No. S066939

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL ALLEN AND CLEAMON JOHNSON

Defendants and Appellants.

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE CHARLES E. HORAN, Judge

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TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent*, v. MICHAEL ALLEN AND CLEAMON JOHNSON *Defendants and Appellants.*	)	S066939 Los Angeles County Superior Court No. BA105846

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. Cal. Penal Code § 1239(b); Cal. Rules of Court, Rule 13.

STATEMENT OF THE CASE

On December 16, 1994, a Los Angeles County grand jury returned a two count indictment against appellants Michael Allen and Cleamon Johnson.

Count I of the Indictment charged appellants with the August 5, 1991

murder of Donald Loggins in violation of Penal Code section 187. It was alleged that a principal in the commission of the murder was armed with a firearm, an Uzi, within the meaning of Penal Code section 12022(a). It was further alleged that Michael Allen: personally used a firearm, an Uzi, in the commission of the offense, within the meaning of Penal Code section 12022.5(a); personally used an assault weapon and a machine gun within the meaning of Penal Code section 12022.5(b); and was previously convicted of first degree murder on or about December 22, 1993, within the meaning of Penal Code section 190.2(a)(2). It was further alleged that Cleamon Johnson furnished a firearm to another for the purpose of aiding, abetting and enabling that person to commit a felony, pursuant to Penal Code section 12022.4. CT 179-180.[1]

Count II of the Indictment charged appellants with the August 5, 1991 murder of Peyton Beroit in violation of Penal Code section 187. It was alleged that a principal in the commission of the murder was armed with a firearm, an Uzi, within the meaning of Penal Code section 12022(a). It was further alleged that Michael Allen: personally used a firearm, an Uzi, in the commission of the offense, within the meaning of Penal Code section 12022.5(a); and personally used an assault weapon and a machine gun within the meaning of Penal Code section 12022.5(b). It was further alleged that Cleamon Johnson furnished a firearm to another for the purpose

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[1] "CT" refers to the clerk's transcript on appeal and "RT" refers to the reporter's transcript on appeal. "CT III Supp." is a thirteen volume clerk's supplemental transcript for which appellant gives the volume number followed by the page number, e.g., "CT III Supp. 1:123." "CT IV Supp." is a five volume supplemental transcript for which appellant gives the volume number followed by the page number, e.g., "CT IV Supp. 1:123."

of aiding, abetting and enabling that person to commit a felony, pursuant to Penal Code section 12022.4. CT 181.

Michael Allen and Cleamon Johnson were also charged with a multiple murder special circumstance within the meaning of Penal Code section 190.2(a)(3). CT 181.

Appellants were arraigned in Los Angeles County Superior Court on January 19, 1995. They entered pleas of not guilty to the charges and denied the special circumstance allegations. CT 210.

Jury selection began on July 23, 1997. CT 636. A jury was impaneled and sworn on July 31, 1997. On August 1, 1997, the alternate jurors were impaneled and sworn. CT 644-645.

The guilt phase of the proceedings commenced on August 5, 1997. CT 780. On August 14, 1997, the prosecution rested. CT 820. Appellant Johnson's case spanned two days, August 15 and 18, 1997. CT 821-822. Appellant Allen rested without putting on any evidence. CT 822. The prosecution presented evidence in rebuttal on August 19, 1997. CT 823. The jury was instructed on August 19, 1997, followed by opening argument by the prosecution and closing argument by appellant Johnson. CT 823. On August 20, 1997, appellant Allen made his closing argument and the prosecution made its closing argument. CT 824.

The jury commenced its deliberations at 11:25 a.m., on August 20, 1997. CT 823. The jury continued to deliberate on August 21, 25, and 26, 1997. CT 828, 830. At the conclusion of deliberations on August 26, two of the jurors, Juror 4 and Juror 5, met together outside the presence of the other jurors and then asked to speak to the trial court about Juror 11. The court questioned the two jurors separately the following day and then, over objection of defense counsel, questioned the remaining jurors. CT 836-837.

After its inquiry, the trial court granted the prosecution's request that Juror 11 be excused, finding the juror "had his mind made up before deliberations began." CT 837. The defense motion to excuse Jurors 4 and 5 for misconduct was denied. CT 837.

An alternate juror was selected to replace Juror 11, and deliberations commenced anew at 3:35 p.m., on August 27, 1997. CT 837. On August 28, at 3:58 p.m., the jury submitted a note regarding its inability to reach a unanimous verdict regarding appellant Allen. CT 839. The following morning, the court questioned the jurors and was informed that one ballot had been taken and the vote was 10 to 2. The court then instructed the jury to resume deliberations. CT 842. On September 2, 1997, after a three-day weekend, the jury reached verdicts, finding appellants guilty on all counts, and finding all allegations and special circumstances true. CT 925-928.

On September 4, 1997, it was stipulated that appellant Allen was convicted previously of the first degree murder of Chester White. CT 933.

On September 11, 1997, the prosecution's presentation of evidence in the penalty phase began. CT 955. The prosecution rested on September 16, 1997. CT 974. Appellant Allen's case in mitigation was presented on September 18, 1997. CT 978. Appellant Johnson's case in mitigation began on September 18, 1997, and concluded on Monday, September 22, 1997. CT 978, 991.

The jury was instructed and the parties gave closing arguments on September 24, 1997. CT 994. The jury commenced deliberations at 3:20 p.m., on September 24, 1997. CT 994. Deliberations continued on September 25, 26, and 29, 1997. CT 995, 996, 998. On September 29, 1997, the jury reached its verdicts of death for both appellants, which were announced the following day. CT 998, 1082-1084.

On December 12, 1997, defense motions for a new trial and applications for modification of the verdict of death were heard and denied. The court then sentenced appellants to death. The sentences for firearm and arming allegations were stayed. CT 1166-1185.

GUILT PHASE STATEMENT OF FACTS

On August 5, 1991, two members of a Crips gang, Donald Loggins and Peyton Beroit, were seated in a white Toyota adjacent to Judge's Hand Car Wash at 88th Street and Central Avenue, in South Central Los Angeles. This location was considered to be in the territory of a rival gang, the 89 Family Bloods. A large man approached the car and shot into it with an Uzi, killing both Loggins and Beroit. Coappellant Michael Allen was identified by several witnesses as the shooter.

Appellant Cleamon Johnson's connection to the crimes was far more tenuous. He was not at the scene at the time of the shootings, but was alleged to have provided the gun to Allen and to have instructed him to commit the killings. The evidence against Johnson was based primarily on the testimony of former associates, all of whom had motives to cooperate with the police when they provided the incriminating information. Their testimony was frequently contradictory and inconsistent.

As demonstrated by the proceedings that led to the excusal of a juror who did not believe the prosecution had met its burden of proof and by the temporary deadlock of the jury after that juror was replaced by an alternate, this was a very close case for guilt.

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A. Prosecution's Case-in-Chief

Eulas Wright was the owner of Judge's Hand Car Wash. RT 3868. On August 5, 1991, between 12:30 and 1:00 p.m., a black 1965 Chevy was brought in to be washed, chromed, and rim-shined. RT 3869-3870. It was a convertible with Dayton rims, RT 3876, described by one of the officers as a "show car." RT 3786-3787; People's Exhibits 2-A - 2-E.

While the Chevy was being cleaned, two men sat in a white Toyota Supra, which was parked on the street next to the car wash. RT 3263. According to Wright, the passenger was the one who brought in the Chevy. RT 3874. Another witness, Carl Connor, testified that Donald Loggins owned the Toyota and Peyton Beroit owned the '65 Chevy. RT 3337.

Wright and his employee, Willie Clark, were working on the Chevy when they heard gunfire and ducked down. RT 3259-3260, 3287-3288, 3871-3872. After the shooting stopped, Wright looked up and saw a man running north away from the scene. According to Wright, he was short and "real chunky," and was wearing a black Oakland Raiders jacket with the hood on. Wright recalled that the shooter was wearing shorts. RT 3873, 3875, 3888, 3892.

When Clark was interviewed by the police at the time of the crimes, he denied seeing anything. RT 3292. Three months later, he identified Michael Allen as the shooter from a photo lineup. RT 3282, 3321. Clark described the shooter to the police as a heavyset black male, five feet seven or five feet eight inches tall, weighing 200 pounds, and wearing a black windbreaker with a hood. RT 3273-3275. Clark told the police that the shooter wore a gold earring on his left ear. RT 3275. Clark also told the police that the man had very short hair. RT 3279.

At trial, Clark was not able to identify Allen in the courtroom. RT

3306. He described the shooter as a big man, wearing a blue windbreaker. RT 3267-3268. When confronted with how he could have known the shooter had short hair – as he told the police – if the shooter had been wearing a hood, Clark responded that he was unsure as to whether the man was wearing a hood. RT 3279.

Clark also told the police that he heard between 15 and 20 shots, and that it sounded like machine gun fire. RT 3272. He said the shooter was standing on the passenger side of the Toyota. RT 3275. After the shooting, Clark saw the man run north. RT 3267-3268, 3275.

A third witness also allegedly witnessed the shooting. Carl Connor testified that on August 5, 1991, he was at the auto repair shop adjacent to the car wash talking to a friend who worked there. RT 3340. He saw the '65 Chevy at the car wash, and saw Loggins and Beroit in the Toyota, with Loggins in the driver's seat and Beroit in the passenger seat. RT 3343. Connor claimed to know Loggins and Beroit from the neighborhood. RT 3336.

Connor had told the police that he had seen Michael Allen, aka "Fat Rat," walk by after Loggins and Beroit first pulled up to the car wash and that Allen looked at the people in the car. RT 3377. Connor denied at trial that he told the police that he then saw Allen walk to Cleamon Johnson's house to get a gun. RT 3377.

Connor testified that he subsequently saw Allen walking east down the sidewalk towards Central on 88th Street, and then saw him run up to the Toyota and start shooting into the car. RT 3344, 3346, 3349, 3351, 3378.

Connor stated that while Allen was shooting into the car, Connor ran from the repair shop to the car wash and ducked down. RT 3351, 3404. He heard about 20 shots, which sounded as if they came from an Uzi or a Mac

10. RT 3354. Connor testified that the shooter was by a red van, about ten feet away and in front of the Toyota, but at an angle, closer to the driver's side. RT 3347, 3422, 3443, 3473. Connor identified Allen as the shooter from a photo lineup when interviewed by the police in August, 1994. RT 3375.

After the shooting, Connor testified, contrary to the testimony of Wright and Clark, that he saw Allen walking down the street heading west, between an alley and Central Avenue on 88th Street. RT 3358-3359. Connor did not recall testifying before the grand jury that Allen was running, not walking. RT 3427-30. According to Connor, Allen, a member of the rival 89 Family gang, shot the two men because he thought they were Crips. RT 3363, 3379.

Connor testified that he did not know where Allen went after the shooting. RT 3359. He did not recall testifying before the grand jury that he saw Allen go to Johnson's house on 88th Street. RT 3364-3367. He denied telling the police that after the shooting, Allen walked back to Johnson's house and dropped off the gun. RT 3379. Connor said he "never said nothing about [Johnson]." RT 3379.

On cross-examination, Connor stated that he was employed as a porter at Don Kott Ford, a car dealership. RT 3391. Connor claimed that he was not working on the day of the shootings, but that his friend "Jose," may have punched his time card for him that day. Connor claimed that both he and Jose were fired for falsifying time cards. RT 3394-3396.

On August 15, 1994, Los Angeles Police Detective Rosemary Sanchez interviewed Connor regarding an unrelated murder. During the course of the interview, she questioned Connor regarding the shootings at the car wash. RT 3971. Connor told Sanchez that he did not want to testify

and was afraid for his and his family's safety. RT 3974. Detective Sanchez testified that Connor was not promised anything in this case, although Connor did receive a $25,000 reward for providing information in the unrelated case that Sanchez was investigating. RT 3975-3976, 3990.

During the course of the interview with Sanchez, Connor said that Allen had walked to Johnson's house, obtained a gun, and after the shooting, had walked back to Johnson's house and dropped off the gun. RT 3981. A tape of the interview was played for the jury. RT 3984; People's Exhibit 22. Detective Sanchez stated that on the day he was scheduled to testify, Connor told her that he would testify against Allen but not against Johnson, because Johnson "has too many followers." RT 3987-3988.

A 911 call was received at 3:41 p.m., on August 5, 1991, and police were dispatched to the scene. RT 3999. Los Angeles Police Detective James Tiampo arrived about an hour after the 911 call. RT 3761-3765. He saw a male identified as Loggins slumped over the driver's seat of the car with injuries consistent with having been inflicted by gunfire. RT 3770, 3772. By the time Tiampo arrived, Beroit had been taken to the hospital, where he died. RT 3771-3772.

Detective Tiampo noted a bullet hole in the upper quarter panel of the car, which passed through the vehicle and exited on the driver's side. There was a corresponding bullet hole behind the driver's side headrest. The car windows were down and there was no broken glass. RT 3774-3775, 3803. There were remnants of two marijuana cigarettes found in the car as well as a beer can approximately two feet away from the car. RT 3777.

Detective Tiampo identified a fragmentation of a bullet found on the passenger side of the car as well as nine 9mm shell casings from expended

rounds found on the street by the car. Most of the casings were at the front quadrant of the passenger side of the car. Another fragment of a bullet was found inside the car. RT 3778-3783. Detective Tiampo agreed that from the location of the casings, the damage to the vehicle, and the lack of damage to the front of the vehicle, it was unlikely that the shooter could have been standing where Connor testified the shooter was standing. RT 3804-3805.

Starr Sachs, an expert in the field of firearms, examined the ballistic evidence. RT 3830. She testified that the nine expended 9 mm shell casings had been fired from the same firearm. The bullet jacket fragments and expended bullets were also 9 mm caliber. RT 3833. Two sets of coroner's bullets recovered from the decedents and one of the two bullet fragments found at the scene had been fired from the same firearm. The other fragment was too damaged to be able to determine whether it was from the same firearm. RT 3833-3838. Ms. Sachs opined that the bullets could have been fired from an Uzi. RT 3837.

Ms. Sachs testified that because the ejection port on an Uzi is on the right-hand side, the cartridge case will come out of the gun to the right of the firearm. As a result, the shooter will generally be to the left of where the cartridge casings are found. RT 3843. Here, given the placement of the cartridges, the shooter could have been standing on the passenger side of the vehicle. RT 3844, 3860.

Dr. Christopher Rogers, a forensic pathologist, testified regarding the autopsies of Beroit and Loggins, both of whom died of gunshot wounds. RT 4107. Dr. Rogers testified that Beroit had three gunshot wounds: one entered through the right ear and ended up in the bone in the central part of the head; a second entered the right side of the face, dislodging the eye, and

exiting out on the left side of the nose; and a third entered the right side of the back. RT 4004, 4095, 4097. The two wounds to the head were potentially fatal. RT 4100. The wounds did not show any gun powder deposits, indicating that the shots were fired from more than two feet away. RT 4098.

Loggins also had three gunshot wounds: two were close together behind the right ear and a third was to the right shoulder. RT 4101. The two wounds to the head were fatal. RT 4106.

Dr. Rogers opined that it was most likely that the shooter was on the passenger side of the car, and that it was not possible that, as Connor testified, the shooter was standing at an angle off of the driver's side. RT 4111-4112. The wounds were consistent with the shooter being adjacent to the car, parallel to the passenger side door. RT 4114.

Marcellus James, aka "Na Na," formerly lived in the neighborhood but claimed not to be a member of the 89 Family. RT 4040-4041.[2] James testified that Allen told him about the shootings. Allen said "he walked up to them and he just shot them." RT 4042. Allen claimed to have shot the two men because they were "from the wrong hood." RT 4043-4044. When James talked to the police in 1994, he was in custody on a domestic violence charge. RT 4055. He originally told the police that he did not hear about the shootings directly from Allen. RT 4069, 4072. At trial, James explained that initially he failed to provide what he knew to the police because he was fearful. RT 4080-4081.

Los Angeles Police Detective Brian McCartin interviewed James on

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[2] The testimony of Marcellus James described herein was admitted against Allen but not against Johnson. RT 4042, 4048.

September 21, 1994. James was reluctant to cooperate. RT 4157. He hedged at first out of fear for his and his family's safety. At one point, James said Allen had not told him about the shootings but that another person had said that Allen had committed the murders. James ultimately stated that Allen admitted to being the shooter. RT 4159-4160, 4163, 4192. Detective McCartin testified that James was not offered anything in exchange for his cooperation. RT 4160.

Freddie Jelks, aka "F.M," was a former member of the 89 Family Bloods. He claimed that he left the gang after Johnson beat him up over a dispute involving Johnson's girlfriend. RT 3518, 3693-3697.

Jelks was in custody with charges pending at the time of his trial testimony, although he denied that he had made any deals in exchange for his cooperation. RT 3514, 3628, 3684. At the time that he provided information to the police in December 1994, he was told that he was going to be booked for a serious offense, but that he could go home to spend Christmas with his family if he kept a "nice flow of information coming." After the police interview, Jelks was released. RT 3716-3722.

Jelks testified that at the time of the shooting he was at Johnson's residence, which he described as a gang hangout for the 89 Family. RT 3519, 3523. He was smoking marijuana with others who were there. RT 3520, 3524. They were talking about the Chevy that was at the car wash, which was in 89 Family territory. RT 3525-3526, 3527-3528. As the conversation continued, Allen arrived. RT 3529-3530.

Jelks testified that Allen was wearing khakis, a T-shirt and a black Ben Davis-type windbreaker, RT 3558, and that he had short hair and was wearing a black baseball cap. RT 3569. Jelks had not told the police that Allen wore a hat or jacket. RT 3712.

The group was discussing that the owner of the car was a member of the rival Crips gang. RT 3537-3541. According to Jelks, Johnson then asked "who would like to go serve," and Allen volunteered. RT 3542, 3543. Serving meant shooting. RT 3542. Jelks stated that the shooting would send a message to the East Coast Crips. RT 3552. It would also earn Allen greater respect. RT 3553.

Jelks testified that Johnson went to the back of his residence to a pigeon coop where weapons were stored and returned with an Uzi. RT 3544-3545. Jelks claimed at trial that Johnson gave Allen the gun, RT 3555; he told the police prior to trial, however, that "I think" Johnson gave Allen the gun. RT 3653.

Jelks testified that a discussion was held as to how Allen would do the shooting, RT 3546-3547, after which Johnson took Allen aside and spoke to him. RT 3555-3556. Johnson told Allen that to avoid being seen on the main street, he should go through the alley (adjacent to Central), which runs north from 88th to 87th Street, then head east to Central, and then back down to where the car was parked on Central and 88th Street. RT 3557; *see also* RT 3705-3708.

At trial, Jelks testified that while Johnson and Allen were conversing about what to do, a member of the Swans, a gang friendly to the 89 Family, pulled into the Johnson's driveway, and that Allen got into the car and was driven to the scene. RT 3562-3565. Jelks told the police, by contrast, that Allen walked through the alley and then headed south on Central Avenue, where he committed the murders. RT 3705-3708.

Jelks testified that he heard 10-12 shots a minute or two after Allen left. RT 3566. After a few minutes passed, Allen returned. He was sweating and breathing heavily. RT 3568, 3569. According to Jelks, Allen

stated that he had done the shooting. RT 3572. At trial, Jelks claimed that Allen gave the gun to Johnson, who handed it to a guy named "Louie." RT 3570. Jelks told the police that after Allen gave the gun to Johnson, Johnson hid it. RT 3726. Although never having mentioned it previously, Jelks testified that Angie Williams, the sister of Keith Williams, pulled up in a car, and drove Allen away. RT 3573, 3650-3651.

Jelks testified that Allen subsequently described the shooting to him, stating that he had walked up to the car, that the two men in the car never saw him, and that he had knelt down and started firing. RT 3580. Allen told him that he shot the passenger first and then the driver. RT 3581. Allen said that he could see the "flesh popping off of [the passenger]." RT 3580, 3622-3623.

According to Jelks, Johnson was a heavily respected member of the gang. RT 3559. Jelks testified that Johnson ordered the killing. He claimed that Johnson was a shot-caller – the person in the gang who could order such a "mission." RT 3624-3625.

Detective McCartin interviewed Jelks in December, 1994. Although Jelks was not under arrest at the time, McCartin used various coercive techniques to get him to talk. RT 4165-4167, 4232. Jelks was told that if he did not cooperate, he would be arrested and would not be able to see his family for Christmas. RT 4167, 4182. Although McCartin first testified that he only threatened Jelks with arrest for outstanding traffic warrants, he subsequently conceded that the threat involved a serious offense that carried a potential life sentence. RT 4167, 4185. Jelks ultimately cooperated. RT 4169. He was not arrested at that time, but was subsequently arrested for the serious offense. RT 4172.

Donnie Ray Adams, a member of the 89 Family, testified that gang

members would hang out at Johnson's house. RT 4408, 4411-4412. Adams claimed that after the shooting, he went to Johnson's house and asked Johnson what happened. Johnson told him that two Crips had been shot. RT 4413-4415. Adams testified that Johnson said he gave a gun and a ski mask to the shooter. RT 4415. Adams, however, had earlier told the police that Johnson said that he had sent the shooter to retrieve a gun and a ski mask, and did not give him these items. RT 4434, 4439.

At the time of his testimony, Adams was in custody awaiting sentence, having pleaded guilty to a charge of distributing cocaine. RT 4407, 4422-4423. He claimed that no promises had been made in exchange for his testimony, RT 4418, although he hoped to reduce his sentence by testifying in this case. RT 4422-4423. He admitted that he did not provide the above-described information to the police when he was interviewed prior to his guilty plea, but did so only in the course of trying to work out a deal for a lesser sentence. RT 4424-4425.

Los Angeles Police Detective Christopher Barling testified as a gang expert. According to Barling, the 89 Family frequented the area west of Central Avenue at 88th Street, and the Kitchen Crips and 89 East Coast Crips frequented the area east of Central Avenue. RT 4289-90.

Detective Barling testified that respect is the most important thing to a gang member, and that respect is gained by either bringing money into the gang or committing violent acts. RT 4296-4297. Barling claimed that the 89 Family was known for committing homicides. RT 4297. He stated that a double murder of rival gang members during the day would send a message to other gangs not to come into their territory and would enhance their reputation. RT 4316.

Barling identified Allen as "Fat Rat," and Johnson as "Evil" or "Big

Evil," and stated that both were members of the 89 Family Bloods. RT 4299, 4300-4301. Barling testified that Johnson had a lot of respect in the gang, but Allen had less because he had only recently rejoined the gang after having been away. RT 4302-4303. Barling explained that when a gang member returns, he usually has to do something to show that he is still a part of the gang. RT 4303.

According to Barling, Johnson was someone who called the shots for the gang. He had a reputation for being a leader in the gang, and he was feared. RT 4306, 4326. Barling testified that the 89 Family often congregated at Johnson's residence and that guns were kept in Johnson's pigeon coop. RT 4307, 4315.

Portions of Johnson's testimony in a 1992 case, *People v. Glass,* in which Johnson was a witness, was read to the jury. RT 4446. At that trial, Johnson testified regarding his gang affiliation, the rivalry between his Bloods gang and Crips gangs, his hatred of Crips, and his status as an "O.G.," an "Original Gangster." RT 4448-4456.

Johnson's telephone calls while he was at the county jail awaiting trial in this case were intercepted, and excerpts were admitted in the prosecution's case-in-chief for the purpose of showing Johnson's membership and status within the 89 Family Bloods. RT 4772-4773. *See* People's Exhibits 38, 39 and 40. In addition, a redacted note unrelated to this case but written by Johnson and seized by a deputy while Johnson was in the visiting room of the county jail, was admitted with regard to Johnson's gang membership and status. RT 4803-4804; People's Exhibit 44.

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B. Defense Case-in-Chief[3]

The defense presented evidence to impeach Carl Connor's testimony about having had a co-worker falsify his time card at work. Jeffrey Childers, the general manager for Don Kott Auto Center, testified that Connor had been employed there. RT 4855. Connor had in fact been terminated in 1992, but it was not for falsifying time cards as Connor testified. He was fired as a result of a DMV investigation which had been initiated by Don Kott Auto Center. RT 4856-4858. The time clock records indicated that on August 5, 1991, Connor punched in at 7 a.m., was out for lunch from 1:30 p.m., until 2:12 p.m., and left for the day at 5:18 p.m. RT 4859-4860; Defense Exhibit E.

James Galipeau, a deputy probation officer for Los Angeles County, testified as a gang expert for Johnson. RT 4868-4872. Galipeau first sought to dispel the notions that the shooting was necessarily gang related, and that simply because members of a Crips gang were killed, it must have been members of a Blood gang who committed the crime. Galipeau noted that Crips are often at war with other Crips, and that a Kitchen Crip would be just as likely to shoot an East Coast Crip as would a Family Blood. RT 4875-4876, 4959. Galipeau testified that not every homicide in a gang area is a gang-motivated killing, and not every homicide committed by a gang member is directed by another gang member. RT 4948. Galipeau stated that in 1991, Central Avenue, where the shooting occurred, was considered a "demilitarized zone," and thus, the location was adjacent to, but not in, a gang neighborhood. RT 4877-4878.

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[3] Coappellant Allen rested without presenting any evidence at the guilt phase.

Galipeau also testified that a black Oakland Raiders jacket, which was identified as having been worn by the shooter, was associated with Crips, and that Bloods wore San Francisco 49ers jackets. RT 4944-4955.

Allene Johnson, Johnson's mother, testified that she was on her way home on August 5, 1991, when she saw the ambulance and a crowd beginning to form at the scene of the crime. RT 4961, 4963. She recalled seeing her sons, including Johnson, outside their home. RT 4964-4965. She did not see anyone in the front yard with weapons, did not see anyone out of breath, and did not recall seeing Allen. RT 4966-4967. She was certain that Freddie Jelks was not at the house when she arrived. RT 4971.

C. Prosecution's Rebuttal

The prosecution introduced taped excerpts of three intercepted telephone calls between Johnson and his mother in which Johnson, while in the county jail, asked his mother to locate Freddie Jelks. RT 5028-5033; People's Exhibits 45-46. Johnson's mother had testified that she did not recall that Johnson had asked her to find out where Jelks was. RT 4976.

Detective Barling was recalled and testified he had seen members of the Bloods wear Raiders jackets. RT 5034. He stated that black is a neutral color, and that both gangs wear black jackets at times. RT 5034.

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PENALTY PHASE STATEMENT OF FACTS

A. Prosecution's Case Against Johnson

The prosecution presented as aggravating factors under Penal Code section 190.3(b) a robbery conviction which post-dated the crimes in this case and evidence in support of several unadjudicated criminal acts as described below.

1. *Drive-By Shooting*

The prosecution presented evidence regarding Johnson's alleged involvement in the murder of Tyrone Mosley, in which two bystanders were shot and injured.[4]

Los Angeles Police Detective Jerry C. Johnson investigated a drive-by shooting that occurred on September 14, 1991, at 97th Street and McKinley. Tyrone Mosley was killed, and Kim Coleman and Kenneth Davis were injured. Mosley was a member of the 97 East Coast Crips, and the shooting occurred in an area claimed by that gang. RT 6227-6247.

Kim Coleman testified that she was shot while hanging out and partying on 97th Street with East Coast Crips. A street fight among some of the women present at the party was about to start when a car pulled up with its lights off. Coleman heard gun shots coming from the car. She was shot in the back, with the bullet coming out on her side and into her right arm. RT 6263-6285.

Marcellus James testified that in September 1991, he was present

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[4] Although not part of the trial record in this case, in 1999, appellant was tried for the murder of Mosley and attempted murder of Coleman and Davis. On September 27, 1999, a mistrial was granted when the jury was unable to reach a verdict. *People v. Johnson*, Los Angeles Superior Court No. BA108967.

when Johnson, Freddie Jelks, and an individual known as "Jelly Rock" talked about going to a party in the neighborhood of a rival gang. After Johnson and Jelks armed themselves, the three got into a car and left, returning about five minutes later. James testified that he did not remember whether Johnson said anything when he got out of the car, but recalled telling the police that Johnson said "they had gotten the 97's." RT 6194-6225.

Detective McCartin testified that he interviewed James in 1994, and that while James initially indicated that Jelly Rock was the driver, he subsequently stated that Jelks was the driver. RT 6304-6310.

Keith Williams testified that he was a member of the 89 Family in 1991. He acknowledged talking with the police in July, 1994, but denied stating that Johnson told him he shot at 97 East Coast Crips. When confronted with his signed statement, Williams claimed that he had lied when he told the police of Johnson's role in the shooting. At trial he asserted that he did not recall his grand jury testimony, in which he claimed that Johnson had admitted involvement in the shooting, although he claimed he did not lie to the grand jury. Williams was in custody on drug charges at the time he gave the statement to the police. He claimed that the police told him that if he gave them a statement they would release him, and, in fact, he was eventually released without charges being filed. RT 6316-6373.

It was stipulated that a ballistics expert examined four .45 caliber automatic casings found at the scene and determined that they were all fired from the same gun, that an expended bullet found at the scene was a .45 caliber bullet, and that a .380 caliber casing was also recovered from the scene. RT 6557.

It was also stipulated that an autopsy was performed on Mosley, who

died as a result of a through-and-through gunshot wound which entered his left side and exited his right side, and that the wound was generally horizontal with no soot or stippling. RT 6558.

2. *Solicitation of Murder of Georgia Denise Jones*

The prosecution introduced a telephone call between Johnson and Reco Wilson as evidence that Johnson solicited the murder of Georgia "Nece" Jones, who was an eyewitness in a murder case against Charles Lafayette, a member of a gang friendly to the 89 Family. While the content of the call is far from clear, the prosecution contended that the fact that Wilson killed Jones four days after the phone call established that Johnson, who was in custody at the time, ordered Wilson to commit the killing. Not only was evidence of the phone call admitted into evidence, but the prosecution was also permitted to present evidence regarding the murder itself.

