejudicial mention of prior criminal conduct. Defense counsel proposed, if the trial court were not to exclude the entirety of the statement, that it be redacted to read: "On this other trip, hey, shit happens, homme [sic]. The shit ain't over but I'll say this, dude had it coming. I feel no different. Don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway." (RT 2758.)

Clearly, without any reference to appellant's brother or prison sentence, the proposed redaction includes sufficient information to relate it to the charges appellant faced at this trial – "I'm looking at the chair. . . ." Nothing more was needed to show that the statement referred to the charge in this trial. Nothing in the reference to appellant's brother or appellant's prison sentence accentuated or clarified that further. Instead, the reference to appellant's brother and the prison sentence constituted a highly prejudicial, but effectively irrelevant reference to other uncharged crimes by

appellant. Given the weakness of the prosecution evidence identifying which of four different people actually killed Andrews, relying as it did on the testimony of jailhouse witnesses of dubious credibility, the prejudicial effect of the references to the uncharged crime was reasonably likely to tip the balance in the jury's deliberations to the prejudice of appellant.

Since the trial court's analysis of the comparative probative values of the statement with and without the reference to appellant's brother was simply wrong, and cannot be justified as reasonable, the admission of Exhibit 35 without redaction of the reference to uncharged crimes was an abuse of discretion, and cannot be sustained.

Moreover, review of the statement in this light leads to the conclusion that the entire passage, whether redacted or not, had little legitimate probative value as an admission, let alone a confession, as the prosecution regularly characterized it. The only remotely inculpatory phrase in the passage from page 3 of Exhibit 32 is actually, "dude had it coming, both of them." Nothing relating to the appellant's brother or the uncharged crime referred to made that phrase more or less inculpatory. Nothing in appellant's statement that "I'm looking at the chair but I don't think they will get me on this trip anyway" makes that phrase more or less inculpatory. As defense counsel argued to the trial court, "it does not reflect on guilt or innocence of the crime." (RT 2757.) While standing alone, the phrase "dude had it coming, both of them," might be inculpatory if appellant's guilt is assumed, it is equally consistent with innocence, if appellant's innocence is presumed.

The real effect of the statement as it was read to the jury, and as argued to the jury by the prosecution, was a prejudicial and inflammatory one. The statement invoked an uncharged crime against appellant's brother, which the prosecution proclaimed to be a murder, despite any evidentiary support provided to the jury. The statement also focused on language which

could be read as a lack of remorse – "dude had it coming, both of them" – and introducing ambiguous evidence that invited speculation as to motive for both crimes. Yet the statement failed to establish any real likelihood that it was an admission of *any* culpability for the Andrews homicide by appellant.

Given the substantial prejudicial effect of this evidence, compared to the minimal, almost non-existent, probative value, the trial court's denial of appellant's objection pursuant to Evidence Code section 352 was an abuse of discretion.

b. Exhibit 36

The bulk of the statement from page 4 of Exhibit 32, reflected in Exhibit 36,[101] is essentially irrelevant and without probative value in this case. It appears to be a series of non-sequiturs, at least when analyzed in light of the actual evidence in this case. The reference to "On my carnales. he [sic] was a runner" adds nothing probative, and only serves to confuse issues. The statements regarding appellant's ancestry, some unknown reference in "the paper,"[102] and why appellant was housed in Fresno County Jail similarly add nothing relevant or probative.

The passage from page 4 of Exhibit 32 addresses numerous apparently unrelated subjects, and only by selectively changing the actual context does any inference related to the Andrews homicide or appellant's guilt arise. However, the inferences sought by the prosecution either don't explain the rest of the actual context or invite speculation about its meaning. The entire statement is therefore irrelevant.

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[101] See fns. [[[4, [[[7, *ante*.

[102] It cannot be determined from either Exhibit 32 or Exhibit 36 whether this was a reference to a newspaper, or some other paper about which appellant and Ybarra had some knowledge.

The only portions of the passage from page 4 of Exhibit 32 of any potential relevance to this case are, "The vato here was a gava," and "Ain't no thing, brother, before its over I'll tag a few more, got to keep these fools in check at times." Yet any argument for relevance of those portions fails upon review of the language used, and the insubstantiality of the inferences the prosecution sought to have the trial court and the jury make.

The prosecution argued to the trial court that "vato" referred to Andrews. However, that interpretation was based only on the speculative inference from the two subsequent phrases – "on my carnales, he [sic] was a runner" – which the prosecution interpreted as referring to appellant's brother. That interpretation is in turn based solely on a superficial parallel to the contents of the passage from page 3 of Exhibit 32, i.e., because the latter passage mentioned appellant's brother as well as this case, the reference to "my carnales" in the passage from page 4 of Exhibit 32 must also refer to the same brother and to this case. Such an inference, however, is no more than speculation.

If "On my carnales." did not refer to appellant's brother, or referred to a different brother than referred to in the passage from page 3 of Exhibit 32,[103] then any basis for inferring that "the vato" refers to Andrews disappears. In fact, the language of the passage from page 4 of Exhibit 32 does not support the conclusion that "On my carnales." refers to the same person that is referenced in the passage from page 3 of Exhibit 32.

In understanding the passage from page 4 of Exhibit 32, review of the

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[103] During the penalty phase, Dr. Terrell testified that appellant's other brother, Larry, who was still alive, was a member of the Aryan Brotherhood – the "AB." (RT 3422.) Dr. Terrell was not aware of David, whom appellant was convicted of killing, being a member of a gang. (RT 3449.)

punctuation of the original kite[104] is necessary.[105] In the original, there may be a comma between "gava" and "on" rather than a period, as in Exhibit 36. In any case, in both the original and Exhibit 36, there is a period between "carnal[es]"[106] and "he." The meaning of the kite, taking into account that punctuation, is different from the meaning pressed by the prosecution: "The vato here was a gava, on my carnal. he was an AB runner." It is more likely that the "AB runner" refers to the "vato" who "was a gava." By the prosecution's reasoning, if the AB runner isn't appellant's brother, but instead is "the vato," then there is no basis for a conclusion that "the vato" refers to Andrews, or that this kite refers to this case at all.

As the prosecution argued to the trial court,

> My second point would be that letter two is very dependent on knowing that the Defendant killed his brother. "The vato here was a gava, my brother." The second letter almost in its entirety is dependent for meaning on the fact that the Defendant killed his brother. It doesn't really say that in the second letter where it does in the first. So, the second letter is giving its greatest and most logical meaning, at least the interpretation of the evidence which the People wish to draw, by knowing and only by knowing that the Defendant had in fact killed his brother. If you read that without that knowledge, it doesn't mean a lot.

(RT 2793-2794.) Therefore, according to the prosecution's own view of the probative value of these kites, if the passage from page 4 of Exhibit 32 in fact does not refer to appellant's brother, but merely to the "vato," it has no

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[104] As shown in the photocopy of the original which was placed into evidence, a copy of which is found at 1 SCT 365.

[105] The punctuation in page 4 of Exhibit 32 does not precisely match the punctuation in Exhibit 36.

[106] In the original, the word used is "carnal." In Exhbit 36 it was changed to "carnales." No explanation for the change was given on the record.

probative value in this case.

Moreover, if the passage from page 3 of Exhibit 32 is understood to make no mention that appellant's prison term of 29 to life resulted from a homicide, then again, as the prosecution argued, the passage from page 4 of Exhibit 32 has no probative value or relevance to this case. Furthermore, if the passage from page 3 of Exhibit 32 should have been excluded as more prejudicial than probative, or having been procured in violation of appellant's right to counsel, the passage from page 4 of Exhibit 32 would have lost any limited probative value it might have had: "it doesn't mean a lot." Even if mention of the prior crime, which the passage from page 3 of Exhibit 32 does not identify as murder, were admissible, it remains mere speculation to infer that the passage from page 4 of Exhibit 32 actually refers to the Andrews homicide or constitutes any admission of guilt of that homicide by appellant.

On the other hand, while the probative value of the evidence was minimal or non-existent, admission of the statements threatened substantial prejudice. The prosecution represented to the trial court that the statements which seemed to suggest motive for the first homicide ("dude was my brother but was on the other side of the fence," "he was an [AB] runner") probably did *not* reflect the true motive for that killing. (RT 2795-2796.) However, the statements as read to the jury raised the risk of confusion of the issues by including vague and confusing language which could be misconstrued as indicating a motive, and perhaps a common motive for both homicides. While the jury was told that Exhibit 36 stated that appellant's brother was "a runner," rather than "an AB runner," still the potential for confusion was evident. The statement that "he was a runner" is meaningless in relation to this case, but invites the jury to speculate on what it might mean. Similarly, "dude was my brother but was on the other side of the

fence," from Exhibit 35, is so vague as to be irrelevant, while inviting speculation about exactly what was meant.

The ambiguity of the reference to "tagging" is given any relevance or probative value in this case only if the rest of the passage from page 4 of Exhibit 32 is given the interpretation the prosecution wanted. Since, as shown above, the rest of the passage from page 4 of Exhibit 32 cannot reasonably be read as the prosecution wants, the primary value of the "tagging" comment was the prejudicial effect the prosecution was able to inject into it by tying that comment to the prejudicial, and otherwise inadmissible, references to an uncharged crime.

The strongest import of these two exhibits as used at appellant's trial was an improper and prejudicial suggestion of criminal or homicidal propensity, and future dangerousness.[107] The trial court erred in assessing the probative value of these kites, and consequently erroneously and unreasonably concluded that the probative value outweighed the substantive prejudice admission of this evidence would entail. The trial thus abused its discretion in admitting the evidence.

C. The Erroneous Admission of Exhibits 35 and 36 Requires Reversal of the Entire Judgment

Because the kites were obtained in violation of appellant's constitutional right to counsel (*Massiah*, *supra*, 377 U.S. 201; *Henry*, *supra*, 447 U.S. 264), admission of Exhibits 35 and 36 must be assessed under the *Chapman* standard, i.e., the judgment must be reversed unless the error is found harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, since the prejudicial nature of this evidence, and the prosecution's argument, deprived appellant of his rights to due

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[107] See Argument IV, *ante*.

process, a fair trial and a reliable determination of both guilt and penalty (see *Estelle v. McGuire*, *supra*, 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation]), the error must be assessed under the *Chapman* standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; U.S. Const. Amend. VI, VIII, XIV.) Moreover, the *Chapman* standard is required because the admission of this evidence also violated the Eighth Amendment. The death penalty's qualitatively different character from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, at p. 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349 [penalty phase].)

The prosecution relied heavily upon the statements in the kites in argument to the jury, reading them in their entirety, repeating individual phrases, characterizing them as a confession, and referring to the crime against appellant's brother as a murder. (RT 2974, 2996-3000, 3089-3090, 3100-3101.) At one point, in reference to the statements, the prosecutor even asked the jury, "How many district attorneys can sit before you and present a confession in the Defendant's own handwriting?" (RT 2997.)

Despite the lack of any admissible evidence of a prior homicide, the prosecutor argued that the statement referred to appellant having murdered his brother, and then proceeded to present his interpretation of the statements in that light. Without question, the prosecution presented these two exhibits as if they authoritatively resolved the question of the identity of Andrew's killer. As set forth above, the prosecution's argument relied primarily upon speculative inferences and the substantial prejudicial effect of otherwise inadmissible evidence contained in the statements. It also apparently relied on the stricken testimony of Nelson that appellant had bragged that he had killed his brother. (See Arg. IV, *ante*.) Without question, the two exhibits

were likely to have had an effect on the jury's deliberations and verdict.

Without Exhibit 35, the jury would not have heard that appellant was serving 29 to life for a crime involving his brother, would not have heard the inflammatory statement of no remorse, "I feel no different, it don't bother me." Without Exhibit 35, the jury would not have heard the misleading and inflammatory suggestion of a motive, "dude was my brother but was on the other side of the fence." Without Exhibit 36, the jury would not have heard the inflammatory, if inherently ambiguous, statement that "I'll tag a few more" or the inscrutable "he was a runner."

Respondent cannot establish that the evidence of the kites as presented to the jury in argument by the prosecution was "did not contribute to the verdict obtained." (*Chapman v. California*, supra, 386 U.S. at p. 24.) The evidence that appellant had killed Andrews was far from clear cut. As the trial court stated, assessing the state of the evidence just before ruling the kites admissible,

> [the s]tatus of this case is this, that one of three men could have performed this killing. One of four men could have performed this killing, at least the final touches of it, according to the evidence. [¶]And those who have testified are at least suspect in their testimony. They have been impeached from wall to wall on a variety of subjects. They could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury.[108]

(RT 2796.) Thus, as seen by the trial court, a finding that appellant was the perpetrator of the homicide was far from a foregone conclusion.

Given the closely balanced nature of the evidence in this case, and the length of the jury's deliberations (see Arg. II) the erroneous admission of

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[108] Defense counsel withdrew their request for accomplice instructions (RT 2943-2945), so the jury was not instructed that Bond's and Benjamin's testimony had to be corroborated.

this evidence, and the prosecution's use of it in argument, was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair.].) The evidence arising from the kites, as presented to the jury, is "the sort of evidence likely to have a strong impact on the minds of the jurors." *McKinney v. Rees* (9th Cir. 1993 993 F.2d 1378, 1386.) Especially combined with the prosecution's heavy reliance upon the kites and improper reliance upon them as establishing that appellant had murdered his brother, the erroneous admission of this evidence so infected the trial with unfairness as to constitute a due process violation, denying appellant a fair trial and a reliable determination of guilt, as well as penalty. (*Ibid.*)

Furthermore, to the extent that the admission into evidence of this evidence violated only state law, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the State arbitrarily withholding a nonconstitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 1, 7, 15, 16; *Woodson v. North Carolina*, *supra*, 428 U.S. 280; *Gardner* v. *Florida*, *supra,* 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. at pp. 88- 89; see *Hicks v. Oklahoma, supra,* 447 U.S. 343.) Even if the error is found only under California law, it is reasonably probable that a result more favorable to appellant would have occurred had the jury not seen Exhibits 35 and 36, and heard the prosecutorial argument they spawned. Reversal is therefore required even under the *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

Moreover, had the jury not heard the inadmissible evidence, there is a reasonable probability that at least one juror would have decided that death

was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510.) Since appellant's death sentence relies on an unreliable guilt verdict, resting upon evidence obtained in violation of appellant's Sixth Amendment rights and the probative value of which was outweighed by its prejudicial effect, and since the death verdict was not surely unattributable to prejudicial effect of Nelson's testimony that appellant bragged about killing his brother (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Accordingly, the judgment of conviction and sentence of death must be reversed.

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VI.

THE VERDICT OF GUILT AS TO COUNT TWO, FOR A VIOLATION OF PENAL CODE SECTION 288A, AS WELL AS THE SECOND SPECIAL CIRCUMSTANCE, MUST BE VACATED, AND THE JURY FINDING OF FELONY MURDER MUST BE STRICKEN, AS HAVING BEEN BASED UPON AN ACT NOT PROHIBITED BY THAT STATUTE.

A. Introduction

The only evidence presented to establish an oral copulation by a person confined in a local detention facility in violation of section 288a, subdivision (e), necessary to a conviction on Count Two, and to a finding that the Second Special Circumstance (Pen. Code, § 190.2, subd. (a)(17(F)) was true, was that appellant told Andrews to kiss his penis, and that Andrews then did so. This evidence was also the only basis for the jury's unanimous finding that the homicide was a first degree felony murder. (CT 557.)

That evidence was insufficient to establish a violation of section 288a, subdivision (e), in that a kiss, or, as was stated in the instruction given to the jury, "any contact however slight, between the mouth of one person and the sexual organ of another person" (RT 3131; CALJIC No. 10.14) does not constitute oral copulation within the meaning of section 288a. The only rational construction of the language of section 288a is that something more than fleeting contact between the mouth and sexual organ is required to violate that section. Whether that "something more" is defined as penetration, "substantial contact," sexual stimulation or gratification, or some other construction consistent with the ordinary meaning of "copulation," a mere kiss, or fleeting contact, such as shown by the evidence here, is insufficient as a matter of law. While such conduct could be made criminal, section 288a has not done so. As a result, the evidence presented

at trial was insufficient to sustain the jury's verdicts on Count Two and the Second Special Circumstance, as well as the jury's finding of felony murder.

Moreover, the instructions under which the verdicts were reached affirmatively misstated the elements of the crime and special circumstance, unconstitutionally lightening the burden of the prosecution, and depriving appellant of a fair trial, due process of law and a reliable determination of both guilt and penalty. (U.S. Const., Amends. VIII, XIV; Cal. Const., art. I, §§ 7, 15, 17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; *Beck v. Alabama* (1980) 447 U.S. 625, 638; see also *Yates v. Evatt* (1991) 500 US 391; *In re Winship* (1970) 397 U.S. 358.)

B. Relevant Facts

According to Benjamin and Bond, the oral copulation consisted of Andrews kissing the tip of appellant's flaccid penis. (RT 1460, 1520-1522, 2479.) This took place after appellant had beaten Andrews. Appellant told Andrews he would stop beating him if Andrews kissed his penis. Andrews did so. (RT 1457, 1460-1461, 1514-1516, 2386, 2478-2482.) Defense counsel asked Benjamin, "Was this a fleeting thing or was it prolonged? In other words, was it fast or was this a sex act?" Benjamin answered, "It was fast." (RT 1514.) Bond agreed the contact was "fleeting." (RT 2480.) According to Benjamin and Bond, appellant continued his attack on Andrews, and began choking him with a towel, which at some undetermined point, according to the jury's verdict, resulted in Andrews' death.

Prior to trial, appellant challenged the sufficiency of the evidence of oral copulation in a motion pursuant to section 995, relying primarily upon *People v. Angier* (1941) 44 Cal.App. 2d 417. (CT 209-212.) The prosecution opposed the motion. (CT 232.) The motion was denied. (RT 5/12/93; CT 236-237.)

After the prosecution's case-in-chief, appellant made a motion

pursuant to section 1118.1. (RT 2846-2852, 2938-2940.) In making the motion, defense counsel indicated that based upon the ruling on the section 995 motion, there was sufficient evidence of oral copulation to go to the jury.[109]

The jury was eventually instructed as follows:

> Oral copulation is the act of copulating the mouth of one person with the sexual organ of another person. Any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes oral copulation. Penetration of the mouth or sexual organ is not required. Proof of ejaculation is not required.

(RT 3131; CALJIC 10.14.)

C. Oral Copulation, as Defined by section 288a Does Not Include a Mere Kiss, or Fleeting Contact, Without Penetration

Section 288a, subdivision (a), defines oral copulation as "the act of copulating the mouth of one person with the sexual organ or anus of another person." According to the plain and ordinary meaning of those words, mere contact between the mouth of one person and the penis of another, without more, does not constitute oral copulation. Whether or not such contact alone could be made equally criminal is not at issue. Only oral copulation is outlawed by section 288a, and the ordinary and common sense meaning of "copulation" involves more than mere contact. Ordinarily that term refers to sexual intercourse, including penetration of the penis.

The definition of oral copulation set forth in subdivision (a) of section

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[109] "Your Honor, I started arguing yesterday that although I felt that there was sufficient evidence for the case to go to the jury on whether there was an oral copulation because we had testimony about kissing of the penis, and kissing of the penis does constitute oral copulation. I briefed that fully in a 995 motion."

(RT 2938-2939; see also RT 2851.)

288a does not expressly address the question of whether or not penetration is required, or what degree of contact may be sufficient in the absence of penetration, or what other requirements there might be to constitute copulation of the mouth and sexual organ. It is reasonable to assume that the legislature deemed the term "copulation" sufficiently clear to resolve the question. Taken in its "usual, ordinary and common sense meaning," the term means more than mere contact.

Webster's New World Dictionary (2d college ed. 1974) at page 314, defines "copulate" as "to unite, couple . . . to have sexual intercourse." "Intercourse" is defined. in this context, as "the sexual joining of two individuals; coitus; copulation: in full, sexual intercourse." (*Id.* at p. 734.) "Coitus" is defined as "sexual intercourse." (*Id.* at p. 277.)

Merriam Webster's Collegiate Dictionary (10th ed. 1994) at page 256, defines "copulate" as "to engage in sexual intercourse." "Intercourse" is defined, in this context, as "physical sexual contact between individuals that involves the genitalia of at least one person." (*Id.* at p. 609.) "Coitus" is defined as "physical union of male and female genitalia accompanied by rhythmic movements usu. leading to the ejaculation of semen from the penis into the female reproductive tract." (*Id.* at p. 223.)

Witkin sets forth the following definition: "The act of oral copulation by definition involves some kind of sexual stimulation or satisfaction from contact of the mouth and sex organs. But whether there must be actual penetration of one into the other is the subject of conflicting decisions." (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Crimes, §§ 32, p. 342.[110])

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[110] Witkin has set forth this definition since the first edition of California Crimes. (See Witkin, Cal. Crimes (1963) Crimes against

(continued...)

In none of these definitions does simple contact, without more, suffice to merit description as "copulation." The definitions of copulation, in their references to sexual intercourse, or coitus, imply penetration. Each definition also defines the act in terms of sexual conduct.

Prior to the 1921 enactment of section 288a, the former section 288a had outlawed "[t]he acts technically known as fellatio and cunnilingus." (Stats.1915, ch. 586, § 1, p. 1022.) In 1919, this Court found that statute in violation of the California Constitution, "because it was not in the English language as required by former article IV, section 24 of the California Constitution, its usage was not in the common parlance and it was therefore uncertain in meaning to a person of common understanding, presumably those persons who might be expected to violate the section. (*In re Lockett* (1919) 179 Cal. 581, 178 P. 134.)" (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1452 (conc. & dis opn. of Carr, J.).)

There is no indication that the 1921 enactment intended to enlarge the scope of activity outlawed by the prior statute. In other words, the prohibition against "copulating the mouth of one person with the sexual organ of another person" was intended to reinstate the prior prohibition of fellatio and cunnilingus, but using the "common parlance" to describe the prohibited act. "Fellatio" is defined as "oral stimulation of the penis." (Merriam Webster's Collegiate Dictionary, *supra*, at p. 428.) "Cunnilingus" is defined as "oral stimulation of the vulva or clitoris." (*Id.* at p. 283.) Again, something more than mere contact is involved.

The statutory definition has been effectively unchanged since 1921, at which time the entirety of section 288a was as follows: "Any person

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[110] (...continued)
Decency and Morals, §544.)

participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding fifteen years." (Stats.1921, c. 848, p. 1633, § 2.) Over the years since then, variations on the punishment for the act, depending on various circumstances of the offense unrelated to the definition of the fundamental act, have been added, and in 1975, the statute was rewritten, with the definition restated in subdivision (a) as it presently reads.[111] (Stats.1975, c. 877, p. 1958, § 2.)

In construing a statute, this Court's essential task is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the [statute]. [Citations.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899; see also *People v. Superior Court* (*Johannes*), *supra,* 70 Cal.App.4th at p. 564.) The primary source of such legislative intent is the language of the statute. In examining that language, a court must "accord words their usual, ordinary, and common sense meaning based on the language the Legislature used and the evident purpose for which the statute was adopted." (*In re Rojas* (1979) 23 Cal.3d 152, 155.)

This Court "cannot, under any rule of statutory construction, read into a statute a meaning different from the wording of the act." (*People v. Vaughn* (1961) 196 Cal.App.2d 622, 629.)

> Although the Penal Code commands us to construe its provisions "according to the fair import of their terms, with a view to effect its objects and to promote justice" (Pen.Code, § 4), it is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings. (*People v. Baker* (1968) 69 Cal.2d 44, 50 [69 Cal.Rptr. 595, 442 P.2d 675].) Penal statutes will not be made to reach beyond their plain intent; they include only those offenses

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[111] An amendment in 1982 added the prohibition against copulation of the mouth with the anus. (Stats.1982, c. 1111, p. 4025, § 5.)

> coming clearly within the import of their language. (*De Mille v. American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 156 [187 P.2d 769].) Indeed, "Constructive crimes--crimes built up by courts with the aid of inference, implication, and strained interpretation--are repugnant to the spirit and letter of English and American criminal law." (*Ex parte McNulty* (1888) 77 Cal. 164, 168 [19 P. 237].) . . . . [A]s Chief Justice Marshall warned long ago, "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." (*United States v. Wiltberger* (1820) 18 U.S. (5 Wheat.) 76, 96 [5 L.Ed. 37].)

(*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632.)

As set forth above, the term copulation means something more than mere contact. It involves some sexual component, e.g., either sexual stimulation or sexual gratification. The ordinary and common meaning involves sexual penetration. That such meaning is reinforced from review of the history of the statute, and the clear intent to rewrite the prohibition of fellatio and cunnilingus. Both fellatio and cunnilingus require, in their ordinary and common meaning, that the act be sexual in nature. The facts in this case do not establish an act of fellatio. There is no basis in the statute's language upon which to base an expansion of the definition to include the act at issue here.

In fact, prior to appellant's trial, at the time the Andrews homicide took place, it was the opinion of the CALJIC Committee that something more than contact was required. From 1989 until 1994, CALJIC No. 10.14 (1989 Rev.) (5th ed.) defined the elements of oral copulation as requiring

> 1. Any penetration, however slight, of the mouth of one person by the sexual organ or anus of another person, or [¶] 2. When there is no penetration, any substantial contact between the mouth of one person

and the sexual organ or anus of another person.[112]

Even if there were some ambiguity in the language of the statute, when language which is susceptible of two constructions is used in a penal law, the courts construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. (*People v. Ralph* (1944) 24 Cal.2d 575, 581; *In re Christian S.* (1994) 7 Cal.4th 768, 780; *People v. Overstreet* (1986) 42 Cal.3d 891, 896-897.) The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. (*People v. Overstreet* (1986) 42 Cal.3d 891, 896-897; *People v. Weidert* (1985) 39 Cal.3d 836, 848; *People v. Davis* (1981) 29 Cal.3d 814, 828; *In re Jeanice D.* (1980) 28 Cal.3d 210, 217.)

> Strict construction of penal statutes has also been recognized as "a useful means to protect the individual against arbitrary discretion by officials and judges." (3 Sutherland, op. cit. supra, at p. 8.) The policy stated in *Keeler*[, *supra*,] and its progeny guards against the usurpation of the legislative function by the judiciary in the enforcement of a penalty where the legislative branch did not clearly prescribe one. (3 Sutherland, op. cit. supra, at p. 8.) This rule embodies a recognition that "since the state makes the laws, they should be most strongly construed against it." (*Ibid.*, fn. omitted.)

(*People v. Weidert* (1985) 39 Cal.3d 836, 848.)

The express language of the statute requires copulation of the mouth of one person and the sexual organ of another person. The fleeting contact described in the evidence below does not constitute copulation under any reasonable understanding of that term. Copulation is normally and

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[112] By the time of appellant's trial, however, the instruction had been revised to the formulation as it was read to the jury in this trial. (CALJIC No. 10.14 (1989 [sic] Rev.)(5th ed.) [mistakenly labeled in CALJIC July 1993 pocket parts as the 1989 Revision, rather than the 1993 Revision].)

commonly understood to involve penetration of the penis into the vagina or the mouth. In no standard dictionary of the English language known to appellant is the term "copulate" or "copulation" defined so as to include within it's meaning fleeting contact such as a simple kiss. The definition provided in Witkin and Epstein, *supra*. clearly states the meaning in this context: "The act of oral copulation by definition involves some kind of sexual stimulation or satisfaction from contact of the mouth and sex organs." (2 Witkin & Epstein, Cal. Criminal Law, *supra*, § 32, p. 342.)

How precisely the definition should be phrased, in terms of penetration, stimulation, gratification, substantial contact, or other construct, is not crucial to appellant's challenge to the sufficiency of the evidence, however. Whatever definition is used, if it reasonably reflects the "usual, ordinary and common sense meaning" of oral copulation, the conduct at issue herein did not constitute oral copulation, and did not violate section 288a.

As demonstrated above, the intent and history of the statutory definition, and basic rules of statutory construction, compel the conclusion that a mere kiss on the tip of a flaccid penis does not constitute oral copulation. It is only in a few Court of Appeal cases that a simple kiss *might* be construed to constitute copulation. As noted in Witkin & Epstein, *supra*, at p. 342, the Court of Appeal opinions on this subject are conflicting. Those cases that state that contact is sufficient rely more on *ipse dixit* than upon any reasoned legal analysis of the actual language of the statute. Other cases construe the statute as requiring something more than mere contact, such as penetration, or some substantial contact. The overriding commonality of most of the cases on either side of the issue, however, is the superficiality and the conclusory nature of the "analysis" relied upon. This is no doubt due to a reticence to discuss the details of the acts involved.

These flaws in analysis have also led to holdings stated more broadly than necessary for the facts at issue. Many of the cases defining the crime as requiring only contact between the mouth and a sexual organ, rather than copulation between the mouth and a sexual organ, addressed conduct which involved more than the fleeting contact the evidence shows here. None of the cases stating a rule that contact constitutes oral copulation apparently dealt with conduct so distinctly outside the statutory definition as in this case. It is unclear whether most of the Courts of Appeal which decided those cases intended their holdings to apply so broadly that those courts would find an oral copulation under the facts of this case.

This Court has never addressed the conflict in the case law, nor specifically addressed the question of whether or not mere contact, without more, is sufficient to sustain a conviction under section 288a.

The most recent Court of Appeal case addressing the issue, and one which avoided any actual statutory construction, is *People v. Grim* (1992) 9 Cal.App.4th 1240 (*Grim*). *Grim* involved testimony by the victim that made it clear that "there was no penetration by appellant's penis into [the victim's] mouth." (*Id.*, at p. 1242.) The trial court in that case had instructed the jury according to the same definition of oral copulation as given in appellant's trial. However, *Grim* noted that after the trial, the 1989 revision of CALJIC No. 10.10 (5th ed. pocket parts) used the revised definition of the offense, which stated:

> "'Oral copulation' consists of: [¶] 1. Any penetration, however slight, of the mouth of one person by the sexual organ ... of another person, or [¶] 2. When there is no penetration, any *substantial* contact between the mouth of one person and the sexual organ ... of another person."

(9 Cal.App.4th at p. 1242 [italics added in opinion].)

The *Grim* court disagreed with the notion that "substantial contact"

rather than "any contact, however slight" was required for commission (and conviction) of oral copulation. The court noted "the significant cases dealing with marginal oral copulation evidence," citing *People v. Angier* (1941) 44 Cal.App.2d 417 (*Angier*), *People v. Coleman* (1942) 53 Cal.App.2d 18 (*Coleman*), *People v. Hickok* (1950) 96 Cal.App.2d 621 (*Hickok*), *People v. Harris* (1951) 108 Cal.App.2d 84 (*Harris*), *People v. Bennett* (1953) 119 Cal.App.2d 224, *People v. Wilson* (1971) 20 Cal.App.3d 507, and *People v. Minor* (1980) 104 Cal.App.3d 194. (9 Cal.App.4th at p. 1243.) The *Grim* court stated that its review of those cases showed that only one case, *People v. Minor*, mentioned "substantial contact" or anything similar, but only in saying that substantial contact is not required. (*Ibid.*) On that basis, *Grim* held that "any contact, however slight" is the more accurate statement of the law.

Grim's analysis, limited as it was to a review of the cases, rather than analysis of the clear language of the statute, was superficial at best.[113]

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[113] More recently, the Missouri Supreme Court addressed the meaning of the term oral copulation in a vagueness challenge to a liquor license regulation, and conducted a more appropriate analysis, relying upon the common and ordinary meaning of the term:

> "Oral copulation" is simply the combining of two specific words: "oral," meaning "of, relating to, or belonging to the mouth; given or taken through or by way of the mouth," Webster's Third International Dictionary, 1585 (1986), and "copulation," meaning "the act of coupling or joining ... sexual union." *Id.* at 503. In combining this information, a person of common intelligence will necessarily understand that "oral copulation" is a sexual union taken through or by way of the mouth, i.e., oral sex, cunnilingus or fellatio.
>
> Furthermore, the regulation governing lewdness, when taken as a whole, also supports the conclusion that the term "oral copulation" is not vague. Each provision of the regulation deals with sexually related conduct, including: bestiality; oral copulation;

(continued...)

Moreover, its review of the cases was itself rather superficial. For instance, *Harris*, *supra*, did state that "plac[ing the] mouth on the genital organ of another" is the "generally accepted interpretation of the statute" (108 Cal.App.2d at p. 88.) That *ipse dixit* has been unquestioningly followed in, for example, *Wilson*, *supra*, *Minor*, *supra*, and *People v. Hunter* (1958) 158 Cal.App.2d 500, 505. However, *Harris* was simply wrong about the "generally accepted interpretation of the statute."

Harris relied for that interpretation upon *People v. Milo* (1949) 89 Cal.App.2d 705 (*Milo*) and *Coleman*, *supra*, neither of which stated any such holding. *Milo* involved a defendant convicted of "copulating with his mouth the penis of a 15-year old boy." (89 Cal.App.2d at p. 705.) At one point, according to the victim, the defendant's "lips got around the top of the [victim's] penis." (*Id.* at p. 706.) A police officer testified that he "observed that the defendant had [the victim's] penis in his mouth." (*Ibid.*) Because the facts at issue involved penetration, it was unnecessary for the court to determine whether or not penetration is required.

Coleman did not address penetration per se, instead finding contact between the defendant's mouth and the victim's sexual organ lasting five or ten minutes to be sufficient. (53 Cal.App.2d at p. 26-27.)

Thus, while *Grim* is correct that no case other than *Minor* had used the *phrase* "substantial contact" to define a test of sufficiency, that concept is consistent with *Coleman*'s holding. *Grim*'s conclusion that *Coleman*

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[113] (...continued)
flagellation; touching, caressing or fondling of breasts; display of pubic hair, anus, vulva or genitals. By considering the use of the term "oral copulation" in the context of these other provisions, it is apparent that the term refers to fellatio, cunnilingus or oral sex.

(*Cocktail Fortune Inc. v Supervisor of Liquor Control* (1999) 994 S.W.2d 955, 958.)

supports a requirement of "any contact, no matter how slight" misunderstands the factual scenario addressed in *Coleman*, as well as the ultimate holding of that case.

In *Bennett, supra*, 119 Cal.App.2d 224, also cited by *Grim* as a "significant case," the entire discussion of the issue was stated without analysis: "Insufficiency of the evidence to establish a violation of section 288a, Penal Code. The argument is based wholly on the assertion that penetration was not shown. It was not necessary. *People v. Coleman*, 53 Cal.App.2d 18, 127 P.2d 309." (*Id.* at p. 227.) As shown above, this mischaracterizes the holding of *Coleman*, and provides no independent support for *Grim*'s conclusions. *Bennett* also fails to provide any detail of the acts involved in that case, so that it cannot be determine whether those facts were sufficiently similar to those in *Coleman* to justify *Bennett*'s reliance upon it.

Moreover, while acknowledging the existence of *Hickok, supra*, 96 Cal.App.2d 621, *Grim* ignored its holding that penetration, however slight, is required. *Hickok* found that insertion of the defendant's penis past the victim's lips, even though then blocked by her clenched teeth, constituted penetration, and was thus sufficient to support the conviction. (*Id.* at p. 628.) In holding that oral copulation is accomplished by penetration, no matter how slight, the court stated:

> The statutes dealing with the crime against nature and rape expressly provide that "Any sexual penetration, however slight" is sufficient to constitute the defined crimes. (Pen. Code, §§ 287 and 263.) These portions of the statutes have been frequently applied by the courts. *People v. Lindley*, 26 Cal. 2d 780, 161 P. 2d 227; *People v. Howard*, 143 Cal. 316, 76 P. 1116; *People v. George*, 91 Cal.App. 2d 537, 205 P. 2d 464; *People v. Stangler*, 18 Cal. 2d 688, 117 P. 2d 321. While section 288a contains no such express admonition, it is obvious that such a provision is necessarily implied by the terms of the section. What is prohibited is the copulation of the mouth of one person with

> the sexual organ of another. Such prohibited act is accomplished by any prohibited penetration of the mouth, regardless of the degree of that penetration.

(*Ibid.*) *Grim* also ignored *People v. Chamberlain* (1952) 114 Cal.App. 2d 192, 194, which followed *Hickok*.

The first cases addressing the issue all relied upon, or required, something more than mere contact to sustain a conviction. *Angier*, *supra*, 44 Cal.App.2d 417, was the first case addressing the issue of whether penetration was required for a conviction of unlawful oral copulation under section 288a. The court held that "a mere kiss or lick of the private parts, even though lewdly done (sec. 288 Pen. Code), is not a copulation." (44 Cal.App.2d at p. 420.) In analyzing the issue, it addressed the common and ordinary meaning of the statutory language:

> The section of the Penal Code under which the information was drawn makes it a felony for a person to participate in the "act of copulating the mouth of one person with the sexual organ of another". That section comes under Chapter V of Title IX, § 281 et seq., of the Code, which chapter deals with bigamy, incest and the crime against nature. "The crime against nature," as contemplated by the legislature, is the perverted act of uniting the mouth of one participant with the sexual organ of the other with a view of gratifying the sexual desire. A mere contact of the mouth with the sexual organ of another, either by a "kissing" or a "licking", cannot be construed to mean a copulation. The word copulation has never had the meaning of mere contact. It has always had the significance of the verb "to couple", which is an English derivative. It is derived from the Latin copulare, which is translated "to couple, join, unite, band or tie together". White's Latin Dictionary. The Latin noun copula is translated by the lexicographers as "that which joins together, as a band, tie or leash". For over three hundred years the English derivative has had no other significance than that of uniting in sexual intercourse. Its popular significance now and for an indefinite past has been the union of the sexes in the generative act. Standard Dictionary; Webster's International Dictionary. The Oxford Dictionary (1893) defines the word thus: "To unite in sexual intercourse." In Stark's Elementary Natural History (1828) it is given the same usage. Gold-Smith's

> Natural History (1874) refers to the "copulating season". In Quick Dec. Wife's Sister (1703) appears: "An hainous sin * * * in the brother to have copulated with this widow." In the King James translation (1611) of Leviticus, 15:16-18, we find that the Mosaic laws ordained that "the woman with whom man shall lie with seed of copulation, they shall both bathe", etc.
>
> Thus does it appear that since Shakespeare reinforced the static character of the English idiom the word copulate has had primarily an unvarying significance, to wit, the act of gratifying sexual desire by the union of the sexual organs of two biological entities. This is the meaning of the word wherever found in statutes and decisions. 14 C.J.S., Coition, 1315; 18 C.J.S., Copulation, 130; 13 C.J. 933. Therefore, the legislature, in framing section 288a of the Penal Code, must have intended to punish only those who participate in an act whereby they are united or joined by the perverted act of one's holding in his mouth the sexual organ of another for the purpose of gratifying their sexual desires. A mere kiss or lick of the private organ, even though lewdly done (sec. 288, Pen. Code), is not a copulation.

(44 Cal.App.2d at p. 418-419.)

Until *Harris*, subsequent cases all relied upon something more than contact to find the evidence sufficient. *Coleman* relied upon uninterrupted contact for five or ten minutes, which is not inconsistent with *Angier*'s holding that "a mere kiss or a lick" is not sufficient. *Milo* relied upon penetration, as did *Hickock*. None of the cases which have stated or held that contact is sufficient have persuasively confronted *Angier*'s reasoning. In *Harris*, *supra*, 108 Cal.App.2d 84, two of the three judges from *Angier* declined to apply the holding of that case to a case involving forcible rape and "'copulating' [the defendant's] mouth with the sexual organ of the prosecutrix," a 24 year old woman. (108 Cal.App.2d at p. 86.) The latter act was described by the court as the defendant having placed his mouth on the *os uteri* of [the victim's] body" (*ibid.*) and having "lewdly and lasciviously 'placed his mouth on her private parts.'" (*Id.*, at p. 87.) The *Harris* court

distinguished *Angier*, stating:

> "Angier had been convicted on the testimony of two infants, five and seven years of age. This court was impressed that the mouth of the accused could not have touched the bodies of the children. Such evidence was an indispensable element in the successful prosecution of such crime. On reaching that conclusion we were led into a discussion of the significance of the word "copulate." While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the use of the word in section 288a signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court. A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another. This is the generally accepted interpretation of the statute. See *People v. Milo*, 89 Cal.App.2d 705, 708 [201 P.2d 556]; *People v. Coleman*, 53 Cal.App.2d 18, 26 [127 P.2d 309]. The *Angier* decision is not pertinent unless the factual situation under judicial consideration is in all essential details identical with those there adjudicated. *People v. Owen*, 68 Cal.App.2d 617, 619 [157 P.2d 432].

(108 Cal.App.2d at p. 88.)

The statement in *Harris* that placing the mouth upon the genital organ of another is sufficient to constitute the crime is the first appearance in the case law of such a rule. However, rather than being based upon any analysis similar to that in *Angier*, the *Harris* rule amounts to little more than *ipse dixit*. No explanation was offered of how simple contact might be construed as "copulation." In fact, *Harris* acknowledges the "philological correctness" of *Angier*'s analysis of the language of the statute.

Instead, *Harris* cites *Milo*, *supra*, and *Coleman*, *supra*, for its interpretation of the law. As shown above, those cases, do not support the conclusion in *Harris*. Moreover, *Harris* failed to address *Hickok*'s contrary holding regarding the need for penetration. *Harris* did not present sufficient detail of the facts with which it dealt to determine how closely those facts corresponded to the facts of *Coleman*. From the scant description of the

facts, it is unlikely that they involved mere fleeting contact, especially considering its acknowledgment of the correctness of *Angier*'s analysis of the statutory language. Moreover, *Harris*' characterization of the contact in that case as having been "lewdly and lasciviously" done, suggests an act more in keeping with the plain meaning of the statute. Ultimately, while *Harris* is often cited for the rule that mere contact is sufficient, it is not clear that even the *Harris* court would have found the evidence presented against appellant, i.e., a fleeting kiss, not lewdly or lasciviously done, to be a violation of section 288a. However, cases since *Harris* have simplistically recited the language of *Harris* without conducting any analysis of the the statutory language or the nature of the act involved. (See, e.g., *Bennett*, *supra*, 119 Cal.App.2d at p. 227; *People v. Hunter* (1958) 158 Cal.App.2d 500, 505; *Minor*, *supra*, 104 Cal.App.3d at pp. 196-197.)

In *People v. Cline* (1969) 2 Cal.App.3d 989, the following dicta is contained in a footnote:

> The sufficiency of the evidence to establish oral copulation within the provisions of section 288a has not been questioned. It is noted that the section as originally enacted (Stats.1915, ch. 586, § 1, p. 1022) referred to "fellatio" and "cunnilingus" (see Black's Law Dictionary (4th ed. 1951) pp. 456 and 743). Those provisions were held to violate former section 24 of Article IV of the California Constitution which required all laws to be published in the English language. (*In re Lockett* (1919), 179 Cal. 581, 582-588 [178 P. 134]; and see *People v. Carrell* (1916), 31 Cal.App. 793, 794 [161 P. 995].) In 1921 the section was amended to read as at present, and its constitutionality was upheld. (*People v. Parsons* (1927) 82 Cal.App. 17, 19 [255 P. 212].) It was at first suggested that the word copulation should be given a literal meaning. In *People v. Angier* (1941), 44 Cal.App.2d 417 [112 P.2d 659], the court ruled, "A mere kiss or lick of the private organ, even though lewdly done (sec. 288, Pen.Code), is not a copulation." (44 Cal.App.2d 419 [112 P.2d 660].) This view was repudiated by the author of that opinion, and reframed as follows: "A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another." (*People v.*

Harris (1951) 108 Cal.App.2d 84, 88 [238 P.2d 158]. See also *People v. Hunter*[114] (1958) 158 Cal.App.2d 500, 505 [322 P.2d 942]; *People v. Massey*[115] (1955), 137 Cal.App.2d 623, 625 [290 P.2d 906]; and 1 Witkin, California Crimes, §§ 543-544, pp. 495-496.)

(2 Cal.App.3d at pp. 992-993, fn. 2.) As demonstrated above, settled rules of statutory construction require the application of the "literal meaning" of the statutory language. No basis for departure from the literal meaning is suggest in either *Cline*'s dicta, nor in *Harris*, which it cites as support for that departure.

In *Wilson*, *supra*, 20 Cal.App.3d 507, the court declined to follow the holding of *Angier* in a case involving the defendant having sexual intercourse with his 14 year old step-daughter on one occasion, having "placed his mouth on [her] private parts" on two occasions, and performing the latter act on his 19 year old stepdaughter on one occasion. (20

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[114] *People v. Hunter* (1958) 158 Cal.App.2d 500, relying solely upon *People v. Harris*, *supra*, and without further analysis of the issue, declined to follow *Angier*.

[115] *People v. Massey* is of no help in analyzing the scope of the statute. In that case, the court assiduously avoided describing the acts alleged or analyzing the elements of the offense, other than stating that "appellant on the stand admitted acts of physical contact which were elements of the offenses charged." (137 Cal.App.3d at pp. 624-625.) The defendant did "argue[] that the acts proven are not embraced within a correct definition of 'copulating' and that the meaning of the word as used in the statute is obscure and uncertain." (*Id.*, at p. 625.) The court responded that "[i]f the word is understood as implying 'coupling,' which is permissible, there is no uncertainty as to the legislative intent. The word as used in the statute has a well understood meaning. *People v. Harris*, 108 Cal.App.2d 84 [238 P.2d 158].)" (*Ibid.*) While the court's circumlocutions obscure the point, it is likely that the acts at issue, done purportedly for the purpose of taking photographs of the acts (*ibid.*), involved more than simple contact, and likely involved penetration, however slight.

Cal.App.3d at p. 509.) The Court also stated that, "Here, the victims testified that defendant kissed them in the vaginal area with his tongue." (*Id.*, at p. 510.) While that description is insufficient to determine whether it corresponded to the facts which *Coleman* found sufficient, it is sufficient to distinguish it from the fleeting contact at issue in appellant's case. However, the court in *Wilson* went on to address *Angier*'s holding, but failed to anlayze *Angier*'s reasoning. In dicta, the *Wilson* court stated,

> The language of *Angier* has been seized upon by defendants charged with such offenses in numerous cases. That decision, however, enjoys little, if any, viability. It was repudiated by its author in *People v. Harris*, 108 Cal.App.2d 84, 238 P.2d 158, where it was held that the statute is violated by placing one's mouth on the genital organ of another. [¶] Thus, to borrow a phrase, the *Angier* case has become a "derelict on the seas of jurisprudence." It is often discussed but never followed. It is simply not the law. The evidence here was clearly sufficient.

(*Id.*, at p. 510.) The *Wilson* court did not, however, address or discuss *Hickok*, *Coleman*, or *Chamberlain*, cases which interpreted §288a as requiring more than mere contact, either penetration or some substantial contact, to support a conviction.

People v. Minor , *supra*, 104 Cal.App.3d 194, cited by *Grim*, held that the evidence was sufficient, and the offense complete when the mouth is forcibly placed upon the genital organ of another. No further discussion of the facts underlying the conviction is provided in *Minor*. The only authority for its holding is a citation to *People v. Harris*, *supra*. No analysis of any other basis for considering mere contact without penetration as sufficient was undertaken in *Minor*.

This review of the case law demonstrates that the first suggestion that mere contact would be sufficient to establish oral copulation is found in *Harris*. The holding in *Harris* is based upon two cases which do not support

that conclusion, and ignores one which holds to the contrary. Moreover, it is unclear that even the *Harris* court would have found the fleeting contact in appellant's case sufficient to constitute copulation. Since *Harris*, though, those cases stating or holding that mere contact is sufficient have followed the erroneous holding in *Harris* without further analysis. On the other hand, *Angier*, *Coleman*, *Hickok*, and *Chamberlain* are all consistent that something more than mere contact is required.