On June 8, 1994, while Johnson was in Ironwood State Prison, his taped telephone conversation with Reco Wilson was seized by law enforcement. The recording was played for the jury. During the course of the conversation, in which Johnson warned Wilson that the police were investigating the gang, Johnson made the following statement: "You know what I'm saying, ah, them three smokers out there? Ah, man put a leash around their ass, by any means necessary. You know what I'm saying. It's either, it's either your way or no way. You know what I'm saying."[5] People's Exhibit 51A; CT IV Supp. 2:440-441.

Detective Barling testified that Nece Jones was an associate of the 89

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[5] A transcript of the telephone conversation is more fully set forth below in Argument XVII.

Family, and she could be characterized as "a smoker," meaning someone who frequently smoked cocaine. RT 6016. Barling stated that the phrase "put a leash around their ass" meant to control someone like you would a dog. RT 6023-6024.

Los Angeles Police Detective Eugene Tapia testified that he responded to the crime scene on June 12, 1994, in which Jones was found dead. He testified that she was shot in the head two times, and that based on the proximity of the shell casings, she was shot at close range. RT 6040-6068.

The county coroner, Stephen Scholtz, testified about the autopsy of Nece Jones, and stated that she died of multiple gunshot wounds. RT 6069-6079.

Detective Barling testified that Charles Lafayette belonged to the 84 Swans, a subset of the Bloods gang. RT 6014-6015. Los Angeles Police Detective Gary Aspinall testified that Lafayette was arrested for the murder of Willie T. Bogan in 1993, and that Nece Jones was an eyewitness, who had identified Lafayette as the shooter and testified at his trial. Jones was put in protective housing out of concern for her safety. After the jury hung, and before Lafayette's retrial, Jones was killed. Lafayette was ultimately convicted of the Bogan murder. RT 6114-6138.

Carl Connor testified that he witnessed Nece Jones's shooting while he was at his friend Derek Battle's residence. Connor claimed that he was in Battle's backyard when he saw Reco Wilson in an alley, covering his face with a rag. Connor testified that he knew something was going to happen, so he ran to the front of Battle's house where he saw Wilson run up to Jones and shoot her in the head six or seven times. This was the case for which Connor received a monetary reward. RT 6141-6192.

Barling testified that Reco Wilson was convicted of murdering Jones. RT 6018. He further testified that appellant called the shots in the gang, and "would tell Reco Wilson, or ask Reco Wilson to do certain tasks." RT 6024.

3. *Solicitation of Murder of Tom Mathew*

The prosecution also presented two telephone calls intercepted while Johnson was in custody at Ironwood State Prison, which it contended constituted solicitation to murder Los Angeles Police Detective Tom Mathew. Tapes of the two calls were played for the jury.[6]

In the first conversation, which occurred on August 23, 1994, Johnson stated that he had approximately 50 more days in custody and said that "I'm gonna be able to have a scope for old Matthews and watcha all him, you know what I'm saying. Just something for they bad ass. And after that motherfucker would be able to kick back, you know what I'm saying." People's Exhibit 52, CT IV Supp. 2:443.

The second conversation was with an unidentified male and occurred on October 7, 1994. In that call, appellant referred to needing a "Barlim Barlim," and said he wanted to "put a eye" on Mathew, and asked the other person on the call to "price one out for me." People's Exhibit 53, CT IV Supp. 2:445-447.

Detective Barling testified that Detective Mathew was a fellow officer who worked in the South Bureau CRASH unit that investigated gang activity. Johnson asked Barling on more than one occasion why Mathew was "messing with them." Detective Barling testified that a "Barlim" refers

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[6] Transcripts of these conversations are more fully set forth below in Argument XVII.

to a 30-30 rifle and that "putting a scope" on someone means to take a gun, look through the scope, and shoot him. RT 6005-6013, 6026-6037.

4. *Sexual Assaults*

Johnson's nieces, Shina Parker and Emerald Starr, and Tashanna Sowell, Parker's childhood friend, testified that Johnson engaged in a sexual act with each of them when they were minors. The three separate incidents, which allegedly occurred between 1987 and 1992, were not reported until years later, and the District Attorney's Office had declined to charge or prosecute Johnson for these offenses.

Shina Parker testified that Johnson had sexual intercourse with her on one occasion when she was eight or nine years old. RT 5841-5870. Her sister, Emerald, testified that when she was eight or nine years old, Johnson had her perform oral sex upon him. RT 5910-5924. Tashanna Sowell testified that when she was ten or eleven years old, she went bike riding with Johnson, and that they laid down on the grass together, after which they engaged in sexual intercourse. RT 5890-5909.

Paula Feinmark, a Los Angeles Police Detective, investigated the allegations in 1995. She testified that the three girls acknowledged the acts occurred but were reluctant to discuss the incidents and were unwilling to testify. There was also no physical evidence to support the allegations. As a result, the cases were never prosecuted. RT 5925-5934.

5. *Possession of Shank*

Los Angeles Deputy Sheriff Robert Maybury testified that on November 19, 1995, a search was conducted of Johnson's cell at the Men's Central Jail, and a metal shank was found in a pair of Johnson's pants. RT 5935-5942.

6. *Robbery Conviction*

Johnson testified on his own behalf at the penalty phase, and during cross-examination, the prosecution elicited that he had been convicted of robbery on January 22, 1992. RT 6912.

B. Prosecution's Case Against Coappellant Allen

The prosecution introduced as aggravating factors under factor (b) evidence of Allen's involvement in the 1993 murder of Chester White, in which another individual, Roderick Lacy, was also shot. RT 6286-6303, 6472; 6394-6435, 6425-6439.

C. Johnson's Case in Mitigation

The defense attempted to show that despite having a loving and caring family, Johnson was unable to escape from the gang activity and gang violence that was prevalent in the neighborhood in which he was raised. Johnson's mother, Allene Johnson, and father, Cleamon Johnson, Sr., both testified about Johnson's upbringing. RT 6730-6767, 6777-6794. Johnson's niece, Shina Parker, testified that she forgave Johnson for what he did to her and did not want him to be executed. RT 6849-6852. Johnson's aunt, Juanita Norman, testified about Johnson's love for and kindness towards her mentally retarded son. RT 6853-6865. Johnson's wife, Denise Johnson, testified that she loved Johnson and hoped the jury would spare his life. RT 7073.

Johnson testified on his own behalf and described his exposure to gangs and violence and his eventual involvement with the gang. RT 6866-6938.

Dr. Adrienne Davis, a clinical psychologist, testified regarding the factors that led Johnson into criminal behavior. She described the financial difficulties his family suffered when Johnson was a young adolescent, and

how the neighborhood he grew up in became infested with and influenced by gangs, drugs and other kinds of criminal activity. Dr. Davis explained that Johnson was pressured from an early age to become involved with a gang and ultimately succumbed. RT 6969-7005.

The testimony of Derek Battle from the case of *People v. Reco Wilson* was read to the jury to establish that Carl Connor did not witness the shooting of Nece Jones. During the Wilson trial, Battle testified that on the day Jones was killed, he was in his backyard with Connor when they heard gunshots. He and Connor then saw a man holding a gun run through the alley with a bandanna covering his face. Battle did not recognize the man and testified that he was not Reco Wilson. Battle and Connor then went to the front of Battle's house where they saw a woman lying on the ground. RT 7075-7107.

D. Prosecution's Rebuttal

Los Angeles Police Office Talbot Terrell described the gang activity at the schools Johnson attended, and he testified that gang problems were not predominant at the elementary and junior high schools. RT 7108-7135.

Detective Rosemary Sanchez testified that she did not inform Carl Connor of a reward for providing information on the Nece Jones murder until after Reco Wilson was convicted. She conceded that fliers had been distributed in the neighborhood regarding the reward. RT 7136-7145.

E. Coappellant Allen's Case in Mitigation

Allen's case in mitigation consisted of testimony of his wife, Rosalind Allen, RT 6620-6623, his mother, Rebecca Allen, RT 6624-6684, and a minister, Robert T. Douglas, Sr., who testified as a gang expert. RT 6685-6716.

INTRODUCTION TO CLAIMS

Paramount among the many egregious errors in this case is the dismissal of a juror on the ground that he was not deliberating when he simply did not believe the prosecution had met its burden of proof. Here, and throughout the trial, the court ignored legal principles and misconstrued facts in order to rule in favor of the prosecution.

At the guilt phase, the trial court improperly allowed the prosecution to present a case that was built on smoke and mirrors. Since the witnesses relied on by the prosecution to link appellant to the murders provided such woefully inconsistent and unreliable testimony, the prosecutor resorted to an unrelenting barrage of extremely frightening yet misleading gang-related evidence that was highly damaging to Johnson's character and which established his criminal propensity but had little if any probative value. This improper evidence included Johnson's alleged involvement in two unrelated murders, dubious testimony regarding threats to murder a key witness, ambiguous statements taken out of context to show Johnson as a violent gang leader, the persistent exploitation of Johnson's gang moniker, and the introduction of a photograph of gang members wielding guns. Furthermore, the court permitted the prosecutor to use law enforcement officers to vouch for the credibility of her witnesses, while it hampered the ability of the defense to fully demonstrate their bias by unduly restricting cross-examination. Not only was the evidence thereby skewed in the prosecution's favor but pinpoint instructions put the court's imprimatur on the prosecution's theory of the case.

The case for appellant's guilt was far from overwhelming, as reflected by the jury's struggle to reach a unanimous decision. After the improper excusal of a deliberating juror, the newly-constituted jury became

deadlocked until the judge's comments coerced unanimous verdicts. Particularly where the case was so close, the guilt phase errors, individually and collectively, were prejudicial.

It became clear at the outset of the penalty phase that the coappellant's strategy was to admit guilt in the underlying capital offenses, but shift all responsibility to appellant. Nevertheless, the trial court refused appellant's request to sever the penalty trials, resulting in appellant essentially having to defend against two prosecutors. Moreover, as with the guilt phase, the court continued to allow the prosecution to inject into the case unreliable, misleading and highly inflammatory evidence that was used to establish that appellant was a violent and dangerous individual. At the same time, the court thwarted appellant's ability to mount a defense, and as a result, in contrast to the unfettered presentation by the prosecution which sought to demonize appellant, appellant's ability to offer a humanizing mitigation case was unduly restricted. As with the guilt phase, the trial court's rulings resulted in a severely distorted evidentiary picture that inevitably led to an undeserved death sentence.

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CLAIMS

I.

THE TRIAL COURT'S DISMISSAL OF A DELIBERATING JUROR WHO BELIEVED THE PROSECUTION FAILED TO PROVE ITS CASE REQUIRES REVERSAL

Two jurors met privately during a recess in guilt phase deliberations to talk about another juror, and subsequently informed the trial court that they were concerned about how the deliberations were proceeding. These two jurors, questioned individually, reported that Juror 11 had determined from the outset that the prosecution had not proved its case and refused to change his opinion. They conceded that Juror 11 continued to participate in the jury's discussions, but they were concerned that his opinion had failed to evolve. The trial court then questioned each of the other jurors, including Juror 11, who admitted that he had made a remark during deliberations that he believed at the time the prosecution rested that it had not proved its case. Juror 11, however, was not singled out by any of the other jurors as refusing to deliberate. In fact, there were other jurors who reportedly maintained a fixed position at the start of deliberations adverse to the prosecution, and by the fifth day of deliberations there remained several undecided jurors. Nevertheless, at the request of the prosecution and over defense objection, the trial court dismissed Juror 11. After an alternate replaced Juror 11 and deliberations began anew, the jury became temporarily deadlocked before ultimately reaching verdicts of guilt.

The trial court's dismissal of a juror who was performing his duties and participating in deliberations but who believed that the prosecution had not proven its case was nothing short of outrageous. Moreover, the court's aggressive questioning of all the jurors despite the lack of any evidence of misconduct was an unwarranted intrusion into the deliberative process.

These errors violated Penal Code section 1089, as well as appellant's state and federal constitutional rights. This case is indistinguishable from *People v. Cleveland*, 25 Cal.4th 466 (2001), in which the discharge of a deliberating juror was ground for reversal.

A. Proceedings Below

1. *The Case for Guilt was Close*

The prosecution's case was not particularly strong. It relied primarily on the often inconsistent testimony of former gang members who were in custody and had self-serving motives for cooperating with the government. As the jury foreperson put it, this was a difficult and complex case. RT 5341.

Guilt phase jury deliberations began on Wednesday, August 20, 1997. CT 824. On Thursday, August 21st, the jury submitted a note with questions related to a key prosecution witness, Freddie Jelks. RT 5246-5247. Portions of the testimony were reread. RT 5255-5256.

By August 26th, the fourth day of deliberations, there appeared to be some "bickering" among the jurors and their discussions included speculation about facts that were not in evidence. RT 5341, 5426. That morning, the court indicated that it had received a note from the jury at the conclusion of the prior day's deliberations, which read as follows: "Is there any reward monies associated with this case?" RT 5263. A portion of the testimony of Detective Rosemary Sanchez was then read to the jury in which Sanchez stated that to the best of her knowledge, no reward in this case had ever been offered. RT 5263, 5270. Juror 5, the foreperson, then indicated that the question the jury had was "broader" and that they wanted to know "if we would be able to have anything beyond the testimony as an answer to the question." RT 5271. The court responded that the case must

be decided on the evidence and that the jury should not consider facts outside the evidence. RT 5271. Juror 6 then asked if there was a taxpayer fund or another way in which reward money would be used in the case. RT 5271-5272. The foreperson acknowledged that the jurors had lots of questions about rewards. RT 5272.

At a sidebar conference, the court and counsel agreed that the jury was speculating about matters that were outside the evidence and needed to be admonished. RT 5274. The court then addressed the jury as follows:

> It appears to the court that the jury is speculating about matters that they should not speculate about. [¶] There is no evidence in the record suggesting any reward fund out there and you are talking about things that are not in any way supported by the evidence in the case and you are not to do so. [¶] You must confine your discussions to the evidence and the law, that is, the evidence received in this courtroom and the law that I gave you. [¶] So you are going off on something that is, frankly, making no sense to your deliberations.

RT 5276. The jury then resumed deliberations. According to one of the jurors, these comments by the court "cleared the air," and the speculating and bickering stopped. RT 5427.

Deliberations continued into a fifth day, and when a vote was taken, it became clear that the jury was far from unanimous. That morning, the foreperson reported that, "we just finished a preliminary round and [Juror 11] voted undecided and the other people were still undecided ...." RT 5314; *see also* RT 5375 (Juror 2 stated that the vote taken that morning was not unanimous: "we are 12 different people, we voted different").

The vote was apparently 9 to 3, with nine jurors in favor of guilt and

three in favor of acquittal. During the court's inquiry, which is discussed in more detail below, one juror indicated that three jurors had found the prosecution's case to be unreliable. RT 5363-5364. Furthermore, three jurors were specifically identified by other jurors as having stated they did not believe the prosecution had proved its case. RT 5365, 5373, 5388-5390.

Thus, this was clearly a close case, and, unlike the typical case involving the discharge of a juror who allegedly was not deliberating, it did not involve a lone holdout juror. As one juror noted, "there was some doubts and thoughts about not enough evidence or we had little to go on or something like that." RT 5425. Finally, even after Juror 11 was dismissed and replaced with an alternate juror, the jury remained temporarily deadlocked at 10-2. RT 5480-5489.

2. *The Court's Inquiry into Deliberations and Dismissal of Juror 11*

At the conclusion of deliberations on August 26th, Jurors 4 and 5 sought to speak privately with the court. The trial court reported this to counsel the following day. CT 836; RT 5283.

Juror 5, the foreperson, was subsequently questioned by the court and stated that "basically I believe that one of the jurors made up their mind prior to deliberations." RT 5313. Juror 5 identified the juror as Juror 11. RT 5316. Juror 5 said that Juror 11 had stated the previous Thursday (i.e., the second day of deliberations) that "when the prosecution rested, she didn't have a case." RT 5314. When Juror 5 asked Juror 11 whether this meant he had made up his mind, the juror said, "No. No. No. I haven't made up my mind. I'm undecided." RT 5314, 5317. As Juror 5 described, deliberations continued, "[b]ut everything has pointed to the fact that there is not one piece of evidence that is acceptable to the person ...." RT 5314.

According to Juror 5, whenever anybody would speak, this juror would make some remark that was contrary to what the person was saying. RT 5317. Juror 5 informed the court that "we just finished a preliminary round and [Juror 11] voted undecided and the other people were still undecided ...." RT 5314.

After Juror 5 returned to the jury room, the prosecutor requested that the court question each of the jurors individually "to flush out the allegations or the comments of the foreperson." RT 5328. Defense counsel for both appellant and for coappellant argued that no further inquiry need be made. As counsel for coappellant put it:

> I don't think the court has heard anything from the foreperson that is not typical of the jury. The foreperson says someone comes in and says, "I didn't like the People's case, it was no good," [and] at that point, then in response to a question, "will you continue to talk? will you continue to listen?" he says, "yeah, I'll listen to you." If he continues to listen and he continues to reject any positions any one else takes, that's just common jury deliberations and jury discussion. I don't see where the foreperson's told us anything that you wouldn't expect from any jury. You have someone who doesn't like the case. That could often happen in cases. Where has he said that he's not going to take part in deliberations? He might continue to reject positions, but that's the way jury deliberations go. So, I don't think we ought to do anything. I think we – you ought to leave them to their own way of deliberation ....

RT 5329.

Appellant's counsel agreed:

> [The foreperson] stated that the Juror number 11

> had indicated that he had not formed an opinion prior to the commencement of jury deliberations, and that the juror, it appears, is participating in deliberations, he's listening to the views of others on the jury, and that there is a disagreement as to the strength of the evidence, or the believability of certain witnesses.... So, I don't believe anything should be done with regard to Juror Number 11. It seems to me at this point there's an insufficient basis to – for the court or counsel to become any further involved in the jury's deliberations than we are by virtue of what was discussed this morning.

RT 5330.

Despite the protestations of defense counsel, the court ruled that it was going to undertake an inquiry of all the jurors. RT 5331, 5332.

Juror 5 was questioned further. He reiterated that the jury began deliberations on Wednesday, and that on Thursday, Juror 11 made the above-referenced comment that he did not believe the prosecution had proven her case when she rested. RT 5334. Juror 5 stated that during the past three days of deliberations, "every time a comment was made, or any time someone was speaking there usually was some comment made by that juror which deprecated that particular argument, or particular opinion." RT 5335.

Juror 5 conceded that Juror 11 participated in the discussions, but complained that Juror 11 had maintained the same position he had held in the beginning of deliberations. RT 5337. Juror 5 also acknowledged that this was a complex and difficult case, and that other jurors had been speculating about matters that were outside the evidence including why certain witnesses were not called. RT 5341.

Juror 4 was then questioned. She agreed with Juror 5: "I felt that one juror had made up their mind before we deliberated, and that during deliberations they were misconstruing evidence to support the way that they had already made up their mind." RT 5348. She identified the juror as Juror 11. RT 5349. She acknowledged that Juror 11 denied that he had made up his mind but "I felt he wasn't being completely honest about that." RT 5349. What led her to this conclusion was that "whatever piece of evidence we addressed he would make very strong pronouncements about how he felt about it, and always these pronouncements were to support his – his opinion, and they often really had no logic to them at all." RT 5349. The court then asked for an example, and Juror 4 stated that when they were discussing the issue regarding whether a witness had a person named Jose falsely punch a time card for him, Juror 11 said "that's a lie. I know Hispanics, they never cheat on time cards, so this witness was at work, end of discussion." RT 5350.

After Juror 4 was excused to the jury room, appellant's counsel and coappellant's counsel requested that the jury be permitted to continue their deliberations without further inquiry. RT 5357. Appellant's counsel stated as follows:

> Your Honor, it sounds to me like the juror is detailing for the court a disagreement on credibility of witnesses between apparently that juror, and the foreperson, and Juror Number 11. She indicated that Number 11 was forceful about his opinions; that he's made strong pronouncements to support his opinion, and he hasn't changed from his original belief. There's no indication that any of these other jurors have had evolution in their opinions either. And I don't think that in terms of proper deliberations

> one needs to surrender a conscientiously held belief as to the proper verdict or result in the case. [¶] A juror having heard the evidence forms an opinion, expresses that, and in spite of efforts by one or more of the other jurors, maybe even all 11 other jurors, to get that juror to change, the juror sticks by his opinion, which he believes is the correct decision in the case. That's what a juror is supposed to do. [¶] A juror is not supposed to accede to the majority decision, or even the decision of the foreperson or another juror .... It seems to me that because the juror hasn't evolved his opinion ... but continues to believe, apparently, that witnesses presented on behalf of the prosecution are untrustworthy and lack credibility, that that juror believes the prosecution doesn't have a case which supports a guilty verdict. And I think that that's a – something that a juror is asked to do, to evaluate the credibility of a witness, to make a determination as to how they think the case should be decided, and it seems like that's what's happening. And there may be some frustration on the part of other jurors that they are unable to persuade somebody to their way of thinking. There may be some sense that the juror is rude if he has interrupted or expressed in forceful language his opinion contrary to that of the speaker, without allowing the speaker to finish. But it seems to me that that is part of the deliberative process, and that Number 11 is properly engaging in jury deliberations. [¶] I would ask that at this point the jury be permitted to resume their deliberations and continue.

RT 5357-5359.

While counsel for appellant and coappellant believed there should be no further inquiry, the prosecutor requested that the court question the

remaining jurors. RT 5360. The court determined that it would continue to question the jurors. RT 5361.

Juror 1 stated that there were no jurors who failed meaningfully to participate in deliberations, but that there appeared to be three jurors who had their mind made up from the outset. RT 5362. "From my standpoint 3 jurors have had this mindset from the beginning. In other words, all the witnesses are unreliable, all the testimony is unreliable .... Everything is unreliable and untruthful that the prosecution presented." RT 5363. According to Juror 1, at least two jurors said at the beginning of deliberations that they did not believe that the prosecution had proven its case. RT 5364.

Juror 1 identified Juror 12 as one who had decided the case prior to deliberations. RT 5364-5365. "Like I say, I believe he said today that he had already determined from the evidence before we were dispatched to the jury room that the defendants in his mind were, you know, one way or the other – I don't know if I want to divulge which way he went – but the deliberations just confirmed his feelings toward it." RT 5365-5366.

Juror 1 did not believe that Juror 11 was failing to deliberate but noted only that he appeared to have fallen asleep on one occasion. RT 5367, 5368. Juror 1 stated that "he's been involved in the deliberations, I would say, for the most part." RT 5367. Since the time he fell asleep, Juror 11 would stand up if he felt sleepy, which kept him awake. RT 5368. Juror 1 had some recollection that a comment was made about Hispanics filling out time cards, but was not clear on the speaker or the content of the remarks. RT 5369-5370.

Juror 2 was questioned next. He stated that "this morning some of the jurors ... indicate[d] to the rest of us that they were either of a strong

opinion, or they had decided and needed to be undecided by listening to other jurors." RT 5371. Juror 2 also identified Juror 12, not Juror 11, as having "expressed that he was almost sold on the evidence at the presentation of evidence ... he was almost sold on his belief that – that supported the way he voted this morning, and that's what he said, and he supported why he was voting the way he was." RT 5373-74. Juror 2 denied that any one juror necessarily had fixed opinions and was refusing to deliberate, but indicated that there remained a difference of opinion among the 12 jurors. RT 5375-5376.

Based on the questioning thus far, the trial court stated that it "was not convinced at this point in the inquiry that there is any gigantic problem at all. People have made comments as jurors will do. I have not yet heard anybody, at least in a convincing way, convince me there's been misconduct at this point." RT 5379. Nevertheless, the court determined to continue the inquiry.

Juror 3 was then questioned. She denied that any juror began deliberations with a fixed opinion as to how the case ought to turn out. She stated that "everybody has been given the opportunity to participate and take part." RT 5383. She denied that anyone made a statement that they knew the prosecution did not have a case when the prosecution rested. Nor did she hear any comment regarding whether Hispanics would cheat on time cards. RT 5384. Juror 3 did recall that Juror 11 had closed his eyes, but could not say whether he was asleep or not. RT 5385. She stated: "I just saw him close his eyes and, you know, lean back and just – but to me he was listening." RT 5386. She claimed that there had not been a problem with sleepiness since that one incident. RT 5386-5387.

Juror 6 stated "that I heard a couple of the jurors saying that they

didn't feel that it was – anything was proven yet." RT 5388. He "sort of had the feeling" that two jurors, Jurors 11 and 7, had their minds made up at the onset of deliberations. RT 5388-5389. "One of the gentlemen said they didn't feel that anything was proved to them. And the other juror "back to back" said: I don't think anything has been proven either." RT 5389. Juror 6 said that he only suspected that these 2 jurors "came in with their mind[s] already made up," but after a short discussion, "everybody said they were undecided." RT 5389-5390. "So it was more of a thing in passing when we went through the door that the statement was made that well, you know, they felt a little bit as though nothing has been proved beyond a reasonable doubt." RT 5390.

Juror 6 acknowledged that Juror 11 "seemed pretty groggy at times," and stood up in order to combat it. According to Juror 6, Juror 11 "seemed that he was trying his hardest." RT 5391. Juror 6 believed that Juror 11 did say with regard to time cards, that "I don't think a Hispanic person would do that kind of thing." RT 5393.

Juror 7 stated that at least five people went into deliberations with their mind made up, including Jurors 3, 9, and 11. RT 5394-5396, 5400. Juror 7 did not notice anyone sleeping, and did not hear any comments about whether Hispanics would falsify time cards. RT 5400-5401.

Juror 8 indicated that "1 or 2 people said that they went in with certain things already happening in their head." RT 5403. He identified the two as Juror 6 and Juror 12. RT 5404-5405. According to Juror 8, Juror 12 said that "after sitting here listening to all the testimony and listening to all the witnesses and everything that it pointed in a certain direction. But then again, he wanted the opportunity to go into the jury room and go over the evidence and see if he could find that beyond a reasonable doubt if what he

was already feeling when he was walking in the jury room was a fact." RT 5406. According to Juror 8, Juror 6 said basically the same thing. *Id.* Juror 12 could have said "from all the testimony that he had heard, all the witnesses that we had been through, that he was just about – just about had made up his mind when he left the jury box about how he felt about this case." RT 5407-5408.

Juror 8 recalled that one afternoon Juror 11 was sitting with his eyes closed, although he was not necessarily asleep, and may have been listening. RT 5408. According to Juror 8, Juror 11 made the remark about how Hispanics would not falsify a time card. RT 5409.

Juror 9 said that "I think some of them had a rough idea of which direction they might go, but I don't think it was something that was set permanently that they wouldn't hear the others." RT 5410. Juror 9 stated that these jurors "expressed that once we got in there, they would listen and – to other people and whatever they had to say and through that go through the deliberations and what we heard here, they would come to a conclusion." RT 5411. Juror 9 agreed that "a couple" of the jurors "seem[ed] a bit less open minded," including Juror 11. RT 5411-5412. Juror 9 observed that Juror 11 "talks about the case. He says that he is willing to hear others ... he seems willing to listen." RT 5412.

Juror 9 also stated that Juror 11 had fallen asleep on one occasion. RT 5412. On that particular day, he was tired because he was up late the night before, and stood up in order to stay awake. RT 5413. According to Juror 9, Juror 11 also said that from experience he knew Hispanics would not lie, that they would not forge a time card. RT 5413.

Juror 10 related that Juror 11 entered deliberations having already decided the case, "but he recanted though in the end." RT 5415. Juror 10

recalled that when the foreperson asked Juror 11 if he had his mind made up, Juror 11 said he was willing to be open minded. RT 5415.

Juror 10 agreed that Juror 11 dozed off one time, but that this was no longer a problem; that if he feels sleepy he gets up and walks around. RT 5417-5418. Juror 10 heard Juror 11 say that "nobody would falsify a time card," but she did not hear him refer to Hispanics. RT 5418.

Juror 11 admitted to saying during the course of deliberations that "when the prosecution rested, that they had not convinced me." RT 5421. He acknowledged that after indicating that he had doubts about one of the witnesses, the foreperson had asked him if he had made up his mind prior to deliberations, but he had not made up his mind. RT 5419-5420. Juror 11 also admitted to making the statement that Hispanics would not falsify a time card: "I said that it has been my knowledge that they don't do things like punch out other people's time cards." RT 5422. He indicated that this knowledge was based on "job experience." *Id.* Juror 11 stated that when he got sleepy, he would stand up, and that he never actually dozed off. RT 5422-5423.

Juror 12 denied that anyone went into deliberations with their mind made up about the case. RT 5424. He noted that jurors had some doubts about the lack of evidence, and he may have said himself that he was "pretty sure when I entered the jury room of what my decision would be, about 85 percent sure." RT 5425. Juror 12 stated that the foreperson was concerned about jurors having decided the case, "but he addressed it to everybody because it got to a point where he felt that we were getting a little deadlocked and he expressed his feeling that if the person's mind was made up, there was no point in us going on." RT 5426.

Juror 12 recalled that one of the jurors made a comment about how

Hispanics would not falsify a time card, but does not recall which one. RT 5426. He indicated that this was in the context of "bickering going on, nitpicking things that we eventually ironed out." RT 5426. He reported that there were "little statements being made back and forth between 2 or 3 members of the jury and a few people got a little insulted. But we hashed that situation out." RT 5426. Juror 12 stated that there was "too much speculation going on," and the nitpicking and bickering all came to a head when the jurors submitted the second question regarding witnesses obtaining rewards to the court, after which the court's comments cleared the air. RT 5426-27.

Juror 12 stated that Juror 11 "dozed off for a moment" on one occasion. RT 5427.

After all the jurors were questioned, the prosecutor asked that Juror 11 be excused, and appellant's counsel asked that Jurors 4 and 5 be excused. RT 5431.[7]

The prosecutor argued that Juror 11 committed misconduct by reaching a decision on the case prior to deliberations. RT 5432. In addition, the prosecutor stated that Juror 11 "brought in information concerning his own personal opinions about a group of people from his work place into the jury room and said it was based on his work experience." RT 5432. Finally, the prosecutor stated that the juror's sleepiness added to the misconduct. RT 5432-5433.