Based upon the application of settled rules of statutory construction, and the plain meaning of the statute, it is clear that the analyses of *Angier*, *Coleman*, *Hickok*, and *Chamberlain* more accurately construe the language of the statute. No case has attempted to explain *how* those cases have erred in their analysis. Instead, the contrary cases rely upon mere *ipse dixit*.

It similarly clear that the evidence at appellant's trial was insufficient to establish a violation of section 288a.

Whether or not penetration is required to constitute oral copulation, it is clear that mere contact does not establish copulation. Witkin & Epstein, *supra*, interprets *Coleman* as finding substantial contact sufficient, based upon contact lasting five or ten minutes. (2 Witkin & Epstein, Cal. Criminal Law, *supra*, §32, p. 342; *People v. Coleman*, *supra*, 53 Cal.App.2d at p. 26-27.) The CALJIC Committee adopted that definition for its 1989 revision of CALJIC Nos. 10.10 et seq. However, the definition of oral copulation provided in Witkin and Epstein itself suggests a more accurate approach, i.e., that the contact involve sexual stimulation or satisfaction, some sexual component that is consistent with the "usual, ordinary and common sense meaning" of the term. The substantial contact of *Coleman* would probably constitute sufficient evidence of such stimulation or satisfaction, as would the contact in *Harris* and *Wilson*. Fleeting contact, or a mere kiss such as that described by the evidence at appellant's trial, would not be sufficient to

establish oral copulation under that definition.

Whether this Court determines that the minimum conduct required to violate section 288a must include penetration, substantial contact or contact involving sexual stimulation or satisfaction, it is clear that mere contact, without more, does not violate the statute. The evidence presented against appellant in this case is thus insufficient as a matter of law to sustain Count Two, the Second Special Circumstance, or the jury's finding of first degree felony murder. The jury's verdict of guilt on Count Two, the finding of the truth of the Second Special Circumstance must therefore be set aside, and the jury's finding of felony murder stricken, and further proceedings on the charges barred by the double jeopardy clause. (*People v. Green* (1980) 27 Cal.3d 1, 62; *People v. Guiton* (1993) 4 Cal.4th 116, 1129 ["if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green,* the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground."]; *Burks v. United States* (1978) 437 U.S. 1; *Greene v. Massey* (1978) 437 U.S. 19]; *In re Johnny G.* (1979) 25 Cal.3d 543, 548-549.)

D. The Instructions Erroneously Defined the Elements of a Violation of section 288a

As demonstrated above, the instruction given to the jury in this case, stating that any contact, no matter how slight, is sufficient to establish a violation of section 288a, unconstitutionally lightened the burden of the prosecution, misstated the elements of the offense, effectively eliminated any jury determination of an element of the offense, and allowed a verdict of guilt based upon acts not prohibited by section 288a. The instruction therefore violated appellant's right to a fair and reliable trial, to a determination by a properly-instructed jury of each element of Count Two,

as well as of the Second Special Circumstance and of felony murder as to Count One, to the benefit of the presumption of innocence and the requirement of proof beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 8-15; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521; *People v. Flood* (1998) 18 Cal.4th 470, 479-482.) Given the nature of the evidence, it is not reasonable to conclude that the erroneous instruction did not contribute to the jury's verdict and finding. There is no basis for a determination that the jury would have returned the verdicts it did had it been instructed that, e.g., penetration, or substantial contact, or contact involving sexual stimulation or satisfaction was required. The erroneous instruction was not therefore, harmless beyond a reasonable doubt. (*Neder v. United States*, *supra*, 527 U.S. at pp. 12-15; *Pope v. Illinois*, *supra*, 481 U.S. 497-503; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal of Count Two and the Second Special Circumstance is therefore required.

E. Conclusion

The instruction given to the jury misstated the elements of the crime, allowing a conviction on Count Two, a finding of the Second Special Circumstance and a conviction of first degree felony murder on evidence which was legally insufficient to support those charges. Because the evidence is insufficient as a matter of law to support the jury's verdict of guilt on Count Two and the finding of both the truth of the Second Special Circumstance and the finding of felony murder, that verdict and those findings must be set aside, and further proceedings on the charges barred by the double jeopardy clause. In addition, the error in the instructions given require reversal of Count Two and the Second Special Circumstance. Moreover, since appellant's death sentence relies on an unreliable guilt verdict, including an invalid conviction of oral copulation, an invalid finding that appellant was guilty of felony murder, and an invalid special

circumstance finding, and the death verdict was not surely unattributable to the invalid conviction and finding (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; see *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown* (1988) 46 Cal.3d 432, 448; see also *Yates v. Evatt* (1991) 500 US 391; *In re Winship* (1970) 397 U.S. 358.) The judgment of death should be reversed accordingly.

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VII.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE FINDING OF THE TRUTH OF THE SECOND SPECIAL CIRCUMSTANCE

Assuming arguendo that this Court finds the evidence presented to the jury in this case sufficient to sustain a conviction of oral copulation by a person confined in a local detention facility (section 288a(e); but see Argument VI, *ante*), the evidence was insufficient to establish that the murder was committed to advance or carry out the commission of that oral copulation. (section 190.2, subd. (a)(17)(F).) No reasonable jury could have determined, beyond a reasonable doubt, that the homicide was committed to carry out or to advance the oral copulation. Moreover, the evidence in this case which is relevant to the finding of the oral copulation special circumstance does not rationally distinguish appellant from other murderers sufficient to justify subjecting appellant to the death penalty. (U.S. Const. Amends. V, XIV; *Jackson v. Virginia* (1979) 443 U.S. 307; *Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Furman v. Georgia* (1972) 408 U.S. 238.)

The finding of the Second Special Circumstance must therefore be vacated, and the penalty judgment must be reversed.

A. Relevant Facts

1. Evidence

According to Benjamin and Bond, the oral copulation consisted of Andrews kissing the tip of appellant's flaccid penis. (RT 1460, 1520-1522, 2479.) This took place after appellant had beaten Andrews for some time. Appellant told Andrews he would stop beating him if Andrews kissed his penis. Andrews did so. (RT 1457, 1460-1461, 1514-1516, 2386, 2480.) However, according to Benjamin and Bond, appellant continued his attack

on Andrews, and began pulling a towel around Andrews' neck, which at some undetermined point, according to the jury's verdict, resulted in Andrews' death.

2. Penal Code Section 1118.1 Motion

At the close of the prosecution's case, defense counsel made a motion to dismiss the Second Special Circumstance pursuant to section 1118.1. Defense counsel argued that the homicide and oral copulation were not part of a continuous transaction, since the oral copulation was complete prior to the homicide, and that there was no independent felonious purpose. (RT 2851-2852, 2938-2940.) The trial court made no immediate ruling, instead deferring decision while the parties and the court considered instructions. (RT 2940.) The trial court did not dismiss the Second Special Circumstance, but rather submitted it to the jury, which amounted to a de facto denial of the motion.

B. The Prosecution's Theory of Guilt

The prosecution argued to the jury that this constituted murder while engaged in the commission of an oral copulation by a person confined in a local detention facility as follows:

> "The murder has to be -- and I don't think you should get caught up in the words. *The real important thing is whether or not there was a preexisting intent to kill.* And in this particular case, that could serve to benefit this defendant. [¶] If you were to find the facts to be that Mr. Dement began this evening with the intent to kill and the sex crimes were merely a step, a terrorizing step, in the ultimate original, cold, calculated design intent to kill, then he would not qualify because the rape and the oral copulation were incidental to the original design. [¶] Our argument is going to be as follows: Based on the way that this transpired and what people said, I would submit to you that what the defendant intended to do on this particular evening was he intended to terrorize this man. He beat him, he sexually assaulted him, and *then as the evening progressed he came into this cold, calculated decision to kill.*" (RT 2697 (emphasis

added).)

In his rebuttal argument to the jury, the prosecutor argued similarly:

"[W]hat was the dominant theme that you see here? It's control, subjugation, degradation. This guy over here sitting behind me, this guy set out on that evening of April 8th to do the things that Dr. Hickey outlined. He set out to control, to subjugate, to degrade, and ultimately to punish Greg Andrews because he was weak, he was new, he was vulnerable, and he was an associate of an enemy. [¶] *This beating that began this evening was in further -- furtherance of this subjugation and this punishment. The sex acts were in furtherance of the attack, the initial attack.* And I want you to take something and think about it. This type of sex act, the sexual assault, is not for pleasure. This is an act of violence. This is an act of punishment. *The murder was in furtherance of this attack.* You know, the beating facilitated the sex and overcame the will of the victim. [¶] I'm about ready to close now, ladies and gentlemen, and I'd like to leave you with just this last thought: I'd submit to you that *the defendant culminated this terroristic attack with the ultimate act which could further advance what can be described as nothing less than a predatory attack. After doing all this which had come before and in furtherance thereof, he slowly and cold-bloodedly choked the life out of that poor Greg Andrews.*" (RT 3102 (emphasis added).)

C. Applicable Law

1. Sufficiency of Evidence

A conviction that is not supported by sufficient evidence violates both the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause 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, i.e., evidence that "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 (*Green)*; see *People v. Bolden* (2002) 29 Cal.4th 515, 533.) 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 at p. 577, internal quotations omitted.) 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.) Finally, the rules governing the review of the sufficiency of evidence apply to challenges against a special circumstance finding. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497; *Green, supra*, 27 Cal.3d at p. 55.)

The same standard applies to a defendant's motion for a judgment of acquittal under section 1118.1.[116] 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." (*People v. Trevino*, *supra*, 39 Cal.3d at p. 695.)

2. Murder During the Commission of a Specified Felony

In *People v. Green* (1980) 27 Cal.3d 1, this Court held that felony based special circumstances made death eligible those who killed "to advance an independent felonious purpose," but not when the felony was "merely incidental to the murder." (27 Cal.3d at p. 61.) This Court determined that the purpose of the special circumstance was to single out those "defendants who killed in cold blood in order to advance an independent felonious purpose...." (27 Cal.3d at p. 61; see also *People v. Thompson* (1980) 27 Cal.3d 303, 322.)

"[I]f the felony is merely incidental to achieving the murder – the murder being the defendant's primary purpose – then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present."

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[116] 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."

(*People v. Navarette* (2003) 30 Cal.4th 458, 505; see also *People v. Kimble* (1988) 44 Cal.3d 480, 501-503.)

If the felony is committed for concurrent purposes, both to commit the murder and for an independent felonious purpose, it is not incidental to the murder, and the special circumstance will be sustained. (*People v. Mendoza* (2000) 24 Cal..4th 130, 183-184 [arson committed with "independent, albeit concurrent goals" both to kill the victim and as a means of concealing a rape or avoiding detection].)

The determination of whether the murder was committed to advance an independent felonious purpose is not "a matter of semantics or simple chronology." (*Green*, 27 Cal.3d at 60.) Whether the murder precedes, follows, or coincides with a separate felony is not determinative. (*Id.*, at pp. 60-61.)

Rather, the goal of the felony special circumstance is to distinguish who will be exposed to the death penalty, and limits that class to those who kill in order to advance an independent felonious purpose. (*Id.*, at p. 61.) "To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes ... one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg* [*v. Georgia*, *supra*,] 428 U.S. at p. 189." (*Green*, 27 Cal.3d at pp. 61-62.)

D. Argument

There is no question that, if an oral copulation occurred, it occurred prior to the final homicidal acts, but after the initial assault on Andrews. It took an almost insignificant portion of the time involved from the first hostile act toward Andrews to the time the assault on Andrews ended. Thus, although it was arguably part of a continuous transaction which included the

homicide (at least as found by the jury, under the instructions given), there is nothing about that continuous transaction that suggests that the initial assault, or the actions which resulted in Andrews' death, were motivated by, or conducted to advance or further the oral copulation. There is no basis for believing that the fleeting contact between mouth and flaccid penis was the focus of the transaction, the aim of appellant's contact, the "prime crime," (*Green*, at p. 62), the "primary criminal goal" (*id.* at p. 61) or the "primary purpose" (*People v. Navarette*, *supra*, 30 Cal.4th at p. 505) of the assault on Andrews. It is not possible to reasonably characterize the homicide as in any way furthering or advancing the oral copulation, or to effect an escape or to avoid detection. The most that can be said is that the two were parts of one single continuous transaction.

The prosecution's theory for the applicability of the special circumstance, such as it was, did not present any basis for determining that the homicide advanced or furthered the oral copulation. Rather, the prosecution posited that the special circumstance applied if appellant's intent to kill arose after the oral copulation, rather than preceding it. Such reliance upon chronology finds no support in the case law. The determination of whether the murder was committed to advance an independent felonious purpose is not "a matter of semantics or simple chronology." (*Green*, 27 Cal.3d at p. 60.) Whether the murder precedes, follows, or coincides with a separate felony is not determinative. (*Id.*, at pp. 60-61.) Rather, the determinative factor is whether the murder advanced or facilitated the oral copulation. Here, it did neither. The oral copulation (if such it was) was complete before the homicide. Nothing about the killing changed anything about that incident. Nor did any evidence, let alone substantial evidence, establish any manner in which it advanced or furthered the oral copulation, or was intended by appellant to do so. To the contrary, the evidence

establishes the conduct found to be an oral copulation was incidental to the assault and the homicide.

The theory suggested by the prosecution, that the entire incident was based upon the intent to terrorize Andrews, which ripened into an intent to kill, would mean that the oral copulation was not the focus, aim or goal of that intent, but was incidental to that intent to terrorize, and that the murder arose out of an intent to advance or facilitate that initial intent to terrorize. Thus, under the prosecution's theory, the homicide was in furtherance of the intent to terrorize, not in furtherance of an act of oral copulation, and the oral copulation was incidental to that intent.

In *People v. Navarette*, *supra*, 30 Cal.4th 458, this Court held that there was no need to instruct the jury with the second paragraph of CALJIC 8.81.17 as to whether the murder was committed to carry out or advance the independent felony where there was no evidence of any motive for the murder other than to advance the independent felony. (30 Cal.4th at p. 505; In *People v. Bolden* (2002) 29 Cal.4th515, 554, this Court cited the absence of "substantial evidence of any motive for the murder apart from accomplishing the robbery," in support of the Court's holding that that the evidence in that case was sufficient to uphold the special circumstance. This case presents the other side of that analysis. Here, it was the prosecution's theory that the motive for the murder was something other than to accomplish the oral copulation – i.e., to terrorize Andrews.

An intent to terrorize is not a sufficient "felonious purpose" to support a finding of a special circumstance under section 190.2 subdivision (a)(17)(F), and a murder committed to further or advance such activity will not justify a potential sentence of death under the California statute.

Nor is this a case involving concurrent intent sufficient to sustain the special circumstance. That an intent to commit the act found to be oral

copulation and an intent to kill Andrews can be found based on this evidence is not per se sufficient to constitute concurrent intents sufficient to sustain the special circumstance. *Green* itself involved concurrent intents – the defendant there had concurrent intents to kill and to commit a robbery. However the intent to kill was not for the purpose of furthering the robbery. (27 Cal.3d at pp. 55-57, 60-62.) Rather, the relationship between the intents must be considered. The test is whether the murder was committed to advance an independent felonious purpose. (*Green*, 27 Cal.3d at p. 61; *Navarette, supra,* 30 Cal.4th at p. 505.) The evidence here does not establish such a purpose. The murder was not committed the further or advance the purpose of engaging in the act found to be oral copulation.

Fundamentally, the evidence here cannot reasonably be characterized as establishing the commission of murder "while the defendant was engaged in . . . the commission of" an oral copulation. (Pen. Code §190.2, subd. (a)(17)(F).) Setting aside the various phrasings and constructs this Court has devised since *Green* to describe the scope of the felony special circumstance, and considering the actual language of the statute, the reality of this case is that what appellant was found by the jury to have done in that cell on the morning of April 9 cannot reasonably be characterized as the commission of murder while engaged in the commission of an oral copulation. To conclude otherwise is to rely on technicalities, divorced from the reality of this case and from the purpose of the felony special circumstance in the California death penalty scheme.

In the entire continuous transaction which included both the act found to be an oral copulation and the homicide, the act found to an oral copulation was an incidental, almost insignificant, part of the whole. The act found to be an oral copulation was itself, at best, "marginal" (*People v. Grim*, *supra*, 9 Cal.App.4th at p. 1243), assuming arguendo this Court even concludes that

it technically constitutes a violation of section 288a. (See Arg. VI, *ante*.) It was not by any means a focus of, or a primary objective in, the continuous transaction. It was a fleeting contact, incidental to the assault and the homicide.

What occurred in that cell, if Bond and Benjamin are to be believed, was an assault on Andrews, involving punching, kicking and pulling a towel around Andrews' neck, culminating eventually in his death. The act found to be an oral copulation was a fleeting contact, not a sex act, and ancillary to the assault and the homicide. Whether one believes the act found to be an oral copulation even occurred is completely dependent upon belief in the testimony of Bond and Benjamin. But, even believing them, that act had, at most, an incidental impact on the entire transaction.

To hold the evidence here sufficient to sustain a conviction for oral copulation is one thing, and appellant contends that would be wrong. To hold the evidence here sufficient to sustain the finding of the special circumstance based upon the act found to be an oral copulation would be to sustain a finding of death eligibility on a technicality, unrelated to the purpose and intent of the felony special circumstance within the California death penalty scheme. As this Court stated in *Green*:

> To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes . . . one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg*. (428 U.S. at p. 189.)

(27 Cal.3d at pp. 61-62.) There is no reasonable basis for determining the applicability of the special circumstance here other than that both the act found to be an oral copulation and the homicide were committed in a continuous transaction. That is insufficient to sustain a finding of death

eligibility under *Green*.

Here, the evidence of the act found to be oral copulation demonstrates that it is, at most "ancillary conduct that technically constitutes" oral copulation. It is no more consistent with *Gregg v. Georgia*, *supra*, or *Furman v. Georgia* (1972) 408 U.S. 238 to determine that appellant is death eligible because he engaged in what technically constituted an oral copulation in the course of assaulting and ultimately killing Andrews, than it was in *Green*. Here the homicide did not further or advance the commission of the oral copulation nor aid in escape or in avoiding detection.

Consequently, the evidence is not sufficient to sustain a finding beyond a reasonable doubt of a felony murder special circumstance. That the jury did find the special circumstance to be true is most reasonably explained not by the strength of any evidence supporting the finding, but by the confusion the jurors experienced with the instructions which they were told governed that finding. (See Argument VIII, *post*.) The jury's finding of the Second Special Circumstance must therefore be vacated.

Moreover, since appellant's death sentence relies upon an unreliable and invalid special circumstance finding, and because the death verdict was not surely unattributable to that special circumstance finding, the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; see *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The judgment of death must therefore also be reversed.

VIII.

THE INSTRUCTIONS GIVEN DEFINING WHEN A MURDER IS COMMITTED "WHILE ENGAGED IN THE COMMISSION OF" AN ORAL COPULATION BY A PERSON CONFINED IN A LOCAL DETENTION FACILITY WERE DEFECTIVE, AND REQUIRE REVERSAL OF THE ORAL COPULATION SPECIAL CIRCUMSTANCE

A. Introduction

Assuming arguendo that this Court finds the evidence sufficient to sustain the Second Special Circumstance, still that finding of the jury must be reversed. The jury indicated to the trial court its confusion concerning the meaning of CALJIC No. 8.81.17, and requested clarification. The trial court's response to that request was inadequate, erroneous and misleading, leaving the jury to "indulge in unguided speculation" (*People v. Failla* (1966) 64 Cal.2d 560, 564) regarding the relationship between the oral copulation and the homicide. The instructions thus violated several of appellant's constitutional rights. His right to trial by jury (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, § 16) was violated by denying him the right to have a properly-instructed jury determine each element of the special circumstance allegation. His right to due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15) was violated by denying him both a fair trial and the benefit of the presumption of innocence and the requirement of proof beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 489-490; *United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Carella v. California* (1989) 491 U.S. 263, 265; *Pope v. Illinois* (1987) 481 U.S. 497; *People v. Kobrin* (1995) 11 Cal.4th 416, 423.) Furthermore, the instructions here violated appellant's rights to a fair and reliable capital guilt trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638) and to a fair and

reliable capital penalty trial. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, §§ 7, 15, and 17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; see also *Godfrey v. Georgia* (1980) 446 U.S. 420, 429.)

B. Relevant Proceedings Below

The jury was instructed according to CALJIC No. 8.81.17 regarding the special circumstances. (RT 3138-3139; CT 703.[117]) During deliberations, the jury sent a note to the judge which stated:

> Can you explain advancing the crime of oral copulation in the special circumstance portion of first degree murder? Does oral sex or sodomy have to be the primary objective or can it be part of the crime

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[117] The instruction initially read to the jury stated:

> "A murder was committed while the Defendant was engaged in the commission or attempted commission of a felony if the murder and the felony are part of a continuous transaction. [¶] To find that the special circumstances referred to in these instructions as murder in the commission of the crime of unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner is true, it must be proved:
>
> 1. That the murder was committed while the Defendant was engaged in the commission or attempted commission of an unlawful oral copulation by a prisoner or an unlawful sodomy by a prisoner; and,
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner, or to facilitate the escape therefrom or to avoid detection.
>
> In other words, the special circumstances referred to in these instructions are not established if the unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner was merely incidental to the commission of the murder." (RT 3138-3139; CT 703.) A copy of the written instructions was provided to the jury. (RT 3144.)

or is the continuous sequence of the crime enough to warrant special circumstances?

(RT 3159.) In response, the trial court gave further instructions to the jury, attempting to explain the meaning of CALJIC No. 8.81.17. (RT 3161-3168.) The trial court first addressed the term used in the jury note of "primary objective" as follows:

> Now I'm going to go back and answer as directly as I can the middle paragraph. You've asked me to discuss this in the context of the special circumstances. "Does oral sex or sodomy have to be the primary objective or can it be part of the crime?"
> You asked me a question that I don't take. It's like: When did you stop beating your wife? "Does oral sex or sodomy have to be the primary objective?" [¶] You've heard me make no reference to a primary objective. I'm at a loss to see where you got that quotation. You might be concerned with it and thought there might be an easy answer, but there's no requirement that it be the primary objective.

(RT 3163.) The trial court reiterated the first requirement, that the murder and felony be in a continuous transaction. (RT 3164.) The court then stated:

> Now, so far that's a lot like the felony murder rule that I discussed with you. To be a special circumstance, then you have to go further. Number two, the murder was committed in order to carry out or advance the commission of the crime of oral copulation by a prisoner or attempted unlawful sodomy by a prisoner or to facilitate escape therefrom or avoid detection.
> In other words, the special circumstances referred to in these instructions are not established if the unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner was merely incidental to the commission of the murder.
> Now, that's for your determination, of course, depending on the circumstances of the case you have before you. I've heard counsel give some examples on both sides on this. I've thought about it, but I'm declining to do that because this case has its own peculiar particular circumstances. And this is one of the issues that will be for your decision.
> Now, again, then, to answer your question, the last paragraph: "Is the continuous sequence of the crime enough to warrant special circumstances?" Answer: No. That only goes to the first part of this.

> Middle part: "Does oral sex or sodomy have to be the primary objective?" You've heard me say nothing about primary objective. "Or can it be part of the crime?" Not if it's just incidental to it. So that's not a complete question.

(RT 3165-3166.)

Thereafter, the jury foreperson had the bailiff ask the trial court "to explain further what advancing the crime of oral copulation in special circumstances means." (RT 3167.) The trial court replied, "Again, using that in its most plain and ordinary meaning, that would mean furthering that crime or facilitating that crime, advancing the crime. Again, that has to be viewed in the context of this case as you folks see it." (*Ibid.*) The trial court then asked counsel if they were satisfied with the court's explanation. Defense counsel responded, "Yes, I think we also discussed a synonym: enable, further facilitate, make more likely, enable." (*Ibid.*) The trial court then stated: "All right. All of which are close synonyms, closely mean the same thing as 'advancing.' [¶] Okay. Does that -- does that clear up some of your confusion on that? I hope it makes it perfectly clear. Of course you have to determine the facts." (*Ibid.*)

The next morning, citing concern that the instructions and response to the jury's inquiry regarding the special circumstance were confusing and possibly erroneous, and that the jury appeared confused,[118] the prosecutor offered to dismiss the two special circumstances then being considered by the jury if, upon inquiry, the jury had already reached a decision on the charge of murder, including degree. (RT 3173-3174.) The prosecutor stated

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[118] After the trial court's response to the jury's questions, and after the jury had retired to deliberate further, the prosecutor had stated that his "observation of the jury were that they did not appear to me to be fully satisfied with the Court's answer, and we may need further tomorrow to meet and discuss any potential further answers." (RT 3167.)

that the confusion was

> particularly . . . due to the unique circumstances of this crime. The jury instructions seem to have been thought out principally with the concept of robbery and kidnapping and burglary in mind, and – . . . It's also a factual thing. As I said in my own argument, if the murder was a preplanned, premeditated murder, you could argue, and I did give them an example that it would be in such a case, it factually could be impossible to commit the felony murder special circumstances that are alleged because they would therefore, under that factual theory, be incidental to the commission of the murder.

(RT 3177.)

Defense counsel initially agreed to the prosecution's proposal, then withdrew their agreement, believing that they would be second-guessed by appellate counsel if the jury were interrupted for such an inquiry, likening the inquiry to an "*Allen* charge." (RT 3179-3180.) However, defense counsel agreed with the prosecutor's view that the special circumstance instruction didn't make sense. "The more I read it the less it makes sense to me. Indeed, these analyses of the special circumstance say it doesn't make sense. So I agree that the law is complex and doesn't really make sense in this area." (RT 3180.)

The trial court recessed to allow the prosecutor to determine whether to strike the specials without inquiry of the jury. (RT 3180.) Nothing more on this subject was discussed on the record. The jury returned its verdicts the next day, in the afternoon. (RT 3182 ff.)

C. Applicable Law

The constitutional guarantees of due process and trial by jury require that all facts necessary for conviction be found by the jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 489-490; *People v. Figueroa* (1986) 41 Cal.3d 714, 725.) However, the jurors will not know what those necessary facts are unless the trial court properly instructs

them. Therefore, "When a person is prosecuted under a statute, the requirements of the statute should be explained to the jury so that they may determine whether or not the defendant's conduct fits within the statute. [Citations.]" (*United States v. Combs* (9th Cir. 1985) 762 F.2d 1343, 1346.)

The Eighth Amendment requires that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, 541.) A death penalty statute must, by rational and objective criteria, narrow the group of murderers upon whom the ultimate penalty can be imposed. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.)

In California, the special circumstances listed in section 190.2 "perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances'" used in the capital sentencing statutes of some other states. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) These "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

Because they play such an important role, these death eligibility factors must provide both "clear and objective standards" and "specific and detailed guidance" for the sentencing jury. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *People v. Bacigalupo*, supra, 6 Cal.4th at p. 468.) Moreover, because a lay jury will decide whether a death eligibility factor has been established, not only the statute itself, but also the instructions used to convey the meaning of that statute to the jury must be clear. Even before the advent of modern death penalty jurisprudence, one California court declared:

"It goes without saying that one whose life is at stake is entitled to have the applicable rules of law stated as clearly and simply as possible and

with meticulous accuracy." (*People v. Morton* (1949) 79 Cal.App.2d 828, 843.) Such meticulous clarity in jury instructions in a capital trial is a constitutional requirement. (*Godfrey v. Georgia*, supra, at p. 428.) A failure to give proper instructions on the elements of a special circumstance allegation violates the Eighth Amendment of the U.S. Constitution. (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319, *overruled on other grounds, Rohan ex rel. Gates v. Woodford,* 334 F.3d 803, 815 (9th Cir.2003).)

A criminal defendant has a due process right under both the California and United States Constitutions to accurate jury instructions on all elements of an offense. This right correlates with the prosecution's duty to prove each of the elements of a crime beyond a reasonable doubt. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Flood* (1998) 18 Cal.4th 470, 480-481.) These constitutional protections are equally applicable to the determination of a special circumstance allegation. As the United States Supreme Court held in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 488: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (See also *People v. Hughes* (2002) 27 Cal.4th 287, 345.)

> A trial court's instructional duties are well-known:
>
> It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citations.]

(*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Without guidance from the trial court, jurors have no way of knowing what specific findings were required to justify a true finding of a special

circumstance. (See *Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

Where, during deliberations, a jury expresses confusion regarding the meaning or application of the instructions, the trial court has a mandatory duty to clear up that confusion. (*Bollenbach v. United States*, *supra*, 326 U.S. at 612-613; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) section1138[119] requires the court to provide a jury any information on a point of law which they require. A violation of section 1138 becomes federal constitutional error when the trial court fails to clarify its instructions so as to address a jury's explicit difficulties.[120] (*Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 574-575 [court's refusal to clarify instruction after specific jury requests, coupled with implication that no future clarification would be forthcoming, violated section 1138 and due process]; *People v. Weatherford* (1945) 27 Cal.2d 401, 420 [section 1138 violation implicates defendant's right to fair trial]; *United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 808-811 [confusing response to jury's questions infringed on

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[119] section 1138 states:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

[120] section 1138 protects the jury's right to be properly instructed on the law. (See *People v. Wader* (1993) 5 Cal.4th 610, 661; *People v. Butler* (1975) 47 Cal.App.3d 273, 283-284 [statute protects jury's fundamental rights].) In failing to instruct the jury on the correct law, a trial court violates their rights as well. (See *Id.* at p. 284 [statute must not be ignored "at the whim of the trial judge or for the convenience of the judge and counsel."].)

defendant's Sixth Amendment rights]: *United States v. Warren* (9th Cir. 1993) 984 F.2d 325, 330 [error, not harmless beyond a reasonable doubt, from trial court's failure to provide a supplemental instruction sufficient to clear up uncertainty which question from deliberating jury had brought to court's attention].)

Jury instructions which leave the trier of fact with an inaccurate impression of the correct rule of law to be applied or which mislead the jury as to how it can apply or evaluate certain evidence constitutes instructional error which requires reversal unless demonstrated to be harmless beyond a reasonable doubt. (*Pope v. Illinois*, *supra*, 481 U.S. 497, 503; *People v. Swearington* (1977) 71 Cal.App.3d 935, 947.

A jury instruction that is ambiguous or confusing is constitutional error if "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62 at 72; *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526 and fn. 7.) When reviewing an ambiguous jury instruction for error, the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and in light of the trial record. (*Estelle v. McGuire*, *supra*, 502 U.S. at 73, citing *Cupp v. Naughten* (1973) 414 U.S. 141, 147.)

D. Argument

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue." (*Bollenbach v. United States* (1946) 326 U.S. 607, 613; *United States v. Levine* (10th Cir. 1994) 41 F.3d 607, 617; *United States v. Washington* (9th Cir. 1987) 819 F.2d 221, 226; *United States v. Combs*, *supra*, 762 F.2d at p. 1346.) In this case, however, the jury was asked to decide whether the oral copulation was incidental to the homicide or the homicide was committed to carry out or advance the oral copulation without

adequate guidance as to the basis upon which that determination was to be made.

As is apparent from the record, everybody involved in the trial – the jury, the prosecutor, defense counsel, the trial court – were confused or unclear about how CALJIC No. 8.81.17 applied to the facts of this case. As argued above (see Arg. VIII, *ante*), the difficulty in applying the instruction to the facts of this case arises from the insufficiency of the evidence to support a finding that the special circumstance was true. Assuming arguendo that some scenario fitting the evidence might conceivably support such a finding, the instructions given by the trial court, including the trial court's response to the jury's inquiries cannot sustain a finding that the jury necessarily or even probably based its finding of the special circumstance upon a finding of facts consistent with that scenario.

The instructions as a whole did not provide "clear and objective standards" (*Godfrey v. Georgia*, *supra* 446 U.S. at 428) by which the jury could determine the applicability of the special circumstance. Whether CALJIC No. 8.81.17 is considered a sufficient instruction in the abstract is not the question. The jury, by its note and follow-up inquiry, demonstrated that the instruction was insufficient for this jury. The instruction left the jury confused and unable to understand the determination it was required to make in this case. The supplemental instructions which the trial court gave not only failed to clarify any meaningful standards, but further confused the issue and misled the jury. Rather than stating the applicable rules of law "with meticulous accuracy" (*People v. Morton*, *supra*, 79 Cal.App.2d at 843), the instructions, taken as a whole, left the jury to come to a verdict through effectively "unguided speculation." (*People v. Failla*, *supra*, 64 Cal.2d at 564.)

Upon receipt of the jury's note, which evidenced confusion

concerning the meaning and application of CALJIC No. 8.81.17, the trial court had a mandatory duty to clear up that confusion "with concrete accuracy." (*Bollenbach v. United States*, *supra*, 326 U.S. at 613; Penal Code § 1138.) Here, the court failed to correct the jury's confusion about the applicable legal principles which it was being told to apply. Instead, the trial court's supplemental instruction for the most part simply re-stated CALJIC No. 8.81.17, which had already proved itself insufficient to the task for this jury. (Compare *United States v. Warren*, *supra*, 984 F.2d at p. 330.) Where the trial court deviated from CALJIC 8.81.17, in addressing the jury's question about "primary objective," the court's instruction further distorted the jury's understanding of the applicable law, and deflected the jury from consideration of relevant circumstances from which a finding that the special circumstance was not true could be found. Thus, rather than clearing up the confusion "with concrete accuracy," the trial court made matters worse, leaving the jury with an inadequate and misleading understanding of the applicable law, and violating appellant's federal and state constitutional rights to be tried by a properly instructed jury. (See *McDowell v. Calderon* (9th Cir.1997) 130 F.3d 833, 836 (en banc), overruled in part on other grounds, *Weeks v. Angelone* (2000) 528 U.S. 225 [jurors' uncorrected confusion on the law may lead to verdicts inconsistent with Eighth Amendment and due process]; *People v. Collins* (1976) 17 Cal;.3d 687, 692-693

This Court has held that a jury need not be instructed in the precise terms of CALJIC No. 8.81.17, noting that various formulations of the elements of the felony special circumstance have been used by the Court. In *People v. Horning* (2005) 34 Cal.4th 871, this Court found no error where the instruction given to the jury required only that the jury find that the underlying felony was not incidental to the murder, omitting the language of

CALJIC No. 8.81.17 that the murder had to be committed in order to carry out or advance the underlying felony.

> We have used various phrasings in explaining this requirement, two of which are included in CALJIC No. 8.81.17, but we have never suggested that we had created two separate requirements, or that any precise language was required to explain the concept to the jury. There is nothing magical about the phrase "to carry out or advance" the felony. Indeed, we ourselves have stated the requirement without using that phrase. (See *People v. Mendoza*, *supra*, 24 Cal.4th at p. 182, 99 Cal.Rptr.2d 485, 6 P.3d 150; *People v. Clark* (1990) 50 Cal.3d 583, 608, 268 Cal.Rptr. 399, 789 P.2d 127.) Several ways exist to explain the requirement.

(34 Cal.4th at 907-908.)

One phrasing of the requirement used by this Court has focused on the "primary criminal goal" or "defendant's primary purpose." In *People v. Thompson* (1980) 27 Cal.3d 303, the Court stated, "A special circumstance allegation of murder committed during a robbery has not been established where the accused's *primary criminal goal* 'is not to steal but to kill and the robbery is merely incidental to the murder . . . because its sole object is to facilitate or conceal *the primary crime*.' " (27 Cal.3d at 322 [quoting *Green*] [emphasis added].) In *People v. Navarette* (2003) 30 Cal.4th 458 (*Navarette*), this Court stated "if the felony is merely incidental to achieving the murder--the murder being the defendant's *primary purpose*--then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance *that* independent purpose, the special circumstance is present." (30 Cal.4th at p. 505 (emphasis added); see also *People v. Kimble*, *supra*, 44 Cal.3d at pp. 501-503.)

In *People v. Bolden* (2002) 29 Cal.4th 515, this Court held that there was no error in refusing an instruction *requiring* that the jury determine which was "the primary crime." (*Id.* at pp. 557-558.) However, *Bolden* did

not reject the reasoning of cases such as *Green*, *Thompson*, and *Navarette* which used that concept, nor did it hold that whether the underlying felony or the killing was the primary objective is irrelevant to the applicability of the special circumstance. *Bolden* only held that an instruction requiring the jury to decide whether robbery (in that case) was the primary motivation for the killing "would have added nothing to the jury's understanding of this requirement" in that case. (*Ibid.*)

Another phrasing of the requirement has focused, as in *Navarette*, *supra*, on the question of whether the defendant had an "independent purpose" for the commission of the felony. In *People v. Green*, *supra*, 27 Cal.3d at p. 61, the phrase "independent felonious purpose" was used. (See also *People v. Bonin* (1989) 47 Cal.3d 808, 850.) This Court has also upheld special circumstances on the basis of "concurrent intents" to commit the underlying felony and the killing. (See, e.g., *People v. Mendoza*, *supra*, 24 Cal.4th at 183-184.) Additionally, this Court has stated that simple chronology in the commission of the underlying felony and the killing is not determinative. (*Green*, *supra*, 27 Cal.3d at pp. 60, 62.)

There were, therefore, concepts and descriptions relevant to the jury's determination of the applicability of the special circumstance other than those in CALJIC No. 8.81.17 which were available to the trial court in an attempt to clarify the issue for the jury when CALJIC No. 8.81.17 proved too confusing for the jury to apply. None of the alternative phrasings which this Court has used was provided to the jury, despite their availability from the case law. For instance, the trial court could have instructed the jury in terms such as used in *Navarette*, *supra*, e.g., "if the oral copulation was incidental to the murder, the murder being the primary purpose, the special circumstance must be found not true. If defendant's primary purpose was to commit the oral copulation and that purpose was independent of the murder,

and the murder was committed to further or advance the commission of the oral copulation, or to facilitate the escape therefrom or to avoid detection, the special circumstance may be found true." The trial court could have informed the jury that the chronological sequence of offenses is not determinative (see *Green*, *supra*, at 60-61), i.e., that the homicide followed the commission of the oral copulation is not determinative. Such a clarification could have aided the jury's evaluation of the prosecution's suggested analysis, that if the intent to kill arose after the oral copulation then the special circumstance was true, whereas if the intent to kill arose before the oral copulation, the special circumstance was not true. (RT 2967.)

Yet the trial court apparently feared deviation from the language of CALJIC No. 8.81.17, even to the point of criticizing the jury for considering one of the concepts which this Court has utilized ("primary objective"), but which is not included in the CALJIC instruction.

> [T]he fact that pattern jury instructions are available should not preclude a judge from modifying or supplementing a pattern instruction to suit the particular needs of an individual case. . . . The thrust of such objection goes not to the use of pattern instructions themselves, but rather to the practice of rote reliance upon such instructions without modification, a practice that may develop simply by virtue of their existence. . . . [P]attern instructions should be modified or supplemented by the court when necessary to fit the particular facts of a case.

(ABA Standards for Criminal Justice, Discovery and Trial by Jury (3rd ed. 1996) Standard 15-4.4 pp. 236-237.)

As was stated in *People v. Thompkins* (1987) 195 Cal.App.3d 244,

> [F]rom our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions. And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a

> mistake in responding to a jury's inquiry during deliberations. We recognize that formulating a response to such questions often requires consultation with counsel and significant independent legal research. In purely cost-benefit terms, however, a trial judge should view any such effort as time well spent.
>
> Although we strongly counsel against the type of peremptory response used in this case, neither do we mean to advocate that a trial judge never stray from the language of form instructions. It is hardly preferable for a judge to merely repeat for a jury the text of an instruction it has already indicated it doesn't understand. We are convinced both jurors and the justice system will be well served in the vast majority of cases if the trial judge thoughtfully considers the jury's inquiry, clarifies it if necessary, studies the applicable legal principles, and responds to the jury in as simple and direct a manner as possible.

(195 Cal.App.3d at pp. 252-253.)

While the jury appeared to have discerned one of the alternative concepts used by this Court, i.e., "primary objective," the trial court diverted the jury from that analysis, effectively telling them that "the primary objective" was an irrelevant or erroneous consideration, saying,

> "Does oral sex or sodomy have to be the primary objective or can it be part of the crime? [¶] You asked me a question that I don't take. It's like: When did you stop beating your wife? "Does oral sex or sodomy have to be the primary objective?" [¶] You've heard me make no reference to a primary objective. I'm at a loss to see where you got that quotation. You might be concerned with it and thought there might be an easy answer, but there's no requirement that it be the primary objective.

(RT 3163; see also 3165-3166.)

As stated above, the question of "primary objective" is not a *necessary* component of the special circumstance. (*People v. Bolden*, *supra*, 29 Cal.4th at pp. 557-558.) However, whether or not the underlying felony is the primary objective is *relevant* to the applicability of the special circumstance. (*People v. Navarette*, supra, 30 Cal.4th at p. 505.) If the

underlying felony is the primary objective, then the applicability of the special circumstance is more likely. (See, e.g., *People v. Navarette*, *supra*, 30 Cal.4th at p. 505 ["no significant evidence of any motive for the murders other than burglary and/or robbery"].) If the underlying felony is not the primary objective, the applicability of the special circumstance is more likely precluded. (See, e.g., *Green*, *supra*, 27 Cal.3d at 62; *People v. Thompson* (1980) 27 Cal.3d 303, 323-325; *People v. Weidert*, (1985) 39 Cal.3d 836, 842.)

This jury, as did the jury in *Green* (see 27 Cal.3d at 60), apparently sensed the relevance of the "primary objective." The trial court, however, precluded the jury's consideration of this highly relevant and often determinative factor. In fact, the trial court's response to the jury, quoted above, essentially derided the jurors for considering the concept. The trial court did not merely omit mention of the concept of "primary objective," as in *Bolden*, but misstated the applicable law, affirmatively deflecting the jury from consideration of a factor from which a finding favorable to the defense could be made. The trial court thus unconstitutionally and erroneously lightened the burden of the prosecution, allowing a finding of the special circumstance on conduct not covered by the statute, distorting the process by which the jury determined the applicability of the special circumstance, undermining the reliability of that jury determination, and depriving appellant of a fair, reliable and non-arbitrary determination of both guilt and penalty.

The jury had no basis, other than the original instruction which proved to be too confusing, and insufficient for this jury, upon which to evaluate whether or how the prosecution's suggested theory, that the oral copulation and the homicide were committed pursuant to a common purpose – to terrorize Andrews. (See RT 2697, 3102.) As argued above (see

Argument VII, *ante*), under the prosecution's theory, the homicide was committed in furtherance of the intent to terrorize, not of the commission of the oral copulation, and the intents to commit the oral copulation and the homicide were not independent. Yet nothing in the in instructions provided the jury any real basis for evaluating the effect of such a conclusion on its verdict.

Having thus failed to clarify, and having instead misstated the applicable law and further confused the issues, the trial court finally left to the jury the ultimate determination of what "advancing the crime of oral copulation" and "incidental to the commission of the murder" means. After re-reading the second paragraph of CALJIC No. 8.81.17, the trial court stated, "Now that's for your determination, of course, depending on the circumstances of the case you have before you. . . . [T]his is one of the issues that will be for your decision." (RT 3165.) After further confusion regarding the meaning of "advancing the crime of oral copulation" was expressed by the jury foreperson, the trial court stated, "Again, using that in it most plain and ordinary meaning, that would mean furthering that crime or facilitating that crime, advancing that crime. Again, that has to be viewed in the context of this case as you folks see it." (RT 3167.) These statements, in light of the confusion demonstrated by the jury, and the erroneous and misleading attempts at clarification by the trial court, effectively told the jury that it was up to them to determine what the instructions meant in this case. They were not just required to apply the law given to them to the facts, they were required, by the trial court's failure to clarify the law for them, to figure out what the law meant so that they could apply it to the facts, but as to the meaning of the law The jury was thereby left with the responsibility for deciding not just questions of fact in the case but questions of law. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331-1332.) The jury was forced to

indulge in effectively unguided speculation concerning the meaning and application of the terms in the instruction to a factual scenario different from those contemplated in their drafting. Moreover, given the derisive tone of the trial court's rejection of the jury's question regarding the primary objective, and the trial court's repeated instruction that the issue was for the jury's determination, the trial court effectively dissuaded the jury from pursuing further clarification.

These instructional errors misled the jury and were prejudicial to the defendant, effectively eliminating relevant factual considerations from the jury's determination of the applicability of the special circumstance. The determination of whether the oral copulation was "incidental to," rather than the moving force behind, the homicide was a critical element in the special circumstance here, requiring factual determination concerning appellant's intent and mental state. The right to a fair trial by an impartial jury includes the constitutional right of a defendant in a criminal case to have the jury determine every material issue of fact presented by the evidence. (United States Constitution, Amendments 5 and 6, California Constitution, article 1, §§ 7, 15 and 16.)

The adequacy of instructions given to the jury is determined from an examination of the instructions as a whole and in light of the entire record of the trial. (*Estelle v. McGuire*, *supra*, 502 U.S. at 73.) Viewing the entire charge, it appears that the special circumstances instructions given to this jury were inadequate, confusing, misleading and erroneous, and raised a substantial likelihood that the jury would find the special circumstance true based upon evidence legally insufficient to sustain such a finding. The initial instruction left the jury confused. The court's response to the jury's request for clarification compounded the confusion. Whether or not CALJIC No. 8.81.17 is deficient in the abstract, it *was* insufficient for this

jury, and the supplemental instructions not only failed to provide the jury the means to properly evaluate the evidence against the appellant, but confused the issue further, and affirmatively misled the jury.

The prejudicial impact of incomplete or inaccurate supplemental instruction is significant in that supplemental instructions may take special prominence in the jury's mind. In *Bollenbach* the court observed,

> "The influence of the trial judge on the jury is necessarily and properly of great weight." *Starr v. United States* [(1894)] 153 U.S. 614, 626, 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. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.

(*Bollenbach*, *supra*, 326 U.S. at p. 612.) A conviction ought not rest on an equivocal charge to the jury on a basic issue. (*Bollenbach*, *supra*, at p. 613.) This Court can have no confidence that the jury's ultimate finding on the second special circumstance was based upon an accurate understanding of the applicable law or a reliable application of the law to the facts of this case. There is no reasonable likelihood that the defects in the instruction had no affect on the verdict.

Instructional error regarding an element of an offense or special circumstance allegation requires reversal of the judgment unless it can be determined to be harmless beyond a reasonable doubt. (*Pope v. Illinois*, *supra*, 481 U.S. 497-503; *Chapman v. California*, *supra*, 386 U.S. at 24.) Review of the entire record compels the conclusion that this error cannot be determined harmless under that standard.

There was no direct evidence which addressed the question posed by the special circumstance allegation, nor any substantial circumstantial evidence which justifies anything more than speculation in this regard. As argued above (see Argument VII, *ante*), the evidence was insufficient to

sustain the jury's finding of the special circumstance, which finding is reasonably likely the result of the erroneous instructions. Even if the evidence is arguably sufficient to sustain a finding of the special circumstance, such a finding is not compelled by the evidence.

The questions from the jury demonstrating their difficulty with this issue, the time the jury required to reach a verdict even after the trial court's supplemental instructions,[121] and the prosecution's willingness to drop the special circumstance allegation when the jury's confusion became apparent, all demonstrate that the evidence on this question was not strong or compelling. Any evidence that the murder was intended to carry out or advance the oral copulation was not "so dispositive" that this Court can say that a properly instructed jury would necessarily have found it to exist. (*Pope v. Illinois*, *supra*, 481 U.S. 497-503; cf. *Rose v. Clark* (1986) 478 U.S. 570, 583.)

This was not a case in which the issue posed by the omitted instruction was necessarily resolved by the jury under other, correct instructions. (Cf. *People* v. *Sedeno*, *supra*, 10 Cal.3d at p. 721.) No other instructions dealt with the connection between the oral copulation and the homicide beyond the existence of a continuous transaction, which is insufficient alone to sustain the special circumstance. Nor was this a case in which the facts necessarily found by the jury were so closely related to the ultimate facts which the jury should have been required to find that it can be said, beyond a reasonable doubt, that no reasonable juror could have found the first facts without also finding the ultimate facts. (Cf. *Carella* v. *California*, *supra*, 491 U.S. at pp. 269-270 [conc. opn. of Scalia, J.].)