Appellant's counsel responded that Juror 11 merely stated that he doubted the credibility of the prosecution's witnesses, and that he continued

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[7] The trial court's failure to excuse Jurors 4 and 5 for misconduct is discussed in Argument II, below.

to deliberate and participate in the jurors' discussions, as was acknowledged by the other jurors. RT 5433. Appellant's counsel argued that, "[i]t may be frustrating when a majority of the jurors disagree with the opinion of another juror, but that is not cause to dismiss him because he doesn't accept their characterization or their determination as to a witness' credibility." RT 5433-5534. Coappellant's counsel stated that there was no problem with Juror 11 not taking part in deliberations: "Even assuming the worse position, that he had some opinion at the beginning, they all said that he continued to deliberate and continued to listen." RT 5439.

With regard to the comment about Hispanics, appellant's counsel stated "I think all the juror is doing is expressing his belief that from the evidence in this case that Mr. Connor was not being truthful when he said a Hispanic, Jose, punched his time card for him." RT 5434. "I think it happens that when jurors discuss matters, and they have different points of views, that everybody draws back upon their past experiences as to why they may or may not hold a particular view." RT 5434-5435. Appellant's counsel pointed out that as Juror 12 stated, this comment came up in the course of many jurors bickering and discussing things outside the record prior to the judge's admonition to only consider the evidence. RT 5436-5437.

Coappellant's counsel remarked that the issue of Hispanics was very minor in the context of the case given that Mr. Connor's testimony about falsifying time cards was not credible. RT 5440. In addition, "as the court knows from his experience as a deputy district attorney, jurors draw from experiences in society .... If you could audio visual things, you would hear things that would probably turn CALJIC upside down." RT 5440.

The trial court stated that, "[i]t would appear to me that the

consensus is ... that the juror made it relatively clear to a majority of the jurors here that he had decided the case; that he had his mind made up at the time – at a time before the matter had been submitted to the jury." RT 5448. According to the court, Juror 11 did not merely have a tentative feeling about the case, but believed that the prosecution did not have a case when it rested. RT 5448. The court stated that the fact that the juror was groggy was not a ground to excuse him. The court, however, had an additional concern, which was that the juror considered evidence not before the court in deciding an issue having to do with the presence or absence of an alleged eyewitness. RT 5449. The court therefore ruled that the juror would be excused. RT 5452.

Juror 11 was discharged, and an alternate juror was chosen to replace him. RT 5462-5463, 5469. The jury was then instructed to begin deliberations anew. RT 5470. The newly constituted jury began their deliberations at 3:36 p.m., and concluded at 4:00 p.m. RT 5475. The jurors resumed deliberations the following day, Thursday, August 28, 1997. RT 5477. At the end of the day, the jury submitted a note that they were unable to reach a unanimous verdict. RT 5478. On August 29th, the foreperson indicated that the jury was deadlocked at 10-2. The jury was ordered to continue to deliberate for the remainder of the day, which they did. RT 5480-5489. Deliberations resumed on Tuesday, September 2nd. RT 5500. The jury ultimately returned its verdicts on September 2nd, with verdicts for one of the defendants reached at 11:10 a.m., and for the other defendant in the early afternoon. RT 5512.

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B. The Trial Court Abused Its Discretion In Questioning The Jurors Once It Became Apparent That There Was No Juror Misconduct

It is well established that the "sanctity of jury deliberations" must be protected. *People v. Cleveland*, 25 Cal.4th at 475 (citing *People v. McIntyre*, 222 Cal.App.3d 229, 232 (1990); *People v. Talkington*, 8 Cal.App.2d 75, 85-86 (1935); *People v. Friend*, 50 Cal.2d 570, 578 (1958); *People v. Hutchinson*, 71 Cal.2d 342 350 (1969)). This includes "'assur[ing] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of the jurors' thought processes.'" *People v. Cleveland*, 25 Cal.4th at 475 (quoting *In re Hamilton*, 20 Cal.4th 273, 294 n. 17 (1999)). Indeed, "'[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression.'" *Id.* (quoting *People v. Keenan*, 46 Cal.3d 478, 541 (1988)).

As this Court noted in *Cleveland*, "[m]any of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes apply even more strongly when such inquiries are conducted during deliberations." *People v. Cleveland*, 25 Cal.4th at 476. The Court explained that, "Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of deliberations could affect those deliberations." *Id.* at 476.

This Court recently reaffirmed that "[c]ourts must exercise care in responding to an allegation from a deliberating jury that one of their number is refusing to follow the court's instructions or is refusing to deliberate ...." *People v. Engelman*, 28 Cal.4th 436, 445 (2002) (citing *People v.*

Cleveland, 25 Cal.4th at 475 and *People v. Williams*, 25 Cal.4th 441, 464-465 (2001) (Kennard, J., concurring)). In *Cleveland*, this Court, citing three federal cases, *United States v. Brown*, 823 F.2d 591 (D.C.Cir. 1987), *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997), and *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), noted that "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence," *People v. Cleveland*, 25 Cal.4th at 483, and that "a court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged, or an allegation that a juror is refusing to deliberate, lest the sanctity of jury deliberations too readily be undermined." *Id.* at 484. *See also Sanders v. Lamarque*, 357 F.3d 943, 945 (9th Cir. 2004) (citing with approval *Brown, Symington,* and *Thomas*).

Here, the trial court improperly delved into the jury's deliberative process after its initial inquiry made clear that there was no jury misconduct and thus no basis for further questioning of the jurors. After the court questioned the jury foreperson to elicit what concerns he and another juror had about deliberations, the inquiry should have ended. The foreperson stated that, in his view, one of the jurors had "made up their mind prior to deliberations" because that juror had remarked on the second day of deliberations that "when the prosecution rested, she didn't have a case." RT 5313-5314. The foreperson, however, acknowledged that when he asked whether the juror meant he had made up his mind, the juror stated that he was still undecided, and continued to participate in the deliberations. RT 5314, 5317. The foreperson's complaint was that although the juror maintained he was undecided and participated in discussions, "everything has pointed to the fact that there is not one piece of evidence that is

acceptable to the person ...." RT 5314.

It is abundantly clear from this exchange that Juror 11 was not refusing to deliberate. This Court has explained that:

> A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror expresses the belief that further discussion will not alter his or her views.

People v. Cleveland, 25 Cal.4th at 485.

Whether or not Juror 11 was using faulty logic or disagreed with the majority of other jurors, this did not constitute a refusal to deliberate. Nor was it inappropriate for Juror 11 "to have come to a conclusion about the strength of [the] prosecution's case early in the deliberative process and

then refuse to change his ... mind despite the persuasive powers of the remaining jurors." *People v. Bowers*, 87 Cal.App.4th 722, 734 (2001).

Thus, after talking with the foreperson, the judge should have ceased the inquiry, and at most, should have reinstructed the jury with regard to its duties and the importance of deliberations. *See People v. Cleveland*, 25 Cal.4th at 480 ("it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations before making further inquiries that could intrude on the sanctity of deliberations"). The court, however, forged ahead with its inquiry, beginning with Juror 4, who along with the foreperson initially registered the complaint regarding Juror 11, and then continuing with Jurors 1 and 2.

The clear consensus from these jurors was that Juror 11 was participating in deliberations, and that the case for appellant's guilt was close, with jurors other than Juror 11 maintaining somewhat fixed positions. Indeed, the court stated after questioning these jurors that it "was not convinced at this point in the inquiry that there is any gigantic problem at all. People have made comments as jurors will do. I have not yet heard anybody, at least in a convincing way, convince me there's been misconduct at this point." RT 5379.

Having found no misconduct, the court should have ceased all inquiry. *See People v. Cleveland*, 25 Cal.4th at 485 ("the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and no other proper ground for discharge exists"). Having failed to do so earlier, at most, the

court should have reinstructed the jury on their duties. *Id.* at 480.

Instead, the court aggressively questioned the remaining jurors in a manner that was broad in scope and far from neutral. The court intimated to the jurors that there was a problem and then essentially asked the jurors to confirm it. For example, the court started the questioning of Juror 1 by stating, "What I'm here to inquire about is a potential problem that has come to mind." RT 5362. *See also* RT 5371 ("We're inquiring of several jurors here to see if we have a problem that the court needs to deal with or not").

Each of the jurors was then asked whether any juror had failed to participate in deliberations or had appeared to have a fixed view at the beginning of deliberations. *See, e.g.,* RT 5362-5364, 5371, 5383, 5387, 5394-5395, 5403, 5410, 5414-5415, 5419, 5424. The court then proceeded to question the jurors in detail regarding their perceptions as well as the content of any comments made by other jurors indicating that they had their minds made up when deliberations began. *See, e.g.,* RT 5363, 5364-5366, 5372-5374, 5383-5384, 5388-5390, 5395-5398, 5405-5408, 5410-5412, 5415-5417, 5419-5421, 5424-5426.

The court specifically focused its inquiry on jurors who indicated positions favoring the defense. For example, after Juror 3 responded that none of the jurors had indicated they had a fixed view from the commencement of deliberations, and that "everybody has been given the opportunity to participate and take part," RT 5383, the judge asked "did you hear anybody, any juror or jurors, make a statement to the effect: when the D.A. rested, I knew they didn't have a case." RT 5384.

When jurors denied that other jurors were refusing to deliberate but conceded that some jurors may have been leaning in a particular direction,

had tentative opinions about a verdict, or were somewhat less open-minded than others, the court persisted in its inquiry to identify the recalcitrant jurors and to determine what precisely was being said in the jury room. The following colloquy with Juror 9 is illustrative:

Court:	During the deliberations, have you formed an impression or opinion that any of the jurors in this case entered the deliberations already having made up their minds about this case one way or the other?
Juror 9:	I think some of them had a rough idea of which direction they might go, but I don't think it was something that was set permanently that they wouldn't hear the others.
Court:	... But did you get the sense that anybody had decided the case before it was concluded ... That is ... had a very firm opinion about whether somebody was guilty or not guilty before the matter was argued, before the matter was submitted to the jury? Anybody say anything like that?
Juror 9:	Like I said, I don't think anybody really had their mind set on something. Just had an impression of – based on what they heard here. And from that, I guess some of them formed an opinion. But they expressed that once we got in there, they would listen – to other people and whatever they had to say and through that go through the deliberations and what we heard here, they would come to a conclusion.
Court:	Has everybody, as far as you can tell, made a good faith effort to take part in these discussions and appear to have an open mind and listen and talk?
Juror 9:	I guess a couple seem a bit less open minded, I guess?
Court:	Which juror or jurors are you referring to?

RT 5410-5412.

The court's aggressive approach and lack of objectivity was further demonstrated in its questioning of the jurors regarding the specific content of Juror 11's alleged remarks. As noted above, according to Juror 5, Juror 11 stated during the second day of deliberations, to emphasize his view that the prosecution's case was weak, that "when the prosecution rested, she didn't have a case." RT 5314; *see also* RT 5334. Similarly, Juror 4 described Juror 11 as saying "that he was waiting for the prosecuting attorney to – to bring her case forward and it never happened." RT 5353.

When the court questioned the other jurors, it often misleadingly altered the phrasing of these comments in a way which changed their meaning from the unextraordinary proposition that the juror had stated in the course of deliberations that he had not been convinced by the prosecution's case to the fact that the juror had made up his mind as to a verdict in the middle of the trial. For example, the court first asked Juror 7, "I wanted to know if anybody said something like that: I knew which way I was going to vote half way through this case; or I knew how I was going to vote as soon as the People rested; or I knew how I was going to vote as soon as the defense rested." RT 5397-5398. Similarly, while Juror 8 indicated that a particular juror had been leaning in a certain direction when he walked into deliberations, the court asked: "Other than expressing tentative feelings and wanting to go through the evidence, did anybody go in there and say anything to the effect: I already knew which way I was going to go half way through the case ...." RT 5406-5407; *see also* RT 5374.

The court also asked the jurors about two other issues which clearly would have alerted them that Juror 11 was being targeted: whether any jurors made comments about Hispanics falsifying time cards and whether

any jurors fell asleep during deliberations. *See, e.g.,* RT 5368, 5384-5385, 5390-5393, 5400–5401, 5408-5409, 5413, 5417-5418, 5426-5428.

There may be legitimate reasons for a trial court to make a reasonable inquiry into allegations of juror misconduct. *See, e.g., People v. McNeal*, 90 Cal.App.3d 830 (1979) (where one of the jurors possessed personal knowledge concerning the testimony of a defense witness); *People v. Burgener*, 41 Cal.3d 505 (1986), *overruled on other grounds, People v. Reyes*, 19 Cal.4th 743, 753 (1998) (where juror was reportedly intoxicated from drugs). Certainly, when a trial court is "on notice that a juror is not participating in deliberations," California law authorizes the court to conduct "'whatever inquiry is necessary to determine' whether such grounds exist (*People v. Burgener*, 41 Cal.3d at 520), and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. (*People v. Marshall*, 13 Cal.4th [799], 843 [1996])." *People v. Cleveland*, 25 Cal.4th at 484.

Such an inquiry, however, must be made with great care, and with the recognition that "not every incident involving a juror's conduct requires or warrants further investigation." *People v. Cleveland*, 25 Cal.4th at 478. As this Court cautioned, "[d]etermining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter, especially when the alleged misconduct consists of statements made during deliberations." *Id.* at 484. Thus, "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." *Id.* at 485. Furthermore, "[t]he inquiry should focus upon the conduct of the jurors, rather than on the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the

juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." *Id.*

The trial court in appellant's case violated these fundamental principles by recklessly making inquiries about the jury's deliberations after it became clear that the juror in question had been participating in deliberations, but simply had a view of the evidence which differed from the two jurors who complained about him. The court's aggressive intrusion into the jury's deliberative process must have made it abundantly clear that the court was displeased with any jurors who believed strongly that the prosecution's case was weak. The court's focus and ultimate dismissal of Juror 11, who held views favorable to the defense, signaled to the other jurors how they should approach the case.

In addition, the manner in which the trial court questioned all of the jurors about the content of their deliberations demonstrated that whatever any of the jurors would say during the course of deliberations was open to scrutiny. This undoubtedly had a chilling effect on the process, impairing the free and private exchange of views that is an essential feature of the constitutional right to a jury trial.

The trial court's questioning of the entire jury panel is in stark contrast with the approach taken in *People v. Johnson*, 3 Cal.4th 1183 (1992), where the trial court declined to make an inquiry into whether a holdout juror should be discharged. In *Johnson*, a juror sent a note to the judge indicating that eleven of the jurors had come to a decision, but the twelfth had not, and it was believed that the holdout juror did not believe in the death penalty. *Id.* at 1253. This Court held that the trial court properly declined to inquire into whether some jurors were coercing the dissenting

juror, and that any such inquiry posed the risk of pressuring the dissenting juror to conform her vote to the majority. *Id.* at 1255. Similarly, in *People v. Bradford*, 15 Cal.4th 1229 (1997), the trial court was found to have appropriately conducted only a limited inquiry when faced with a request to discharge jurors who allegedly had fixed views of the case before all the evidence had been reviewed. Rather than question the jurors, the trial court reread the relevant jury instructions, and permitted the jury to resume deliberations. *Id.* at 1352.

In appellant's case, the trial court violated the sanctity of the jury deliberations by delving into the jurors' thought processes after deliberations had begun. This violated appellant's Sixth Amendment right to an impartial jury, Fourteenth Amendment right to due process, and his Eighth Amendment right to a reliable sentencing determination. Such questioning not only led to the erroneous dismissal of a juror, but made it impossible for the remaining jurors to deliberate impartially at either the guilt phase or penalty phase. Apart from the erroneous dismissal of a deliberating juror, the court's conduct was prejudicial and requires reversal.

C. The Trial Court Erroneously Dismissed A Deliberating Juror

1. *There Was Insufficient Evidence to Establish That Juror 11 Was Not Participating in Juror Deliberations*

California Penal Code section 1089 provides that "[i]f at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty ... the court may order him to be discharged ...." While section 1089 permits a juror to be removed where that juror refuses to deliberate, this Court, as discussed above, has indicated that great

caution must be exercised in doing so.

A trial court's determination to discharge a juror is reviewed for abuse of discretion. *People v. Cleveland*, 25 Cal.4th at 474 (quoting *People v. Marshall*, 13 Cal.4th at 843). However, where, as here, the substitution of a juror has implicated appellant's state and federal constitutional rights to a jury trial, "a juror's inability to perform as a juror 'must appear in the record as a demonstrable reality.'" *Id.* at 487-488 (Werdegar, J., concurring).

In *People v. Cleveland*, 25 Cal.4th 466, this Court found reversible error due to the excusal of a juror whose behavior was far more recalcitrant than the discharged juror in appellant's case. In *Cleveland,* according to all the jurors questioned, there was only one juror who refused to deliberate. It was consistently reported that the juror refused to engage in discussions with the other jurors, refused to consider the law and instructions, and repeatedly brought up facts that were outside the record. In appellant's case, by contrast, all the jurors agreed that Juror 11 was participating in discussions, and at most viewed the facts differently from some of the other jurors. In addition, the other eleven jurors were far from consistent in their observations on which jurors were or were not participating fully. Juror 11 was one of several jurors who reportedly had strong views upon entering deliberations, and there were other jurors who expressed similar views as to the weakness of the prosecution's case. Finally, given the jury questions about reward money, Juror 11 was not the only juror who was speculating about facts outside the evidence, and it appeared that any such discussions ceased after the judge clarified the jurors' duties.

Cleveland involved two counts of second degree attempted robbery, where the defendant was alleged to have entered a liquor store and

unsuccessfully sought to obtain from the clerk a gun that was under the counter. *People v. Cleveland*, 25 Cal.4th at 469-470. On the second day of deliberations, the jury informed the court that one of the jurors was unwilling to deliberate, and the foreperson was questioned. *Id.* at 470-471. The foreperson explained that when the juror was asked to explain his position that there was no evidence to support the prosecution's case, the juror stated, "You're not going to sway my mind, this is what I feel in conscience in looking at the big picture, no fault no foul, there's pushing and shoving on every football field." *Id.* The foreperson indicated that the juror did not want to discuss the elements of attempted robbery, and added that the juror stated: "I cannot in conscience look at the evidence rendered and state that the person was really after the gun." *Id.* at 470-471. When asked whether the juror listened to the other jurors, the foreperson responded: "Halfheartedly and then interrupts." *Id.* at 471.

Other jurors were then questioned. They reported that the juror in question (Juror 1) would not discuss or consider the elements of the offense, *id.* at 471, 472-473, that he had "unreasonable interpretations," *id.*, that he was not deliberating, was not applying the law, and was not exchanging views with the other jurors, *id.* at 471-472, that he would not follow the court's instructions, and was "making judgments and speculations based on his personal feelings," *id.* at 472, and that he would disregard the evidence and bring in facts from outside the record. *Id.* at 472.

The court questioned Juror 1, who stated that he was participating in deliberations, but that instead of arguing about the details of the case, he tended to consider the "whole picture." He stated he accepted the court's instructions, and had no problem with the law, but only with the facts as he perceived them. *Id* at 473.

The court excused Juror 1 over the defendant's objection, stating: "I do find that he is not functionally deliberating with the other jurors, that they would ask him specific questions as to elements and facts, and he refuses to respond, and you can't have a meaningful discussion unless you discuss what the particular facts and elements are. It doesn't do any good to talk in generalities as he does want to, so he is excused." *Id.* at 473.

In reversing, this Court held that contrary to the trial court's finding, Juror 1 was participating in deliberations. While the other jurors uniformly testified that Juror 1 was refusing to apply the law, "the juror simply viewed the evidence differently from the way the rest of the jury viewed it." *Id.* at 485-486. The comments of the other jurors indicated their frustration with the juror's approach to the case, his methods of analysis, and his refusal to respond to questions from other jurors. As this Court noted, "it is possible that Juror No. 1 employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. Juror No. 1 participated in deliberations, attempting to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even if less than sympathetically, to the contrary views of his fellow jurors." *Id.* at 486.

If the juror in *Cleveland* was found to have been deliberating, there is no question that Juror 11 in appellant's case was deliberating. It is undisputed that Juror 11 continued to state, along with other jurors, that he was undecided, despite his view that the prosecution had not proved its case after it rested, and that he participated in deliberations, listening to others and asserting his point of view. At most, his manner may have offended other jurors and he may have used "faulty logic" when attempting to back up his view of the evidence, neither of which under this Court's precedent

would have justified his dismissal.

It is particularly noteworthy that in appellant's case there is much less evidence than in *Cleveland* to support a conclusion that the juror in question failed to deliberate. In *Cleveland*, eleven jurors were persuaded by the prosecution's case and were frustrated by the opposing view of a single juror. Here, Juror 11 was not the only juror who believed the prosecution's case was weak. It was reported that anywhere between three and five jurors were believed to have had their minds made up at the start of deliberations. RT 5363, 5396. At least three jurors, including Juror 11, were specifically identified as having stated they did not believe the prosecution proved its case. RT 5365, 5373, 5388-5390. And, as discussed above, even after Juror 11 was dismissed and replaced with an alternate, the jury appeared to be deadlocked at 10-2. Thus, far from being a lone holdout juror who refused to deliberate, Juror 11 was one of several jurors who had problems with the prosecution's case, but was singled out by two jurors who were offended by his manner.

Another case strikingly similar to appellant's case is *People v. Bowers*, 87 Cal.App.4th 722, in which the court of appeal found that the trial court abused its discretion in discharging a juror for failing to enter into meaningful deliberations. As in appellant's case, the jury foreman notified the trial court that one of the jurors was not deliberating. After the court gave the jury additional instructions, and sent them back for further deliberations,[8] the foreman sent another note to the court, and then related

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[8] The trial court in *Bowers*, unlike here, initially reinstructed the jury with regard to its duties and had the jury deliberate further before undertaking any inquiry of the jurors. *People v. Bowers*, 87 Cal.App.4th at 725-726.

that he believed that while the juror in question, Juror 4, had participated in the deliberations at times, it was clear that he had made up his mind from the beginning. The court then conducted an inquiry of all the jurors.[9] As in *Cleveland*, and unlike appellant's case, the juror in *Bowers* appeared to be the lone holdout. In addition, although there was some disagreement among the jurors regarding the degree of Juror 4's participation, there was far more unanimity among the jurors in *Bowers* compared to appellant's case as to whether the juror in question was adhering to a fixed position. Nevertheless, the appellate court's summary of jurors' responses bears a remarkable resemblance to the facts in appellant's case – even as to an allegation that the juror may have fallen asleep:

> Many jurors testified Juror No. 4 had participated in the jury deliberations from the beginning, and had advised the other jurors of his decision and the basis for that decision, specifically, that he did not believe the testimony of the prosecution witnesses. Other jurors testified Juror No. 4 had made up his mind from the beginning, refused to participate at certain times by staring out the window, and had not fully engaged in discussions nor responded to questions. In addition, Juror No. 7 alleged Juror No. 4 had fallen asleep during the deliberations. However, the entire panel agreed Juror No. 4 held steadfastly to his decision and could not be convinced the majority's opinion was right.

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[9] In contrast to the inquiry in appellant's case, the trial court in *Bowers* "admonished each juror not to expose the jury's thought processes and tried to ask each juror the same questions, in an effort to limit the scope of the investigation to the manner of deliberations." *People v. Bowers*, 87 Cal.App.4th at 726.

People v. Bowers, 87 Cal.App.4th at 726.

The appellate court found the trial court's discharge of the juror in *Bowers* was a violation of Penal Code section 1089. The court stated that "[w]hile there was some evidence Juror No. 4 was inattentive at times during the deliberations and did not participate in the deliberations as fully as others, the record shows this conduct was a manifestation, effectively communicated to the other jurors, that he did not agree with their evaluation of the evidence – specifically, their credibility determinations." *Id.* at 730.

As with *Cleveland*, if the juror in *Bowers* was found to have been deliberating, Juror 11 in appellant's case certainly was deliberating. Here, after meeting privately, Jurors 4 and 5 notified the court that it appeared that Juror 11 had entered deliberations with his mind made up. They maintained that although Juror 11 was continuing to participate in deliberations and stated that he was keeping an open mind, it appeared that he had a fixed position, that his view of the evidence and his reasoning was illogical and contrary to the other jurors, and that his manner was insulting and deprecating to the other jurors. RT 5314, 5334-5335.

None of the other jurors singled out Juror 11. Juror 1 stated that Juror 11 has "been involved in the deliberations, I would say, for the most part." RT 5367. Juror 1 indicated that there were three jurors who appeared to have made up their minds prior to deliberations that the prosecution had not proved its case, including Juror 12. RT 5362. Juror 2 denied that any of the jurors had fixed opinions and was refusing to deliberate, but noted that some jurors "did say that as they left the courtroom the evidence was either sufficient or not sufficient to secure their conviction. They left here with semi conviction about guilt or innocence." RT 5372. Juror 2 identified Juror 12 as the most fixed in his views. RT

5371-5376. Juror 3 denied that any juror began deliberations with a fixed view, and that all the jurors had been given an opportunity to participate and take part. RT 5383. Juror 6 reported that "a couple of jurors" said they did not feel that the prosecution proved their case, and identified Jurors 7 and 11. RT 5388. Juror 6 stated that it was only an impression that these two jurors had their minds made up, and acknowledged that everyone indicated they were undecided at the beginning of deliberations. RT 5389-5390. Juror 7 stated that at least five people went into deliberations with their minds made up, including Jurors 3, 9, and 11. RT 5400-5401. Juror 8 stated that one or two people went in "with certain things already happening in their head." RT 5403. Juror 8 identified Jurors 6 and 12 as appearing to have these views, but stated they wanted the opportunity to discuss the evidence in the jury room. RT 5405-5406. While Juror 9 indicated that Juror 11 was less open-minded than some of the other jurors, and that some jurors had a "rough idea of which direction they might go, [he did not think] it was something that was set permanently that they wouldn't hear the others." RT 5410-5412. Juror 10 stated that Juror 11 entered deliberations having already decided the case but changed his mind, and indicated he was willing to be open minded. RT 5415. Juror 12 denied that anyone went into deliberations with their mind made up about the case. RT 5424. Juror 12 said that jurors had some doubts about the lack of evidence, and he was himself 85% sure when he entered the jury room as to his decision. RT 5426.

When questioned, Juror 11 admitted to having said that "when the prosecution rested, that they had not convinced me." RT 5419. He added, however, that he did not believe that he or any of the other jurors had made

up their mind prior to commencement of deliberations. RT 5419.[10]

Juror 11 may have disagreed with some of the other jurors with regard to the strength of the prosecution's case, but he was clearly not alone in this view. As a result, it cannot be said that his "inability to perform as a juror" appears in the record as a "demonstrable reality." On the contrary, he stated he was undecided, participated in discussions with other jurors, and expressed his views. As in *People v. Karapetyan*, 106 Cal.App.4th 609 (2003), "[t]he real problem, which should have been apparent to everyone in the courtroom, was that, after more than [four] days of deliberations, the jury was deadlocked ....." *Id.* at 621. It was at that point that two jurors decided that one of the jurors was refusing to deliberate. *Id.*

As this Court has explained, however, "refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." *People v. Cleveland*, 25 Cal.4th at 485. And as stated in *Bowers*, "[i]t cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote ...." *People v. Bowers*, 87 Cal.App.4th at 735.

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[10] Interestingly, the trial court failed to ask Juror 11 directly whether his comments reflected that he had actually made up his mind about the case prior to deliberations. Instead, the court put the question to Juror 11 as follows: "Did you make a statement *either in jest or in seriousness*, something to the effect that you had your mind made up already about the case, or that you decided it when the People rested that you knew they didn't have a case, or the defense rested or something like that?" RT 5420 (emphasis added).

The trial court discharged Juror 11 because it believed that the juror inappropriately "had his mind made up at the time – at a time before the matter had been submitted to the jury."[11] RT 5448. Even if this were true, it is not a ground for dismissal, particularly where the juror continued to participate in the deliberations. This case is unlike *People v. Thomas*, 26 Cal.App.4th 1328 (1994), where a juror "did not answer the questions posed to him by the other jurors, did not sit at the table with other jurors during deliberations, acted as if he had already made up his mind before hearing the whole case, and did not look at the two victims in the courtroom." *Id.* at 732. *See also People v. Diaz*, 95 Cal.App.4th 695 (2002) (juror properly excused where she suffered from emotional distress, was untruthful about her ability to deliberate, and had stopped participating in deliberations after two hours on the first day of deliberations).

CALJIC 17.41, which was given in appellant's case, states that "[i]t is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict." CT 908. As the appellate court in *Bowers* noted, "[t]hat conduct, identified in the instruction as 'rarely helpful,' does not amount to misconduct or a failure to deliberate. *People v. Bowers*, 87 Cal.App.4th at 733. "This instruction, while strongly suggestive in its terms, does not

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[11] As noted above, after the court questioned Jurors 4 and 5, who were most adamant in their view that Juror 11 was not deliberating appropriately, as well as two other jurors, it indicated that it "was not convinced at this point in the inquiry that there is any gigantic problem at all" and that it had not heard anything that would convince it that "there's been misconduct at this point." RT 5379. Since upon further inquiry, none of the remaining jurors agreed with Jurors 4 and 5, by singling out Juror 11 as refusing to deliberate, it is not clear how the trial court was able to determine that Juror 11's conduct warranted excusal.

impose a mandatory duty on the jurors." *Id.* Here, as in *Bowers*, the record reflects that Juror 11 "participated to some extent in [the jury's] discussions, expressed the reasons for his decision, and remained willing and able to vote concerning a verdict." *Id.* at 735. Thus, it is not possible to say that the record shows a "demonstrable reality" that he was unable to perform as a juror. He was therefore excused without good cause.

The dismissal of Juror 11 for allegedly failing to deliberate violated Penal Code section 1089, as well as appellant's constitutional rights as enumerated below, and constitutes reversible error.

2. *The Inquiry into Juror 11's Comments During Deliberations and the Court's Reliance on Such Comments as a Basis for Dismissal Was Inappropriate*

As noted above, a second ground was cited by the trial court for dismissing Juror 11. The trial court found that the juror used evidence outside the record in deciding an issue having to do with whether or not an eyewitness was present at the scene at the time of the crime. As the court put it, the issue should not be resolved "based on things outside the record such as this juror's opinions about how Hispanics behave in various situations." RT 5449-5450. The trial judge found that the statement was made and "the juror is using facts not in the record to decide this case." RT 5451.

The allegation regarding Juror 11's statement about Hispanics derived from the trial court's questioning of Juror 4, who indicated that Juror 11 denied that he had decided the case before deliberations began but that she did not believe him. RT 5349. She elaborated that "whatever piece of evidence we addressed he would make very strong pronouncements about how he felt about it, and always these pronouncements were to

support his – his opinion, and they really had not logic to them at all." RT 5349. The court then asked for an example. RT 5349. Juror 4 responded that when they were discussing the testimony of a witness who claimed that he had a person named Jose falsely punch a time card for him, Juror 11 said "that's a lie. I know Hispanics, they never cheat on timecards, so this witness was at work, end of discussion." RT 5350.

Preliminarily, the trial court's request for an example was improper. The court should not have inquired into the specific content of the jury's deliberations, and as discussed above, its intrusion into the deliberative process was inappropriate and violated appellant's rights to a fair trial and an impartial jury.

Evidence Code section 1150, in the context of post-verdict situations, permits introduction of evidence of "statements made ... within ... the jury room," but such evidence "must be admitted with caution," because the juror's statements implicate the juror's reasoning process, which would have a chilling effect on jury deliberations. *People v. Cleveland*, 25 Cal.4th at 484-485 (citing *In re Stankewitz*, 40 Cal.3d 391, 398 (1985); *People v. Hedgecock*, 51 Cal.3d 395, 418 (1990)). Accordingly, this Court has noted that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." *Id.* at 485. In addition, "[t]he inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." *Id.*

In any event, Juror 11's alleged statement that based on his job experience, Hispanics do not falsify time cards certainly was not grounds to exclude the juror. While the trial court characterized this comment as demonstrating the consideration of extra-record evidence, it does not

qualify as receipt of information from an extraneous source; it was merely an off-the-cuff remark reflecting the juror's illogical reasoning for rejecting the credibility of a particular witness who was otherwise impeached with properly admitted evidence.

Juror 11's comment certainly did not rise to the level of "substantial bias" which this Court has found necessary to establish prejudicial juror misconduct. *See People v. Danks*, 32 Cal.4th 269 (2004); *People v. Marshall*, 50 Cal.3d 907 (1990); *In re Carpenter*, 9 Cal.4th 634 (1995). As this Court noted, "Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic." *In re Carpenter*, 9 Cal.4th at 655.

The juror's comments were far more innocuous than those found harmless in *People v. Marshall*, 50 Cal.3d 907, where the juror stated he had a law enforcement background and that the lack of evidence did not mean that the defendant had no criminal history because juvenile records are sealed. *Id.* at 947-949. Where in *Marshall*, the juror's background in law enforcement made it far more likely that his remarks would be taken seriously, here, there is nothing to suggest that the juror's comments had any impact whatsoever on the proceedings.

Moreover, this Court has recognized that "[d]etermining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter, especially when the alleged misconduct consists of statements made during deliberations." *People v. Cleveland*, 25 Cal.4th at 484. As the Court recently reaffirmed:

> "The introduction of much of what might

> strictly be labeled 'extraneous law' cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require ... [the jury] to be a laboratory, completely sterilized and freed from any external factors.' (*Rideau v. Louisiana* (1963) 373 U.S. 723, 733 ... (dis. opn. of Clark, J.).) Moreover, under that 'standard' few verdicts would be proof against challenge."

People v. Danks, 32 Cal.4th at 302-303 (quoting *People v. Marshall*, 50 Cal.3d at 950).

The foreperson acknowledged that this was a difficult case and that other jurors had engaged in speculation and considered facts which were outside the scope of the evidence. RT 5341. ("Well, there have been comments by the jurors that people are not sticking to the facts, you know, and so forth, or speculating on the state of mind, or why we didn't hear from somebody, or why there weren't other witnesses, or whatever the case may be"). Thus, even assuming Juror 11's remarks constituted an improper comment on evidence outside the scope of the record, this juror was not alone in making such comments.

More significantly, consideration of such evidence was cured by the court's admonition that the jurors should not speculate about matters

outside the record. RT 5276. As discussed above, the court had previously admonished the jury about such speculation after the jurors asked a question of the court that reflected they were considering factors that were not in evidence. *See* RT 5263-5276. There was nothing in the record that indicated that Juror 11, along with the other jurors, did not heed this instruction or that Juror 11's comment did not occur before the court's admonition. As Juror 12 noted, the speculation in which the jurors had been engaging, which included Juror 11's comments, ceased after the court's admonition "cleared the air." RT 5426-5427.

In addition, there is nothing in the record indicating that any other juror took Juror 11's comments about Hispanics seriously. It was almost certainly considered a remark made in the heat of discussions that had absolutely no bearing on the deliberations.[12] Indeed, it is not clear that Juror 11, himself, actually used this information in any significant way.

Finally, even assuming Juror 11 committed misconduct by making this isolated comment in the midst of deliberations, it was not so serious that it required his dismissal. The time card issue arose in the context of the testimony of Carl Connor, who testified that he witnessed the shootings. When Connor was confronted with the fact that a time card indicated that he was at work at the time of the shootings, he responded that he might have had a co-worker named Jose, whose last name he could not recall, punch his time card to show that he was working when he was not. Connor

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[12] Juror 4, who first revealed the remark, noted that it was illogical. RT 5349-5350. Juror 12 claimed that it was said in the context of other speculative statements which were ignored once the court admonished the jury. RT 5426-5427. Only three other jurors even recalled the content of the comment. *See* RT 5393 (Juror 6), RT 5409 (Juror 8), RT 5413 (Juror 9).

further testified that he was terminated from his employment because of falsifying time cards. RT 3395-3396. Connor was impeached by the testimony of the general manager of Connor's former employer, who testified that Connor was not fired for falsifying time cards but in fact was terminated for a completely different reason. RT 4853-4858.[13]

Thus, the credibility of Connor's testimony specifically about the time card – as well as more generally – was seriously damaged by other properly considered evidence. Even assuming Juror 11 disbelieved Connor's explanation for the time card based in part on extraneous evidence, this was insignificant in the overall context of the case, and could have easily been cured, if it had not been already, with an admonition by the court. As coappellant's counsel remarked:

> As to the issue of Hispanics and the total testimony of Carl Connor, Carl Connor tripped himself up on the witness stand by lying about the reason for his dismissal. [¶] So in the total context of Carl Connor, whether or not any juror says anything about Hispanics was brought up (1) by Carl Connor, (2) it had little to do with the believability of Carl Connor being that the evidence showed that Mr. Connor was fired for something other than what Mr. Connor said on the stand. [¶] So what Juror No. 11 says about time cards in the total picture of everything is very minor.

RT 5440.

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[13] Connor was impeached in several other respects. For example, his testimony regarding where the shooter stood when he fired into the vehicle, RT 3347, 3422, 3443, 3473, was contradicted by prosecution witnesses. *See* RT 3804-3805, 3843-3844, 3860. His testimony that the shooter fled in a westerly direction, RT 3358-3359, was also contradicted by other witnesses. *See* RT 3267-3268, 3276, 3873. *See* Argument XIII.

Although misconduct can constitute grounds to believe that a juror will be unable to fulfill his or her functions as a juror, such misconduct must be "serious and willful." *People v. Daniels*, 52 Cal.3d 815, 864 (1991). Nothing reportedly said or done by Juror 11 came close to rising to the level of misconduct required to warrant his dismissal.

D. The Discharge Of Juror 11 Violated The State And Federal Constitutions

The trial court's inquiry and ultimate discharge of Juror 11 deprived appellant of his valued right to have his trial completed by a particular tribunal, his Sixth and Fourteenth Amendment rights to a full and fair trial by an impartial jury, his due process rights grounded in the entitlement to procedures mandated by state law, and his Eighth Amendment right to a reliable sentencing determination in a capital case.

A state defendant has a federal constitutional right to an impartial jury. *See Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (due process right to trial by impartial jury); *see also Ross v. Oklahoma,* 487 U.S. 81, 85 (1988) ("It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury"). In addition to this broad guarantee, the United States Supreme Court has recognized in the context of the Fifth Amendment that a defendant has a "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

As Justice Werdegar stated in her concurring opinion in *People v. Cleveland*, 25 Cal.4th 466, "substitution of a juror after the jury has retired to deliberate "may trench upon a defendant's right to a trial by jury. U.S. Const. amend. VI; Cal. Const. art I, § 16[.]" *Id.* at 487 (citing *People v.*

Collins, 17 Cal.3d 687, 692 (1976)). Thus, "discharge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision." *People v. Cleveland*, 25 Cal.4th at 487 (Werdegar, J., concurring); *see also Sanders v. Lamarque*, 357 F.3d at 944 ("Removal of a holdout juror is the ultimate form of coercion"). That is precisely what occurred here.

In addition, under the state Constitution, "[e]very criminal defendant is entitled to a unanimous verdict," *People v. Wheeler*, 22 Cal.3d 258, 265 (1978), and "to be valid a criminal verdict must express the independent judgment of each juror." *People v. Karapetyan*, 106 Cal.App.4th at 621 (citing *People v. Gainer*, 19 Cal.3d 835, 848-849 (1977)). The improper removal of a deliberating juror thus violated appellant's state constitutional right to a unanimous jury verdict, including the right to the independent and impartial decision of each juror. Cal. Const. art. I, § 16.

Appellant's Sixth and Fourteenth Amendment rights are also implicated by the trial judge's misapplication of Penal Code section 1089. The purpose behind the substitution procedure set forth by that statute is to preserve "the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." *Miller v. Stagner,* 757 F.2d 988, 995 (9th Cir. 1985); *see People v. Bowers*, 87 Cal.App.4th at 729 ("The California process for substitution of jurors under Penal Code section 1089, and Code of Civil Procedure section 233, preserves the essential features of the jury trial required by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment"). The trial court's gross misapplication of section 1089 infringed upon appellant's Sixth and Fourteenth Amendment rights to an impartial jury and arbitrarily deprived him of a state-created liberty

interest guaranteed by the Due Process Clause. *See Hicks v. Oklahoma*, 447 U.S. 343, 346-347 (1980).

Finally, the trial judge's actions in dismissing Juror 11, which strongly signaled to the jury both that its deliberations would be subject to scrutiny and that it disapproved of a juror who favored the defense, adversely impacted not only the guilt phase, but also the penalty phase in which the newly-constituted jury rendered a sentence of death. As the United States Supreme Court has made clear, "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi,* 486 U.S. 578, 584 (1988) (quoting *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976)).

E. The Removal Of Juror 11 Was Prejudicial

The dismissal of a deliberating juror is the type of error which warrants automatic reversal. It cannot reasonably be assessed by resort to harmless error analysis. *See Sullivan v. Louisiana*, 508 U.S. 275, 280-282 (1993) (harmless error analysis inappropriate where jury given deficient reasonable doubt instruction). For example, in *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001), the Seventh Circuit found the prosecutor's mid-trial exercise of a peremptory challenge against a seated juror to constitute automatic reversal. The court observed that there was no way to "assess how the makeup of the jury may have impacted the decision making process." *Id.* at 545. As the Court stated, "[n]o one argues that the alternate who replaced Juror M was somehow biased, and it is impossible to determine what impact, if any, the substitution had on the jury's ultimate decision." *Id.*

That is precisely the problem this Court faces in determining the effect of the improper removal of the juror in appellant's case. Trying to evaluate the prejudice created by the trial judge's improper discharge of a juror would amount to "speculation run riot." *People v. Bigelow,* 37 Cal.3d 731, 745-746 (1984) (impossible to assess prejudice from denial of advisory counsel).

If this Court declines to apply the automatic reversal rule in this instance, reversal is still required under the test used in *People v. Cleveland*, 25 Cal.4th at 486. In *Cleveland*, this Court relied on *People v. Hamilton*, 60 Cal.2d 105, 128 (1963), *overruled on other grounds, People v. Morse*, 60 Cal.2d 631 (1964), in holding that the trial court's erroneous excusal of a deliberating juror was prejudicial and required reversal. In *Hamilton*, this Court stated that "if the record shows ... that [the discharged] juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side." *Id.* at 128. Here, the record plainly shows that the discharged juror favored the defense. In fact, he was removed precisely because he had indicated that he did not believe that the prosecution had proven its case. Under these circumstances, the trial court's errors require reversal.

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II.

TWO JURORS WHO MET PRIVATELY DURING A RECESS IN DELIBERATIONS TO DISCUSS THE CONDUCT OF ANOTHER JUROR COMMITTED PREJUDICIAL MISCONDUCT

A. Proceedings Below

As discussed in Argument I, Jurors 4 and 5 met privately during a recess in deliberations to discuss the behavior of another juror. The following morning, the trial court described to counsel in chambers what had occurred: "As the jury left at 4:00, the bailiff went to lock the room and there were 2 jurors left in the room. 4 and 5. [The jury] left at about 4:00 and it was probably about 4:10, or thereabouts, that [Jurors 4 and 5] were found back there." RT 5283-5284.

The trial court reported that the two jurors told the bailiff that they wanted to see the judge, that they did not want to put their concerns in writing, and that they did not want the lawyers present when they met with the judge. The bailiff informed the jurors that the judge was not available, and that they had to write a note. The jurors refused to write anything out, and after it became clear that they were not going to be permitted to see the judge, they left for the day. RT 5285-5286.

Jurors 4 and 5 were questioned individually by the court the next morning, as detailed above, and contrary to the observations of the other jurors, complained that Juror 11 – and Juror 11 alone – was not deliberating appropriately.

Juror 5 acknowledged that he and Juror 4 had discussed their concerns about Juror 11 the previous day after the jury recessed. RT 5317-5318. He noted that while they remained in the jury room after the other jurors had left for the day, another one of the jurors came in to get his badge and asked them what they were doing. Juror 4 told him that they were only

straightening up. RT 5319. In fact, they were discussing the nature of the deliberations, and in particular the conduct of Juror 11.

After Juror 5 was questioned, appellant's counsel noted that "one of the court's instructions is that the matter not be discussed unless all jurors are present. It also appears that the foreman and Juror No. 4 violated that order and engaged in juror misconduct ... by remaining in the jury room and continuing to have discussions about this case out of the presence of the other jurors." RT 5326-5327; *see also* RT 5330-5331.

Juror 5 was questioned further about his meeting with Juror 4, and maintained that they did not discuss the facts of the case, the witnesses, or the law. Juror 5 said that given some of the encounters Juror 4 had with Juror 11, he "sensed" that she agreed with him about Juror 11, and during a break in deliberations asked her if she felt the same way he did. When she said she did, they agreed that the situation ought to be brought to the court's attention, and agreed to remain after the day's deliberations. RT 5338-5339.

When Juror 4 was questioned, she related that during a break, Juror 5 said to her that he was "having great difficulties with this case." RT 5354. Juror 4 understood that Juror 5 was referring to problems with Juror 11, and after she agreed that she was having the same difficulties he was, they agreed to stay after deliberations and see if they could obtain clarification from the court. RT 5355.

Juror 4 stated that when she and Juror 5 were in the jury room alone, they did not discuss the facts of the case or the law, but that they did discuss Juror 11, and what they believed was his inappropriate conduct during deliberations. RT 5355-5356.

As discussed in Argument I, the remaining jurors were questioned,

and it became apparent that Jurors 4 and 5 were the only jurors who were disturbed by Juror 11's conduct. In fact, their description of the proceedings although consistent with each other, was at odds with the other jurors.

While the prosecution argued that Juror 11 should be discharged, appellant's counsel argued that it was Jurors 4 and 5 who had committed misconduct by discussing the case between themselves:

> It seems to me that what has happened here is that these 2 jurors were in the jury room. The foreman approached No. 4 and wanted to know if he thought there was a problem with deliberations and they forged at the break this tentative alliance in terms of how to attempt to get rid of a juror who disagreed with them in terms of the outcome of the case. [¶] They then hung back after the bailiff had directed the jurors to leave. They remained in the jury room to have a private, secret discussion in which they formed an alliance among themselves to the exclusion of the other jurors. And the other jurors were not present. [¶] And although they did not discuss the law, and they did not discuss the facts of the case, they did discuss a subject connected with the trial. They discussed the jury deliberations among themselves out of the presence of the other jurors. [¶] They discussed whether – what means they would employ to try to have the court's assistance in removing Juror No. 11 who appears to be a juror who is voting "not guilty." [¶] I think the obvious inference is to find that these other jurors are voting guilty, and the majority of the jurors are voting guilty, and what way to get this juror out of the jury room so they can proceed to come back with a guilty verdict. [¶] I think it is highly inappropriate and in violation of the court's

> instructions[14] for 2 jurors to sit back there and form this mini-alliance to try to get rid of another juror.

RT 5441-5442. Coappellant's counsel agreed. RT 5443.

The prosecutor argued that even if these two jurors committed misconduct, it did not rise to the level of misconduct which would give the court good cause for excusing the jurors. RT 5444.

The court ruled that although Jurors 4 and 5 "technically" committed misconduct, and that "it was not appropriate and in violation of the court's instructions," the conduct was not prejudicial and therefore did not require excusal. RT 5446-5448.

B. Jurors 4 And 5 Committed Prejudicial Misconduct

Every person accused of criminal conduct has a federal and state constitutional right to trial by a fair and impartial jury. U.S. Const. amends. VI, XIV; Cal. Const. art. I, § 16; *Duncan v. Louisiana*, 391 U.S. at 149; *Irvin v. Dowd*, 366 U.S. at 722; *People v. Collins*, 26 Cal.4th 297, 304 (2001); *People v. Diaz*, 152 Cal.App.3d 926, 933 (1984) ("The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution"). In deliberating on questions of fact, the jury has the duty to follow the law in the trial court's instructions. *See* Cal. Penal Code § 1126.

"A sitting juror commits misconduct by violating [his or] her oath, or by failing to follow the instructions and admonitions given by the trial courts." *In re Hamilton*, 20 Cal.4th at 305; *see id.* at 294 (juror misconduct

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[14] The jurors were instructed that during recesses, "you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room." CT 913.

occurs when there is "a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors ..."). "To succeed [on a claim of jury misconduct], defendant must show misconduct on the part of a juror; if he does, prejudice is presumed; the state must then rebut the presumption or lose the verdict." *People v. Marshall*, 50 Cal.3d at 949.

There is no question that the two jurors committed jury misconduct by meeting privately and discussing the case. The jury was instructed with CALJIC 17.52, and in accordance with Penal Code sections 1121 and 1122, that during periods of recess from deliberations, "you must not discuss with anyone any subject connected with this trial and you must not deliberate further upon the case until all 12 of you are together and re-assembled in the jury room." RT 5096-5097. Violation of this duty is serious misconduct. *See In re Hitchings*, 6 Cal.4th 97 (1993) (juror conversing with co-worker violates Penal Code section 1122, and constitutes serious misconduct).

In *State v. Fields*, 1998 WL 430536 (Ohio App. 5 Dist. 1998), the jury foreman and another juror went outside to smoke cigarettes for a few minutes during deliberations and discussed the case while smoking. The appellate court found that when the two jurors separated themselves from the rest of the jury, they committed misconduct that materially affected the substantial rights of the defendant and required reversal. Similarly, here, Jurors 4 and 5 conversed between themselves about matters relating to the case outside the deliberative process. For at least ten minutes,[15] they discussed the conduct of a juror they disagreed with, and schemed how to get that juror discharged from the case. When another juror entered the

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[15] As noted above, the bailiff reported that jury left at 4:00 p.m., and that he found the two jurors in the jury room at approximately 4:10 p.m. RT 5283-5284.

deliberations room and asked what they were doing, they lied, denying they were talking about anything relevant to the case and stated they were merely straightening up the room. When they later reported to the court their misgivings about Juror 11, it was clear that they were acting in concert.

The trial court acknowledged that the two jurors committed misconduct but held their conduct was not grounds for dismissal. The trial court determined that the misconduct was harmless because the jurors were acting in good faith in discussing what to do about a juror who they believed had made up his mind about the case. RT 5446-5448.

The court, however, failed to understand that once juror misconduct is found, there is a rebuttable presumption of prejudice. *In re Hamilton*, 20 Cal.4th at 295. Such a presumption can only be rebutted "if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice ...." *Id.* at 296 (citing *In re Carpenter*, 9 Cal.4th at 653, and *In re Hitchings*, 6 Cal.4th at 121).

Nothing in the record sufficiently rebuts the presumption of prejudice that arose when these two jurors committed misconduct by meeting outside of deliberations to discuss how to deal with a third juror because he would not waver from a position that appeared to favor the defense. After having met privately, these two jurors triggered the court's inquiry. Their responses to the court's questions, contrary to the other ten jurors, focused on Juror 11 as the sole recalcitrant juror. The fact that they provided such consistent observations, which were at odds with the other jurors, strongly suggests that as appellant's counsel described, they forged a secret alliance to remove a juror with whom they disagreed. As discussed in Argument I, this not only resulted in the erroneous removal of a

deliberating juror, but also had a chilling effect on the subsequent guilt and penalty deliberations.

The error violated appellant's rights to trial by a fair and impartial jury, due process and a reliable determination of guilt and penalty. U.S. Const. amends. V, VI, VIII, XIV. Both the guilt and penalty phase verdicts must be vacated.

III.

THE TRIAL COURT COERCED A VERDICT FROM A DEADLOCKED JURY

A. Proceedings Below

As discussed in Argument I, each and every juror was questioned about the content of his or her deliberations after two jurors complained that Juror 11 was not deliberating appropriately. Prior to the court's inquiry, the jury had voted 9 to 3 in favor of guilt. After Juror 11 was excused, an alternate was selected to replace him. RT 5469. The jurors were then admonished as follows:

> Ladies and Gentlemen, members of the jury, a juror has been replaced by an alternate juror. You must not consider this fact for any purpose. The People and the Defendants have the right to a verdict reached only after full participation of the 12 jurors who return the verdict. This right may be assured only if you begin your deliberations again from the beginning. You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.

RT 5470.

The newly-constituted jury began deliberations at 3:36 p.m., on August 27, 1997. RT 5474. They deliberated until 4:00 p.m. RT 5475. Deliberations resumed the following day. RT 5476-5477. At the end of the day, the jury sent the court a note which said "the jury is unable to reach a unanimous verdict re Mr. Allen." RT 5478-5479.

When the court and counsel convened the next morning, coappellant moved for a mistrial, which was denied. RT 5479. The jury was then called into the courtroom, and the court immediately scolded them for reporting a deadlock and not reaching a verdict, and essentially instructed the jurors that they were not to contact the court unless and until they had reached a unanimous verdict:

> Let me say at the outset, the instructions that we gave to you, as I recall them, both written instructions and then later the day before yesterday afternoon were as follows: If you arrived as to a verdict as to a particular defendant, you were to take those verdict forms and hand them to the bailiff or clerk and we would seal them up. [¶] I don't recall that we asked you specifically to report a deadlock as to a particular defendant .... I indicated that you can deliberate in any fashion that you wish or any order that you want as to one defendant or both. [¶] All we asked is if there was a point where the jury arrived at a verdict as to a particular verdict to let us know that and we would seal them up for future reference. [¶] In any event, we will deal with the note that you sent out.

RT 5482. The court then engaged in the following colloquy with the jury:

> Court: How many ballots – when I say "ballots," I mean formal votes – have there been on Mr. Allen since the jury went out? ...

Foreperson: I believe there were 2.
Court: 2 ballots taken?
Foreperson: Yes.
Court: When was the first ballot taken?
Foreperson: The first one was taken the day before yesterday and then yesterday.
Court: Day before yesterday?
Foreperson: Day before yesterday.
Court: Wednesday?
Juror 12: 27th.
Juror 6: It was shortly there before that we got called out and one of our jurors was dismissed. It was right before that.
Court: Look. I am not interested in what the other jury did. That is a nonexistent –
Juror 6: That is when the ballot took place, the first one.
Court: That is a non-existent entity. It does not exist anymore. As you know, the court seated an alternate and instructed the jury to set aside the past deliberations and to begin anew. There is a new jury.
Juror 6: Then only one ballot, sir.
Foreperson: With the new jury, one ballot.
Court: This is the only jury we are dealing with.
Foreperson: I'm sorry for not understanding.
Court: When was that taken?
Foreperson: Yesterday afternoon.
Court: Do not tell me which way it was leaning. Don't tell me how many guilty or not guilty. I want to know 2 numbers that add up to 12 and give me the biggest number first.
Juror 6: The biggest number –
Court: First.
Foreperson: Well –
Court: Let's be clear on this. When the jury voted, the total votes were 12.
Foreperson: Yes.
Court: There were 2 numbers representing guilty or not guilty. Correct?
Foreperson: Yes.

Court: Give me the biggest number first.
Foreperson: 10.
Court: 10 to 2?
Foreperson: 10 to 2.
Court: What time yesterday?
Foreperson: Probably before we took our afternoon break. So it was between 2:00 and 3:00.
Court: Don't – At no point either in a note or verbally, until I ask you to, do not tell me which way something is leaning. I don't want to know that and we are not entitled to know that at this point in time. [¶] Do you feel, Mr. Foreman, that further deliberations would be of assistance and might potentially, as to Mr. Allen, result in a verdict one way or the other?
Foreperson: I would say probably not.
Court: All right. Do you believe that further reading of testimony to the jury or clarification of any legal instruction might be of assistance to the jury in arriving at a decision as to Mr. Allen?
Foreperson: I would like to think it would, but I really can't speak for the other jurors in that regard.
Court: Well, you have been elected to the position to speak at this point and so I am asking you for your estimation. You have been back there.
Foreperson: It is just what I answered. I would like to think that more time could possibly be helpful, but I have doubts about that.

RT 5481-5485.

Despite the foreperson's stated belief that further deliberations would not be fruitful, the court ordered that deliberations should continue:

> The court is not convinced that there is no reasonable possibility of a verdict. So I will require you to continue deliberations on the case. And if there is anything that the jury needs or feels might be helpful, do not hesitate to ask. In the meantime, go back into the jury room and continue your deliberations.

RT 5489.

At 8:55 a.m., the jury resumed deliberations, and ten minutes later requested a readback of certain testimony. CT 842. The jury continued deliberating until approximately 11:00 a.m., at which time the readback of requested testimony was undertaken, which lasted until noon, when the case was adjourned until Tuesday, September 2, 1997. RT 5495-5499. Readback continued on September 2, 1997, until approximately 10:00 a.m., at which time the jury resumed deliberations. RT 5501-5504.

At 11:10 a.m., the jury returned verdicts with regard to coappellant Allen, RT 5512, and shortly thereafter returned verdicts with regard to appellant. RT 5512-5514.

B. The Trial Court's Conduct Was Unduly Coercive

"Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps,* 484 U.S. 231, 241 (1988); *United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir. 1970) (defendant has "the right to have the jury speak without being coerced").

In *Allen v. United States*, 164 U.S. 492, 501 (1896), the Supreme Court approved a charge (the *Allen* charge) which encouraged a minority of jurors to reexamine their views in light of the views expressed by the majority, noting that a jury should consider that the case must at some time be decided. "An *Allen* charge is traditionally understood as an instruction to work towards unanimity. In the archetypal *Allen* charge context, the judge instructs a deadlocked jury to strive for a unanimous verdict." *Weaver v. Thompson*, 197 F.3d 359, 365 (9th Cir.1999) (citations omitted).

This Court, in *People v. Gainer*, 19 Cal.3d 835 (1977) disapproved of the *Allen* charge in two respects, finding that it is error to give an

instruction which either "(1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." *Id.* at 852. The Court found "the discriminatory admonition directed to minority jurors to rethink their positions in light of the majority's views" was improper because by counseling minority jurors to consider the majority view, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. *Id.* at 845, 848. Second, the Court noted that a statement that the jury "should consider that the case must at some time be decided," was inaccurate because of the possibility that the case might not be retried. *Id.* at 851-852.

Penal Code section 1140 requires that the trial court discharge the jury without reaching a verdict where both parties consent or where "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." This Court has explained that "[t]he determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. [citation]. The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [citation]." *People v. Sheldon*, 48 Cal.3d 935, 959 (1989) (quoting *People v. Rodriguez*, 42 Cal.3d 730, 775 (1986)).

In considering a claim of coercion from an *Allen* instruction, the reviewing court must consider "the supplemental charge given by the trial court 'in its context and under all the circumstances.'" *Lowenfield v. Phelps*, 484 U.S. at 236 (quoting *Jenkins v. United States*, 380 U.S. 445,

446 (1965)); *People v. Carter*, 68 Cal.2d 810, 816-817 (1968), *abrogated on other grounds, People v. Gainer*, 19 Cal.3d at 851-852. Moreover, the court's comments should be evaluated from the perspective of the minority jurors. *United States v. Burgos*, 55 F.3d 933, 940 (4th Cir. 1995).

The trial court's actions in this case were coercive in a number of respects. First, the jurors were already aware due to the earlier proceedings surrounding the dismissal of a juror that the content of deliberations was open to scrutiny and that jurors who held out for acquittal might be subject to a similar fate as the discharged juror. Second, the court's stern comments in response to being informed that the jury was deadlocked strongly implied that the jury was required to reach a verdict. Third, the court's request for a numerical division of the jury's vote when it was plainly aware that the majority of jurors favored guilt, followed by an order to deliberate further, put undue pressure on the minority jurors.

The court's comments must be viewed in the context of the earlier proceedings in which one of the jurors had been targeted by two other jurors, including the foreperson, and was then removed from the case after intensive inquiry by the trial judge. As discussed in Argument I, the nature of the court's inquiry at that time made clear that a juror was being dismissed because he did not believe the prosecution had proved its case, and this undoubtedly had a chilling effect on the remaining jurors. While there remained two jurors who were apparently holding out for acquittal once deliberations began anew, these jurors were unduly vulnerable to coercion in light of the earlier circumstances.