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[121] Nine hours over three days. (See RT 3159-3168, 3173, 3182; CT 541-543, 546-547.)

Whether (1) the homicide had been committed to further or advance the oral copulation or (2) the oral copulation had been incidental to the homicide was a key issue in the finding of the oral copulation special circumstance. The evidence on that point was, at best, ambiguous, and at worst, insufficient. As explained above, it is reasonably likely that the jury applied the challenged instruction in a way the violated the Constitution. (*Pope v. Illinois*, *supra*, 481 U.S. 497, 503; *Estelle v. McGuire*, *supra*, 502 U.S. at 72.) Therefore, the error was not harmless beyond a reasonable doubt and reversal of the Second Special Circumstance is required. (*Pope v. Illinois*, *supra*, 481 U.S. 497-503; *Chapman v. California* (1967) 386 U.S. 18.) Furthermore, to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the State arbitrarily withholding a nonconstitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 1, 7, 15, 16; Woodson v. North Carolina, supra, 428 U.S. 280; *Gardner* v. *Florida, supra,* 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. at pp. 88- 89; see *Hicks v. Oklahoma, supra,* 447 U.S. 343.) Even if the error is assessed only under California law, it is reasonably probable that a result more favorable to appellant would have occurred had the trial court not responded erroneously to the jury's request for further information on the law applicable to the Second Special Circumstance. Reversal of the special circumstance is therefore required even under the *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the errors in the supplemental instructions which resulted in an unreliable finding of a special circumstance (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), it

was obtained in violation of appellant's Eighth Amendment right to be free from cruel and unusual punishment. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; see *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

E. Conclusion

The trial court's combined instructional errors violated appellant's rights to a fair and reliable capital guilt trial, to a determination by a properly-instructed jury of each element of the special circumstance allegation, to the benefit of the presumption of innocence and the requirement of proof beyond a reasonable doubt. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7, 15- 17.)

Moreover, since appellant's death sentence relies upon an unreliable guilt verdict, and an invalid special circumstance finding, and because the death verdict was not surely unattributable to the errors in the supplemental instructions which resulted in the special circumstance finding, the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; see *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The Second Special Circumstance finding and appellant's judgment of death must therefore be reversed.

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IX.

REVERSAL IS REQUIRED DUE TO IMPROPER AND MISLEADING ARGUMENT TO THE JURY BY THE PROSECUTION

During his guilt phase argument, the prosecutor committed serious misconduct by referring to, and misrepresenting, evidence outside the record, by misstating evidence, and by improperly commenting upon appellant's decision not to testify and using for improper purposes evidence which was admitted for a limited purpose. This misconduct violated appellant's right to confront and cross-examine witnesses, to a fair jury trial, to due process, and to reliable determinations of guilt and death eligibility under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., V, VI, VIII, XIV Amends.)

A. Relevant Proceedings in the Trial Court

In his rebuttal argument to the jury, after the defense had completed their argument, the prosecutor stated:

> I'd like to go through some of the testimony -- some of the statements that were made by the defense attorneys in this case. [¶] I'd like you to recall something with respect to the Bond and Benjamin conspiracy. Remember, right here in these United States, there's a Fifth Amendment right. You don't have to be interviewed by a police officer. You don't have to testify. At any time, anywhere along from the first morning, neither Bond nor Benjamin didn't have to say a thing, but they did. I want you to bear that in mind.

(RT 3080-3081.)

Defense counsel immediately objected, and asked for a conference. The trial court asked that the argument continue and the objection be reserved, and defense counsel acceded to the trial court's request. (RT 3081.) Later in the argument, the prosecutor again emphasized that Bond

and Benjamin allowed themselves to be cross-examined, and had not invoked their Fifth Amendment rights.[122] After the prosecution's argument was completed, and out of the presence of the jury, defense counsel asked for a mistrial based upon the above argument, which constituted prosecutorial misconduct. Defense counsel argued that it constituted a misstatement of facts, because Bond had, in fact, invoked his Fifth Amendment privilege at the preliminary examination in this case, and was made "to further spotlight the fact that [appellant] has availed himself of the Fifth Amendment rights." (RT 3104-3105.)

Defense counsel requested that the trial court take judicial notice of the transcript of the preliminary examination in this case, a part of the court file. The trial court responded, "Evidence is closed." (RT 3104.) The trial court then asked, "What I want to know, sir . . . in our trial do we have evidence for the jury that Mr. Bond asserted his Fifth Amendment rights?"

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[122] Both men basically came and said, "'What I'm telling you here today after I've thought about it, I've read my statements, I've been cross-examined, I've given you my best effort." That was the final statement from these men.

(RT 3085)

* * *

> And you could convict this man based on simply the testimony of Benjamin and Bond. And when you look at their testimony, I submit to you that most of what they told you was the truth. They pretty much at this point in time had to. You could ignore that testimony completely. Say they didn't come forward. Say they decided to sit here and take the Fifth, and we provided to you the testimony instead of Anthony Williams, Brad Nelson, Albert Martinez, Eric Johnson.

(RT 3099-3100.)

(*Ibid.*) Defense counsel first responded that there was not, but it was then noted that on cross-examination, Bond had acknowledged invoking the Fifth Amendment when he testified at the preliminary examination in this case. (RT 3104-3105; see CT 37; RT 2413.)

The prosecutor stated that he had expected an objection, but "decided to say what I said because the witnesses were accused of committing the murder by the defense, and I felt that this was fair comment," relying upon *United States v. Robinson* (1988) 485 U.S. 25. (RT 3105.) He stated that "the comment was knowingly made, researched, and I believe done in compliance with good ethics and the law." (RT 3106.)

Defense counsel responded that the prosecutor had *told* the defense that Bond had invoked the Fifth Amendment in "the federal case."[123] Defense counsel also repeated that Bond had invoked the Fifth Amendment at the preliminary examination, and that Bond had invoked the Fifth Amendment at a deposition.[124] (RT 3106.) The prosecutor responded, "He did and he didn't." (*Ibid.*)

The trial court denied the motion for mistrial, stating:

> Was it in furtherance of an explanation with respect to their speaking and how they spoke? That is the key issue in this case. If there may have been some information known to the district attorney that's not in our file, that would constitute prosecutorial misconduct. I need to leave that to some other Court, as you may report it. [¶] It may be worth commenting, in this case there's been no reference to Mr.

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[123] Presumably the federal civil trial proceeding simultaneously with the state criminal trial, stemming from a lawsuit filed against appellant, the County of Fresno, and others arising from the death of Mr. Andrews. *Andrews, et al. v. County of Fresno et al.*, No CV F-93-5010 REC, U.S. District Court, Eastern District of California.

[124] Again, presumably from the federal civil litigation.

> Dement having asserted Fifth Amendment rights, and the impression to the jury is probably quite to the contrary because of detectives' discussions with him that were received in the record, so I don't know how that could reflect on the defendant in this case.

(RT 3107.)

The trial court's ruling, its reasoning, and its refusal to consider facts established by the record in this case and conceded by the prosecutor, were error. The prosecutor's argument, which referred to, and misrepresented, evidence outside the evidentiary record, misstated the evidence, and improperly commented upon petitioner's silence prior to trial and at trial, constituted misconduct in violation of appellant's constitutional rights.

B. Applicable Law

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to an "elevated standard of conduct" because he or she exercises the sovereign powers of the state. (*People v. Hill* (1997) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court has explained:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

(*Berger v. United States* (1935) 295 U.S. 78, 88.)

Put differently: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord *United States v. Blueford* (9th Cir. 2002), 312 F.3d 962, 968; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 (disn. opn. of Douglas, J.) ["The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws that give those accused of a crime a fair trial"]; *United States v. Young* (1985) 470 U.S. 1, 7; *In re Ferguson* (1971) 5 Cal.3d 525, 531; see also *People v. Hunter* (1989) 49 Cal.3d 957, 975; *People v. Lyons* (1956) 47 Cal.2d 311, 318.)

Misconduct by a prosecutor violates the Due Process Clause of the Fifth and Fourteenth Amendments where it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright* (1986) 477 U.S. 168, 178-179.

In addition, a prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury," even if such action does not render the trial fundamentally unfair. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823 & fn.1; accord *People v. Smithey* (1999) 20 Cal.4th 936, 961.) When a claim of misconduct focuses upon comments made by the prosecutor before the jury, "the

question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Smithey*, *supra*, 20 Cal.4th at p. 960.)

1. Misstatements of Evidence/Reference to Matters Not in Evidence

Misstating the evidence in the record, and/or stating or inventing facts not in the record, constitutes misconduct (*Darden v. Wainwright* (1986) 477 U.S. 168, 180; *People v. Bolton* (1979) 23 Cal.3d 208, 212; *People v. Kirkes*, *supra*, 39 Cal.3d at p. 725), and is a frequent basis for reversal. (U.S. Const., V, VI, and XIV Amends.; Cal. Const., art. I, §§ 15, 16; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103; see also, *Furman v. Wood* (9th Cir. 1999) 190 F.3d 1002, 1006 [improper argument requires reversal if it "so infected the trial with unfairness" as to deny due process]; *Cf.* A.B.A., ABA Standards for Criminal Justice Prosecution Function and Defense Function 3- 5.8(a) (3d ed. 1993) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").)

Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence constitutes misconduct. (*People v. Avena* (1996) 13 Cal.4th 394, 420.) A prosecutor may not make inaccurate statements of the record which may mislead or confuse the jury. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 823-827; *People v. Graves* (1968) 263 Cal.App.2d 719, 738; *Haynes v. United States* (D.C. 1967) 372 F.2d 383, 395; *King v. United States* (D.C. Cir. 1967) 372 F.2d 152; *Corley v. United States* (D.C. Cir. 1966) 365 F.2d 884, 885; Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, (1973) 64 J. Crim. Law & Criminology 22, 30 fns. 72, 73.) "A

prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 823, quoting *People v. Purvis* (1963) 60 Cal.2d 323, 343.)

Misstatements may be excused where they are made inadvertently, in good faith, or on a minor matter (see *People v. Beivelman* (1968) 70 Cal.2d 60, 75-76); however, misstatements constitute prejudicial misconduct when addressing a "nerve-center issue," to advance the prosecutor's case, regardless of whether they are done in bad faith. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823 [prejudicial misconduct were prosecutor deliberately misstated or mischaracterized evidence, including false assertion of the conclusiveness of serology evidence, confusion of knife possessed by defendant and that possessed by another man, misrepresentation of testimony regarding the perpetrator's height and mischaracterization of the victim's scar]; *Miller v. Pate* (1966) 386 U.S. 1 [deliberate misrepresentation that stain on underwear was blood when prosecutor knew it was paint]; *King v. United States*, *supra*, 372 F.2d at p. 395 [misstatement of expert testimony on crucial issue of organic brain damage was misconduct and prejudicial regardless of whether prosecutor acted in bad faith]; *Wallace v. United States* (4th Cir. 1960) 281 F.2d 656, 667-668 [misconduct to repeatedly misquote witness]; *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 700-702 [argument that victim/witness had never changed her story, where no evidentiary support for that contention, constituted clear and serious misconduct, referring to facts not in evidentiary record, as well as improper vouching for credibility of witness].)

2. *Griffin* Error

The Fifth Amendment to the United States Constitution, applied to

the states through the Fourteenth Amendment, forbids comment by the prosecution on the defendant's silence at any phase of the trial. (*Griffin* v. *California* (1965) 380 U.S. 609, 615 [14 L.Ed.2d 106, 85 S.Ct. 1229].) Such impermissible comment is also a violation of the defendant's right to the presumption of innocence and fair trial secured by due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15) and, in a capital case, a violation of his right to fair and reliable guilt and penalty determination (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17).

Although *Griffin* involved explicit references to the failure of the defendant to take the stand (*Griffin* v. *California*, *supra*, 380 U.S. at p. 615), this Court has recognized that "[t]he rulings of the courts should not be so esoteric that a judgment must turn on the superficial difference between this prosecutor's phraseology and that found improper in *Griffin*." (*People* v. *Modesto* (1967) 66 Cal.2d 695, 711, overruled on other grounds in *Maine* v. *Superior Court* (1968) 68 Cal.2d 375, 383, fn. 8.). The *Modesto* court noted that the impermissible comment in *Griffin* was not "'a magical incantation, the slightest deviation from which will break the spell.'" (*Ibid.*) Instead, the comments must be evaluated in terms of their net effect upon the jury. (*Ibid.*)

"'*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand.' [Citation.]" (*People* v. *Miranda* (1987) 44 Cal.3d 57, 112.) Thus, although the prosecutor can comment on the state of the evidence and the failure of the defense to call logical witnesses (*ibid.*), it is *Griffin* error for the prosecutor to make remarks that are "manifestly intended to call attention to the defendant's failure to testify" or are "of such a character that the jury would naturally and necessarily take [them] to be a comment on the failure to testify" (*Lincoln* v. *Sun* (9th Cir.

1987) 807 F.2d 805, 809; *United States* v. *Cotnam* (7th Cir. 1996) 88 F.3d 487, 497).

Improper comments can take many forms. For example, it is *Griffin* error for a prosecutor to state that certain evidence is uncontradicted when that evidence could not be contradicted by anyone other than the defendant testifying on his own behalf (*People* v. *Bradford* (1997) 15 Cal.4th 1229, 1339; *United States* v. *Cotnam*, *supra*, 88 F.3d at p. 497) or to refer to the absence of evidence that only the defendant's testimony could provide (*People* v. *Murtishaw* (1981) 29 Cal.3d 733, 757 and fn. 19; *Williams* v. *Lane* (7th Cir. 1987) 826 F.2d 654, 665). It is likewise *Griffin* error to argue that the defendant won't tell his side of the story (*Griffin* v. *California*, *supra*, 380 U.S. at p. 615) or to refer to the defendant "sitting -- just sitting" in the courtroom (*People* v. *Modesto*, *supra*, 66 Cal.2d at p. 711).

In *People v. Medina* (1974) 41 Cal.App.3d 438, the prosecutor referred to the fact that there were five percipient witnesses to what happened, and noted that three of them testified and "'were subjected to cross-examination which is a pretty sharp test of truth, and they subjected themselves to cross-examination.'" (41 Cal.App.3d at 457.) The Court of Appeal observed that "[t]he other two possible witnesses left unaccounted for could not have been anyone other than defendants." (*Ibid.*) The prosecutor then argued that their testimony was unrefuted, "'And they were up there on that stand. They were put under oath. They were subject to perjury. . . .'" (*Ibid.*) The appellate court found that this argument, which effectively urged the jury to believe the three accomplice witnesses because the defendants didn't take the stand and subject themselves to cross-examination and to prosecution for perjury, was *Griffin* error. (*Ibid.*)

3. Judicial Notice

Evidence Code § 452[125] provides that judicial notice may be taken of court records. Evidence Code section 453[126] *requires* a trial court to take judicial notice of such a court file upon request of a party where adequate notice is given to the opposing party and sufficient information is provided to the court to allow judicial notice to be taken.

C. Argument

1. Misstatement of Evidence/Reference to Matters Outside the Record

There can be no question but that the prosecutor's argument that Bond had not invoked his Fifth Amendment rights was a misstatement of fact. The argument was also a reference to, and misstatement of, matters outside the evidentiary record before the jury. The prosecutor argued to the jury that Bond and Benjamin could have invoked the Fifth Amendment at any time since they were first interviewed by law enforcement in this case, and could have refused to testify, but did not do so: "At any time, anywhere along from the first morning, neither Bond nor Benjamin didn't have to say a

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[125] Evidence Code § 452, subdivision (d) states that, to the extent that they are not embraced within Section 451, judicial notice may be taken of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

[126] Evidence Code § 453 states:

> The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:
>
> (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
>
> (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

thing, but they did." (RT 3080-3081.) There was no evidence before the jury that either Bond or Benjamin had or had not invoked the Fifth Amendment privilege concerning the events of April 8-9, 1992, prior to their testimony before this jury, except that Bond had admitted during cross-examination having done so at the preliminary examination in this case. (RT 2413; see also CT 37.) The prosecutor's assertion that they had not invoked their Fifth Amendment rights "anywhere along from the first morning" was therefore a reference to matters outside the evidentiary record before the jury. It was also demonstrably false on the face of this record. Not only had Bond admitted invoking the Fifth Amendment at the preliminary examination (RT 3104-3105), but the prosecutor admitted knowing of other instances of Bond having done so. In response to defense counsel's argument for a mistrial, out of the presence of the jury, and after he had completed his final closing argument to the jury, the prosecutor admitted that Bond had invoked the Fifth Amendment "during the federal case two weeks ago" and at a deposition. (RT 3107 ["He did and he didn't"].)

Thus, the prosecutor made an affirmative misstatement of fact while simultaneously misrepresenting facts outside the evidentiary record before the jury. That such misleading and false argument constituted misconduct cannot be questioned.

That it was not inadvertent misconduct is clear from the prosecutor's statements to the trial court during argument on the defense mistrial motion. The prosecutor stated he had made the argument after much thought and research, arguing that *United States v. Robinson*, *supra*, 485 U.S. 25, supported the misstatements as "fair comment," responding to defense arguments accusing Benjamin and Bond of having committed the homicide in this case.

However, *Robinson* lends no support to the prosecutor's actions here. There, in argument to the jury, defense counsel charged, several times, "that the Government had unfairly denied [the defendant] the opportunity to explain his actions." (485 U.S. at 27.) The prosecutor, after the defense argument, objected, and argued that the defense had "opened the door," and the trial court agreed. (*Id.* at 28.) The prosecutor then argued to the jury, inter alia, that the defendant "'could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.'" (*Ibid.*) The defense did not object or request a curative instruction. (*Ibid.*) The Supreme Court held that in the light of the comments by defense counsel, the prosecutor's argument did not infringe upon the defendant's Fifth Amendment rights. (*Id.* at 31.)

The differences between the situation in *Robinson* and the misleading and false argument made by the prosecutor here abound. In *Robinson*, the prosecutor objected to a defense argument which was factually incorrect. The prosecutor in appellant's case made no objection to any argument by the defense as to the likely guilt of Bond or Benjamin. In *Robinson*, the prosecutor obtained a ruling by the trial court in advance of the argument in question. In appellant's case, it was the defense which had a ruling by the trial court supporting the argument that Bond and Benjamin had committed the murder, in that the trial court had found support in the evidence that Bond and Benjamin were accomplices as a matter of law. (4SCT 153 [settled statement regarding defense counsel's request[127] that the trial court give CALJIC 3.16, instructing the jury that Bond and Benjamin were

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[127] Defense counsel thereafter withdrew their request for instructions on accomplice testimony, and requested that such instructions not be given. (RT 2943-2945.)

accomplices as a matter of law].) The prosecutor here made no attempt to obtain any ruling from the trial court regarding the contemplated argument before making it for the first time in front of the jury. Finally, the prosecutor's argument in *Robinson* was factually correct. The prosecutor's argument in appellant's case was false and misleading.

While *Robinson* allows some leeway for "fair comment" by the prosecutor to respond to improper arguments by the defense, it cannot be read to allow misstatements of the evidence as "fair comment" in response to defense arguments such as those made here concerning Bond and Benjamin which were proper, fully supported by the evidence, and supported by trial court rulings on that evidence.

The prosecutor's misconduct in arguing about this false and misleading "evidence" rendered the resulting verdict fundamentally unreliable, and thus reversible. (U.S. Const., V, VI, VIII, and XIV Amends.; Cal. Const., art. I, §§ 15, 16, and 17; see *Darden v. Wainwright, supra,* 477 U.S. at pp. 181-182 [improper argument which "manipulates or misstates the evidence" can deprive the defendant of a fair trial]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 818, citing *Donnelly v. DeChristoforo* (1979) 416 U.S. 637, 643.)

2. Judicial Notice

The trial court recognized that "If there may have been some information known to the district attorney that's not in our file, that would constitute prosecutorial misconduct." (RT 3107.) However, it inexplicably and erroneously rejected consideration of any evidence demonstrating the falsity of the prosecutor's argument, refusing to take judicial notice of the contents of the court's own file in this case, and even ignoring the prosecutor's acknowledgment that he also knew Bond had invoked the Fifth

Amendment "during the federal case" and in a deposition.

Defense counsel requested that the trial court take judicial notice of the court file in this case, but the trial court responded, "Evidence is closed." (RT 3104.) Pursuant to Evidence Code §§ 452 and 453, the trial court was required to take judicial notice of the court file upon request. There was no complaint by the prosecution of lack of adequate notice, nor did the trial court base its rejection of judicial notice on that ground. In any case, the request was made as soon as practical, and involved no logistical difficulties. The court file was readily accessible. The trial court's refusal to take judicial notice of the court file in this case was therefore erroneous, and an abuse of discretion, as was its failure to consider the prosecutor's concession of knowledge that Bond had invoked his Fifth Amendment rights.

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Wharton* (1991) 53 Cal.3d 522, 566 [quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.]) Denial of a motion for mistrial is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

"The term [']judicial discretion['] implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.' [Citation.]" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Here, the trial court's failure to take judicial notice of its own file, or to acknowledge the prosecutor's admission of knowledge which the trial court had said would be evidence of misconduct, rendered the denial of a

mistrial an abuse of discretion. The trial court effectively refused to consider available evidence of material, relevant facts. The trial court thereby abdicated, rather than exercised its discretion, choosing "to leave that to some other Court." (RT 3107.) The denial of the motion for mistrial was therefore itself error and an abuse of discretion.

3. *Griffin* Error

According to the evidence, there were three percipient witnesses to what went on in cell F-8 – Bond, Benjamin and appellant. By focusing on the fact that Bond and Benjamin waived the protections of the Fifth Amendment and made statements, testified, and subjected themselves to cross-examination "naturally and necessarily" drew the jury's attention to appellant's reliance upon his right to remain silent. The argument invited comparison between the three cellmates, and suggested conclusions favorable to Bond and Benjamin could be drawn from those comparisons. Yet the comparison, and the conclusions the prosecutor sought to have the jury reach, necessarily involved conclusions unfavorable to appellant, in a manner which violates the federal constitution. As in *People v. Medina*, *supra*, 41 Cal.App.3d at p. 457, this argument constituted *Griffin* error.

The prosecution sought to both bolster Bond's and Benjamin's credibility and demonstrate their innocence by this argument. As the prosecutor said, the argument was in response to defense arguments accusing Bond and Benjamin: "I . . . decided to say what I said because the witnesses were accused of committing the murder by the defense, and I felt that this was fair comment." (RT 3105.) However, the necessary corollary of the argument that waiver of Fifth Amendment protections demonstrates innocence is that reliance upon Fifth Amendment protections, either pretrial or by not testifying at trial, demonstrates guilt. Such argument necessarily

violates *Griffin*.

The trial court's ruling makes it clear that it did not understand either the ramifications of the prosecution's argument or the defense objection. The trial court noted in its ruling denying the mistrial that there was no evidence before the jury that appellant had invoked his right to remain silent during the investigation of the case. (RT 3107.[128]) This demonstrated the court's misunderstanding of the impropriety of the prosecutor's argument, and the prejudice caused to the defense. While there was no evidence before the jury specifically that appellant had asserted his Fifth Amendment rights during the investigation, the prosecutor's argument implied that appellant had done so, in the context of contrasting that stance with Bond and Benjamin, who, according to the prosecutor, did not invoke their right to remain silent. However, the clearer, and more damaging point to the argument was the contrast between Bond and Benjamin, on the one hand and appellant on the other, at trial, where Bond and Benjamin testified, and subjected themselves to cross-examination, while appellant remained silent, not responding with his own testimony to answer their allegations. Yet the court did not address appellant's assertion of his Fifth Amendment right not to testify.

As with its ruling regarding the prosecutor's misstatements of evidence and misrepresentation of facts not in evidence, the trial court failed to acknowledge, or recognize, the nature and prejudicial import of the

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[128] "It may be worth commenting, in this case there's been no reference to Mr. Dement having asserted Fifth Amendment rights, and the impression to the jury is probably quite to the contrary because of detectives' discussions with him that were received in the record, so I don't know how that could reflect on the defendant in this case."

prosecutor's misconduct, and erred in denying the defense mistrial motion. The prosecution's argument constituted clear *Griffin* error. The trial court failed in its responsibility to protect appellant's Fifth Amendment rights, as well as his right to the presumption of innocence, to a fair trial, to due process of law, and to fair and reliable jury determinations of both guilt and penalty. As shown below, this violation of appellant's rights cannot be determined to be harmless beyond a reasonable doubt, and compels reversal of the judgment as to both guilt and penalty.

D. Prejudice

Because the prosecutor's misconduct in argument denied appellant rights guaranteed by the federal constitution, reversal is mandated unless respondent can establish that it was harmless beyond a reasonable doubt. (*Chapman*, supra, 386 U.S. at 24.) "Under the *Chapman* test, the question is 'whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

Appellant has established that the jury, as well as the prosecutor, considered the case a close one. (See Arg. II, *ante*, pp. 116-117.) As argued above (id at 112-120), the evidence that appellant strangled Andrews and tied the towel around his neck, as opposed to Bond, Benjamin or Nelson having done so, or that an oral copulation occurred or was attempted, is closely balanced, given the suspect credibility of the primary prosecution witnesses on those subjects. There was no physical evidence or testimony other than Christian's testimony regarding Martinez's statement[129] which in any way corroborated Bond's and Benjamin's testimony that appellant, rather than one or both of them, or Nelson, had strangled Andrews, or done

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[129] But see Argument II, *ante*.

so fatally. The prosecution's case for oral copulation, and thus for felony murder and the Second Special Circumstance, depended on testimony of Bond and Benjamin which was totally uncorroborated.

The prosecutor's improper and misleading arguments were clearly intended to bolster the credibility of Bond and Benjamin through misleading statements and by contrasting their testimony to appellant's silence. Where credibility issues were so crucial to the prosecution's case, this misconduct focused on a "nerve-center issue," intended by the prosecutor to advance his case.

The fact that this outside-the-record evidence came from the prosecutor, a figure jurors are likely to regard "as unprejudiced, impartial and nonpartisan, and [whose] statements are apt to have great influence" (*People v. Perez, supra,* 58 Cal.2d at p. 247), enhanced its prejudicial impact. That it came in closing argument, with no opportunity for the defense to respond, similarly enhances its likely prejudicial impact.

That the prosecutor thought it important enough to his case to make such an improper argument is indicative of both the closely balanced state of the evidence and of the probability that the improper argument influenced the jury's deliberations and verdicts. In any case, the prosecutor having committed such misconduct in argument for the purpose of influencing the jury's verdict, respondent should be estopped from claiming now that it had no effect.

The trial court, having determined that there was no misconduct, gave no admonition or curative instruction addressing the prosecutor's improper argument. While the trial court did eventually instruct the jury in terms of CALJIC 1.02 that "statements made by the attorneys during the trial are not evidence" (RT 3109; CT 641), such an instruction, delivered with the other

routine instructions for evaluating the evidence presented at trial, with nothing directly linking it to the misleading and improper argument made by the prosecutor, could not cure the error. (See *United States v. Carter* (6th Cir. 2001) 236 F.3d 777, 787-788 [prosecutor's misconduct in argument to jury not cured by instruction akin to CALJIC 1.02 where it is not given at the time of the improper comments, but with other routine instructions prior to deliberations]; *cf. United States v. Cruz-Padilla* (8th Cir.2000) 227 F.3d 1064, 1069 [prosecutorial misconduct during closing argument was not cured because the district court issued no curative instructions].) It is extremely unlikely that generalized instructions could counteract the unconstitutional and prejudicial nature of the argument made by the prosecutor. (See *United States v. Carter*, *supra*; see also *United States v. Kerr* (9th Cir.1992) 981 F.2d 1050, 1053-1054 [prosecutor's improper vouching for government witness not cured by general instructions which didn't mention the specific misconduct, nor given immediately after harm done].)

The state cannot carry its burden of establishing that the prosecutor's improper and misleading argument, and the absence of any action by the trial court to protect appellant from the prejudice resulting from that argument, was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at 24.) There is, therefore, no basis for concluding that the jury's verdicts were surely unattributable to the prosecutor's misconduct (*Sullivan v. Louisiana*, *supra*, 508 U.S. at 279; *Chapman*, *supra*, 386 U.S. at 24; *People v. Brown* (1998) 46 Cal.3d 432, 447-48) and reversal of the judgment is required.

Furthermore, to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the State arbitrarily withholding a

nonconstitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 1, 7, 15, 16; Woodson v. North Carolina, supra, 428 U.S. 280; *Gardner* v. *Florida, supra,* 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. at pp. 88- 89; see *Hicks v. Oklahoma, supra*, 447 U.S. 343.) Even if the error is assessed only under California law, it is reasonably probable that a result more favorable to appellant would have occurred had the misconduct not occurred. Reversal of the judgment is therefore required even under the *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

E. Conclusion

For all the above reasons, the prosecutor's argument constituted misconduct, referring to, and misrepresenting, matters outside the record, misstating evidence and misleading the jury in an attempt to bolster the credibility of Bond and Benjamin in the eyes of the jury, and focusing the jury's attention upon appellant's exercise of his Fifth Amendment right to remain silent. The prosecutor's conduct thus denied appellant his rights to a fair trial, due process of law and reliable determination of his guilt on both counts of which he was convicted and on the special circumstances. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 15, 16, 17; see *Estelle v. McGuire, supra*, 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation].)

Moreover, the prosecutor's argument also violated the Eighth Amendment. The death penalty's qualitatively different character from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, at p. 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349 [penalty phase].) Since appellant's death

sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the prosecutor's misconduct in argument to the jury in the guilt phase (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi, supra*, 486 U.S. at p. 590; *Beck v. Alabama, supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi, supra*, 472 U.S. at pp. 330-331: *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The judgment as to Counts One and Two, the special circumstances, and penalty must therefore be reversed.

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X.

THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF BENJAMIN REGARDING PRIOR PERJURY

The trial court, upon objection by the prosecution, ruled that the defense would not be allowed to cross-examine Benjamin to establish that he had committed perjury in his prior murder trial. The trial court's ruling violated appellant's rights to confrontation and cross-examination, to a fair trial, to due process of law, to present a defense, and to a reliable determination of both guilt and penalty. (U.S. Const. Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 7, 15; *Davis v. Alaska* (1974) 415 U.S. 308, 316; *Delaware v. Van Arsdall* (1986) 475 U.S. 673.)

During defense cross-examination of Benjamin, the defense sought to question him, inter alia, about his testimony at his prior trial for murder that he had not committed the murder, but that someone else had, and about his later admission, reflected in California Department of Corrections medical records, that he had in fact committed the murder. (RT 1551-1553.) The prosecution objected on the grounds that the impeachment was collateral and irrelevant. (RT 1552.) The trial court ruled, "There may be no reference to what occurred in that other case with respect to this witness denying it, blaming it on another dude and then later admitting that he was the one that did it. That is strictly collateral." (RT 1554.)

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to cross-examination of the witnesses against him, to test "the believability of a witness and the truth of his testimony." (*Davis v. Alaska*, *supra*, 415 U.S. at p. 316; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678-679.)

A violation of the Confrontation Clause is stated where a defendant is prohibited from engaging in otherwise appropriate cross-examination designed ... "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska, supra,* 415 U.S. at p. 318; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) On cross-examination,

> the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness.

(*Davis v. Alaska*, *supra*, 415 U.S. at p. 316.)

Under California law, evidence of misconduct involving dishonesty or moral turpitude is relevant and admissible, even in the absence of a conviction, to impeach the credibility of a witness in a criminal case. (*People v. Wheeler* (1992) 4 Cal.4th 284 [impeachment with misdemeanor]; *People v. Mickle* (1991) 54 Cal.3d 140, 168 [impeachment of jailhouse informant with evidence he'd threatened witnesses in his own case]; *People v. Harris* (1987) 47 Cal.3d 1047 [prior reliability of a police informant admissible to attack or support witness's credibility].) Misconduct involving moral turpitude may *suggest* a willingness to lie. (See *People v. Castro* (1985) 38 Cal.3d 301, 314-315.) Commission of perjury *demonstrates* a willingness to lie under oath. Consequently, it is highly probative on the issue of credibility. (See, e.g., *People v. Rollo* (1977) 20 Cal. 3d 109, 118 ["... different felonies have different degrees of probative value on the issue

of credibility. Some, such as perjury, are intimately connected with that issue...."].) Even if it were determined that Benjamin lied to CDC rather than to the jury in his trial,[130] the lie would be relevant and probative, and thus admissible as past conduct of Benjamin "from which the jury could reasonably infer a readiness to lie." (*People v. Mickle* (1991) 54 Cal.3d 140, 168.)

Benjamin's false testimony under oath at the prior trial constituted perjury.[131] That the trial court erred in preventing the defense from impeaching Benjamin with his commission of perjury at his prior trial for murder is beyond question. That the error violated appellant's constitutional right to confrontation is similarly beyond question.

There is no basis on this record to justify the trial court's denial of such impeachment as "strictly collateral." A "collateral matter" is a "a

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[130] But in assessing the harm from denial of cross-examination, this Court is to assume "that the damaging potential of the cross-examination were fully realized." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.) Thus, this Court is to assume that Benjamin would have admitted his lie was at his trial, and thus constituted perjury.

[131] section 118, subd. (a), defines perjury as follows:

> (a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

matter that is not relevant and could not be the subject of proof independently of the impeachment." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, §§341, 343, pp. 426, 428.) The "collateral" nature of impeachment is not per se a basis for denial of cross-examination or presentation of impeaching evidence. (*Id.* at §§342, 343, pp. 426-428.) Under California law, as set forth above, prior commission of perjury, or of conduct "from which the jury could reasonably infer a readiness to lie" (*People v. Mickle* , *supra*, 54 Cal.3d at p. 168), is relevant to a witness' credibility, and thus admissible. (See Evid. Code §210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness ...."] and §351 ["Except as otherwise provided by statute, all relevant evidence is admissible."]

Nothing in defense counsel's argument in support of this cross-examination suggested an attempt to retry Benjamin for the murder. In fact, defense counsel stated that "I'm not really interested in getting into that case." (RT 1553.) Counsel demonstrated a good faith basis for the proposed cross-examination, referring to the transcript of Benjamin's testimony from the trial, and his admissions which contradicted that testimony, which were contained in the CDC medical files. (RT 1547-1548, 1551-1553 ["'He [Benjamin] remembers the shooting but does attribute his poor judgment and inaccurate aim to his intoxication at the time.'"].) There was no basis, other than Benjamin's history as a perjurer, for assuming that he would not have admitted the perjury when confronted with it on cross-examination. (See *People v. Quartermain* (1997) 16 Cal.4th 600, 624 [error to exclude cross-examination of witness regarding acts of bribes of judges on the ground that it would consume undue amount of time, where it was unlikely witness would deny it, given witness had freely admitted it in other judicial

proceedings; however, no confrontation clause violation because witness admitted on cross-examination having perjured himself "many times" in other proceedings].)

In addition, as was the case in *People v. Wheeler* (1992) 4 Cal.4th 284, "[t]his was not a case in which the prosecution sought to impeach an *accused* witness with evidence of her prior crimes. Hence, there was no danger that the prior-crimes evidence would create unfair prejudice on the issue of guilt or innocence" of the defendant on trial. (4 Cal.4th at p. 297, fn.9.)

The cross-examination sought by appellant was therefore relevant, probative and admissible. The trial court's denial of cross-examination on this point was, therefore, clearly erroneous.

In assessing the prejudice from a wrongful denial of cross-examination, this Court is to assume "that the damaging potential of the cross-examination were fully realized," before determining whether the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.) Relevant factors in that determination include the importance of the witness' testimony to the prosecution case, the presence or absence of evidence corroborating or contradicting the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of prosecution case. (*Ibid.*)

Benjamin's testimony was of substantial importance to the prosecution case. As demonstrated above (see Argument II, *ante*), the case was a close one. The prosecution's case relied upon Benjamin and Bond for necessary details of the crime, for the primary evidence of premeditation and deliberation, and the only evidence of oral copulation upon which both the felony murder theory, the Second Special Circumstance and the guilty

verdict on Count Two were based. The primary strength of their joint testimony was the extent to which Bond and Benjamin corroborated each other's testimony.[132]

However, there were substantial weaknesses in the prosecution's case centered on Bond and Benjamin. There was no physical or other corroboration of Bond's and Benjamin's testimony concerning the supposed oral copulation. There was physical evidence that Benjamin and Bond participated in assaulting Andrews. An examination of their bodies revealed blood spatters, smears, abrasions, a scratch, and discoloration like a bruise. (RT 2210, 2214-2218, 2223, 2225-2226, 2233, 2235.) Benjamin testified that Bond took part in assaulting Andrews. (RT 1460-1461, 1521-1522, 1568, 1570, 1661.) Bond testified that Benjamin aided appellant by preventing Bond from pulling appellant off of Andrews. (RT 2508, 2544-2545.)

There was also substantial evidence that appellant was not the person who tied the towel around Andrews' neck. Benjamin and Bond both testified that the towel that appellant had allegedly used to choke Andrews had been flushed down the toilet. (RT 1480-1481, 1565, 1584-1585, 2400, 2423, 2428.) They also both testified that no towel was tied around

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[132] The trial court was prepared to give instructions on accomplice testimony as to Bond's and Benjamin's testimony, which would have prevented the jury from finding necessary corroboration for either Bond or Benjamin from the other. (RT 2943-2944; 4SCT 153; CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.16.) There was no corroboration of any evidence of the act found to be oral copulation except in the testimony of Bond and Benjamin. Had the jury been instructed as the trial court intended, the Second Special Circumstance would have been rejected by the jury. However, defense counsel withdrew their request for accomplice instructions, and the instructions were not given. (RT 2943-2945.)

Andrews' neck before appellant left the cell when the cell door was unlocked. (RT 1525, 1578-1579, 2423-2424, 2429.) Moreover, Bond was heard to tell another inmate, around the time of his testimony in this trial, that he was incarcerated for killing his cellmate. (RT 2905-2906; 2918.)

The trial court recognized that there was sufficient evidence to support giving, and did give instructions allowing conviction of either attempted murder or assault by means likely to produce great bodily injury, apparently on the theory that appellant was not the person who killed Andrews. (CT 602-607, 679-685, 845, 847.)

Thus, there was substantial evidence that Benjamin and Bond were more involved in the fate of Andrews than either had admitted in their testimony, and had a substantial incentive to cast blame upon appellant in an attempt to deflect it from themselves. Bond admitted that, before going back to the cell and informing the guards about Andrews, he and Benjamin talked and got their stories straight. (RT 2426.) They had further discussions about the incident before their testimony at the preliminary hearing, when they were transported together from state prison to Fresno County Jail for that testimony. (RT 2546-2547; 2568; 2729-2735; 2780-2781.) Despite that preparation (or perhaps because of it), there were numerous inconsistencies between their trial testimony and their prior statements and prior testimony. Thus, even the extent to which Bond and Benjamin corroborated each other was subject to substantial skepticism.

While the credibility of both Benjamin and Bond was attacked by the defense, the jury evidently credited their joint testimony, at least to some degree, in reaching its verdict. However, it is reasonably likely that the jury would not have returned the verdicts it did if Benjamin's credibility was substantially undercut further. As shown above (see Arg. II, ante), the jury

saw this case as close. Evidence of Benjamin's prior perjured testimony to a different jury would likely have had a substantial impact upon this jury's evaluation of his credibility. Evidence of perjury is substantially more probative of Benjamin's willingness to lie to this jury than other impeaching evidence presented by the defense, such as prior inconsistent statements and prior felony convictions. Perjury is "intimately connected with" credibility. (*People v. Rollo*, *supra*, 20 Cal.3d at p. 118.) Had the defense been allowed to present this impeachment to the jury, it would have substantially lessened the jury's willingness to base a verdict of first degree murder, oral copulation, the special circumstance or, ultimately, the death penalty solely or primarily on Bond's testimony, even if "corroborated" by a discredited Benjamin.

Similarly, the prosecution saw the case as close, and the credibility of Benjamin as important. The prosecution sought to bolster Benjamin's credibility in argument to the jury, arguing that Benjamin didn't have to speak to law enforcement or testify about the crime, but, rather than invoking the Fifth Amendment, willingly subjected himself to cross-examination.[133] Of course, the prosecution didn't mention that Benjamin had escaped cross-examination on this damaging impeachment. Had defense cross-examination of Benjamin not been erroneously curtailed, it is reasonably probable that the jury would have been less likely to have given any substantial credibility to Benjamin's testimony.

The denial of cross-examination and impeachment of Benjamin thus prevented appellant from presenting relevant evidence which cast substantial

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[133] See Arg. IX, ante, which demonstrates that such argument was misconduct in this case.

doubt on the prosecution's case against him, and upon the credibility and reliability of one of the prosecution's primary witnesses. The violation of his right to confrontation also denied him the right to present a defense and the right to a fair trial. It simultaneously undercut the reliability of the jury's determination of the evidence, and of the ultimate determinations of both guilt and penalty. (U.S. Const. Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 7, 15.)

Under the *Chapman* standard applicable to these violations of appellant's federal constitutional rights, respondent cannot establish that the jury's verdict was surely unattributable to the trial court's concealment of Benjamin's prior perjury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Furthermore, to the extent that the erroneous restriction on appellant's cross-examination of Benjamin violated only state law, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the State arbitrarily withholding a nonconstitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 1, 7, 15, 16; Woodson v. North Carolina, supra, 428 U.S. 280; *Gardner* v. *Florida, supra,* 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. at pp. 88-89; see *Hicks v. Oklahoma, supra*, 447 U.S. 343.) Even if the error is assessed only under California law, it is reasonably probable that a result more favorable to appellant would have occurred had the misconduct not occurred. Reversal of the judgment is therefore required even under the *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

The denial of cross-examination and impeachment of Benjamin also violated the Eighth Amendment. The death penalty's qualitatively different character from all other punishments necessitates a corresponding increase

in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* , *supra*, 447 U.S. 625, at p. 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349 [penalty phase].) Since appellant's death sentence relies on an unreliable guilt verdict, and upon the unreliable testimony of Benjamin, the death verdict was not surely unattributable to this erroneous denial of confrontation. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) The death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Gardner v. Florida*, *supra*, 430 U.S. 349; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The entire judgment must therefore be reversed.

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XI.

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

At the request of the prosecution, the trial court delivered an instruction regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, allowed inferences unsupported by the evidence, and constituted improper pinpoint instructions.

The trial court instructed the jury pursuant to CALJIC No. 2.06, as follows:

> "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness or by destroying evidence, 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."

(RT 3112; CT 550, 568, 646.)

The instruction was erroneously given. It was unnecessary and improperly argumentative. It permitted the jury to draw irrational inferences against appellant. The instructional error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., VI, VIII, & XIV Amends.; Cal. Const. , art. I, §§ 7, 15, 16, & 17.) The instruction was particularly prejudicial because the evidence of an oral copulation, as well as of any connection of such an offense to the homicide in this case, was insubstantial. (See Args. VI, VII, *ante*.) Accordingly, reversal of the convictions on counts 1 and 2, the first special circumstance

finding, and the death judgment is required.[134]

A. The Consciousness Of Guilt Instruction Improperly Duplicated The Circumstantial Evidence Instruction

The instruction under CALJIC No. 2.06 was unnecessary. This Court has held that specific instructions relating to the consideration of evidence which simply reiterate a general principle upon which the jury has already been instructed should not be given. (See *People v. Lewis, supra,* 26 Cal.4th at pp. 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) Here, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (RT 3110-3112, 3135; CT 644-645, 695.) These instructions amply informed the jury that it could draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt, nor of permissive inferences of guilt of prosecution witnesses. This unnecessary benefit to the prosecution violated both the Due Process and Equal Protection Clauses of

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[134] Although it cannot be determined from the record whether or not counsel for appellant objected to CALJIC No. 2.06 (see Settled Statement Regarding Jury Instruction Conferences, 4SCT 147-183), instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *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.)

the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479; *Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

B. The Consciousness Of Guilt Instruction Was Unfairly Partisan And Argumentative

The instruction here directed the jury's attention, inter alia, to actions which, according to the testimony at trial, were taken not just by appellant, but by Benjamin and Bond as well. The evidence from Benjamin and Bond was that, after Andrews was placed under the bottom bunk and before the three surviving cellmates exited the cell, all three, i.e., Benjamin, Bond and appellant, all took part in cleaning up the cell and disposing of clothes and towels used either to assault Andrews or to clean up the cell. (RT 1480-1481, 1525, 1565, 1584-1585, 1643, 1662.) Yet the instruction allowed for an inference of consciousness of guilt only as to appellant. Clearly, any inference from those actions must have equally applied to all three surviving cellmates, and would have had no substantial probative value in differentiating the guilt or innocence of any of the three.

Thus, the instruction was not just unnecessary, but was impermissibly argumentative. The trial court must refuse to deliver any instructions which 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 single out and bring into prominence before the jury 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." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even if they are neutrally phrased, instructions which "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, the consciousness of guilt instruction given in this case is impermissibly argumentative. Structurally, it is almost identical to the defense "pinpoint" instruction which this Court found to be argumentative in *People v. Mincey, supra*, 2 Cal.4th at p. 437. The instruction told the jurors that if they find certain preliminary facts, they may rely on those facts to find additional facts favorable to one party or the other. Since the instruction in *Mincey* was held to be argumentative, the instruction at issue here should be held 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 an 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 which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'") This holding, however, 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. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.)

To insure fairness and equal treatment, this Court should reconsider those 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 at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 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* (1996) 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*, 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/consciousness of guilt 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].)[135]

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 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

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[135] 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.)

applied to an instruction on the defendant's false statements].)

The argumentative consciousness of guilt instruction given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. It therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., Amends. V and XIV; Cal. Const. art. I, §§ 7 & 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., Amends. VI, XIV; Cal. Const. art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends. VIII, XIV; Cal. Const. art. I, § 17.)

C. The Consciousness-Of-Guilt Instruction Permitted The Jury To Draw Two Irrational Permissive Inferences About Appellant's Guilt

The consciousness-of-guilt instruction given here suffers from an additional constitutional defect – it embodies improper permissive inferences. The instruction permits the jury to infer one fact, such as Appellant's consciousness of guilt, from other facts, i.e., destruction of evidence or intimidation of a witness. (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other

considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the consciousness-of-guilt evidence was relevant to whether appellant was responsible for assaulting or killing Andrews, or aiding and abetting in the assault or killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) Under the facts here, two types of irrational inferences

were permitted.

The first irrational inference concerned appellant's mental state at the time the charged crimes allegedly were committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that appellant killed Andrews, but that he also had done so while harboring the intents or mental states required for conviction of first degree murder and oral copulation. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)[136]

Therefore, appellant's actions after the crimes, upon which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental states for first degree premeditated murder, first degree felony murder, or the oral copulation special circumstance at the

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[136] Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a). pp. 481-482, original italics, fn. omitted.)

time of the killing of Andrews. There was no rational connection – much less a link more likely than not – between appellant's cleaning of the cell, or any intimidation of possible witnesses and consciousness by him of having committed the homicide with (1) premeditation; (2) deliberation, (3) malice aforethought, (4) a specific intent to kill, or (5) a specific intent to engage in an act of oral copulation with Andrews. Appellant's cleaning of the cell, or any intimidation of possible witnesses cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder or manslaughter.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 & 2.06] .) However, Appellant respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.)

The *Crandell* analysis is mistaken for three reasons. First, the

instruction does not speak of "consciousness of some wrongdoing;" it speaks of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instruction to mean something it does not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., CT 666 [CALJIC No. 2.90 stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [or] her guilt is satisfactorily shown."].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instruction does not specifically mention the defendant's mental state, it likewise does not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instruction suggests that the scope of the permitted inferences is very broad. It expressly advises the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[137]

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[137] In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall*

(continued...)