Thus, after the jury reported it had deadlocked, the court should have taken special care to ensure that none of the jurors felt forced to capitulate to the majority view. *See People v. Price*, 1 Cal.4th 324, 467 (1991)

(quoting *People v. Carter,* 68 Cal.2d at 817, and citing *People v. Miller,* 50 Cal.3d 954, 994 (1990)) ("When a jury indicates it has reached an impasse, a trial court that directs further deliberations must exercise great care to avoid the impression that jurors should abandon their independent judgment 'in favor of considerations of compromise and expediency'"). Here, on the contrary, the court's first comments were to chide the jury for even reporting a deadlock. This would have strongly signaled to the jurors that a hung jury was inappropriate and that they were required to reach a verdict. *See People v. Carter*, 68 Cal.2d at 817 (displacement of independent judgment of jury may occur where court places undue pressure to reach a verdict).

The court then asked for a numerical accounting of the jury's vote, which was disclosed as 10 to 2. California courts allow the practice of inquiring into the jury's numerical division as long as the judge does not ask how many for conviction and how many for acquittal. *See People v. Johnson*, 3 Cal.4th at 1254; *People v. Proctor,* 4 Cal.4th 499, 539 (1992).[16]

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[16] The Supreme Court has long held that it is improper for a trial judge to inquire as to the numerical division of a deadlocked jury. *Sanders v. Lamarque*, 357 F.3d at 944 (citing *Brasfield v. United States*, 272 U.S. 448, 449-50 (1926); *Burton v. United States*, 196 U.S. 283, 307-08 (1905)). In *Brasfield*, the Court held that an inquiry into the jury's numerical division is inherently coercive whether or not the numbers for conviction and acquittal are revealed. Appellant acknowledges that this is a rule of procedure not binding on the states, and that this Court has rejected repeated requests to reconsider the California practice which permits such inquiry as long as the court does not inquire as to how many are for acquittal and how many for conviction. *See People v. Proctor*, 4 Cal.4th at 539 & n. 7. As discussed above, in appellant's case, the court was well aware that there were ten jurors for conviction and two for acquittal, and thus, its order for further deliberations was coercive.

Here, while purportedly seeking a vote count without an indication of which side was in the majority, the court admittedly was aware, based on the earlier inquiry, that the majority was for guilt and the minority was for acquittal, and the jurors knew the court was so aware. RT 5453-5454.

As discussed above, prior to the discharge of Juror 11, a vote had been taken in which there were nine jurors in favor of guilt and three in favor of acquittal. Thus, when the jury indicated subsequent to the dismissal of Juror 11 (one of the three purportedly in favor of acquittal) that the vote was 10 to 2, there was no question that the count was 10 for conviction and two for acquittal.

After the numerical division was revealed, and despite the foreman's indication that he did not believe further deliberations would be helpful, the judge sent the jury back to deliberate further, stating it was not convinced there was no possibility of the jury reaching a verdict. "The urging of agreement in such circumstances of course creates in the jury the impression that the court, which has also heard the testimony in the case, agrees with the majority of jurors," resulting in coercion of the minority jurors. *People v. Carter*, 68 Cal.2d at 815 (citing *People v. Baumgartner*, 166 Cal.App.2d 103, 106 (1958); *People v. Walker,* 93 Cal.App.2d 818, 825 (1949); *People v. Talkington,* 8 Cal.App.2d at 83-90; *People v. Blackwell,* 81 Cal.App. 417, 421 (1927)).

Under these circumstances, the order to continue deliberating could only be interpreted as a message to the two holdout jurors that they were expected to reconsider their votes. It is not realisitc that the jurors could have believed that the court was expecting the ten jurors in favor of guilt would change their votes – particularly after the excusal of a pro-defense juror just days earlier.

Finally, the court failed to provide any further guidance or instructions that would have assured the minority jurors that they did not have to accede to the will of the majority. For example, the jury was not reinstructed with CALJIC 17.40, which would have reminded each juror that "they did not have to decide any question in a particular way because a majority of the jurors ... favor that decision." *See People v. Miller*, 50 Cal.3d at 994. At no time did the court indicate to the jury that they were under no legal obligation to return with unanimous verdicts, and at no time did the trial court explain to the jurors that it was not trying to pressure them in any way to reach unanimous verdicts.

Under the totality of the circumstances, the court's comments were coercive. The resulting verdict violated California law as well as appellant's right to due process and to a fair and impartial jury under the Sixth and Fourteenth Amendments, and the state constitutional right to a unanimous verdict. Cal. Const. art. I, § 16; *People v. Collins*, 17 Cal.3d 687, 692 (1976); *People v. Gainer*, 19 Cal.3d at 848-849.

C. The Court's Coercive Conduct Requires Reversal

In *People v. Gainer*, this Court held that a conviction following the giving of an *Allen*-type instruction which is directed to minority jurors to rethink their position constitutes a "miscarriage of justice" and requires reversal. *People v. Gainer*, 19 Cal.3d at 855. Such a per se rule of reversal is not necessarily required when the only erroneous statement to the jury is that "the case must at some time be decided." *Id.* In such cases, the reviewing court is required to "determine whether it was reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." *Id.* (citing *People v. Watson*, 46 Cal.2d

818, 836 (1956)).[17] In applying the harmless error analysis, however, "the court should recognize that the more the erroneous statement appears to have been a significant influence exerted on a jury after a division of juror opinion had crystallized, the less relevant is the court's own perception of the weight of the evidence presented to the jury before the impasse." *People v. Gainer*, 19 Cal.3d at 855-856.

Appellant submits that the trial court's comments in this case which were at least implicitly directed at the minority jurors were unduly coercive in each of the ways articulated in *Gainer,* requiring reversal per se. Under any standard of review, however, reversal is mandated. The court's remarks must be viewed in the context of the earlier inquiry in which one of the minority jurors had been dismissed, as well as the court's apparent annoyance with the jurors for declaring that they were deadlocked, the jurors' awareness that the court understood that there remained two minority jurors, and the closeness of the case.

Even though the jury indicated it was deadlocked with regard to coappellant, the fact that it reached its verdict in appellant's case so soon after the verdict in coappellant's case indicates that the deadlock applied to both appellants, and that the court's comments were equally coercive as to appellant's verdict. For the reasons discussed above, the court's coercive conduct was not harmless beyond a reasonable doubt; reversal is required.

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[17] Even assuming a harmless error analysis would be appropriate in this case, since the error implicated appellant's federal constitutional rights, the *Chapman* standard (*Chapman v. California*, 386 U.S. 18, 24 (1967)), not the *Watson* standard should be used.

IV.

APPELLANT ESTABLISHED A PRIMA FACIE CASE THAT THE UNDERREPRESENTATION OF WOMEN ON THE GRAND JURY VIOLATED THE EQUAL PROTECTION CLAUSE

A. Proceedings Below

Appellant filed a motion to dismiss the indictment pursuant to Penal Code section 995 on the ground that the process for selecting the grand jury violated the Equal Protection Clause of the Fourteenth Amendment due to the underrepresentation of women. CT 238-242; 261-262. An evidentiary hearing was held in which Gloria Gomez, Manager for Juror Services, testified.

Ms. Gomez administered the programs involving the impanelment of the grand jury. RT 228. She testified that there were two ways in which individuals became nominees to the grand jury: 1) by submitting an application; and 2) through direct nomination by a superior court judge. RT 228-229. Volunteer applicants who submitted applications to sit on the grand jury were interviewed and then rated by superior court judges. The judges then had an opportunity to nominate two individuals from either the volunteer list or their own direct nominees to the grand jury pool. Subject to objections from superior court judges to anyone on the list, a final list was compiled from which the final 23 grand jurors were randomly chosen. RT 229-230, 254-255. The selection criteria for grand jurors made no distinction between male and female, although whether or not the applicant was male or female was plainly evident from the applications, which indicate gender. RT 257, 263.

For 1988/1989, there were 157 individuals in the pool, consisting of 63 women and 94 men; the final grand jury had 2 women and 21 men. RT 235, 237. In 1989/1990, there were 146 in the pool, 63 women and 83 men;

the final grand jury had 9 women and 14 men. RT 236, 238. In 1990/1991, there were 121 in the pool, 52 women and 69 men; the final grand jury had 8 women and 14 men (and 1 unidentified). RT 236, 238. In 1991/1992, there were 178 in the pool, 76 women and 102 men; the final grand jury had 8 women and 15 men. RT 236, 238. In 1992/1993, there were 175 in the pool, 62 women and 113 men; the final grand jury had 19 women and 14 men. RT 236, 238. In 1993/1994, there were 183 in the pool, 61 women and 120 men; the final grand jury had 8 women and 15 men. RT 236, 238. In 1994/1995, there were 261 in the pool, 172 men and 86 women; the final grand jury had 8 women and 14 men (and 1 unidentified). RT 237, 238.

Additional information was provided regarding the composition of the grand jury for the 1994/1995 period, which was the grand jury that indicted appellants. For this grand jury, 86 of the candidates were nominated by judges. Of those nominated by judges, 55 were men and 20 were women. Of those who submitted applications without being nominated, 117 were men and 66 were women, with 2 unidentified. RT 239.

Ms. Gomez testified that in contrast to the composition of the grand jury, the percentages of jurors called to serve on petit jurors was roughly 50% male and 50% female, which was consistent with the general population in the county. RT 240, 251.[18]

Ms. Gomez conceded that the underrepresentation of women on the grand jury had been a consistent and ongoing problem, and she was unable to explain why there would be such persistent underrepresentation of

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[18] Ms. Gomez testified that according to the 1990 Census for Los Angeles County, the population for individuals 19 years of age and older was 49.4% male and 50.6% female. RT 241-242.

women both in the application and selection process year after year. RT 244-247, 252. Ms. Gomez acknowledged that it was the presiding judge who decided what method to use, and agreed that the presiding judge could use the same selection method for obtaining a pool of grand jurors as is used for petit jurors instead of the current method. RT 250-251.

The trial court ruled that it would apply the test set forth in *Duren v. Missouri*, 439 U.S. 357, 364 (1979) for determining whether appellant established a prima facie case of an equal protection violation, rather than the test of *Castaneda v. Partida*, 430 U.S. 482, 484 (1977) which was urged by appellant.[19] RT 269, 274. The court noted that it believed that *Duren* "has a very, very high standard for the defense to meet. Basically in that one they were talking about you have to show gerrymandering ... under [*Duren*] you have to show gerrymandering ...." RT 271.

Although the court expressed concerns about the disparity in terms of gender, finding that the system in which the grand jury was selected "leaves open the possibility of abuse," RT 274, and that the attempts to remedy the disparity were not "substantial" and "is of some concern," RT 275, the court, relying on *Duren*, found that there was no showing of systematic exclusion, and therefore denied the motion. RT 275.

B. Appellant Established A Prima Facie Case Of Discrimination In The Selection Of The Grand Jury

The trial court used the wrong legal standard in rejecting appellant's claim that the indictment should be quashed because of the

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[19] *Duren* requires a showing that underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. at 364. Under *Castaneda*, one must show that the procedure is "susceptible of abuse." *Castaneda v. Partida*, 430 U.S. at 494-495.

underrepresentation of women on the grand jury. The proper standard for evaluating an equal protection challenge to the composition of the grand jury is *Castaneda v. Partida*, 430 U.S. 482, not *Duren v. Missouri*, 439 U.S. 357. *See People v. Brown*, 75 Cal.App.4th 916 (1999).

Under the *Castaneda* three-prong test to establish a prima facie equal protection violation, one must (1) show that the excluded group is a cognizable class; (2) demonstrate a degree of underrepresentation given the proportion of the excluded group in the total population compared to the proportion called to serve as grand jurors over a significant period of time; and (3) show that the selection procedure is susceptible of abuse or is not racially neutral, to bolster the presumption of discrimination raised by the statistical disparity. *Castaneda v. Partida*, 430 U.S. at 494-495. Once the defendant has shown substantial underrepresentation of this group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case. *Id.* at 495. In order to rebut the presumption of unconstitutional action, the State must show "'that permissible [gender] neutral selection criteria and procedures have produced the monochromatic result.'" *Id.* at 494 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).[20]

Appellant clearly met the first prong of *Castaneda.* There was no dispute that women are a cognizable group. *See Duren*, 439 U.S. at 364 (citing *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975)).

With regard to the second prong, the significant disparity between

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[20] Appellant had standing to raise an equal protection challenge on behalf of women excluded from grand jury service. *See Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) (applying *Powers v. Ohio*, 499 U.S. 400 (1991) to challenge to composition of grand jury).

the population of women and the representation of women on the grand jury was also not in dispute. As noted above, approximately 50% of the population in the county was female, but over the course of seven years, women were consistently underrepresented, with women comprising between 34-38% of the grand jury each year, for an absolute disparity of 12-16%, and a comparative disparity of 24-32%.[21] CT 261-262, RT 162-172. In *Hernandez v. Texas*, 347 U.S. 475 (1954), an absolute dispartiy of 14% was deemed sufficient to establish discrimination, and in *Whitus v. Georgia*, 385 U.S. 545, 550 (1967), a disparity of 16% was sufficient. *See also Rideau v. Whitley*, 237 F.3d 472 (5th Cir. 2000) (13.5% disparity sufficient); *Ramseur v. Beyer*, 983 F.2d 1215, 1232 (3d Cir. 1992) (14.1% absolute disparity of "borderline significance," i.e., "at the margin of the range found acceptable by the courts."); *People v. Ramos*, 15 Cal.4th 1133, 1156 (1997) (citing cases in which less than 10% absolute disparity found insufficient to raise prima facie case) (*see e.g., United States v. Pepe,* 747 F.2d 632, 649 (11th Cir.1984); *United States ex rel. Barksdale v. Blackburn,* 639 F.2d 1115, 1126-1127 (5th Cir.1981); *United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980)).

As to the third prong, the court below erroneously relied on the more stringent fair cross-section test of *Duren*, and thus held that appellant had to show "not only substantial underrepresentation but that it is due to some systematic efforts to create that underrepresentation." RT 174. While such

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[21] *See People v. Ochoa*, 26 Cal.4th 398, 427 n. 4 (2001) (courts calculate the "absolute disparity" by subtracting the proportion of the underrepresented group in the pool (figure B) from the underrepresented group's proportion of the population (figure A); courts calculate the comparative disparity by dividing the absolute disparity by figure A and multiplying the result by 100).

a showing is required to establish a prima facie challenge based on the fair cross-section requirement of the Sixth Amendment, it is not the test for an equal protection challenge. Rather, as noted above, under *Castaneda*, what is required is a showing that the selection procedure is subject to abuse – not that there is purposeful or systematic exclusion of women.

Here, the trial court actually determined that the system in which the grand jury was selected "leaves open the possibility of abuse," RT 274, which, based on the test in *Castaneda*, is sufficient to raise a prima facie case. As noted above, the final grand jury list upon which the grand jurors were selected was screened by the superior court judges, who nominate grand juror candidates either from a list of volunteers or "directly," based on their own criteria, and the applications explicitly identify the gender of the prospective grand juror. As opposed to the selection of petit jurors which is wholly random and accurately reflects the gender makeup of the population, for every year documented, the grand jury selection process had been disproportionately weighted towards males. Even the trial court indicated its dissatisfaction with this process. But because the court believed that the test required "systematic exclusion," it failed to find a prima facie case.

The subjective nature of the selection process, which relied on judges to evaluate and/or nominate prospective grand jurors, has been found particularly problematic and subject to discrimination. The United States Supreme Court has acknowledged the facial constitutionality of this so-called "key-man" system, which relies on jury commissioners to select prospective grand jurors from the community at large rather than a random selection method. The Court, however, also has recognized that as applied, the system is susceptible to abuse. *Castaneda v. Partida*, 430 U.S. at 495-

497. *See also Smith v. Texas*, 311 U.S. 128, 132 (1940) ("Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who knew no negroes as well as from commissioners who know but eliminate them"); *Scott v. Walker*, 358 F.2d 561, 573-574 (5th Cir.1966) (en banc) (discrimination found where "[i]t is plain from the record here that the commissioners put on the list only those personally known to them").

The fact that the applicants' gender was identified on the applications provided further potential for abuse. The Fifth Circuit has observed in the context of racial discrimination, which applies equally to gender discrimination, that "[i]n cases in which the jury commissioners have had access to the racial identity of potential grand jurors while engaged in the selection process, the Supreme Court has repeatedly found that the procedure constituted a system impermissibly susceptible to abuse and racial discrimination." *Rideau v. Whitley*, 237 F.3d at 488 (citing *Castaneda v. Partida*, 430 U.S. at 495) (finding that the non-random selection of names of grand jurors was susceptible to abuse because Mexican-Americans were easily identifiable by their Spanish surnames); *Alexander v. Louisiana*, 405 U.S. at 630 ("[W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves are not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination."); *Whitus v. Georgia*, 385 U.S. at 548-549 (finding a selection system was susceptible to abuse where potential grand jurors were selected from segregated tax digest lists, which also coded African-Americans with a "(c)" behind each name); *cf. Avery v.*

Georgia, 345 U.S. 559, 562 (1953) (finding that the practice of placing potential petit jurors' identification on yellow cards if they were African-American and on white cards if they were white "[o]bviously ... makes it easier for those to discriminate who are of a mind to discriminate" (quoted with approval in *Alexander v. Louisiana*, 405 U.S. at 631).

The use of the key-man system, by which the judges on the superior court selected applicants who were identified by gender, which persistently underrepresented women despite the availability of a random selection process, establishes a prima facie case of discrimination. The trial court, utilizing the wrong legal standard, abused its discretion in finding that appellant failed to establish a prima facie case.

C. The Trial Court's Denial Of The Motion To Quash The Indictment Warrants Reversal Of Appellant's Conviction And Sentence

Generally, once a prima facie showing of an equal protection violation has been made, the burden shifts to the State, and an appropriate remedy on appeal would be to remand the case to permit the prosecution to rebut the showing of discrimination. *See, e.g., People v. McGee*, 104 Cal.App.4th 559, 571 (2002) (limited remand with regard to *Wheeler* motion); *People v. Rodriguez,* 50 Cal.App.4th 1013, 1024-1025 (1996) (same); *People v. Snow*, 44 Cal.3d 216, 226-227 (1987) (same). However, the original hearing in appellant's case was held in 1995. It is extremely unlikely given the passage of time that a fair hearing could be held. *See, e.g., People v. Hall*, 35 Cal.3d 161, 170-171 (1983) (where defendant established a prima facie case under *Wheeler*, and the trial court's inquiry of the prosecution to justify its peremptory challenges was inadequate, court reversed judgment, finding that three years later, "it is unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the

exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges"); *People v. Allen*, 23 Cal.3d 286, 295, n. 4 (1979) (reversal required "in light of infeasibility of accurately probing and assessing the prosecutor's prior motive at this late date").

In any event, given the strong showing of discrimination in this case, the State would be unable to rebut the prima facie case. It was undisputed that the presiding judge of the superior court persisted in using a highly subjective procedure for selecting grand jurors that consistently underrepresented women year after year, despite the availability of a system used for petit juries which more accurately mirrored the population. At most, the State, if given an opportunity, could proffer testimony from the superior court judges that they did not intentionally seek to discriminate against women. However, this would not be sufficient to overcome the strength of the prima facie case. *Castaneda v. Partida*, 430 U.S. at 498, n. 19; *see also Rideau,v. Whitley*, 237 F.3d at 488-489 (citing *Norris v. Alabama*, 294 U.S. 587, 598 (1935) ("If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause] would be but a vain and illusory requirement"); *Alexander v. Louisiana*, 405 U.S. at 630 (finding the racial identification in the selection process impermissible "although there is no evidence that the commissioners consciously selected by race"); *Whitus v. Georgia*, 385 U.S. at 551 ("While the commissioners testified that no one was included or

rejected on the jury list because of race or color this has been held insufficient to overcome prima facie evidence"); *Eubanks v. Louisiana*, 356 U.S. 584, 587 (1958) (quoting above passage from *Norris*); *Reece v. Georgia*, 350 U.S. 85, 88 (1955) ("[M]ere assertions of public officials that there has not been discrimination will not suffice").

The general rule in California is that a conviction will not be reversed due to an irregularity in grand jury proceedings absent a showing that the irregularity deprived the defendant of a fair trial or otherwise resulted in actual prejudice relating to the conviction. *People v. Corona*, 211 Cal.App.3d 529, 535 (1989) (citing *People v. Towler*, 31 Cal.3d 105, 123 (1982)). Where as here, the claim involves discrimination in violation of the Equal Protection Clause, however, reversal is required. *Vasquez v. Hillery*, 474 U.S. 254, 260-264 (1986).

V.

THE TRIAL COURT ERRONEOUSLY EXCUSED A PROSPECTIVE JUROR WHOSE VIEWS ABOUT THE DEATH PENALTY DID NOT IMPAIR HER ABILITY TO BE IMPARTIAL

The trial court granted the prosecution's challenge for cause and excused Hope Black, a prospective juror who stated that she would be able to weigh aggravating and mitigating circumstances and impose a death sentence, but acknowledged that she had mixed feelings about the death penalty. The trial court unduly relied on the juror's questionnaire answers, and failed to undertake an appropriate inquiry or apply the correct legal standard in disqualifying Ms. Black from jury service. Because the record does not show that Ms. Black's feelings about the death penalty substantially impaired her ability to sit as an impartial juror, her dismissal violated appellant's rights to an impartial jury, a fair capital sentencing

hearing, and due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. Reversal of appellant's death judgment is required.

A. Prospective Juror Black's Questionnaire And Voir Dire

1. *Black's Jury Questionnaire*

Question number 65 on the questionnaire given to all venirepersons asked, "what are your general feelings about the death penalty?" Ms. Black replied: "I have mixed feelings about the death penalty. I believe that some crimes should be punished by death. But from the religious standpoint I believe no one has the right to take a life but God." CT III Supp. 10:2653. She further indicated that her feelings have been changing as she "grew stronger in my walk with God." *Id.* On subsequent questions, Ms. Black stated that she supported the death penalty but could not personally vote to impose it." *Id.* at 2654. She indicated that she believed that life without possibility of parole was a worse punishment than death, and reiterated her religious belief of "thou shalt not kill;" that no one has a right to take another's life. *Id.* at 2655. Ms. Black further stated that she could not accept responsibility for the decision between death and life without possibility of parole, indicating "I do not want to have it on my conscience that I killed someone or help end his life." *Id.* at 2656; *see also id.* at 2657. Ms. Black, however, subsequently stated that she did not know whether she would automatically vote for life without possibility of parole if the case reached the penalty phase. *Id.* at 2657.

2. *Black's Voir Dire*

Ms. Black's view of the death penalty evolved between the time she

filled out the questionnaire and voir dire.[22] When questioned during voir dire, she attempted to clarify the statements she made on her questionnaire. Although she acknowledged that she did not welcome the responsibility to make the decision, she could see herself rendering a verdict of death. RT 2938. Ms. Black said that since filling out the questionnaire she had thought about it further. RT 2938. She stated as follows: "I thought that if it was my family members ... that was killed ... it would be no doubt in my mind if a family member was murdered for me to say: okay, I think they deserve the death penalty, if the circumstances – if they actually just gruesomely murdered somebody in my family." RT 2939. She further stated: "But I was thinking if I could with good conscience say somebody in my family's life was taken away, I in good conscience could do the same and not have that be on my conscience." RT 2939.

Ms. Black indicated that over the prior weekend something happened to her that changed her mind. She stated that she had been out late, and had to change a flat tire at 4:30 a.m. Her sister later asked her whether she thought this was a dangerous situation and if she had been worried about dying. Ms. Black told the court that she responded to her sister by saying, that "when it is my time to go I am going to go. No matter which way I go, it is time to go .... The circumstances of me dying is not going to stop me from doing the things that I need to do because I am going to die anyway." RT 2940-2941. Ms. Black explained that she "thought about it and I was thinking about having that on my conscience, somebody else dying. And it is like they will die no matter what because, well, I believe that everyone's

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[22] The questionnaire was completed on July 24, 1997, CT III Supp. 10:2659, and the voir dire took place a week later, on July 31st. *See* RT 2814.

death is predestined. How you are going to die is how you are going to die. If I say: you have the death penalty. You are going to die, you are going to die regardless if I say it or somebody else says it." RT 2941. Ms. Black believed that the result was pre-ordained, but made clear that she did not know what the outcome would be. RT 2942, 2944. She insisted that she would have no tendency to believe her vote did not matter because it was pre-ordained, and agreed to perform her duty by weighing mitigating and aggravating circumstances. RT 2947-2948. Ms. Black continued to acknowledge that she was ambivalent; that she had mixed feelings about the death penalty. RT 2949.

The prosecutor challenged Ms. Black for cause on the ground that her ability to be fair and impartial was substantially impaired. RT 2950. Defense counsel disagreed: "The prospective juror has responded under oath to the court's question that she could choose either penalty based on the evidence that she left some answers 'I don't know' because she wanted to think about them further. And she has done that since being called in the jury box. [¶] An examination of her beliefs is that as previously she was not for the death penalty. She has now some ambivalence and has stated that she could render either verdict depending on the weighing of aggravating and mitigating factors should the case reach the penalty phase." RT 2951.

Defense counsel pointed out that she was no different from prospective juror Painter, who was challenged by the defense because he stated he could not vote for life without possibility of parole, a challenge

which was denied by the trial court.[23] RT 2951. Defense counsel further stated that prospective juror Black "stated here from the jury box that she could render either verdict and I think that the challenge is without basis." RT 2951-2952.

Counsel for coappellant Allen agreed: "I think that [prospective juror Black] is prepared to weigh life or death. RT 2952.

The trial court granted the challenge for cause: "The juror is under oath today. She was also under oath when she filled out the questionnaire." RT 2952. The court then read some of the juror's answers from her questionnaire, RT 2952-2953, and discounted the juror's change of heart since the filling out of the questionnaire: "And now she comes up with a situation, and I don't know what to make of it, but an epiphany arose when she had a flat tire that changed her long-standing religious view on the penalty. I am not convinced that is the case." RT 2953. The court further stated that "I note that from her fidgeting and hesitation and obvious confusion that she was doing the best she could to give answers that I feel would put her in line with those heard by some other jurors in the case that had not been excused." RT 2953-2954.

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[23] Mr. Painter was a reserve officer for the Los Angeles Police Department for 22 years. RT 2727. In his questionnaire, he stated he held a negative view of defense lawyers, and strong feelings about criminal activity committed by gangs. *See* CT III Supp. 1:262, 272. He also indicated very strong feelings in favor of the death penalty. *Id.* at 273. He went so far as to indicate that he could not see himself choosing life imprisonment without possibility of parole ("for those crimes that death is a possible sentence, I believe the harshest penalty should apply"). In contrast, during voir dire, Painter repeatedly stated he could be fair and impartial, and indicated that he would follow the law. RT 2728, 2730-2731. The court discounted the questionnaire answers, and denied the defense challenge for cause. RT 2737.

B. The Trial Court Committed Reversible Error In Excusing Ms. Black For Cause Based On Her Questionnaire

1. *Applicable Legal Standards*

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. *Duncan v. Louisiana,* 391 U.S. at 149-150; *Irvin v. Dowd,* 366 U.S. at 722. In capital cases, this right applies to the determinations of both guilt and penalty. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Turner v. Murray,* 476 U.S. 28, 36 n. 9 (1986). This right also is protected by the California Constitution. *See* Cal. Const. art. I, § 16.

The United States Supreme Court has enacted a process of "death qualification" for capital cases. *See Witherspoon v. Illinois,* 391 U.S. 510, 522 (1968); *Wainwright v. Witt*, 469 U.S. 412, 421 (1985). Appellant maintains that this process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. *Witt v. Wainwright,* 470 U.S. 1039 (1985) (Marshall, J., dissenting from denial of certiorari); *Grigsby v. Mabry,*758 F.2d 226 (8th Cir. 1985), *rev'd sub nom. Lockhart v. McCree,* 476 U.S. 162, 176 (1986). The reasons supporting this claim are set forth in Justice Marshall's dissenting opinions in *Witt*, 470 U.S. at 1040-1042, and in *McCree,* 476 U.S. at 184-206, which are incorporated herein to preserve the issue for federal habeas corpus review, if necessary.

Even with a death qualification process, prospective jurors may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois,* 391 U.S. at 520-523 (footnotes

omitted). As decisions of this Court and the United States Supreme Court make clear, "a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case ...." *People v. Stewart*, 33 Cal.4th 425, 446 (2004). The focus must be on the juror's ability to honor his or her oath as a juror: "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. at 176; *see also Witherspoon v. Illinois*, 391 U.S. at 514, n. 7 (recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"); *People v. Kaurish*, 52 Cal.3d 648, 699 (1990) (neither *Witherspoon* nor *Witt* "nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty").

As this Court recently noted:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote for the death penalty ... [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.

People v. Stewart, 33 Cal.4th at 446.

The exclusion of such a juror violates the defendant's rights to due process and an impartial jury "and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" *People v. Hayes,* 21 Cal.4th 1211, 1285 (1999) (quoting *Witherspoon v. Illinois*, 391 U.S. at 521). Under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Wainwright v. Witt*, 469 U.S. at 421 (quoting *Adams v. Texas,* 448 U.S. 38, 45 (1980)). The same standard is applicable under the California Constitution. *See, e.g., People v. Guzman,* 45 Cal.3d, 915, 955 (1988); *People v. Ghent,* 43 Cal.3d 739, 767 (1987); *People v. Kaurish*, 52 Cal.3d at 699. Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Adams v. Texas*, 448 U.S. at 45.

"Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, 469 U.S. 412." *People v. Stewart*, 33 Cal.4th at 447.

In applying the *Witherspoon-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. *People v. Ashmus,* 54 Cal.3d 932, 962

(1991); *see also Wainwright v. Witt,* 469 U.S. at 433 (ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole). *People v. Heard,* 31 Cal.4th 946, 958 (2003).

The prosecution, as the moving party, bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. *People v. Stewart,* 33 Cal.4th at 445. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, ... it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality .... It is then the trial judge's duty to determine whether the challenge is proper." *Id.* at 445-446 (quoting *Wainwright v. Witt,* 469 U.S. at 424).

The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. *Gray v. Mississippi,* 481 U.S. 648, 668 (1987).

Finally, given the per se standard of reversal for *Witherspoon-Witt* errors, the trial court bears a special responsibility to conduct adequate death qualification voir dire. As this Court recently emphasized, when a prospective juror's views appear uncertain, the trial court must conduct careful and thorough questioning, including follow-up questions, to determine whether the juror's "views concerning the death penalty would impair his [or her] ability to follow the law or to otherwise perform his [or her] duties as a juror." *People v. Heard,* 31 Cal.4th at 965. In short, trial courts must "proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." *Id.* at 968.

In this case, the trial court erred in excluding Ms. Black because the record failed to show that her views on capital punishment would have

substantially impaired the performance of her duties as a juror. Accordingly, appellant's death sentence must be set aside.

2. *Ms. Black Was Qualified for Jury Service*

The prosecutor failed to carry her burden to show that Ms. Black was not qualified to serve on appellant's jury. *See Gray v. Mississippi,* 481 U.S. at 652, n. 3 ("A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve.").

The record of the voir dire of prospective juror Black, viewed "as a whole," *Wainwright v. Witt*, 469 U.S. at 435, does not support her excusal by the trial court, because her responses, particularly subsequent to filling out the questionnaire, did not convey a "definite impression," *id.* at 426, that her views would prevent or substantially impair the performance of her duties. Instead, the court's ruling excusing Ms. Black was based on an unfair reliance on the juror's questionnaire, and was erroneous.

While Ms. Black admitted to having mixed feelings about the death penalty, a feeling of ambivalence is common to most jurors charged with the difficult task of serving on a capital jury. *Witherspoon v. Illinois*, 391 U.S. at 515. Her ambivalence towards serving on a capital jury does not rise to the level of cause under the *Witherspoon-Witt* standard, particularly in light of her stated willingness to follow the law. Although in her questionnaire, Ms. Black had indicated difficulty in taking responsibility for a life and death decision, she made clear during the court's questioning that she had changed her mind. Ms. Black unequivocally stated that she no longer was concerned that she could not make the decision with a clear conscience, and that she would follow the law by considering aggravating and mitigating circumstances. The court ignored these remarks, unduly

relying on the questionnaire to grant the prosecutor's challenge.

In *People v. Stewart*, this Court held that written answers supplied by prospective jurors, including "I do not believe a person should take a person's life" and "I am opposed to the death penalty" stated a "generalized opposition to the death penalty" and may have "provided a *preliminary* indication that the prospective juror *might* prove, upon further examination, to be subject to a challenge for cause." *People v. Stewart,* 33 Cal.4th at 448 (emphasis in original). In such a situation, "clarifying follow up examination" was required before the court could properly excuse the prospective jurors for cause. *Id*; *see also United States v. Chanthadara*, 230 F.3d 1237, 1269-1272 (10th Cir. 2000).

Here, Ms. Black was asked additional questions regarding her views, but the court promptly rejected all attempts to explain her earlier answers. As noted above, the court's decision whether to excuse a juror must be based on the record of the voir dire "as a whole." *Wainwright v. Witt*, 469 U.S. at 435. Accordingly, when the trial judge's decision is based on selected answers in isolation and to the exclusion of numerous contrary responses which explained the selected answers, and not on the voir dire in its entirety, it is not fairly supported by the record and is not worthy of deference from this Court.

The trial judge must follow the process this Court has laid down for itself: "In short, in our probing of the juror's state of mind, we cannot fasten our attention on a particular word or phrase to the exclusion of the entire context of the examination and the full setting in which it was conducted." *People v Varnum,* 70 Cal.2d 480, 493 (1969). That process was not followed here, as the judge's ultimate assessment of the juror's state of mind was colored and controlled by an inaccurate and unfair

interpretation of the juror's earlier responses on the questionnaire.

The trial court's process for resolving the challenge to Ms. Black was further flawed because it ignored the rule that "[t]he burden of proving bias rests on the party seeking to excuse the venire member for cause." *United States v. Chanthadara,* 230 F.3d at 1270 (citing *Wainwright v. Witt*, 469 U.S. at 423); *see also People v. Stewart*, 33 Cal.4th at 445. Selectively focusing on, and/or giving more weight to, answers supporting the prosecution challenge as opposed to those supporting the defense position hardly comports with the notion of placing the burden of proof on the prosecution.

In addition, a review of Ms. Black's responses shows that "the factual record does not fairly support [her] exclusion under the standards of *Adams* and *Witt*." *Gall v. Parker,* 231 F.3d 265, 331 (6th Cir. 2000). The Court of Appeals in *Gall* found that the venireman's "discomfort with the death penalty" did not appear to prevent or substantially impair the performance of his duties as a juror. In support of its holding, the appellate court cited several factors: the prospective juror "rejected the proposition that his mind was 'closed' to imposing the death penalty;" he stated that "he would possibly or 'very possibl[y]' feel the death penalty was appropriate in certain factual scenarios;" he told the judge that "he believed he could and would follow the law as instructed;" and he said "his decision would likely depend on the facts he was faced with." *Id.* at 331.

In appellant's case, Ms. Black indicated some ambivalence about the death penalty, but never stated that her mind was "closed" to imposing the death penalty. She at most stated that she was not sure whether she could impose it. *United States v. Chanthadara*, 230 F.3d at 1271. Ultimately, Ms. Black indicated that she could do so, and would follow the law. Far

from being a prospective juror who was close-minded regarding imposing a death verdict, she was conscientiously struggling with reconciling her religious views and the law, and eventually determined that the two were not inconsistent. She ultimately concluded that thinking about how she could in good conscience vote to impose death if a member of her family had been killed allowed her to consider voting to impose death in other cases. RT 2939.

As in *People v. Heard*, 31 Cal.3d at 964, Ms. Black did not state that she would automatically vote for life without possibility of parole, and never said she was reluctant to find the defendant guilty of first degree murder and special circumstances in order to avoid having to face the issue of the death penalty. *See* CT III Supp. 10:2657. Nothing in her responses during voir dire supported a finding that her views would prevent or substantially impair the performance of her duties as a juror. Indeed, she unequivocally asserted that she could render a verdict of death and would follow the law. RT 2938.

Ms. Black expressed some religious views relating to capital punishment, but she also stated that these views would not interfere with her ability to follow the law. As the United States Supreme Court stated, "[i]t cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' thereby affirmed that he would never vote in favor of it or that he would not consider doing so in the case before him." *Witherspoon v. Illinois*, 391 U.S. at 515, n. 9. And as stated in *People v. Stewart*, "[a] juror might find it very difficult to vote to impose the *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or

unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." *People v. Stewart*, 33 Cal.4th at 447 (emphasis in original).

In sum, although Ms. Black's questionnaire answers suggested that she might not be able to vote for death, the totality of her remarks made clear her willingness to do so. As in *People v. Heard*, "[i]n view of [the prospective juror's] clarification of h[er] views during voir dire," the "earlier juror questionnaire response, given without the benefit of the trial court's explanation of the governing legal principles," does not provide an adequate basis to support Ms. Black's excusal for cause. *People v. Heard*, 31 Cal.4th at 963.

Based on an examination of the entire record, Ms. Black was erroneously excluded under the *Witt* standard. She was able to follow the court's instructions and obey her oath, notwithstanding her religious views on the death penalty. Her erroneous exclusion guaranteed that appellant would be tried by a jury "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. at 521.

3. *Reversal of the Death Judgment Is Required*

As shown above, the trial court's decision to excuse prospective juror Black is not fairly supported by the record or by substantial evidence, and should not be accorded any deference by this Court because of the improper process employed by the judge in making that determination. The court's erroneous discharge of prospective juror Black violated appellant's rights to a fair and impartial jury, to due process, and to a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The erroneous exclusion of any one prospective juror because of his or her opposition to the death penalty is reversible error per se and is not sub ject to harmless-error analysis. *Gray v. Mississippi*, 481 U.S. at 666-668; *People v. Heard*, 31 Cal.4th at 966. Appellant's death judgment must therefore be reversed.

VI.

THE TRIAL COURT PERMITTED THE PROSECUTION TO INFLAME THE JURY BY UNLEASHING EVIDENCE THAT DID NOTHING BUT HIGHLIGHT APPELLANT'S BAD CHARACTER AND CRIMINAL PROPENSITY

As discussed here, and in Arguments VII-XI, below, the trial court erroneously admitted a slew of unreliable, misleading, and inflammatory evidence that portrayed appellant as a callous, violent gang leader. With little credible evidence to connect appellant with the murders, the prosecution relied instead on this evidence for the impermissible purpose of showing appellant was a bad person with a propensity to kill his rivals and witnesses.

There was unquestionably some evidence of appellant's gang affiliation that was relevant to the case. Such evidence, regarding appellant's status in a Bloods gang and his gang's rivalry with the Crips gang, was before the jury and not in dispute. However, the fact that some gang-related evidence may have been appropriately introduced did not immunize the jury from the emotional impact of gang evidence detailing alleged criminal and violent propensities of appellant and his fellow gang members. Indeed, the evidence of threats, murders, and violence which had nothing to do with the case surely overshadowed the evidence that was actually relevant to the jury's determination of guilt.

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

A. Proceedings Below

1. *Statements about Appellant's Role in Gang and Rivalry with Crips*

The prosecution sought to admit various statements made by appellant pursuant to California Evidence Code 1220 as admissions of a party. CT 670-674. Several of these statements were made when appellant testified on May 21, 1992, as a witness for the defense in the case of *People v. Charles Glass*. In the course of his testimony, appellant made the following statements which the prosecution sought to present to appellant's jury:

1) appellant identified himself as "Big Evil," and agreed that he hated Crips. CT 671, 690;

2) appellant testified that he hated Crips. CT 671, 690;

3) appellant agreed that he did not believe in the gang truce, and did not like others who he believed to be Crips. CT 671, 690;

4) appellant said he was testifying truthfully. CT 671, 692;

5) appellant identified himself as an "O.G.," and said he became enemies with people he grew up with (who became Crips) through gang affiliation and he and those now-enemies have even tried to kill one another. CT 671, 701;

6) appellant talked with defendant Glass (a Crip) about their respective gang affiliations. CT 671, 702;

7) appellant told Glass what he was going to do to Glass' homeboys because they were enemies. CT 671-672, 703;

8) appellant stated that beating up a Crip was nothing. CT 672, 704;

9) appellant acknowledged that gangs retaliate against one another and that there would be retaliation if he saw or caught any Crip in a gang. CT 672, 704;

10) appellant testified that he did not have to answer to anybody. CT 672, 712;

11) appellant stated that being an O.G. means "I'm an original gangster. I mean I'm unique about myself. I don't care about what nobody else thinks about me or what they say. What I do is what I want to do and when I want to do it I want to do it and it's up to me." CT 672, 712;

12) appellant said he paid his dues and doesn't answer to anybody. CT 672, 712;

13) appellant testified that other people answer to him. CT 672, 713.

The prosecution sought to introduce these statements ostensibly to show the hostility and rivalry between appellant's gang and the Crips, and, according to the prosecution, to show appellant's role in the gang as an O.G., who answers to no one and to whom other people answer. CT 672. According to the prosecution, these statements were relevant to motive and intent. RT 4130.

Appellant objected, arguing that these statements portrayed appellant as a callous person of bad character who had a propensity to commit the charged crimes. Appellant argued that the statements were irrelevant, constituted inadmissible character evidence under Evidence Code section

1101, and were unduly prejudicial and cumulative pursuant to Evidence Code section 352. CT 812.

The trial court held that appellant's statements were relevant to appellant's state of mind, to motive, and to his intent. Accordingly, with one exception,[24] the statements were admitted. RT 4132-4137, 4448-4456.

2. *Statement about Murder of Gang Member's Brother*

The prosecution also sought to introduce a statement made by appellant during an interview while in prison on June 8, 1994, regarding a fellow gang member, Albert Sutton, who had been murdered. Homicide detectives had questioned appellant about the Sutton matter. Sutton reportedly had brought some Crips into the neighborhood. Sutton's brother was shot, and Sutton, who cooperated with the police, was killed three days later. RT 4148. When the detectives told appellant that one of the Crips was Albert Sutton's brother, appellant responded, "it does not matter whose brother it is. You don't bring a Crip into the 'hood. Albert had to be disciplined." CT 672-673.

The prosecution argued that these statements showed appellant's leadership "as a self appointed disciplinarian in the context of his gang affiliation" and "identify the defendant's state of mind regarding conduct which would provoke a lethal response" as well as his "state of mind regarding Crips." CT 673.

Appellant contended, as with the testimony in the Glass case, that the evidence was improper character evidence under Evidence Code section 1101, that it was irrelevant, more prejudicial than probative, and

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[24] The statement identified above as #6 was not admitted as being too unintelligible without additional testimony. RT 4134.

cumulative. Counsel argued that appellant would be prejudiced because the jury would be made aware that Sutton was killed, and would necessarily infer that appellant was involved by virtue of his statements. CT 812-813; RT 4150.

The trial court rejected the defense arguments. RT 4149-4150. The court, adopting wholesale the prosecution's theory of the case, reasoned that while an average juror might have difficulty understanding that a gang member could conceivably be killed for driving his car to the wrong car wash, "certainly, when you hear Mr. Johnson make statements like the ones made in here, it makes the whole thing understandable to, I think, the average juror who has very little experience with gang activity and gang motivation, and what folks do to one another in the neighborhood and their gang. So that is obviously quite relevant and it will be admitted." RT 4139.

At trial, evidence about the Sutton matter was introduced through the testimony of Detective Brian McCartin. McCartin informed the jury that he was a *homicide* detective. RT 4154-4155. In June 1994, McCartin spoke with appellant about "a matter involving Albert Sutton," which was a "matter" that McCartin was investigating. RT 4173, 4174. McCartin stated that he interviewed appellant about the case, and that appellant had said that "Albert Sutton shouldn't have brought any Crips into the hood." RT 4177. McCartin then asked appellant if he knew that one of those Crips was Albert's brother, to which appellant responded: "it doesn't matter. You don't bring Crips into the hood" and "Al had to be disciplined." RT 4177-4178. McCartin also elaborated in the course of discussing the Sutton case that appellant was nonchalant, non-caring, and acted is if "that is just the way business is." RT 4173, 4178.

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3. *Admission of Jail Note*

The prosecution also sought to introduce a note displayed by appellant to his wife during a visit while he was in custody in county jail, which was seized by a deputy sheriff in October 1995 – more than four years after the murders in this case. The note referred to Keith Williams, aka "K-Rock," a fellow gang member who provided information to the police regarding appellant's alleged role in the murder of Tyrone Mosley. *See* RT 4250-4256. The portion of the note the prosecution wished to present read as follows:

> You know for a fact if I wanted [K-Rock] dead that it could have been done ... you have personally heard people from all types of other sets swear to me that they will handle him, his family and anybody else that I needed handled. Because I've done favors for them; and they know I'll do it for them. But I told them don't sweat it, don't even trip on him.

CT 673; RT 4804.

Appellant argued that the note was inadmissible character evidence, was cumulative, irrelevant, and substantially more prejudicial than probative. CT 813-814.

The trial court ruled that it was going to admit the portion of the note where appellant stated "that he is of such a position on this gang that folks from other sets of this gang swear to him they will handle a witness, his family and anybody else that this gentleman needs handled because he has done favors for them and they know that he will reciprocate." RT 4142.

The trial court determined that this was relevant to "appellant's attitude not only towards potential witnesses in matters but, once again, shows you the level to which your client feels that he is entrenched in this

gang life style and milieu where he brags in his writings, some of them, that he has acquaintances, associates and loyal followers up and down in various jails and so forth." RT 4142.

The court concluded that "certainly his position in this gang I think is important. His attitude toward gangs and gang members is likewise important as to the issue of motive and intent and so forth. Frankly, it would tend to show that your client is not just a hanger on but rather deeply entrenched and proud of it. And I think it is quite relevant." RT 4142.

Subsequently, the court appeared to reconsider its ruling. It asked the prosecution its theory for why the note should be admitted. The prosecutor replied that it showed appellant's state of mind, and that when he issued orders people responded appropriately: "It's directed to a fellow gang member who understands, (A) Mr. Johnson's position of authority and (B), his state of mind with respect to carrying out specifically his intentions as stated." RT 4258.

The court then reversed its earlier ruling, stating that given that Williams was not a witness in this case, the threats were not relevant, "[and] I don't feel that that theory that the defendant knows that his orders would be carried out, and things of that nature is at this point sufficiently relevant to overcome the inherent prejudicial effect of the letter." RT 4259-4261. The court also held that the note did not show consciousness of guilt, or add anything pertaining to appellant's gang affiliation, of which the court stated there was already ample evidence. RT 4163. The note was deemed inadmissible. RT 4264.

Near the end of the prosecution's case, the prosecutor again argued for the note's admission, reiterating essentially the same argument that the trial court previously rejected:

> What it is really offered for is to show that the defendant has a state of mind that if he wants to get something done on the street, he can. [¶] It happens that the person that it is directed at is a witness in the other murder, in the Mosley murder. [¶] But my offer is not with respect to him specifically threatening Keith Williams. It is really offered for the defendant's state of mind that if he wants to get something done on the street, he can, and there are people out there who will do things for him.... It is offered for his state of mind and for his role, his authority, while he is inside, in custody, still being able to maintain control about what is going on out in the street.

RT 4720.

Inexplicably, the court agreed, and reversed itself again. It then permitted the requested portion of the note to be admitted. RT 4754-4760; People's Exhibit 44.

The jury was informed that the note was taken from appellant on October 21, 1995, while he was at the county jail, and that "the note does not refer to the witnesses who testified in this case, or to the victims in this case." RT 4804. The note was then read to the jury. RT 4804.

B. Legal Standards

Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. *People v. Smithey,* 20 Cal.4th 936, 973 (1999). Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. *People v.*

Coddington, 23 Cal.4th 529, 588 (2000), *overruled on other grounds, Price v. Superior Court*, 25 Cal.4th 1046 (2001). Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." *People v. Alvarez,* 14 Cal.4th 155, 204, n. 14 (1996).

Evidence Code section 1101(a) prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101(b) provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. *People v. Ewoldt,* 7 Cal.4th 380, 393 (1994). Under section 1101(b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent ...) other than his or her disposition to commit such an act." *People v. Catlin*, 26 Cal.4th 81, 145-146 (2001).

The rule excluding evidence of criminal propensity derives from early English law and is currently in force in all American jurisdictions. *See People v. Ewoldt*, 7 Cal.4th at 392; *People v. Alcala*, 36 Cal.3d 604, 630-631 (1984).

Such evidence is impermissible to "establish a probability of guilt." As the United States Supreme Court stated in *Michelson v. United States*, 335 U.S. 469 (1948):

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. [footnote] The inquiry is not rejected because character is irrelevant; [footnote] on the contrary, it is said to weigh too much with the

> jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Id. at 475-476.

The admissibility of bad character evidence depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. *People v. Catlin*, 26 Cal.4th at 145-146. There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. *See People v. Poulin,* 27 Cal.App.3d 54, 65 (1972). Because such evidence can be highly inflammatory and prejudicial, its admissibility must be "scrutinized with great care." *People v. Thompson,* 27 Cal.3d 303, 315 (1980), *disapproved on another ground People v. Williams,* 44 Cal.3d 883, 907, n. 7 (1988).

Gang-related evidence, like other bad character evidence, is not admissible if it is introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." *People v. Sanchez,* 58 Cal.App.4th 1435, 1449 (1997). Such evidence is admissible if it is relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. *See People v. Ruiz,* 62 Cal.App.4th 234, 240 (1998). In addition, this Court has cautioned that even if gang evidence is relevant, it may have a highly inflammatory impact on the jury, and therefore, "trial

courts should carefully scrutinize such evidence before admitting it." *People v. Williams*, 16 Cal.4th 153, 193 (1997); *People v. Gurule,* 28 Cal.4th 557, 653 (2002) (quoting *People v. Champion*, 9 Cal.4th 879, 922 (1995).

When evidence of other acts is offered to prove a material fact, the court must employ a case-by-case balancing test of the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. *People v. Stanley,* 67 Cal.2d 812 (1967). Evidence of other acts "should be scrutinized with great care ... in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived." *People v. Elder,* 274 Cal.App.2d 381, 393-394 (1969) (quoting *People v. Durham*, 70 Cal.2d 171, 186 (1969)). Thus, other acts evidence is only admissible in very limited circumstances, when the court has carefully weighed the evidence and found that it is so probative in value that it overcomes its inherently strong prejudicial effect on the defense. *People v. Haslouer,* 79 Cal.App.3d 818, 825 (1978). The exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant in cases of doubt, because in comparing prejudicial impact with probative value, the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." *People v. Lavergne*, 4 Cal.3d 735, 744 (1971); *People v. Murphy,* 59 Cal.2d 818, 829 (1963).

C. The Prejudicial Effect Of The Evidence Far Outweighed Its Minimal Probative Value

In appellant's case, there was no dispute that appellant was a member of a gang, that the victims were from a rival gang, and that appellant was a person of stature within his gang who could order others to

do various acts. In his opening statement, appellant's counsel acknowledged that appellant was a member of the 89 Family, a Blood gang. RT 3252. In closing, he acknowledged that appellant had status in the gang as an "O.G.," who commanded respect and could tell others what to do, and that he hated rival gang members. RT 5146, 5186. Both lay and expert witnesses testified in detail regarding the relationship between Crips and Blood gangs, *see, e.g.,* RT 3518, 3538-3540, 4292-4295, 4412, as well as appellant's reputation and status in the gang and his ability to mete out discipline. *See, e.g.,* RT 3560, 3625, 4301-4307, 4410-4411. This testimony was not disputed by the defense. As the prosecutor argued in closing, "the natural enmity between Crips and Bloods was so significant that virtually every witness that came in here told you they are arch enemies." RT 5142.

What was in dispute was not appellant's reputation in the gang or his hatred of the Crips, but specifically, whether or not appellant ordered coappellant Allen to shoot the two Crips at the car wash. The prosecution's evidence in this regard was based primarily on former gang members whose credibility was questionable. As a result, the prosecutor sought to bolster her case by introducing the above-described evidence which demonstrated that appellant was a bad person with a propensity to murder his enemies.

This evidence should not have been admitted under California Evidence Code sections 352 and 1101. Admission of the statements was extremely prejudicial to appellant, while its probative value was slight. Even if the evidence had some relevance to motive and intent, i.e., that appellant hated members of the rival gang and had the ability to order others to do his bidding, there was no connection between these remote, vague, and often ambiguous statements and the circumstances leading to the

shootings in this particular case.

The trial court, however, repeatedly minimized the impact gang evidence would have upon the jury. Here, as in its other rulings regarding gang and bad character evidence discussed below, the court failed to recognize that while perhaps in its own experience as a trial judge gang-related violence and behavior was commonplace, such a constant barrage of evidence would have an emotional impact on jurors. *See, e.g.,* RT 3214 (stating in overruling objection to reference to gang monikers that gang members simply use such names, "It is not a big deal. It is just a fact of life. It is an identifier and has no connotation other than that. I have had folks under oath over and over tell me just that. They recognize people by those names and communicate with people by using those gang monikers and they become a secondary identity"); RT 4276 (remarking in overruling objection to gang expert testimony that "people really are blown out of their socks every day for testifying and giving information, and things of that nature"); RT 5020-5021 (in rejecting defense objections to admission of photographs of gang members holding guns, "that's what gang members do .... are you suggesting that the jury is not aware at this point in time that gang members often possess guns?").

The statements from the *Glass* case that the jury heard showed that appellant hated Crips, that he was an O.G. who did not have to answer to anybody, and that he could command others to do his bidding. As noted, there was already ample evidence in the record with regard to appellant's role in the gang, and his and his gang's rivalry with the Crips. While these statements, untethered from any particular incident, had minimal probative value, they reinforced the portrayal of appellant as a boastful, vengeful person who had a propensity for committing or ordering violent acts against

his enemies. These were statements out of appellant's own mouth, in which he appeared to display callousness and nonchalance about violence and murder, hatred for rival gang members, and an apparent unrestrained ability to do whatever he wanted, including committing or ordering murders, without fear of retribution.

The statements in the *Glass* case were also highly misleading and taken out of context. For example, appellant's comments that he did not have to answer to anybody, that as an O.G., he did not care what others thought, and that he could do what he wanted to do were not made in reference to crimes or violence as was strongly implied to the jury. Rather, they were remarks made in direct response to a question regarding whether he was worried about testifying as a witness on behalf of a member of the Crips. CT 712-713. In addition, the prosecutor presented a statement that appellant did not believe in the gang truce, CT 692, to show appellant's unrelenting hatred for Crips, but it was not revealed to the jury that later in his testimony appellant stated that the reason there would not be a truce was because a member of his gang had just been shot in the head by rival gang members days earlier. CT 703. It was based on this shooting that appellant threatened "to do to Glass' homeboys because they were enemies." *Id.* Also, while appellant was quoted as saying that "beating up a Crip is nothing," CT 704, this was directly followed by appellant minimizing his own beatings: "I've been beat up, you know, and you really don't mean it." *Id.* Finally, and perhaps most significantly, the jury never learned that appellant's anger directed towards the Crips in the *Glass* case likely stemmed from the fact that the defendants were on trial for kidnapping a woman who was an associate of appellant's and the girlfriend of one of his homeboys. RT 685.

Appellant's statements that appeared to condone, if not admit to, the killing of Albert Sutton, a fellow gang member, who was apparently "disciplined" for bringing Crips, including Sutton's brother, into the neighborhood, were extremely prejudicial while having no probative value. Appellant's comments were ambiguous. Appellant merely stated that Sutton had to be "disciplined" for bringing a Crip into the neighborhood. Whether or not Sutton was "disciplined" in some manner by his fellow gang members for his dealings with the Crips, however, he was apparently killed for another reason not mentioned by appellant – for cooperating with the police regarding the murder of his brother. RT 4148. It is not at all clear what appellant meant by "disciplined" or whether appellant was involved in disciplining Sutton. In addition, although there was no evidence connecting appellant to the Sutton murder, the jury was likely to believe, particularly when considered in combination with the statements in the *Glass* case, that appellant had committed or ordered this killing. At minimum, the statements showed appellant's callousness.

The jail note indicating that appellant could have someone killed which was introduced ostensibly to show that appellant knew that his orders would be carried out, as the trial court recognized before it reversed its ruling, was cumulative and far more prejudicial than probative. There was ample evidence in the record to show that appellant was a well-respected member of his gang whose orders would be followed. However, the subject of the threat in the note was not connected to the car wash killings. Indeed, the note was written in October 1995 – four years later. This evidence merely showed appellant to be a person with a propensity to order murders.

There was a high degree of danger that the admission of the bad character evidence described above would confuse the jury. Most

significantly, there was no connection with regard to any of these statements and the crimes at issue – or in fact, to any crimes that were actually committed by appellant. Many of the statements appeared to be mere bravado – particularly those made in the *Glass* case – and had no connection to any crimes. Others were ambiguous and taken out of context to appear more menacing than they really were, such as the statements in the *Glass* case that appellant did not have to answer to others, and his opinion that Al Sutton should be disciplined. Both Sutton and Keith Williams, the subject of the jail note, were fellow gang members, not Crips, and thus the matters involving them had even less relevance to the murder of rival gang members. The jury may have believed, however, that appellant's hatred of Crips, his condoning of the Sutton murder, and his ability to have murders carried out established his propensity to commit the kind of crimes for which he was on trial.

In addition, these statements were remote in time. The car wash killings occurred in August, 1991. Appellant testified in *Glass* almost a year later; his statement about Sutton took place almost three years later; and the jail note was written more than four years later.

Finally, the cumulative impact of this evidence shifted the focus from the properly admitted testimony and turned the trial into what was essentially character assassination. As the trial court initially recognized with regard to the jail note, this was inherently prejudicial evidence. RT 4259-4261. In light of its misleading nature and minimal probative value, the bad character evidence should not have been admitted.

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D. The Admission Of Bad Character Evidence Violated Appellant's Constitutional Rights

The admission of this evidence 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 trial court's erroneous admission of the evidence 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, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. *Estelle v. McGuire,* 502 U.S. 62, 67 (1991); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

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

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. 586, 603-605 (1978); *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980); *Penry* v. *Lynaugh,* 492 U.S. 302, 328 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

E. The Use Of Bad Character Evidence Was Not Harmless

As discussed above, the prosecution's case against appellant was far from overwhelming, and relied on witnesses of dubious credibility to establish the key facts that connected appellant to the shootings. To persuade the jury that appellant was guilty, the prosecutor sought to significantly bolster its case through innuendo and character assassination by introducing extremely inflammatory evidence that portrayed appellant as a person of bad character. None of this evidence had any relevance to the murders, but was likely to inflame the jury and mislead it with regard to appellant's guilt.

The prosecutor conceded during closing argument that her witnesses had "baggage," i.e., that "they've gotten in trouble before, or because they didn't testify perfectly, or because there's something about them that you just don't like because they seem to belong to an organization that you just can't endorse ...." RT 5115. To overcome the flaws in her witnesses' testimony, the prosecutor reminded the jury that "the defendant himself identifies his status in the gang, his feeling about Crips, his hatred for Crips, and his role in the gang as a shot-caller. That's not evidence that anybody else created. That came directly out of the defendant's own mouth. And that evidence is very probative as to who he is and what he's doing." RT 5119. *See also* RT 5232 ("Cleamon Johnson a man of great status, a man who by his own words doesn't answer to other people, other people answer to him.")

No jury instruction cured the harm. The jury was never instructed that this evidence could not be used as evidence of appellant's bad character or criminal propensity. The jury was informed regarding the note, that it could only be considered as it "may bear upon, if at all, Defendant

Johnson's membership and status within the 89 Family Bloods. You may not consider it for any other purpose unless the court later instructs you otherwise." RT 4805. However, no similar instruction was given regarding the other character evidence. Moreover, the instruction regarding the note failed to inform the jury explicitly that it could not consider the evidence to prove that appellant was a person of bad character or one who had a disposition to commit crimes. *See, e.g.,* CALJIC 2.50. The lack of instructions to guide the jury permitted the unrestricted use of the objectionable evidence.

While there is no duty to give limiting instructions sua sponte, *People v. Collie,* 30 Cal.3d 43, 63-64 (1981), their absence from a case where highly inflammatory character evidence is introduced heightens the prejudicial effect of the error. Logically, the absence of limiting instructions enhances the likelihood that the jury will "misuse [the evidence] as character trait or propensity evidence" and "use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense." *People v. Gibson*, 56 Cal.App.3d 119, 128-129 (1976).