Third, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.)[138] Since this Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

The consciousness-of-guilt instructions permitted a second irrational inference, i.e., that appellant was guilty not only of unlawfully killing Andrews, but also of engaging in, or attempting to engage in, an act of oral copulation with him, and killing him "in order to carry out or advance the commission of the oral copulation." This Court approved an inference precisely that far-reaching in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm

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[137] (...continued)
(1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

[138] In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608, italics added.)

"tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140, original italics; accord, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt of all the offenses committed during a single attack"].)

To determine if the sweeping inferences permitted by the consciousness-of-guilt instruction are constitutional in this case, the Court must ask: If the defendant cleaned up the scene of the homicide, disposed of evidence of the homicide, and intimidated or threatened possible witnesses to the homicide, is it more likely than not that he has *also* engaged in an act of oral copulation in connection with the homicide? Obviously, the answer to each question is, "No,"[139] and the inferences permitted by the consciousness-of-guilt instruction are accordingly constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Because the consciousness-of-guilt instruction permitted the jury to draw irrational inferences of guilt against appellant, use of the instruction undermined the reasonable doubt requirement and denied him a fair trial and due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15).

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[139] Appellant's cleaning up the scene of the homicide, disposing of evidence of the homicide, and intimidating or threatening possible witnesses to the homicide could not conceivably indicate consciousness of guilt of oral copulation unless one first assumes that appellant, in fact, committed such a crime. (See *United States v. Durham* (10th Cir. 1998) 139 F.3d 1325, 1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 [ruling that consciousness of guilt instructions should not be given where they, in effect, tell the jury "that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt."] Embodying such "circular" reasoning (*ibid.*) in a jury instruction permitting a jury to arbitrarily infer guilt therefrom would – and in this case did – constitute a clear denial of due process. (U.S. Const., 14th Amend.)

The instruction 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., VI & XIV 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, the instruction violated his right to a fair and reliable capital trial (U.S. Const., VIII & XIV Amends.; Cal. Const., art. I, § 17).

D. The Giving Of The Pinpoint Instruction On Consciousness Of Guilt Was Not Harmless Beyond A Reasonable Doubt

Giving the consciousness-of-guilt instruction was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's oral copulation and murder convictions and the first special circumstance finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, supra, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The jury was given an unconstitutional instruction which related to a number of different activities reflected in the evidence presented to the jury, which magnified the argumentative nature of the instruction as well as its impermissible inferences. In the context of the ambiguous and untrustworthy evidence of how Andrews was finally killed, and where the towel which was found tied around his neck came from, and especially the insubstantial evidence of oral copulation which underlay the first special circumstance found by the jury, which turned entirely upon the uncorroborated and suspect testimony of Benjamin and Bond, the instruction was extremely prejudicial to appellant's case. In the context of this case, these instructions were not

harmless beyond a reasonable doubt. Therefore, the judgment on Counts 1 and 2 and the first special circumstance finding must be reversed.

Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneous instruction (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The penalty judgment, must also be reversed.

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XII.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.01, 2.02 and 2.90)

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CT 666, RT 1320 [CALJIC No. 2.90 (1979 Rev.) (Presumption of Innocence – Reasonable Doubt – Burden of Proof].) CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 666, RT 3120.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions given in this case, it was reasonably likely to have led the jury to convict appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given two interrelated instructions – CALJIC Nos. 2.01 and 2.02 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (CT 567, 645, RT 3112 [CALJIC

No. 2.01[140]]; CT 617, 695, RT 3135 [CALJIC No. 2.02].[141])

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[140] CALJIC No. 2.01 as read to the jury states:

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (RT 3112.)

[141] CALJIC No. 2.02, as read to the jury, states:

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged in Counts One and Three, or the crime of attempted murder, which is a lesser crime, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to

(continued...)

These two instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CT 645, 695; RT 3112, 3135.) These instructions informed the jury that if appellant *reasonably appeared* to be guilty, they were to find him guilty – even if they entertained a reasonable doubt as to his guilt. This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to Due Process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15), trial by jury (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. VIII, XIV; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)[142]

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[141] (...continued)
the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state. If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (RT 3135.)

[142] Although there is no record that defense counsel objected to CALJIC No. 2.01, and, at least initially, requested CALJIC No. 2.02, (see CT 555; 4SCT 152-153), the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (§§ 1259, 1469; see *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
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First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told that they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (CT 645, 695; RT 3112, 3135.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine

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[142] (...continued)
error; nor must a defendant request amplification or modification 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.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met. The defense requested CALJIC No. 2.01 during a conference on jury instructions (4 SCT 152-153), but no more than that can be determined due to the failure of the trial court to conduct such conferences on the record. (4SCT 147-156.) CALJIC No. 2.02 was requested by both the prosecutor and defense counsel (CT 617), and the record fails to show that defense counsel had any deliberate, tactical purpose for acceding to the erroneous portions of the instructions.

that the defendant is *probably* guilty" (emphasis added)].) Thus, the instructions improperly required conviction and findings of fact necessary to a conviction on a degree of proof less than the constitutionally-required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions improperly shifted the burden of proof to appellant by requiring the jury to find that the prosecution's interpretation of the evidence was correct, and hence that appellant was guilty as charged, if the prosecution's interpretation appeared to be reasonable and appellant did not produce a countervailing reasonable interpretation pointing toward his innocence. (Cf. *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.) The instructions thus created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by presenting the jury with a reasonable exculpatory interpretation.

"A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 (emphasis added; footnote omitted).) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, these instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (CT 645, 695; RT 3112, 3135, emphasis added.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume

the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. The prosecutor in this case, in argument to the jury, attempted to place just such a burden upon the defense. (RT 3097.) The defense objected, and the trial court responded by saying there was no burden on the defense, characterizing the prosecutor's argument as merely comment on the evidence. (RT 3097-3098.) The prosecution then continued with the argument, claiming that he wasn't trying to impose a burden on the defense, but now with the imprimatur of the trial court's ruling that the argument was proper. He argued, essentially, that the lack of defense evidence on any point meant that any interpretation not consistent with the prosecution's interpretation was speculation. (RT 3098.) The erroneous instructions were prejudicial with regard to guilt in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict appellant because he was a likely suspect, rather than because they believed him guilty beyond a reasonable doubt.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations, since there was no direct evidence other than the highly suspect testimony of Benjamin and

Bond that appellant was the person who strangled Andrews or who tied the towel around Andrews neck, or that any oral copulation, or attempted oral copulation, occurred. As a result, the jury could have accepted the prosecution's account of the incident as a reasonable explanation and therefore found appellant guilty and the oral copulation special circumstance to be true, even without being convinced that the prosecution had met its burden of establishing guilt beyond a reasonable doubt.

Moreover, the focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by suggesting that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.) Again, the prosecution's argument cited above compounded this flaw in the instruction. (RT 3097-3098.) This argument also drew attention to appellant's failure to testify, and therefore highlighted his failure to meet his "burden" to provide a reasonable defense.

For these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 1.02, 2.21, 2.21.2, 2.22, 2.27, 2.50, 2.51, 8.20 and 8.67)

The trial court gave eight other standard instructions and one substantially modified – specifically, CALJIC Nos. 1.00, 1.02 Supp, 2.21,

2.21.2, 2.22, 2.27, 2.50 (modified), 2.51, 8.20 and 8.67 – that magnified the harm arising from the erroneous circumstantial evidence instructions and individually and collectively diluted the constitutionally mandated reasonable doubt standard. (CT 560-561, 638-639, RT 3108-3109 [CALJIC No. 1.00 (Respective Duties of Judge and Jury)]; CT 564, 642, RT 3110 [CALJIC No. 1.02 Supp.[143]]; CT 574, 652, RT 3114-4115 [CALJIC No. 2.21.2 (Witness Willfully False)]; CT 575, 653, RT 3115 [CALJIC No. 2.22 (Weighing Conflicting Testimony]; CT 578, 656, RT 3116 [CALJIC No. 2.27 (1991 Rev.) (Sufficiency of Testimony of One Witness)]; CT 579, 657, RT 3116-3117 [CALJIC No. 2.50 Mod.[144]]; CT 580, 658, RT 3117

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[143] The supplemental instruction based on CALJIC No. 1.02, as given to the jury, stated:

> The witness Brad Nelson testified that the defendant had bragged about committing a crime other than the crime for which defendant is on trial in the current case. Mr. Nelson's testimony on a separate crime is hereby stricken and you are hereby instructed to disregard such testimony. Do not allow Mr. Nelson's testimony on an uncharged, alleged crime to enter into your deliberations. Mr. Dement's guilt or innocence must be determined without regard to any alleged prior conduct.

[144] The modification of CALJIC No. 2.50 given to the jury stated:

> Evidence has been introduced which includes a reference showing that the 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 that the defendant is a person of bad character or that he has a disposition to commit crimes. [¶] This evidence was received and may be considered by you only for the limited purpose of providing context and meaning in the written statement made by the defendant. [¶] A defendant in a criminal action has the

(continued...)

[CALJIC No. 2.51 (Motive)]; CT 592-593, 670, RT 3123-3124 [CALJIC No. 8.20 (Deliberate and Premeditated Murder)]; CT 604-605, 682-683, RT 3128-3129 [CALJIC No. 8.67 (Attempt to Commit Murder – Willful, Deliberate, and Premeditated)]. Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)[145]

Several of the instructions violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (CT 233-234; RT 937-938.) CALJIC No. 2.01,

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[144] (...continued)

> right to expect that his guilt or innocence will be decided by the evidence brought before the jury and without regard to any alleged prior conduct. Therefore, you must only consider this evidence for the limited purpose for which it was introduced.

[145] Although defense counsel failed to object to these instructions, appellant's claims are still reviewable on appeal. (See fn. 142, *ante* which is incorporated by reference here.)

discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence" (CT 645; RT 3112), as did the supplemental instruction (CALJIC No. 1.02 Supp.), limiting the use of evidence of a separate crime. (CT 642; RT 3110.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (CT 658; RT 3117.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant guilty because the evidence did not establish that he was "innocent."[146]

Further, 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 appellant to show an alternative motive to that advanced by the prosecutor. It also allowed the jury to rely on inferences of motive, from evidence not substantial enough to establish motive beyond a reasonable

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[146] As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone*.

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, emphasis original.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

doubt, as supporting guilt. In this case, the evidence of motive was insubstantial, based primarily on Detective Christian's testimony regarding appellant's statements at the hospital in response to Christian's comments about Rutledge and appellant's wife. (See Arg. III, *ante*.) In argument to the jury, the prosecution combined that testimony with his own speculation about appellant's wife to suggest motive:

> . . .essentially it was just before he slaps him to wake him up, the defendant states, "If he gives the wrong answers, I'll know." He then slaps him about, and both Benjamin and Bond, they don't remember what he was saying, but he was talking. He was asking him about some girl. Remember all that? Patricia Dement. They didn't say Patricia Dement. I'm not saying that. They said, "Some girl, I can't remember her name." I'm suggesting to you it was Patricia Dement. [¶] Greg Andrews, ladies and gentlemen, gave the wrong answers. It was determined by him (indicating) that Brad [sic] Andrews was a friend of Tommy's. Tommy was his enemy. Tommy was a person he was willing to kill. This man decided that he was going to punish.

(RT 2976.) Such evidence was too insubstantial and the inferences too speculative to establish motive. However, bolstered by CALJIC No. 2.51, it is likely that the jury concluded that the evidence and the speculation offered by the prosecution established appellant's guilt.

As used in this case, CALJIC No. 2.51 deprived appellant 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 appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

Similarly, CALJIC Nos. 2.21 and 2.21.2 lessened the prosecution's

burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (CT 243-244; RT 943-944 (emphasis added).) The instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[147] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of

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[147] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

> counting the number of witnesses. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(CT 245; RT 944.) This instruction specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 246; RT 944), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Again, the prosecutor's argument to the jury, cited above, which placed such a burden on the defense, compounded the error in this instruction. (RT 3097-3098.)

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-

existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation. . . ." (CT 670; RT 3123, italics added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation – as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632, recognizing that "preclude" can be understood to mean "'absolutely prevent'".) CALJIC No. 8.67 applies the same language to proof of deliberation and premeditation required for conviction of attempted murder. (CT 682; RT 3128.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship, supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has

repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [addressing CALJIC Nos 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a

reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin, supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as given in this case, explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[148] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the

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[148] A reasonable doubt instruction also was given in *People v. Roder, supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

Here, that showing cannot be made. The prosecution's case was not strong. The only witnesses to what happened were other jail inmates, with numerous felony convictions and of dubious credibility, and substantial personal interest in aiding the prosecution against appellant. As the trial court stated,

> [the s]tatus of this case is this, that one of three men could have performed this killing. One of four men could have performed this killing, at least the final touches of it, according to the evidence. [¶]And those who have testified are at least suspect in their testimony. They have been impeached from wall to wall on a variety of subjects. They could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury.

(RT 2796.) Given such a state of the evidence, the importance of circumstantial evidence, and how the jury is instructed to consider it, is crucial to the jury's evaluation of the credibility, accuracy or reliability of the various alternate suspects and jailhouse informers, and the stories they told. Similarly, the need for strict adherence by the jury to the reasonable doubt burden of proof is crucial. That these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement the reliability of jury's findings into substantial question.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, the judgment on Counts One and Two and the Second Special Circumstance allegation must be reversed.

XIII.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute and the instructions given in this case assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. And neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these critical omissions in the California capital sentencing scheme run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, *rev'd on other grounds, California v. Brown*, 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the

jury's satisfaction pursuant to any delineated burden of proof.[149]

Here, the jury was specifically instructed that no burden of proof was required in determining penalty. The jury was told that the "[y]ou 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." (RT 3819.)

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *see also People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp. 773-774.) This Court's reasoning, however, has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Blakeley v. Washington* (2004) 542 U.S. 296.

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[149] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in section 190.3, subdivision (b), below.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing 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.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*.

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.[150] The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Ibid.*)

In *Blakeley*, the 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." (*Blakeley v. Washington*, *supra*, 124 S.Ct. at p. 2535.) 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.*)

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[150] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 [Scalia J., concurring].)

The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

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." (*Blakeley v. Washington*, *supra*, 124 S.Ct. at p. 2537 [italics in original].)

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.[151] Only California and

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[151] *See* Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; 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

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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*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and ... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, 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.[152] As set forth in California's

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[151] (...continued)
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.)

[152] This Court has acknowledged that fact-finding is part of a (continued...)

"principal sentencing instruction," (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "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." (RT 3818; CALJIC No. 8.88.)

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.[153] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment

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[152] (...continued)
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* (1988) 46 Cal.3d 432, 448.)

[153] 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 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.)

notwithstanding these factual findings.[154]

In *People v. Anderson* (2001) 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 section 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

In the face of the United States Supreme Court's recent decisions, this holding is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "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 v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer points out in explaining the holding in *Blakeley*, the Court made it clear that "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

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[154] 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*, *supra*, 40 Cal.3d at 541.)

out that crime." (*Blakeley v. Washington*, *supra*, 124 S. Ct. at p. 2551 [Breyer, J., dissenting] italics in original.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that: (1) aggravation exists; (2) aggravation outweighs mitigation; and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (O'Connor, J., dissenting)].) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494]), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 [Scalia, J., concurring].) They thus trigger

Blakely-Ring-Apprendi and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

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." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, n. 32 [citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, n. 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." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, n. 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. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) 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* (1991) 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, 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; *Woldt v. People* (Colo. 2003) 64 P.3d

256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[155]

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 *Blakeley*. In *Blakeley* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were only illustrative and not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant 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 sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakeley v. Washington*, *supra*, 124 S.Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakeley*, 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

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[155] *See also* Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala L. Rev. 1091, 1126-1127 (2003) (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).

beyond a reasonable doubt.[156]

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

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[156] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle 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." (*People v. 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. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant'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 United States Constitution.

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 without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal. 4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding of aggravating circumstances beyond a reasonable doubt 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 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 v. Arizona*, *supra*, 536 U.S. at p. 606 [quoting with approval *Apprendi v. New Jersey*, 530 U.S. at 539 (O'Connor, J., dissenting)].)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment .... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to 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 Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitution Require That The Jury 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

1. 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 Amendments. (*In re Winship*, *supra*, 397 U.S. at p. 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* (1977) 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 as well as the Eighth Amendment.

2. 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. (*In re 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. (*In re 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 v. Randall*, *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 *In re Winship*, *supra*, 397 U.S. 364 [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 v. Kramer*, *supra*, 455 U.S. at p. 755) the 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]. The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], 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 v. Kentucky*, *supra*, 455 U.S. at p. 755 [quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427].)

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 v. Kentucky*, *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." (*In re 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 v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. *(Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the 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.'" (*Monge v. California*, supra, 524 U.S. at p. 732 [quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441] [italics 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 that the factual bases for its decision are true, but that death is the appropriate sentence.

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 e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) 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* (Conn. 2003) 833 A.2d 363, 408, n.37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) 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.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court* (1993) 5

Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 62, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of

the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code. § 190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[157]

A fact could not be established – i.e., a fact finder could not make a finding -- without imposing some sort of burden on the parties presenting the

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[157] As discussed below, the United States Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the State of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, providing greater protection to noncapital than to capital defendants violates the Fourteenth Amendment rights to due process and equal protection, and the Eighth Amendment right to be free from cruel and unusual punishment. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking a defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital

punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish," (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 260) – the "height of arbitrariness," (*Mills v. Maryland*, *supra*, 486 U.S. at p. 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.

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,* 508 U.S. 275.) 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 at the penalty phase would continue to believe that. Such jurors do exist. 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*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth, And Fourteenth Amendments By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633.)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious, and unreviewable

manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[158]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* -- particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Hildwin*, *supra*, 490 U.S. at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[159]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and

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[158] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[159] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 265.) Appellant raises this issue to preserve his rights to further review.

full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) [Kennedy, J., concurring].) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial 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 also *People v. Wheeler, supra*, 22 Cal.3d at 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[160] For example, in cases where a criminal defendant has

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[160] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., (continued...)

been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan*, (1991) 501 U.S. 957, 994), – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995), *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

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[160] (...continued)
tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993); Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); 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(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

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 (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.

(*Id.* at p. 819.)

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*, 4 Cal.4th at p. 79; *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakeley* make clear that the findings of one or more aggravating circumstances and 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 appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth, And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The trial court rejected the defense request to instruct the jury on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no particular burden to prove mitigating factors and that the jury was not required unanimously to agree on the existence of mitigation). (RT 3721-3722; CT 833-834: Defense Requested Instructions B, C.) This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California* (1990) 494 U.S. 370, 380.) Constitutional error thus occurs when

"there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501, *rev'd on other grounds* (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Thus, had the jury been instructed that unanimity was required

before mitigating circumstances could be considered, there would be no question that reversal would be warranted. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection, and a reliable capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Have Been Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf.

Delo v. Lashley (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. amends. VIII, XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. U.S. Const. amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at 190.) However, as the other subsections of this argument, as well as Arguments XIV, XV, and XVI, *post*, demonstrate, this state's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XIV.

THE INSTRUCTIONS DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION VIOLATED APPELLANT'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 the Defendant.
>
> After having heard all of the evidence and 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 any 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." (RT 3818-3819.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const. amend. XIV), to a fair trial by jury (U.S. Const. amends. VI, XIV), and to a reliable penalty determination (U.S. Const. amends. VI, VIII, XIV), and require reversal of his sentence. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.)

A. The Instruction Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant 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." (RT 3819.) "So substantial," however, is an impermissibly vague phrase which bestowed intolerably broad discretion on the sentencing jury.

To pass constitutional muster, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death penalty sentencing scheme must adequately inform the jurors of "what they have to find in order to impose the death penalty ...."

(*Id.* at pp. 361-362.) A death penalty scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth and Fourteenth Amendments. (*Ibid.*)

The phrase "so substantial" violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* ...." (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. (*Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391), 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. at p. 867, n. 5.)

In analyzing the word "substantial," the Georgia Supreme Court concluded in *Arnold*:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context. the fact that we are here concerned with the imposition of the death penalty compels a different result.

Arnold, *supra*. 224 S.E.2d at 392.[161]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, n. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.* [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.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court

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[161] The 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.)

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. amends. VIII, XIV), the death judgment must be reversed.

B. The Instruction Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown*, *supra*, 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord *People v. Champion*, *supra*, 9 Cal.4th at p. 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; *see also Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death

instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is far different than the finding the jury is actually required to make: that death is an "especially suitable," fit and proper punishment, i.e., that it is appropriate.

It is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990)), 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*, *supra*, 6 Cal.4th at pp. 462, 464.) Thus,

just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

CALJIC 8.88 was also defective because it implied that death was the *only* available sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances...." However, it is clear under California law that a penalty jury may always return a verdict of life without possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown*, *supra*, 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed mitigation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.) The failure to properly instruct the jury on this crucial point deprived appellant of his right to have the jury given proper information concerning its sentencing discretion (*People v. Easley* (1983) 34 Cal.3d 858, 884), deprived appellant of an important procedural protection that California law affords capital defendants in violation of due process, and made the resulting verdict unreliable in violation of the Eighth and Fourteenth Amendments.

In sum, the crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const. amend. VIII, XIV) and denies due process (U.S. Const. XIV; *Hicks v. Oklahoma*, *supra*, 447 U.S. at 346), and must be reversed.

C. The Instruction Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code 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.)[162] 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. at 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 section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error

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[162] 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 at p. 544, n. 17.)

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 [italics in original].)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore*, *supra*, 43 Cal.2d at 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; *see also People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[163]

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[163] There are due process underpinnings to these holdings. In *Wardius v. Oregon*, *supra*, 412 U.S. at 473, n. 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* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *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

(continued...)

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.)

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

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[163] (...continued)
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.

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 appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, *aff'd* (8th Cir. 1978) 573 F.2d 1027, 1028; *cf. Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. Conclusion

The trial court's main sentencing instruction, CALJIC No. 8.88, together with CALJIC 8.85, discussed below in Argument XV, *post*, failed to comply with the requirements of the due process and equal protection clauses of the Fourteenth Amendment, the Sixth Amendment right to a jury trial, and the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XV.

THE INSTRUCTIONS REGARDING THE MEANING OF MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION IN APPELLANT'S CASE RESULTED IN AN UNCONSTITUTIONAL DEATH SENTENCE

Prior to trial, appellant filed a motion to preclude the death penalty in this case due to the failure of Penal Code section 190.3, and specifically subsections (a), (b) and (i), to provide any meaningful and guided distinction between those capital defendants for whom the death penalty is appropriate and those for whom it is not. (CT 314-317.) The trial court denied the motion. (RT 82-85.) The jury was instructed on section 190.3 pursuant to CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 3806-3807) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of aggravating and mitigating factors. (RT 3818-3819.) For the reasons discussed below, these instructions, together with the application of the statutory sentencing factors, render appellant's death sentence unconstitutional.

A. The Instruction Regarding Factor (a) And Its Application Violated Appellant's Constitutional Rights

Penal Code 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.

The purpose of section 190.3, according to its language and

according to interpretations by both this Court and the United States Supreme Court, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Subdivision (a) of section 190.3 permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." Accordingly, the jury in this case was instructed to consider and take into account as factor (a), "[t]he circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (RT 3806.)

In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this factor, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California, supra*, 512 U.S. at p. 975.)

An analysis of how prosecutors actually use section 190.3, subdivision (a), shows that they have subverted the essence of the Supreme Court's judgment. In fact, the extraordinarily disparate use of the circumstances of the crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decisionmaking that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v.*

Cartwright, *supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. Factor (a) has been used in ways so arbitrary and contradictory as to violate both due process of law and the guarantee of fair and reliable sentencing.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it 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. (See, e.g., *People v. Dyer* (1988) 45 Cal.3d 26, 78.) Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of religion" (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), sought to conceal evidence three weeks after the crime (*People v. Walker*, *supra*, 47 Cal.3d at p. 639, n. 10), threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204), or disposed of the victim's body in a manner precluding its recovery. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, n. 35.)