Given the weakness in the prosecution's case, its reliance on this inflammatory evidence, and particularly when considered in combination with the other bad character evidence, (*see* Arguments VII-XI), was extremely prejudicial especially in the absence of an adequate limiting instruction. Reversal is required because the error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24.

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VII.

A GANG EXPERT WAS PERMITTED TO PROVIDE OPINIONS THAT INVADED THE PROVINCE OF THE JURY

The prosecution presented the testimony of Detective Barling, a so-called gang expert, to provide not simply opinions regarding topics typically considered appropriate, such as the culture and habits of gangs, or the rivalries between gangs, but to fill an evidentiary vacuum regarding ultimate facts and to bolster the credibility of witnesses. Barling was permitted to offer as expert opinion that fear of retribution by appellant's gang about which prosecution witnesses testified was legitimate. He also provided testimony – despite his lack of personal knowledge – to corroborate evidence as to the location of guns allegedly kept by appellant. None of this testimony fell within the proper subject area for an expert and it usurped the role of the jury as fact finder. Its admission constituted reversible error.

A. Proceedings Below

The prosecution sought to present the testimony of a police detective, Christopher Barling, as a "gang expert" regarding "a rivalry between the defendant's gang, 89 Family Swans which is a Blood set, and Crip gang members." CT 659. The prosecution's offer of proof was essentially the prosecution's theory of the case, which she was having trouble proving through lay witnesses:

> I want to elicit from him the manner in which 89 Family operates; which is the fact that Mr. Johnson is a person who occupies a position of great respect; that he is a person who is able to get his business done; that he uses other gang members and other gang members do things for Mr. Johnson to gain respect in the neighborhood; that Mr. Johnson is somebody

> who is feared by members of the gang because of his position of respect; that Mr. Allen had returned to the neighborhood after a short period – after being out of the neighborhood; and that part of the way that a gang member reenters the neighborhood and regains respect is to go on missions; that this was in fact a mission; that it had all of the markings of a mission; that there was a particular location in the 89 neighborhood where guns were known to be kept; that that location was the pigeon coop in the back of the Johnson's yard; that what Mr. Jelks testified to regarding Mr. Johnson's home being a place where people in the neighborhood, specifically members of the gang would hang out, is something that he saw, he heard, and he knew as a consequence of having been out there on the streets for a number of years.... That 89 Family and East Coast Crips across the street were arch rivals; that this was a bitter rivalry that had gone on for a period of time; and that – I expect Detective Barling could testify as to the gang implications of a killing in the middle of the day on a major thoroughfare, which was a boundary line between the East Coast Crips and the 89 Family Bloods.

RT 4266-4267. Finally, the prosecution described Barling's opinion, "that in his view as a gang expert in the context of 89 Family and 89 Family alone, that the concerns about retribution voiced by the witnesses were in his view legitimately based." RT 4268.

Appellant and his coappellant objected to much of this proffer. While the defense did not dispute that a gang expert could testify regarding gang boundaries, gang rivalries, and gang membership, they argued that it would be improper for the expert to testify about this particular incident – that it was a mission, and had all the markings of a mission. RT 4269. As

appellant's counsel put it, this was a conclusion and "being a police officer, doesn't provide a basis to present this type of information to the jury." RT 4269.

Appellant also objected to any testimony from the gang expert regarding whether or not guns were kept in the pigeon coop, as either hearsay or as calling for a conclusion. RT 4269. As counsel put it:

> It's offered to prove that specific fact. I think that if the witness has had a situation where he's seen the guns in there he could testify to that. If he has conducted a search warrant at the house and guns have been recovered, I think he could testify to that. But just to offer up his opinion, or the statement that guns were known to be kept in the pigeon coop sounds to me like inadmissible material.

RT 4270.

Appellant further claimed that the expert should not be permitted to testify that the fear of retribution that the witnesses claimed to have was real. Counsel noted that the witnesses had testified to their fear: "it's been a steady source of repetition with each witness," and "for this witness to come in and under the guise of a gang expert say that it's real, it seems to me that that's a conclusion on his part" and not within the purview of a gang expert. RT 4270. Coappellant's counsel agreed. RT 4271.

The trial court ruled that the expert may "testify as to his knowledge of the defendants in this case, and may render an opinion .... re Mr. Johnson's position in that group. He may render opinions ... whether Johnson is a respected member by other gang members. Whether he has a reputation for being the type of person wherein others will do things for him at his behest.... [and] that Mr. Johnson is feared, that people are scared of Mr. Johnson." RT 4273-4274. The expert was also permitted to testify

about fears of retribution prosecution witnesses had expressed and whether or not such fears were hollow. RT 4276.

The trial court held, however, that the expert could not opine "that in this case what happened was Mr. Allen was sent out by Mr. Johnson to do a killing as part of some sort of mission." RT 4274. The expert, however, could provide a description of a "mission." RT 4274.

In addition, the prosecution was permitted to elicit "an opinion that sometimes when folks are absent and then return they are expected to, or choose to do things for the gang to sort of get back in their good standing, without reference to his opinion that that's what Mr. Allen did here." RT 4274. "You may elicit from him, if he knows it, that Mr. Allen was absent in fact for some period of time from that neighborhood, without saying that Allen was in the Youth Authority at the time." RT 4274.

The trial court also held that the fact that appellant's home was a meeting place was a proper subject for expert testimony, that the witness could testify to the gang rivalry, and the significance of a bold killing in the middle of the day on a thoroughfare that is the dividing line between various gangs. RT 4275-4276.

The court also ruled that the expert could testify regarding the legitimacy of the witnesses' fears of retribution, noting that although the witnesses testified about their fear, it was suggested effectively by the defense that the witnesses were liars who feared the police, and therefore "the jury might need a little testimony about that."

As the trial court stated:

> It's easy to claim fear and, you know, I don't know how the jury assesses the reality or unreality of those claims without knowing a little bit about what really does go on, and the

> fact that people really are blown out of their socks every day for testifying and giving information, and things of that nature. Because it is true, and I think that hearing it from gang members is one thing. You point out they are not always the most credible of witnesses. And hearing it from somebody else is an all together different matter.

RT 4276.

In a hearing pursuant to Evidence Code section 402, Detective Barling testified that he had heard from members of the gang as well as neighbors that guns were stored in the pigeon coop but had no first hand knowledge. RT 4280. The defense argued that Barling should not be permitted to conclude that guns were kept in the pigeon coop based on hearsay and that such an opinion was beyond the witness's expertise. RT 4282. Remarkably, the court held that Barling could testify that in his opinion guns were stored in the pigeon coop. RT 4284.

At trial, Detective Barling was qualified as the prosecution's gang expert. He testified generally regarding the 89 Family and its rivalry with Crips gangs. RT 4289-4290, 4292-4295. He testified about gang culture, including the concept of "respect," RT 4296-4298, the meaning of a "mission," RT 4298-4299, discipline within the gang, RT 4305, and hand signs, tattoos, and graffiti. RT 4319-4320.

Barling's testimony then ventured far beyond general information regarding gang habits and culture. He identified appellant and coappellant as members of the 89 Family, and testified as to their monikers: "Big Evil" and "Fat Rat." RT 4299-4301. Barling testified that appellant was a shot-caller, who directed missions, and that he was not only respected but also feared. RT 4306, 4326.

Barling then testified about fear in the community and that people were afraid to report gang-related crimes in the neighborhood for fear of retaliation. RT 4312. He claimed that the fact that an individual (i.e., appellant) was in custody did not preclude him from ordering retaliation from jail. RT 4312. According to Barling, the 89 Family disdained people who cooperated with the police. RT 4313. He repeatedly claimed that the fears of retribution expressed by witnesses to gang homicides were legitimate. RT 4313, 4314. Barling testified that the 89 Family would rather see "snitches" dead than have them testify. RT 4317.

Barling was then asked about specific witnesses, and testified that he spoke with Connor, Jelks, and James, all of whom expressed fear regarding retribution from the 89 Family. Barling opined that their fears were legitimate, and that they feared retribution from the gang, and from appellant, in particular, and did not fear the police. RT 4324-4326.

Barling also testified that the 89 Family kept guns in a pigeon coop at appellant's residence. RT 4314-4315

B. The Gang Expert's Testimony Regarding The Fearfulness Of Witnesses Was Improper

As a general rule, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact ...." Cal. Evid. Code § 801(a). Additionally, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Cal. Evid. Code § 805. This rule, however, "does not permit the expert to express any opinion he or she may have." *People v. Killebrew*, 103 Cal.App.4th 644, 651 (2003).

> Undoubtedly there is a kind of statement by the witness which amounts to no more than an

> expression of his general belief as to how the case should be decided .... There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.

Id. (quoting *Summers v. A.L. Gilbert Co.,* 69 Cal.App.4th 1155, 1182-1183 (1999)).

In *People v. Gardeley*, 14 Cal.4th 605, 617 (1996), this Court concluded that "the subject matter of the culture and habits of criminal street gangs" can be the appropriate subject of expert testimony pursuant to Evidence Code section 801. The admission of such testimony may be admissible when the testimony is used to educate the trier of fact "concerning territory, retaliation, graffiti, hand signals, and dress." *People v. Valdez*, 58 Cal.App.4th 494, 506 (1997); *see also People v. Ferraez*, 112 Cal.App.4th 925, 930 (2003). In *Gardeley*, the expert permissibly testified on the primary purpose of the gang in question, and that the actions for which the defendants were being prosecuted were gang related. *Id.* at 612-613.

Gardeley, however, is not authority for allowing officers who testify as gang experts to state any opinions they may have about gangs and gang activities. *See People v. Killebrew*, 103 Cal.App.4th at 654. While it may be appropriate to admit evidence regarding gang culture and habits to provide the jury with some understanding of gang actions and to put the crimes in context, this does not "bestow upon an expert carte blanche to express any opinion he or she wishes." *Summers v. A.L. Gilbert Co.*, 69 Cal.App.4th at 1178. Indeed, "testimony that a specific individual had specific knowledge or possessed a specific intent" is not the proper area of

gang expert testimony. *People v. Killebrew*, 103 Cal.App.4th at 656-658, and cases cited therein.

In *Killebrew*, the defendant was convicted of felony conspiracy to possess a handgun after members of his gang were involved in a drive-by shooting. The prosecution's theory was that the shooting would generate retaliation, which would have compelled the occupants of three vehicles to conspire to possess the gun that was recovered. The prosecution relied heavily on the expert's testimony, which went far beyond a general discussion of gangs and gang psychology. The expert testified, for example, on the subjective knowledge and intent of the occupants of the car, opining that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." *Id.* at 652.

The court of appeal found this testimony to be improper and inadmissible. The court noted that testimony regarding the "knowledge and intent" of each occupant was much different from "expectations" of gang members in general when confronted with a specific action. *Id.* at 658. The court recognized that the expert testimony was "the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided." *Id.* The court noted:

> Testimony that a gang would expect retaliation as a result of a shooting such as occurred at Casa Loma Park, that gangs would travel in large groups if expecting trouble, that in a confrontation more than one gang member may share a gun in some identified circumstances, and that oftentimes gang members traveling together may know if one of their group is armed, would have been admissible. Beyond that, [the gang expert] simply informed the jury

> of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

Id. at 658.

Similarly, in appellant's case, while Detective Barling could (and did) testify that gang members who cooperate with law enforcement are considered snitches and are often the subject of retaliation, it was impermissible for him to testify about the subjective beliefs of the witnesses – that appellant was feared and that the fears expressed by various witnesses were legitimate. Barling specifically stated that the three principal prosecution witnesses, Connor, Jelks, and James, all of whom sought to explain inconsistencies in their testimony with the fact that they had been fearful of retribution from the 89 Family, feared the gang and not the police, and that their fears were genuine. RT 4324-4325.

As in *Killebrew*, this type of testimony regarding the specific state of mind of individuals was irrelevant and improper. In essence, the prosecutor presented a police officer who vouched for the credibility of her witnesses. It is impermissible, however, for the State to place the prestige of the government behind a witness. *See People v. Sergill*, 138 Cal.App.3d 34 (1982) (police officer not qualified to testify regarding truthfulness of one who claimed to be victim of crime); *cf. People v. Fierro*, 1 Cal.4th 173, 211 (1991) ("Impermissible 'vouching' may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony"); *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) ("the government may not vouch for the credibility of its witnesses, either by putting its own prestige

behind the witness, or by indicating that extrinsic information not presented in court supports the witness's testimony").

In addition, the officer provided evidence that appellant was a shot-caller in the gang who was a dangerous individual with a propensity for violence and that he was not only feared by others, but that such fear was reasonable. This evidence was extremely inflammatory. As in *People v. Bojorquez*, 104 Cal.App.4th 335 (2002), the expert's repeated references to the gang's criminal activity "tended to ascribe guilt of that conduct to appellant," *id.* at 344-345, and "made it a near certainty that the jury viewed appellant as more likely to have committed the violent offenses charged against him because of his membership in the [] gang." *Id.* (quoting *People v. Cardenas*, 31 Cal.3d 897, 906 (1982)); *see also People v. Pinholster*, 1 Cal.4th 865, 945 (1992) ("[e]vidence of gang membership is considered prejudicial because it tends to establish criminal disposition"). This testimony was cumulative, and far more prejudicial than probative, and therefore should have been excluded. Cal. Evid. Code § 352.

C. The Gang Expert's Testimony Regarding Where Guns Were Stored Was Based on Hearsay

Freddie Jelks testified that appellant went to the back of his residence to a pigeon coop where guns were stored, retrieved an Uzi, and gave it to coappellant Allen who proceeded to commit the murders. RT 3544-3545, 3555. This was obviously critical evidence which, if believed, demonstrated that appellant had aided and abetted the crime. Detective Barling corroborated Jelks's testimony, stating that weapons were in fact stored in the pigeon coop. RT 4315. Barling's testimony, however, was not based on first-hand knowledge but on hearsay; he did not personally see weapons in the coop, but had heard from other gang members and

neighbors that guns were stored there. RT 4280.

As discussed above, just because an expert is qualified to testify does not mean that the expert has carte blanche to render opinions about any and all subjects. Expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Cal. Evid. Code § 801(a). This Court has held that:

> "[a]n expert may generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably ... be relied upon' for that purpose. (citations omitted) On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, '"under the guise of reasons,"' the expert's detailed explanation '"[brings] before the jury incompetent hearsay evidence."'"

People v. Catlin, 26 Cal.4th at 137 (quoting *People v. Montiel*, 5 Cal.4th 877, 918 (1993)).

The fact that the officer may be an expert on gangs does not provide him with special expertise with regard to determining where weapons were stored. A gang expert may appropriately testify based on conversations with gang members and personal investigation regarding opinions within his expertise, such as the nature of criminal activity of a particular gang, *People v. Gardeley*, 14 Cal.4th at 620, or the general characteristics of certain gangs. *People v. Olguin*, 31 Cal.App.4th 1355, 1384-1385 (1994). Whether or not appellant possessed weapons in a pigeon coop at his residence, however, does not require any special expertise, and the officer's testimony based on hearsay and under the guise of expert opinion should

have been excluded. *See People v. Killebrew*, 103 Cal.App.4th at 659 (expert testimony that individuals were gang members which was based on hearsay was inadmissible). This testimony was far more prejudicial than probative. It not only bolstered the testimony of Freddie Jelks, but provided independent evidence, cloaked in the authority of not only a law enforcement officer, but one deemed by the court to be an expert, that appellant provided the murder weapon to the shooter.

D. The Admission Of Gang Expert Testimony Violated Appellant's Constitutional Rights

The admission of gang expert testimony usurped the jury's role as fact finder, rendered the trial fundamentally unfair, lightened the prosecution's burden of proof, unduly inflamed the jury, deprived appellant of his right to confront and cross-examine witnesses, undermined the need for heightened reliability at all stages of a capital case, and constituted an arbitrary deprivation of appellant's liberty interest in the application of state evidentiary rules, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

E. The Admission Of Gang Expert Testimony Was Prejudicial

The prosecution's case relied in large part on witnesses whose credibility had been called into question based on their initial reluctance to cooperate with law enforcement, their custodial status, and the disparity between their testimony at trial and their prior statements. The prosecution sought to demonstrate that any recalcitrance or inconsistency demonstrated by these witnesses was based on fear of retribution from appellant and his fellow gang members, and not – as the defense attempted to show – due to the fact that they had falsely inculpated appellant out of their own desires for leniency and favorable treatment from law enforcement.

Carl Connor, who at trial denied knowledge of appellant's involvement in the crime and was contradicted by his prior statements and testimony, testified that he was afraid that by testifying he would be labeled a snitch and thereby put his family in danger. RT 3382-3385. Freddie Jelks denied that he received any favorable treatment by law enforcement, RT 3684, and claimed that any reluctance on his part to provide information to the police was due to his fear of retribution for being a snitch. RT 3733. Marcellus James also testified that initially he failed to give all the information he knew to the police because he was fearful of gang retaliation. RT 4080-4081.

In her opening argument, the prosecutor stressed that the recalcitrance of her witnesses or the inconsistency in their testimony was due to fear of retribution from appellant. *See* RT 5123-5125, RT 5131-5134, 5136-5137. The defense countered that the witnesses falsely incriminated appellant out of fear of the police and/or to secure some benefit for themselves. *See, e.g.,* RT 5163-5174.

In closing, the prosecutor again focused on the fear of retribution as an explanation for any inconsistencies and to bolster the credibility of the witnesses. She argued that Connor was "pressured by the defendant" and "fearful" he would end up murdered. RT 5221. She admitted Connor was "evasive" but contended that he had reason to be. She concluded that the jury must decide whether he would risk "lying about something and somebody that could cause him to get killed." RT 5221. Next she denied that Jelks received any benefit for testifying, and argued that he did not come forward initially because of fear and that he must be deemed credible given that he testified "against somebody who he was afraid of." RT 5223. She argued that Marcellus James was not straightforward with the police

originally and appeared reluctant on the stand because he knew what would happen if he cooperated. RT 5223-5224.

The prosecution's argument that the witnesses should be believed was given substantial credence by the testimony of an expert who opined that the witnesses were indeed telling the truth when they sought to explain their reluctance to testify, and that whatever discrepancies there were between their various statements was a product of fear of appellant and his gang. This testimony unfairly skewed the evidence in the prosecution's favor and supplanted the jury's factfinding role.

The critical importance of these witnesses to the prosecution's case rendered admission of the testimony of a police officer who vouched for their credibility and purported to corroborate their testimony highly prejudicial. In addition, the presentation of inflammatory gang evidence essentially without limitation was also harmful. Evidence regarding the violence committed by appellant's gang of which appellant purportedly was the shot-caller, and the provocative testimony about fear engendered by appellant was cumulative, and served to reinforce in the jury's mind that appellant was a person of bad character, with a propensity to commit violent acts. As with Argument VI, the absence of a limiting instruction increased the likelihood of prejudice.

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VIII.

THE TRIAL COURT PERMITTED THE PROSECUTION TO INTRODUCE GRAPHIC EVIDENCE OF GANG VIOLENCE THAT WAS UNRELATED TO THE CHARGED OFFENSES

As discussed in Argument VII, the prosecution repeatedly sought to bolster the credibility of its recalcitrant and inconsistent witnesses with evidence that the witnesses were afraid of retribution from the 89 Family, and particularly from appellant. To do so, the prosecution not only presented evidence from the witnesses themselves regarding their fear and from a gang expert, who offered his "expert" opinion that witnesses had reason to be fearful, but also introduced evidence that a woman had been killed for testifying against a member of a gang friendly to the 89 Family. This evidence was irrelevant, cumulative, highly inflammatory and far more prejudicial than probative. Its admission violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights and requires reversal.

A. Proceedings Below

While in prison, appellant had a telephone conversation with fellow 89 Family member Reco Wilson which was taped by law enforcement. The prosecution sought to present the conversation to appellant's jury to show that appellant had ordered Wilson to murder Georgia "Nece" Jones, who was an eyewitness to a murder allegedly committed by a member of a gang friendly to the 89 Family. Several days after Wilson spoke with appellant, Wilson shot and killed Jones. CT 726-728. The defense argued that this was inadmissible character evidence and that its admission would be extremely prejudicial. RT 4722, 4731. The trial court agreed with the defense that "you couldn't think of a more prejudicial situation than putting

in another murder in a murder trial."[25] RT 4747.

During the testimony of Carl Connor, however, the prosecutor was permitted to put before the jury evidence of the Jones murder together with the strong implication of appellant's alleged involvement.

As discussed above, Carl Connor claimed to be an eyewitness to the car wash shootings. He testified that he saw coappellant approach the victims, shoot into the car, and walk away. RT 3344-3349, 3358-3359. At trial, he denied knowledge of appellant's involvement in the murder, which contradicted his grand jury testimony and police statement in which he claimed that coappellant went to appellant's house after the shooting, and his statements to the police in which he claimed that coappellant went to appellant's house prior to the shooting to retrieve a gun. RT 3364, RT 3377, 3379. In addition, as discussed in Argument XIII, there were many other inconsistencies in Connor's testimony.

In an attempt to bolster Connor's credibility and reconcile the discrepancies between his testimony at trial and his prior statements, the prosecutor sought to present evidence that Connor was afraid of retribution if he testified against appellant. Thus, the prosecutor asked Connor whether he feared for his safety if he identified appellant. RT 3382. Connor initially denied being fearful. RT 3382. He was then asked if he was aware of Nece Jones, and what happened to her. Over objection, Connor replied

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[25] The trial court limited introduction of the tape at the guilt phase to a brief excerpt which merely demonstrated appellant's status in the gang and his ability to direct or control others, without any implication of another killing. RT 4749-4750. It does not appear that the excerpt was introduced at the guilt phase. As discussed below in Argument XVII, a fuller version of the tape as well as additional evidence regarding the Jones murder was admitted at the penalty phase.

that he knew she had testified against somebody who was part of the 89 Family and was killed. RT 3383.[26] Connor then admitted that, in fact, he was afraid for his family. RT 3384. He testified that he was afraid that either he or a member of his family could be shot and killed because of his testimony. RT 3385. Connor admitted that he previously testified as a witness in the Nece Jones murder case and received a reward for his testimony. RT 3389. Detective Sanchez confirmed in her testimony that Connor received a monetary award for offering information and then testifying in the case. RT 3974-3977.

B. The Trial Court Erred In Allowing Gang Evidence Regarding An Unrelated Murder

As discussed above, evidence that a defendant committed an uncharged crime or other act, i.e., character evidence, is admissible when "relevant to prove some fact (such as motive, opportunity, intent ...) other than his or her disposition to commit such an act." *People v. Catlin*, 26 Cal.4th at 145-146. However, because such "other crimes" evidence can be highly inflammatory and prejudicial, its admissibility must be "scrutinized with great care." *People v. Thompson,* 27 Cal.3d at 315. To be admissible, other crimes evidence must not only be relevant, it must "shed great light." *People v. Nible*, 200 Cal.App.3d 838, 848 (1988).

Gang evidence, like other bad character evidence, is not admissible if introduced only to "show a defendant's criminal disposition or bad

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[26] The court gave a limiting instruction: "Ladies and gentlemen, the reason the court is allowing this in over the objection of relevance is it is not so the jury will have any particular knowledge of what happened to Nece, or anybody else, but how it may bear upon this witness' testimony and why he has made certain statements, his demeanor or reluctance." RT 3383-3384.

character as a means of creating an inference the defendant committed the charged offense." *People v. Sanchez,* 58 Cal.App.4th at 1449 (citations omitted); *People v. Ruiz*, 62 Cal.App.4th at 239-240. Moreover, even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, "trial courts should carefully scrutinize such evidence before admitting it." *People v. Williams*, 16 Cal.4th at 193; *People v. Gurule,* 28 Cal.4th at 653 (quoting *People v. Champion*, 9 Cal.4th at 922).

The primary focus of this careful analysis is to ensure that the evidence is not offered to prove character or propensity and that its practical value outweighs the danger the jury will nevertheless view it as evidence of criminal propensity. Here, the trial court recognized that the evidence of the Jones murder was extremely prejudicial, yet it admitted the evidence despite its slight probative value. Moreover, given the context in which the evidence was presented, the jury undoubtedly was led to believe that appellant was responsible for Jones's murder.

Evidence that a witness who testified against a gang member in an unrelated case was then murdered may have had some probative value to Connor's fear of testifying. The probative value, if any, was slight. Connor did not testify that he was afraid of testifying because of what happened to Nece Jones, but only that he was aware that Jones was killed for being a witness. In fact, Connor claimed to have been an eyewitness to the Jones murder and testified in that case. RT 3386. On the other hand, this evidence was highly prejudicial to appellant given the strong implication that appellant was involved in the murder of Jones.

The inference that appellant was responsible for the Jones murder was a result of the manner in which the prosecutor questioned Connor, asking him about the Jones murder immediately after asking him if he was

afraid about testifying against appellant. RT 3382-3383. Adding to the prejudicial effect of this evidence was the testimony of Detective Barling that appellant was a shot-caller, who directed missions, and that he was not only respected, but feared. RT 4306, 4326. Other witnesses also testified that appellant was a shot-caller who could order a mission. RT 3624, 3625. Thus, if a witness was killed because she testified against a member or friend of the 89 Family, the jury likely would believe that appellant had given the order.

When other crimes evidence is received, its relevance and probative value must be examined with care because it is so inherently prejudicial. It is to be received with extreme caution, and all doubts about its connection to the crime charged must be resolved in the accused's favor. *People v. Alcala*, 36 Cal.3d at 631. "Even where evidence of other crimes is relevant on some theory other than the accused's criminal disposition, its prejudicial effect is so great that it still may not be admissible. The court must inquire whether such evidence is cumulative and whether its probative value outweighs its prejudicial effect." *People v. Smallwood*, 42 Cal.3d 415, 429 (1986). As the prejudicial effect of such evidence is so high, "uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded." *Id.* at 429 (citing *People v. Thompson*, 27 Cal.3d at 318); *see also People v. Alcala*, 36 Cal.3d at 631-632.

Here, the court acknowledged that evidence of appellant's alleged involvement in the Nece Jones murder was more prejudicial than probative and thus excised the contents of a telephone call that arguably connected appellant with the murder. But by permitting Carl Connor and Detective Sanchez to testify that Jones was killed by the 89 Family, in the context of

Connor's testimony regarding whether or not he feared appellant, and the undisputed evidence that appellant was the shot-caller in the gang, the jury would not have missed the clear implication that he was responsible for Jones's death. The limiting instruction given by the court made the connection more explicit, informing the jury that the Jones murder was relevant to Connor's fear of testifying against appellant.

This evidence was inadmissible as irrelevant, more prejudicial than probative, and improper character evidence in violation of California Evidence Code sections 352 and 1101. The emotional impact of this evidence unfairly prejudiced and inflamed the jurors against appellant, and its admission infected the trial with unfairness and lightened the prosecution's burden of proof in violation of appellant's rights to due process, a fair trial and impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and analogous provisions of the California Constitution. The introduction of another murder without permitting appellant an opportunity to challenge the evidence violated appellant's Sixth and Fourteenth Amendment rights to due process and to confront and cross-examine witnesses. The trial court's failure to apply the California Evidence Code in a non-arbitrary manner also violated appellant's liberty interest in violation of due process. In addition, the introduction of this evidence infringed upon appellant's right to a reliable determination of guilt and penalty as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the California Constitution.

Given the closeness of the case and the inflammatory nature of this evidence, its admission, particularly in combination with the other bad character evidence discussed in Arguments VI, VII, IX, X and XI, was

prejudicial. The prosecution's case was based on the testimony of former gang members and associates who claimed that appellant, as the shot-caller of the 89 Family, had ordered coappellant to kill two members of the rival Crips gang. While evidence of appellant's status in the gang was not contested, the credibility of the prosecution witnesses was the critical issue in the case. Evidence that a witness to an unrelated murder was killed by appellant's gang, a killing which was imputed to appellant, was extremely damaging to the defense case in that it confirmed for the jury that appellant was capable of ordering a murder and thus, made the prosecution's case more believable. Thus, admission of evidence regarding the murder of Nece Jones was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24.

IX.

THE TRIAL COURT REFUSED TO LIMIT THE PROSECUTOR'S PERSISTENT EXPLOITATION OF APPELLANTS' MONIKERS

A. Proceedings Below

Appellant's gang moniker was "Evil" or "Big Evil," and coappellant's was "Fat Rat." There was no issue in dispute in this case as to whether appellants used these monikers or whether they were in a gang. The prosecutor admitted the lack of any probative value with regard to the monikers. Nevertheless, she strongly urged that appellants' monikers be used during the trial. Appellants objected. CT 637-640.

Appellant's counsel argued that the use of these monikers would violate the prohibition against character evidence as contained in California Evidence Code section 1101(a), and that the negative connotation of the word "evil" would unduly inflame the jury. Under Evidence Code section

352, appellant contended, there was no probative value to referring to appellant as "Evil,"or "Big Evil," and that such reference only served to inflame the jury and to prejudice appellant. RT 3208-3211.

Appellant's counsel pointed out that identity was not an issue in the case and "[t]here is never going to be the defense here presenting to the jury when somebody is talking about Mr. Johnson that they are talking about somebody other than the gentleman right here in court who is the defendant in this case." RT 3210-3211. As counsel put it, the witnesses were quite capable of using appellant's proper name, and "to use another name is simply to try to smear him and present a prejudicial effect to the jury to lead them to find a verdict of guilty based not on the facts of the case, but on inflammatory and prejudicial references." RT 3211. Coappellant's counsel added that under Evidence Code section 352, "it is a typical hard core trick to keep ramming gang names into the jury so that they are going to get that intimidation and prejudice toward the defendants." RT 3212.

The prosecutor claimed that witnesses referred to appellant by his gang moniker, and that appellant himself used it. RT 3207. She argued that witnesses used the monikers rather than given names of appellant and coappellant, and "to saddle the witnesses with the responsibility to try to remember what these individuals' given names are, I am talking about all the witnesses, civilian, secret or otherwise, is an undue burden and an attempt to cloud the truth and impose on their credibility." RT 3213.