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-987 [Blackmun, J., dissenting].) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries

to find squarely conflicting circumstances to be aggravating under that factor.

Furthermore, these examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide (e.g., age of the victim, method of killing, motive, time of the killing, location of the killing) – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.[164]

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright, supra*, 486 U.S. at p. 363 [discussing the holding in *Godfrey v. Georgia*, 446 U.S. 420].)

That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious

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[164] 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. (See Argument XIII, *ante*.)

sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

B. The Instruction On Factor (b) and Its Application Violated Appellant's Constitutional Rights

The prosecution introduced three unadjudicated incidents pursuant to 190.3, subdivision (b) which it contended were criminal acts involving force or violence. These incidents should not have been admitted, and even assuming the evidence was constitutionally permissible, allowing the jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously and beyond a reasonable doubt violated appellant's constitutional rights.

The jury's reliance on these incidents also deprived appellant of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, the guarantee against double jeopardy, and a reliable and non-arbitrary penalty determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

1. Admission of evidence under factor (b) of Penal Code section 190.3 violated appellant's constitutional rights

The admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process and a reliable determination of penalty. (See, e.g., *Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-587; *State v. Bartholomew* (Wash. 1984) 683 P.2d 1079, 1086; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 279-281; *Cook v. State* (Ala. 1978) 369 So.2d 1251, 1257; *Commonwealth v. Hoss* (Pa. 1971) 283 A.2d 58, 69.)

Admission of the unadjudicated prior criminal activity also denied appellant his right to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offenses") by an impartial and unanimous jury, and his rights to the effective confrontation of witnesses and to equal protection of the law. The instructions which directed the jury to consider that evidence in fixing penalty violated these same constitutional rights.

Factor (b), as it is written and as it has been interpreted by this Court, is an open-ended and vague aggravating factor that fosters arbitrary and capricious application of the death penalty in violation of the Eighth Amendment requirement that a rational distinction be made "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321 [quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460].)

This Court has interpreted the section in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded capital defendants must be more rigorous than those provided to noncapital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 [Burger, C.J., concurring]; *Eddings v. Oklahoma, supra*, 455 U.S. at pp. 117-118 [O'Connor, J., concurring]; *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606), this Court has turned this mandate on its head, singling out capital defendants for less procedural protection than that afforded other criminal defendants.

For example, this Court has ruled that, in order to consider evidence under factor (b), it is not necessary for the jurors unanimously to agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt. (See *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) It has also held

that the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192), and it has held that the trial court is not required to enumerate the other crimes that the jury should consider or to instruct on the elements of those crimes. (*People v. Hardy, supra*, 2 Cal.4th at pp. 205-207.) The Court has ruled that unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under subdivision (b), but felony convictions, even for violent crimes, rendered after the capital homicide are not admissible. (*People v. Morales* (1989) 48 Cal.3d 527, 567.) This Court has also ruled that a verbal threat of violence is admissible if, by happenstance, the words are uttered in a state that has made such threat a criminal offense, even if the threat would not be a crime in California. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261. It has also held that evidence of juvenile misconduct is admissible under factor (b) (*People v. Burton* (1989) 48 Cal.3d 843, 862), as is an offense dismissed pursuant to a plea bargain. (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659.)

Thus, this Court clearly treats death differently by lowering rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution. These unwarranted distinctions between capital and noncapital defendants also deny capital defendants the equal protection of the laws. (U.S. Const. amend. XIV; Cal. Const. art. I, § 7; *Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

In addition, the use of the same jury for the adjudication of other crimes evidence at the penalty phase deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt. Under the California capital sentencing statute, a juror may consider

evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to each such offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585) and the jurors must give the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial. When a state provides for capital sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that such jury be impartial.[165] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 [where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand]; *Irvin v. Dowd, supra*, 366 U.S. at pp. 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of appellant's guilt of the previously unadjudicated offenses were the same jurors who had just convicted him of capital murder. A jury which has already unanimously found a defendant guilty of capital murder cannot be impartial in considering whether unrelated but similar violent crimes have been proven beyond a reasonable doubt. (*State v. McCormick*, *supra*, 397 N.E.2d at p. 280; *see also People v. Frierson*, 39 Cal.3d 803, 821-822 (1985) [Bird, C.J., concurring].)

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[165] The Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (*See Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-87; *Bullington v. Missouri*, *supra*, 451 U.S. at p. 446.) Similarly, due process protections apply to a capital sentencing proceeding. (*See e.g., Gardner v. Florida*, 430 U.S. at p. 358.)

Even in the unlikely event that only a single juror was impermissibly prejudiced against him, appellant's rights would still be violated. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208 ["a conviction cannot stand if even a single juror has been improperly influenced"]; *United States v. Aguon* (9th Cir. 1987) 813 F.2d 1413, 1421, *modified* (9th Cir. 1988) 851 F.2d 1158 (en banc) ["The presence of even a single partial juror violates a defendant's rights under the Sixth Amendment to trial by an impartial jury"].)

A finding of guilt by such a biased fact finder clearly would not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3d Cir. 1977) 551 F.2d 553, 554 [relying on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified if it is exposed, even inadvertently, to the fact that the defendant was previously convicted in a related case]; accord *United States v. Carranza* (1st Cir. 1978) 583 F.2d 25, 27.)

Further, because California does not allow the use of unadjudicated offenses in noncapital sentencing, the use of this evidence in a capital proceeding violated appellant's right to equal protection of the laws. (*Myers v. Ylst*, *supra*, 897 F.2d at p. 421.) It also violated appellant's Fourteenth Amendment right to due process because the State applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346-347.)

Finally, as discussed above, the failure to require jury unanimity with respect to the unadjudicated conduct not only exacerbated this defect, but itself violated appellant's constitutional rights to due process, a jury trial,

and a reliable determination of penalty. (*See Apprendi v. New Jersey, supra,* 530 U.S. 466; *Ring v. Arizona, supra,* 536 U.S. 584; *Blakeley v. Washington, supra,* 124 S. Ct. 2531.)

2. Absent a Requirement of Jury Unanimity on the Unadjudicated Acts of Violence, the Instructions Allowed Jurors to Impose the Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed

The Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida, supra,* 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.) For this reason, the Supreme Court has not hesitated to strike down penalty phase procedures that increase the risk that the fact finder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio, supra,* 438 U.S. at pp. 605-606; *Gardner v. Florida, supra,* 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the fact finder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also

are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (RT 3813.)

Thus, as noted above, members of the jury may individually rely on this – and any other – aggravating factor each of the jurors deems proper as long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (*See Johnson v. Louisiana* (1972) 406 U.S. 356, 388-389 [Douglas, J., dissenting]; *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of nine to three. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 [Douglas J., dissenting].)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable

factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States*, *supra*, 164 U.S. at p. 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves"].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388 [Douglas, J., dissenting].)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated, or even discussed is unreliable and, therefore, constitutionally impermissible.

C. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

A number of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. (See Pen. Code, § 190.3, subds. (e),(f),(j).) Yet, the trial court did not delete those inapplicable factors from the instruction. (RT 3806-3807.) Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant 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, appellant 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* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. 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 appellant 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. (Cf. *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331-1332.)

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime, artificially inflated the weight of the aggravating factors, and undermined the right to heightened reliability in the penalty determination, all in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

D. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable, And Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" –

factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent and/or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, 428 U.S. at p. 304; *Zant v. Stephens*, 462 U.S. at p. 879.)

It is likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

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,* 512 U.S. at p. 973 [quoting *Gregg v. Georgia, supra*, 428 U.S. at p. 189]) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, 455 U.S. at p. 112.)

E. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration Of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), and tying such factors to commission of the crime improperly created a qualitative threshold as well as an inappropriate nexus requirement for the consideration of mitigation, which acted as a barrier to its consideration, in violation of the Sixth, Eighth, and Fourteenth Amendments. (*Tennard v. Dretke* (2004) 542 U.S. 274; *Mills v. Maryland, supra*, 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

F. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violates Appellant's Constitutional Rights

The instructions given in this case did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence.[166] The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.)

California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980.) There can be, therefore, no meaningful appellate review unless they make written findings regarding those factors, because it is 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 finding 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.

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings.

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[166] This is in contrast to the special interrogatories the trial court required the jury to complete and return as to the legal and factual bases of their verdict of guilt as to Count One. (CT 557-558.)

A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the State's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) The same reasoning must apply 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].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Id.*; Pen. Code, § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see *Myers v. Ylst, supra*, 897 F.2d at p. 421; *Ring v. Arizona, supra*, 536 U.S. 584), 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. Thus, in *Mills v. Maryland, supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state

procedure. (*Id.* at p. 383, n. 15.) The mere fact that a capital-sentencing decision 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 its basis cannot be articulated in written findings.

The importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[167] California's failure to require such findings renders its death penalty procedures unconstitutional.

Further, written findings are essential to ensure that a defendant

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[167] *See* Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); 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(8)(a)-(b) (2003); 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., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); 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); 41 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., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

subjected to a capital penalty trial under section 190.3 is 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 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 factfinding 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.

G. Even If The Absence Of Procedural Safeguards Does Not Render California's Death Penalty Scheme Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Appellant Violates Equal Protection

The United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. 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.) "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'." *Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668 [quoting *Trop v. Dulles* (1958) 356 U.S. 86, 102].)

In the case of interests identified as "fundamental," 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 affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, 17 Cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme by rejecting claims that failing to

afford capital defendants the disparate sentencing review provided to noncapital defendants violates equal protection. (See *People v. Allen*, *supra*, 42 Cal.3d at pp. 1286-1288.) The Court's reasons were a more detailed version of the rationale used to justify not requiring any burden of proof in the penalty phase of a capital trial, unanimity as to the aggravating factors justifying a sentence of death, or written findings by the jury as to the factors supporting a sentence of death, i.e., that death sentences are moral and normative expressions of community standards. However, that rationale does not support denying those sentenced to death procedural protections afforded other convicted felons.

In holding that it was rational not to provide capital defendants the disparate sentencing review provided to noncapital defendants, *Allen* distinguished death judgments by pointing out that the primary sentencing authority in California capital cases is normally the jury, "[a] lay body [which] 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 reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.)

While the State cannot preclude a sentencer from considering any factors that could cause it to reject the death penalty, it can and must provide rational criteria to narrow the sentencer's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the statutory criteria that narrow

death eligibility, or the flat judicial prohibitions against imposing the death penalty on certain offenders or for certain crimes.

Moreover, jurors are also not the only sentencers. A verdict of death is always subject to independent review by the trial court, which not only can reduce a jury's verdict, but must do so under some circumstances. (*See* Pen. Code, § 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the lack of disparate sentence review cannot be justified on the ground that reducing a jury's verdict would interfere with its sentencing function.

A second reason *Allen* offered for rejecting the equal protection claims was that the range available to a trial court is broader under the Determinate Sentencing Law ("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*, 42 Cal.3d at p. 1287.) That rationale cannot withstand scrutiny, because the difference between life and death is not in fact "narrow;" particularly not when contrasted with that between sentences of two years and five years in prison.

The notion that the disparity between life and death is "narrow" not only violates common sense, it also contradicts specific pronouncements by the United States Supreme Court: "Th[e] especial concern [for ensuring that every possible procedural protection is provided in capital cases] 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. at p.

305.) The qualitative difference between a prison sentence and a death sentence militates for, not against, requiring disparate review in capital sentencing.

Finally, this Court said that the additional "nonquantifiable" aspects of capital sentencing, as compared to noncapital sentencing, support treating felons sentenced to death differently. (*People v. Allen*, *supra*, 42 Cal.3d at p. 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification, because it is one with very little difference, albeit one that was recently rejected by this Court. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275 ["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"]; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, n. 3 ["The final step in California's capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditional discretionary decision to, for example, impose one prison sentence rather than another"].) A trial judge may base a sentence choice under the DSL on a set of factors that includes precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j), with Cal. Rules of Court, rules 421 and 423.) It is reasonable to assume that the Legislature created the disparate review mechanism discussed above because "nonquantifiable factors" permeate all sentencing choices.

In short, 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)

531 U.S. 98.) 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.)

This Court has also said that the fact that a death sentence reflects community standards justifies denying capital defendants the disparate sentence review provided all other convicted felons. But that fact cannot justify depriving capital defendants of this procedural right, because that type of review is routinely provided in virtually every state that applies the death penalty, as well as by the federal courts in considering whether evolving community standards no longer permit the imposition of the death penalty in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 304.)

Nor can the fact that a death sentence reflects community standards justify refusing to require written jury findings, or accepting a verdict that may not be based on a unanimous agreement that particular aggravating factors are true. (*Blakeley v. Washington*, *supra*, 124 S. Ct. 2531; *Ring v. Arizona*, *supra*, 536 U.S. 584.)[168] These procedural protections are especially important in meeting the acute need for reliability and accurate

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[168] 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 v. Arizona*, 536 U.S. at pp. 588, 609.)

fact-finding in death sentencing proceedings; withholding them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented, and cannot withstand the close scrutiny that should apply when a fundamental interest is affected.

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XVI.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates Appellant's Eighth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment and also violates his Fourteenth Amendment right to equal protection of the law.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States

Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) The time has come for *Pulley v. Harris* to be reevaluated since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (conc. opn. of White, J.).)[169] Comparative case review is the most rational – if not

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[169] Appellant does not challenge the narrowing effect of California's special circumstances in this automatic appeal because that factual question (continued...)

the only -- effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[170]

The capital sentencing scheme in effect at the time of Appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without

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[169] (...continued)
depends on an empirical showing that must wait for a petition for writ of habeas corpus. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

[170] 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. Rev. Stat. §§ 29-2521.01, 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. § 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).

Many states have judicially instituted similar review. (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. 1980) 417 NE.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]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's authorization of the death penalty for felony murder *simpliciter* works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Section 190.2 immunizes few kinds of first degree murderers from death eligibility, and section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments XVI and XVIII through XX, which are incorporated here. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide Appellant with intercase proportionality review. The absence of intercase proportionality review

violates Appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

B. The Lack Of Intercase Proportionality Review Violates Appellant's Right To Equal Protection Of The Law

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing 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 provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning undergirding *Allen*, however, was flawed.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case 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.) Although the

observation may be true, it ignores a more significant point, i.e., the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (See *Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (See Pen. Code, § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a

reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing 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, italics added.) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "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* (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare Pen.

Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 & 423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like Appellant, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates Appellant's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

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XVII.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States is one of the few nations that regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona*, supra, 536 U.S. at p. 618 [Breyer, J., concurring]; *People v. Bull* (Ill. 1998) 705 N.E.2d 824 [Harrison, J., dissenting].) And, as the Supreme Court of Canada has explained:

> 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, 1 S.C.R. 283 [2001 SCC 7], ¶ 91 (2001).

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, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, n. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 [Brennan, J., dissenting].)

A. 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."

The ICCPR was ratified by the United States in 1992, and 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.[171] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty

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[171] 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 appellant'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 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.)

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.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant 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*, 43 Cal.3d at 778-779; see also *id.* at 780-781 [Mosk, J., concurring]; *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. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 [Norris, J., dissenting].) Thus, appellant requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

B. 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*, 492 U.S. at p. 389 [Brennan, J., dissenting]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830.) 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>.)[172]

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 [Field, J., dissenting] [quoting 1 Kent's Commentaries 1]; *Hilton v. Guyot* (1895) 159 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, n. 57 [Field, J., dissenting].)

"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*, *supra*, 356 U.S. at p. 100.)

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[172] 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."

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, n. 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, n. 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].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

XVIII.

IF THE SECOND SPECIAL CIRCUMSTANCE FINDING IS REVERSED, THE DEATH JUDGMENT MUST ALSO BE REVERSED

The jury made its decision to impose a death judgment at a time when it had found both the oral copulation and the prior conviction of murder special circumstances to be true. If this Court reverses the Second Special Circumstance finding, the death judgment must likewise be reversed. (*See Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [in finding prejudicial error, court noted that three of the four special circumstances the jurors found to be true were invalidated on appeal].)

Section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall consider . . . the existence of any special circumstances found to be true." (CT 543; RT 2551; *see* § 190.3, subd. (a).) Reliance by the jury on an aggravating factor which "has been revealed to be materially inaccurate" is a violation of the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment and reversible per se. (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590.) That is the situation here if this Court finds insufficient evidence to support the Second Special Circumstance finding (*see* Args. VI and VII, *ante*).

Moreover, in *Ring v. Arizona*, *supra*, 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, to capital-sentencing procedures and concluded that specific findings the legislature makes prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this state, jurors

have two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists; and (2) if one or more aggravating circumstances exist, whether they outweigh the mitigating circumstances. If this Court reverses a special circumstance finding, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt. This Court cannot conduct a harmless-error review regarding the death sentence without making findings that go beyond "the facts reflected in the jury verdict alone." (*Ring, supra*, 536 U.S. at p. 602; *Apprendi, supra,* 530 U.S. at p. 483.) Accordingly, because jury findings regarding the facts supporting an increased sentence are constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any special circumstance finding is reversed.

Finally, even applying a harmless-error standard to the invalidation of a special circumstance aggravator, reversal is required here. "'[T]his is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances.'" (*Silva v. Woodford, supra*, 279 F.3d at p. 849, quoting *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081.) Furthermore, the length of the deliberations, more than nine hours over a three day period[173] (RT 3821-3835; CT 541-543, 546-547), "suggests that a death sentence . . . was not a foregone conclusion." (*Silva, supra,* at pp. 849-850.) Given the closeness of the penalty determination, it is more than

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[173] Excluding a weekend.

reasonably possible that the erroneous consideration of an invalid special circumstance contributed to the judgment of death. (*Chapman v. California, supra*, 386 U.S. 18, 24; *Stringer v. Black, supra*, 503 U.S. at pp. 230-232; *People v. Brown* (1988) 46 Cal.3d 432, 448.) It certainly cannot be found that the error had "no effect" on the penalty verdict. *(Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) The death judgment must therefore be reversed.

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XIX.

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* (1974) 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.)[174] 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 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].)

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[174] 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.)

The prosecution's case in the guilt phase was dependent upon identifying appellant as the person who killed Andrews. Yet, despite evidence supporting a conclusion that appellant had punched or kicked Andrews, the prosecution evidence identifying appellant as the one who killed Andrews was weak. The physical evidence did not point to appellant specifically. The towel that appellant had supposedly pulled around Andrews' neck had been flushed down the toilet, and was apparently never recovered, or at least not introduced into evidence. There was no evidence that appellant had tied a towel around Andrews' neck, and there was evidence that three other inmates, Bond, Benjamin and Nelson, had access to cell F-8 and he could tied towel around Andrews' neck after appellant had left the cell. There was physical evidence supporting the conclusion that Bond or Benjamin had been involved in assaulting Andrews, as well as evidence that Bond and Benjamin destroyed evidence in the cell before the cell was opened that morning.

The prosecution's case that it was appellant who tied the towel around Andrews' neck was dependent entirely upon the suspect credibility of jailhouse informants and alternate suspects with substantial incentives to fabricate evidence, and evidence of statements by appellant which the prosecution characterized as confessions or statements of motive. However, as shown above, the presentation of both the jailhouse witness testimony and the evidence of appellant's statements depended upon violations of appellant's constitutional rights and upon erroneous rulings under state law.

Appellant's constitutional right to confront the jailhouse witnesses was violated, through the presentation of "prior inconsistent statements" of Johnson and Martinez, who did not affirm the statements as theirs (Arg. II,

ante), and by the denial of cross-examination and impeachment of Benjamin establishing that he had previously committed perjury. (Arg X, *ante*.)

The primary evidence of appellant's statements, other than purported statements attributed to appellant by the jailhouse witnesses, was obtained by the prosecution through violation of appellant's constitutional rights, under the Fifth and Sixth Amendments. (Args III, V, *ante*.)

The weakness of the prosecution's case was bolstered, however, by erroneous instructions and prejudicial evidence which lightened the burden of the prosecution and "made it easier" for the jury to convict. (Args. IV, V, XI, XII, *ante*.) The prosecution further bolstered the prosecution case through false and constitutionally prohibited argument to the jury. (Arg. IX, *ante*.)

Any of the errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman*, *supra*., 386 U.S. at p. 24.) Taken separately, or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination both of guilt, and ultimately, of penalty. (U.S. Const., Amends. V, VI, VIII. XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Gardner v. Florida*, *supra*, 430 U.S. 349; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Aside from the weakness of the prosecution's evidence identifying who killed Andrews, and the fundamental errors which bolstered that

evidence, the prosecution's case establishing felony murder, and a felony murder special circumstance was also weak, and dependent upon marginal evidence and technicalities rather than upon substantial evidence and the plain meaning of the relevant statutes. The evidence upon which the conviction of oral copulation was based was fundamentally insufficient to establish that crime. (Arg. VI, *ante*.) The finding of the Second Special Circumstance was based upon evidence which did not support it, due to the confusion of the jury about the law applicable to the finding, and faulty instructions delivered to a jury after it requested additional instruction. (Args. VII, VIII, *ante*.) The fundamentally flawed verdicts and findings by the jury further contributed to an unreliable determination of penalty by the jury. (See, e.g., Arg. XIII, *ante*; U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Stringer v. Black, supra,* 503 U.S. at pp. 230-232; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Gardner v. Florida*, *supra*, 430 U.S. 349; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Silva v. Woodford, supra*, 279 F.3d at p. 849; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant'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, supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 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 Sergio's trial. (See *People v. Hayes* (1990) 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; see also *People v. Brown* (1988) 46 Cal.3d 432, 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].)

The case in aggravation presented at the penalty phase was not so overwhelming compared to the evidence in mitigation that the death penalty was a foregone conclusion. The weakness of the prosecution's case at guilt must have left some lingering doubt as to appellant's guilt, or the extent of it, in the jurors' minds. However, the prejudicial effect of, e.g., the threat to Rutledge, the statements in the kites suggesting a lack of remorse and future dangerousness, Nelson's characterization that appellant bragged about killing his brother, the false impression of Benjamin's credibility allowed through denial of cross-examination about his prior perjury, the guilty verdict on Count Two and the finding on the Second Special Circumstance which were based on insufficient evidence and defective instructions, the prosecutor's misleading, false, and unconstitutional argument at guilt which improperly bolstered the credibility of Bond and Benjamin, all were reasonably likely to have a continued prejudicial effect upon the jury's consideration of the evidence presented at penalty as well as upon the jury's ultimate decision to return a sentence of death. Thus aside from the unreliability of the guilt verdicts and findings due to the errors at the guilt phase, those errors introduced further unreliability into the penalty phase and the penalty decision.

Reversal of the death judgment is mandated here because it cannot be shown that the 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. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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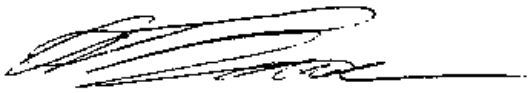
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: October 20, 2005

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



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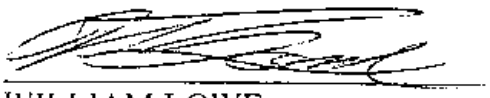
(CAL. RULES OF COURT, RULE 36(B)(2))

I, William Lowe, am the Deputy State Public Defender assigned to represent appellant, Ronnie Dale Dement, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 120,887 words in length excluding the tables and certificates.

Dated: October 20, 2005



WILLIAM LOWE

DECLARATION OF SERVICE

Re: *People v. Dement* No. S042660

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

JEFFREY D. FIRESTONE
Deputy Attorney General
Department of Justice
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2250

FRESNO COUNTY SUPERIOR COURT
ATTN: Clerk of the Court
1100 Van Ness
Fresno, CA 93724

RONNIE DALE DEMENT
P.O. Box C-63925
San Quentin, CA 94974
(To be hand delivered on November 16, 2005)

Each said envelope was then, on October 20, 2005, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty that the foregoing is true and correct.

Executed on October 20, 2005, at San Francisco, California.

Glenice Fuller
DECLARANT