The court found that the names had "some relevance." RT 3214. Without reference to the facts of this case, the court noted, as a *general* matter, that gang members use monikers and are often known by witnesses only by those monikers rather than their given names:

In other words, if you know somebody as Big

> Evil, that is his name. That is what he goes by. It is not a big deal. It is just a fact of life. It is an identifier and has no connotation other than that. I have had folks under oath over and over tell me just that. They recognize people by those names and communicate with people by using those gang monikers and they become a secondary identity.

RT 3214.

The court acknowledged that the problem here concerned the derogatory and inflammatory nature of the name, rather than the fact of a gang moniker per se. RT 3215. However, the court quickly dismissed this concern largely because it found that appellant had chosen to use the name himself over a long period of time:

> He has seen fit when addressing the world to be addressed as Big Evil and to make himself known as Big Evil. To come into court now and ask to be addressed by witnesses who know him ... as Big Evil and have known him and associate with him as Big Evil imposes an artificial error on this trial and now he is known as Mr. Johnson makes witnesses testify out of their milieu.

RT 3215.

In addition, although not raised by the prosecutor, the court considered that at some point the moniker would come in on the issue of identification as well as circumstantial evidence of gang membership. RT 3216.

The court also noted that it would be excessively burdensome to edit the voluminous exhibits to delete references to the monikers. RT 3216. Again, this was not a point pressed by the prosecutor.

The court concluded that "while it is not the most flattering name, it

is not the type of situation that is going to overly prejudice this jury," and therefore "the relevance outweighs the prejudicial effect, if any." RT 3214-3217.

The court indicated it would admonish the jury that they were not to consider the name for any purpose other than as an identifier. RT 3217.[27] In addition, the court, at least initially, cautioned the prosecutor to limit her use of the monikers in examining witnesses. The court ruled that the prosecutor would be allowed to elicit where necessary testimony that witnesses knew appellants by their monikers, but once the witness had made the identification, the prosecutor was to guide the witness to use the appellants' names and not unduly repeat or emphasize their nicknames. The court stated:

> [T]here is no need to endlessly repeat during questions and as a preface of questions the name over and over and over. The witnesses at some point should be instructed once the

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[27] The admonition to the jury was as follows:

> Ladies and gentlemen, throughout the trial you may hear various gang monikers or neighboring [sic] names referred to by various witnesses. You've heard a couple here, one identified, described as having the nickname of Big Evil and the other as Fat Rat. [¶] You are instructed that you are not to draw any inference from those names. They are simply used as identifiers in the case, and you can certainly consider that testimony on issues relating to identity, who is who, and the relationship to the parties, but you can't draw any inference because somebody's name is Big Evil, Fat Rat, or any other gang names you hear, okay?

RT 3533.

> evidence is in and once we know who is who, you can do it by pointing at the defendants or referring to Mr. Johnson as Mr. Johnson .... At that point any lack of clarity in the mind of the witness should go away. During your questioning I would not expect that you have to 500 times repeat the fact and use it when referring to the defendants, especially when you are referring to them in argument to the court and statements made before the jury where it simply is gratuitous and there is no need.

RT 3217-18.

As discussed below, the prosecutor ignored the court's order almost immediately, and the court did little to restrain the prosecutor's exploitation of appellants' monikers throughout the trial.

B. The Trial Court Failed To Prevent The Prosecutor From Eliciting Repeated References To Gang Monikers

The prosecutor blatantly ignored the court's admonition, repeatedly emphasizing that appellant was known as "Evil" or "Big Evil" and coappellant was "Fat Rat," going well beyond what she claimed was the need to use monikers to avoid witness confusion. The prosecutor often initiated references to the monikers, encouraging witnesses to do the same, and the court simply acquiesced.

The first witness to identify either appellant or coappellant was Carl Connor. He testified that he recognized as the shooter "a guy we call Fat Rat." RT 3346. The prosecutor, instead of following the court's order to minimize references to the appellants' nicknames and steer witnesses towards their true names, did precisely the opposite:

> Q. What was the name that you knew that person by?
>
> A. Fat Rat.
>
> Q. Do you remember what Fat Rat had on?

RT 3347.

At this point, coappellant's counsel asked to approach the bench, and noted "the court's prior ruling about counsel's persistence in using the street name." RT 3348. Only then did the prosecutor have Connor identify coappellant, again, as the person he knew as Fat Rat, and then as Mr. Allen. RT 3349, 3357. Subsequently, when the prosecutor questioned Connor about where coappellant went after the shooting, she repeatedly referred to Connor's grand jury testimony that he saw "Fat Rat" go back to "Evil's" house after the shooting, RT 3364-3367, and to his police statement that he saw "Fat Rat" walk to "Evil's" house prior to and after the shooting. RT 3377, 3379. The prosecutor then asked Connor, "Do you know who Evil is?" and had Connor identify appellant. RT 3380.

The next witness was Freddie Jelks. Jelks initially referred to appellant by his name, "Cleamon Johnson" or "Mr. Johnson." RT 3515, 3520-3521. He referred to coappellant as "Mr. Allen." RT 3529-30. The prosecutor, for no legitimate purpose, then asked Jelks whether he knew "Mr. Allen" by another name, to which he responded "Fat Rat," and asked how long he knew him by that name, to which Jelks responded eight or nine years. RT 3530-3531. The prosecutor then asked whether Jelks knew "Mr. Johnson" by any other name. Jelks replied that he knew him as "Big Evil," and that he knew him by that name for 10-12 years. RT 3531. The prosecutor then asked Jelks if he heard other people refer to appellants by these names, and whether he heard appellants refer to themselves by these names. RT 3531.

Coappellant's counsel then asked to approach the bench, and as with the prior witness, complained about the prosecution's reference to the gang monikers: "The same thing the court cautioned the D.A. about. She's way

overdoing this gang name stuff," pointing out that the witness knew the appellants by their true names. RT 3532. When the court asked the prosecutor the relevance to this line of questioning, it became clear that it had nothing to do with the parties' nicknames. She stated, "I was trying to go directly into what this group of people were doing after Mr. Allen's approach." RT 3532. Appellant's counsel then asked the court to instruct the jury with the admonition specified above. RT 3533. After the admonition, the prosecutor returned to using appellants' true names for the remainder of Jelks's testimony.

After witnesses related to the crime scene and ballistics evidence testified, Eulas Wright, an eyewitness to the shooting, testified for the prosecution. During the course of his testimony, Mr. Wright indicated that he recognized appellant from the neighborhood. RT 3883. Although Wright stated that he did not know appellant by name, the prosecutor referred to appellant by his moniker, asking, "did you tell the police that day that you knew Big Evil from the neighborhood?" After an objection, the court asked Wright if he had used the name "Big Evil" when he talked to the police, and Wright responded that he had not. RT 3883-3884.

The next witness who mentioned appellant was Detective Rosemary Sanchez, who testified regarding Carl Connor's statements, in which Connor referred to appellant as "Big Evil" and "Evil," and referred to coappellant as "Fat Rat." *See, e.g.,* RT 3981. Connor's taped statement was played for the jury, and a transcript was provided. Appellant was referred to as "Evil" and coappellant as "Fat Rat." *See* People's Exhibit 22; CT IV Supp. 2:371-387.

Marcellus James testified regarding coappellant's alleged admission to the shootings. The prosecutor asked James, "do you know anybody by

the nickname of Fat Rat?," RT 4041, and proceeded to refer to coappellant by that name during her questioning of James. RT 4041-4042. Coappellant's counsel made another objection, which was overruled. RT 4042. James identified appellant as "Evil," but instead of the prosecutor directing James to refer to him as "Johnson," asked, "and where is Evil sitting?" RT 4046.

The prosecutor questioned Detective McCartin about his interview of Marcellus James. After McCartin testified that James stated that "Mr. Allen" admitted to the shooting, the prosecutor asked, "did Mr. James use the name, 'Mr. Allen?'" McCartin responded that James used the name "Fat Rat." RT 4163; *see also* RT 4240.

Christopher Barling, the prosecution's gang expert testified about the 89 Family. Although Barling knew appellant's name was Johnson, and coappellant's name was Allen, the prosecutor, for no proper purpose, steered Barling towards using the gang monikers:

> Q. When you talk to members of the 89 Family on the street, do they usually talk to you with people's given names or monikers?
> A. More likely monikers, but sometimes given names depending on the conversation with the person.
> Q. In this particular case, are you familiar with either of the defendants who are on trial?
> A. Yes, I am.
> Q. Drawing your attention to the individual at the far left side of the courtroom. Who is that person.
> A. It is Michael Demone Allen. Fat Rat.
> Q. Have you had any contact with Mr. Allen?
> A. Yes.
>
> ***
>
> Q. Do you recognize the individual seated here, also to my left, in the striped shirt?

A. Yes, I do.
Q. Who is that?
A. That is Cleamon Demon[e] Johnson.

***

Q. Did Mr. Johnson tell you what nickname he went by?
A. Yes.
Q. What name is that?
A. Evil.
Q. Did he go by simply Evil or by another name?
A. Evil or Big Evil.

RT 4299-4301.

Another gang member, Donnie Ray Adams, testified. The prosecutor, again, directly contrary to the court's order, first asked Adams whether he knew appellant by his moniker and only subsequently asked if he knew him by his true name:

Q. While you were a member of 89 did you know an individual who went by the name of Evil?
A. Yes.
Q. Do you know his real name?
A. Yes.
Q. What's his real name?
A. Cleamon Johnson.

RT 4408-4409.

Adams continued to refer to appellant in his testimony as "Evil." When the prosecutor asked a question which referenced "Mr. Johnson," Adams also used "Mr. Johnson" in his answer; when the prosecutor used "Evil," so did Adams. *See, e.g.,* RT 4413-4415. The prosecutor also asked Adams about "Fat Rat." RT 4418.

In addition, the prosecutor introduced prior testimony and intercepted telephone calls from appellant in which he referred to himself and was referred to by others as "Evil" or "Big Evil." *See, e.g.,* RT 4449–4450; CT IV Supp. 2:388-389, 400.

Appellant's mother testified for the defense. Over defense objection, the prosecutor asked appellant's mother whether she has heard her son referred to as "Evil." RT 4974.

The prosecutor's injection of the gang monikers continued unabated at the penalty phase. Marcellus James testified again, with both the prosecutor and witness referring throughout his testimony to appellant as "Evil." *See, e.g.,* RT 6195, 6197, 6207, 6208, 6221.

When another gang member, Keith Williams, testified for the prosecution at the penalty phase, the prosecutor initially asked Williams about "Cleamon Johnson," RT 6319, but then reverted to referring to appellant as "Evil." RT 6321-6322. In fact, after the prosecutor, rather than the witness, referred to appellant as Evil, she asked Williams, "And when I refer to Evil, who is Evil?" RT 6322; *see also* RT 6233.

Appellant's mother testified at the penalty phase. The prosecutor again asked her whether she knew that her son's moniker was "Evil." RT 6761.

Finally, during penalty phase closing argument, the prosecutor's ultimate purpose in flooding the case with references to appellant's moniker became clear – to argue that appellant deserved the death penalty because of his evil nature as characterized by his nickname. The prosecutor argued that appellant was a "malevolent predator," with "murder in [his] heart[] and satan in [his] soul," RT 7480, 7481, and summed up the aggravating evidence against appellant by saying, "we are dealing with a man who has a moniker which is amazingly accurate in its descriptiveness." RT 7465.

C. The Trial Court Abused Its Discretion In Permitting Repeated Use Of Gang Monikers

The prosecution clearly wished to have appellant referred to

throughout the trial as "Evil" or "Big Evil" because the reference provided circumstantial evidence of his bad character – that he was an evil person, or as the prosecutor explicitly stated in her closing penalty phase argument, that he had a moniker that was "amazingly accurate in its descriptiveness." RT 7465. Such references, particularly in combination with the introduction of bad character evidence, served to bolster the prosecution's theory that appellant was capable of ordering the murders in the underlying case and of intimidating witnesses, and ultimately, that he was of such evil character that he deserved to be given the death penalty.

As discussed above, it is impermissible to introduce evidence "of a defendant's evil character to establish a probability of guilt." *Michelson v. United States*, 335 U.S. at 475-476. Moreover, under California Evidence Code section 1101(a), evidence of a person's character or character trait is inadmissible when offered to prove his conduct on a specified occasion.

Thus, gang-related evidence, like other bad character evidence, is not admissible if it is introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." *People v. Sanchez,* 58 Cal.App.4th at 1449. *See also People v. Ruiz,* 62 Cal.App.4th at 240. Moreover, even if gang evidence is relevant, it may have a highly inflammatory impact on the jury, and therefore, "trial courts should carefully scrutinize such evidence before admitting it." *People v. Williams*, 16 Cal.4th at 193. Evidence of a defendant's membership in a gang should not be admitted if only tangentially relevant "because of the possibility that the jury 'will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged,'" (quoting *People v. Williams,* 16 Cal.4th at 193) or "will jump to the conclusion the defendant deserves the

death penalty." *People v. Gurule*, 28 Cal.4th at 653 (citing *Dawson v. Delaware*, 503 U.S. 159 (1992)).

Despite the prosecutor's concession that the monikers had no probative value, and the absence of any disputed issue regarding appellant's identity or gang membership, the trial court held that the monikers were relevant to identification and appellant's gang membership. RT 3214-3216. This was based, however, on the court's general notions regarding gang evidence and had nothing to do with the specific facts of this case. RT 3214. The court also rejected appellant's objection to use of the moniker because it was a name that appellant used himself. RT 3215. This additional reasoning, of course, had nothing to do with whether the monikers had probative value.[28]

In *People v. Contreras*, 144 Cal.App.3d 749 (1983), there was evidence that the crime was committed by a particular gang and that someone matching the defendant's physical description and having the nickname "Fat Johnny" had participated in the crime. The defendant asserted an alibi defense and testified that he was not a member of a gang and did not have the nickname "Fat Johnny." The court found that the defendant's gang moniker was properly admitted because such evidence

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[28] The trial court also noted that as a practical matter it would be unduly burdensome to delete the monikers from the voluminous exhibits. RT 3216. This was not, however, a concern expressed by the prosecution. In addition, the exhibits already had been redacted to protect identities of numerous other witnesses and otherwise cleansed of inadmissible references. It thus would not have been difficult to delete references to the appellants' monikers as well. In any event, even assuming arguendo that the exhibits could not be redacted, it was not the perhaps unavoidable occasional reference to appellant as "Evil," but the prosecutor's ceaseless use of the moniker that was so inflammatory and prejudicial.

was relevant to issues of identity and motive. Here, by contrast, there was no dispute that appellant was a member of a gang, and identity was not in issue. Indeed, the prosecutor did not attempt to argue that the monikers had any probative value, but contended that their use was necessary because certain witnesses knew the appellants only by their monikers.

In *People v. Brown*, 31 Cal.4th 518 (2003), this Court found that the trial court did not abuse its discretion where the court "carefully weighed defendant's concern over the potentially prejudicial effect of the nickname with the prosecutor's assertion that many of the witnesses knew defendant only by that name." *Id.* at 551.

Brown is distinguishable in many respects. First, in *Brown*, the moniker had some probative value in that identity was an issue at trial. Here, neither identity nor any other issue was in dispute in which the monikers would have been relevant. Nevertheless, the trial court, far from carefully weighing appellant's concerns about prejudice, relied on generalities that had nothing to do with the evidence or issues in the case in finding that the monikers were more probative than prejudicial.

In *Brown*, reference to the defendant's nickname, "Bam" or "Bam Bam" was deemed sometimes necessary to render a witness's testimony understandable, but there was "no gratuitous use of, or reference to, the nickname." *Id.* The same cannot be said of this case, where at every opportunity – whether or not it was to clarify a witness's testimony – the prosecutor injected appellants' monikers into the trial. As described above, it was often the prosecutor, not the witness, who referred to the appellants by their monikers, even after the witness identified the defendants by their true names.

In *Brown*, the trial court "instructed the prosecution to minimize its

use [of monikers] in order to reduce any prejudice," and the prosecutor apparently did so. *Id.* In stark contrast, while the trial court in appellant's case initially found that the use of monikers should be restricted, the court acquiesced in the prosecutor's repeated and gratuitous use of monikers throughout appellant's trial.

Also, while in *Brown*, the nickname "Bam," was considered to have "some negative connotations" associated with the sound of gun fire, *id.* at 548, it is hard to imagine a more derogatory name than "Evil," particularly in a capital case. Indeed, the prosecutor attempted to equate appellant's name at the penalty phase with his character in arguing for the death penalty.

The trial court abused its discretion in finding the monikers to be more probative than prejudicial under Evidence Code section 352, and in permitting repeated references to appellants' gang monikers at the guilt and penalty phases of appellant's trial. The monikers had no probative value and were highly inflammatory. Repeated references to appellant as "Evil" or "Big Evil" (and to coappellant as "Fat Rat") constituted improper character evidence in violation of Evidence Code section 1101(a). In addition, the repeated use of monikers lightened the prosecution's burden of proof, and so permeated the trial with unfairness that it violated appellant's rights to due process, to a fair trial, to an impartial jury, and to a non-arbitrary, individualized and reliable sentencing determination, in violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

D. The Prosecutor Committed Misconduct By Violating The Court's Order To Minimize Use Of The Monikers

As discussed above, the court permitted the use of monikers, but cautioned the prosecutor that she was not to elicit testimony regarding gang

monikers, and once the identification was made she should refrain from referring to them. RT 3217-3218; CT 780. It is clear from the record, however, that the prosecutor not only failed to limit her use of the monikers to situations where witnesses initially identified appellants by those names, but she continually exploited the inflammatory nature of the monikers by repeatedly eliciting references to them. It was the prosecutor who often initiated the reference to the moniker, and her questioning encouraged the witnesses to follow suit. As a result, appellant was referred to repeatedly as "Evil," or "Big Evil" throughout the trial.

The prosecutor committed misconduct by violating the court's order and injecting appellants' monikers into the proceedings whenever possible and for no legitimate purpose. As discussed above, references to appellant as "Big Evil" or "Evil" were extremely inflammatory and created an inference that based on such a name, appellant was capable of ordering the murders, and intimidating and disposing of witnesses. At the penalty phase, the prosecutor attempted to link appellant's nickname to his character, by noting that it was "amazingly accurate in its descriptiveness," and arguing that he deserved death because he had "satan" in his soul.

The prosecutor thus successfully permeated the trial with references to appellant as "evil" in violation of the court's order. This misconduct so infected the trial with unfairness that it denied appellant of his right to due process. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 642-643 (1974); *People v. Hill,* 17 Cal.4th 800, 819 (1998). Even assuming the misconduct did not render the trial fundamentally unfair, the prosecutor's use of such deceptive and reprehensible methods violated California law. *See People v. Morales,* 25 Cal.4th 34, 44 (2001).

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E. The Use Of Appellant's Moniker At The Penalty Phase Constituted Non-Statutory Aggravation

The references to appellant as "Evil" or "Big Evil," at both phases of the trial culminated in the prosecutor arguing to the jury that appellant should be sentenced to death because of his evil character. *See, e.g.,* RT 7464, 7480-7481. But evidence of appellant's gang moniker and the improper inference that he had an evil character, in addition to being inadmissible for the reasons discussed above, was irrelevant to any statutory factor listed in Penal Code section 190.3.

Under state law, the prosecution may not present evidence at the penalty phase which is not relevant to the factors listed in Penal Code section 190.3. *People v. Boyd*, 38 Cal.3d 762, 775-776 (1985). It is without question that evidence of a defendant's character is only admissible under factor (k), and it may only be considered as mitigating. *See, e.g., People v. Hardy,* 2 Cal.4th 86, 207 (1992). In *People v. Kipp*, 26 Cal.4th 1100, 1134 (2001), this Court reiterated that "character evidence under section 190.3, factor (k), can only be mitigating, and therefore the prosecution may not introduce evidence of defendant's bad character as part of its case in aggravation at the penalty phase."

Because appellant's alleged "evil" character was not relevant to any aggravating factor, its consideration by the jury violated state law. In addition, the consideration of non-statutory aggravation by the jury arbitrarily deprived appellant of his state-created interest in having his sentence determined by only statutory factors, in violation of due process. *Hicks v. Oklahoma*, 447 U.S. at 346-347.

The jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process," also violated

due process, *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983), and undermined the heightened need for reliability in the determination that death is the appropriate penalty in violation of the Eighth Amendment. *Johnson v. Mississippi*, 486 U.S. at 585.

F. The Repeated Use Of Appellants' Gang Monikers Was Prejudicial

In *People v. Brown*, 31 Cal.4th 518, this Court found use of the defendant's nickname to be harmless because the instances in which the name were used "were brief, mild and factual and could not have been prejudicial." *Id.* at 551.[29] By contrast, the repeated references to appellant as "Evil," or "Big Evil," were extremely inflammatory.

At the guilt phase, together with the introduction of bad character evidence, *see* Arguments VI-VIII, X-XI, the repeated use of the monikers permitted the jury to make an inference that appellant was a person of evil character who was capable of ordering murders and intimidating witnesses. This was particularly prejudicial in this case where the prosecution relied in large part on the testimony of former gang members whose lack of cooperation with law enforcement and inconsistent statements were attributed to fear of reprisals by appellant. To bolster the credibility of witnesses who testified against appellant, it was therefore critical for the prosecution to portray appellant as a person of evil character who could

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[29] In *Brown*, this Court applied the *Watson* harmless error test rather than the *Chapman* test because the issue "concerns the mere admission of evidence that was not particularly inflammatory." *People v. Brown*, 31 Cal.4th at 551 n. 12. Here, where the evidence was extremely inflammatory and as alleged, violated appellant's constitutional rights, the *Chapman* test is appropriate. In any event, given the closeness of the case, the repeated use of gang monikers was prejudicial under any standard.

instill such fear.

At the penalty phase, the prosecutor made the more direct link between appellant's "evil" character and the fact that he deserved the death penalty, stating that appellant's name was "amazingly accurate in its descriptiveness" of his character.

In contrast to the limited use of the defendant's nickname in *Brown*, the manner in which appellant's more inflammatory nickname permeated the proceedings was prejudicial. Reversal of the conviction and death judgment is required.

X.

THE TRIAL COURT ERRONEOUSLY PERMITTED A KEY WITNESS TO TESTIFY THAT APPELLANT SOUGHT TO HAVE HIM KILLED

The prosecution injected into the trial unreliable and extremely inflammatory evidence that appellant had ordered the murder of witnesses. As discussed above, during Carl Connor's testimony, the prosecution elicited evidence that Nece Jones, a witness in an unrelated murder case, was killed for testifying against an associate of the 89 Family. It was also inferred that a fellow gang member, Al Sutton, was killed at appellant's behest. In addition, as will be discussed here, during the testimony of Freddie Jelks, the prosecutor introduced unreliable and unsubstantiated evidence that appellant had ordered that Jelks be murdered for cooperating with the police.

The trial court failed to limit the introduction of prejudicial evidence that was cumulative and had slight probative value. As a result, the trial degenerated into nothing more than an assault on appellant's character, which portrayed him as a gang leader who ordered murders of rivals and

witnesses alike. Individually, and together with the other evidence related to appellant's gang membership, character, and criminal propensity, the admission of the Jelks evidence fatally infected the trial with unfairness and violated appellant's rights to a fair trial, an impartial jury, and a reliable penalty determination.

A. Proceedings Below

Freddie Jelks was a key witness for the prosecution, who provided a link between appellant and the murders. Jelks was not reluctant to testify against appellant, and his direct testimony inculpated both appellant and coappellant in the shootings. RT 3519-3582, 3622-3624. Despite the unequivocal nature of his testimony, the prosecution was permitted to question Jelks on direct examination regarding his fear of being considered a snitch. RT 3629. Jelks was asked what he was afraid of, and Jelks replied, "in a situation like this you talk to the police, you know, it gets back and, you know, you are a dead man." RT 3631. The prosecutor then asked Jelks if anyone in the neighborhood had asked him whether or not he had "snitched" after he talked with the police. RT 3631. Jelks responded that on three occasions this happened. Over hearsay and relevancy objections, Jelks testified that "Face," a person from the neighborhood "said that Evil sent him to find out if I was talking or not." RT 3632. Jelks further testified that Face told him there was "hit" out on him; that he was supposed to get killed. RT 3633. Face told him that "there was a kill on sight order" on him. Jelks testified that he was told the same thing by "B Mike" and "a young lady named Belinda," that "Mr. Johnson wanted them to shoot me." RT 3633, 3644. Jelks testified that he believed what they were telling him was credible and that what they told him made him fearful. RT 3634. Jelks also testified over objection that members of his family had been

threatened. RT 3634, 3638.

As defense counsel argued: "Your honor, I think that it's degenerating into a trial of character assassination of the defendant, rather than the facts related to what happened out there on 88th Street that day. I think that there's some marginal relevance to say that a witness is afraid. I think once he says that, to start going into all these details and to try to present all these facts – " RT 3637. The court responded that the jury was entitled to hear more than that the witnesses are afraid, and then noted, "I guess one of the problems here is your client has led such a colorful and active life, according to what I've read, that some of this is inescapable." RT 3637.

B. Evidence Of Threats To Murder A Witness Was Irrelevant, Cumulative, Unreliable, And Inflammatory

It is true that evidence that a witness is afraid to testify may be relevant to his credibility, and in such circumstances is admissible. *People v. Warren*, 45 Cal.3d 471, 481 (1988); *People v. Feagin*, 34 Cal.App.4th 1427 (1988). Similarly, evidence that a witness is fearful of retaliation may be admissible. *People v. Gutierrez*, 23 Cal.App.4th 1576, 1587 (1994) (citing *People v. Malone*, 47 Cal.3d 1, 30 (1988)). Where relevant to the jury's assessment of a witness's credibility, an explanation for the witness's fear is likewise admissible. *People v. Feagin*, 34 Cal.App.4th at 1433; *People v. Avalos*, 37 Cal.3d 216, 232 (1984); *People v. Gutierrez*, 23 Cal.App.4th at 1588; *People v. Burgener*, 29 Cal.4th 833, 869 (2003).

However, fear of retaliation is not necessarily relevant in every case in which a witness is fearful. Where a witness exhibits no reluctance to testify and there is nothing in the content of their testimony which suggests that they are afraid of the defendant, the fact that they may possess some

fear of the defendant is simply not relevant. It is only when the fear is necessary to explain the witness's bias, recalcitrance, demeanor, or inconsistent testimony that it becomes relevant.

Thus, in *Feagin*, the testimony that the defendant tried to kill the witness was relevant, inter alia, to explain "his reluctance to testify and inconsistent statements ... and his reasons for hiding his face while testifying." *People v. Feagin*, 34 Cal.App.4th at 1434. In *Gutierrez*, threats were deemed relevant to explain why many of the witnesses to a murder had become extremely reluctant to testify. *People v.Gutierrez*, 23 Cal.App.4th at 1586-1587.

In *Avalos*, an eyewitness was reluctant to identify the defendant in court although she had previously identified him at a lineup. This Court held that the witness's fear was relevant to her credibility: "The determination that an explanation of Ms. Martinez's hesitation would be relevant to the jury assessment of her credibility was well within the discretion of the trial court." *People v. Avalos*, 37 Cal.3d at 232.

Finally, in *Burgener*, the defendant had sought to impeach a witness's detailed testimony at the 1988 penalty retrial with her inability to recall details during her earlier testimony at the 1981 guilt phase trial. The witness explained that she had been afraid to tell the truth in 1981 because of threats made against her and her family, and therefore claimed an inability to remember when asked questions during the 1981 proceedings. It was thus the defense that actually brought out the existence of the threats on direct examination; the prosecution on cross-examination was permitted to elicit that the defendant was the source of the threats. *People v. Burgener*, 29 Cal.4th at 868-869.

In appellant's case, there was no indication during direct

examination that Jelks's testimony was in any way impacted by fear of retaliation. On the contrary, as noted above, Jelks was not reluctant to testify, and his direct examination inculpated appellant. Indeed, the prosecutor represented that she believed his testimony was "substantially consistent" with his prior statements and grand jury testimony. RT 3590. Evidence of his alleged fear of appellant was therefore irrelevant. Evidence of the underlying basis for that fear – that he was informed that appellant wanted to kill him and had a "hit" out on him – was simply gratuitous.

While it had little, if any, probative value, evidence that appellant had ordered Jelks to be killed was extremely prejudicial. The evidence did not merely establish that the defendant threatened a witness, but it also showed that appellant had put a "hit" on the witness, and that there was a "kill on sight" order with regard to the witness. Such inflammatory evidence would undoubtedly elicit an emotional response from the jury, based on events that were not a part of the charged offenses.

In addition, Jelks's unsubstantiated testimony regarding the threats was highly suspect for a number of reasons. First, there was no indication that appellant even knew that Jelks was an informant. After Jelks provided information to the police, he testified before the grand jury, with his identity protected. RT 402. The defense efforts at trial to obtain the identity of the grand jury witnesses, including Jelks, were rebuffed until they were disclosed near the time of trial. *See* CT 348-356, 358-370, 437; RT 914-916.[30] Second, there was no evidence of any efforts to kill Jelks despite the

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[30] In September 1995, almost a year after Jelks was interviewed by the police, appellant learned that Jelks had been arrested and asked his mother to find out where Jelks was being housed. CT IV Supp. 2:411-413, 425-426; RT 5028-5032.

so-called kill-on-sight order, which was supposedly relayed to Jelks by the very people who were ordered to kill him. Finally, given the extensive monitoring of appellant's communications while he was in custody, had appellant directed any of his associates to threaten or to kill Jelks, undoubtedly there would be a transcript of the communication. But there were no contemporaneous reports of any threats regarding Jelks and no discovery was ever provided to the defense regarding any such threats. RT 3636.

As discussed above, gang evidence is highly inflammatory and should be introduced with caution. *People v. Williams*, 16 Cal.4th at 193; *People v. Gurule,* 28 Cal.4th at 653 (quoting *People v. Champion*, 9 Cal.4th at 922). Moreover, in this case, the key issue with regard to appellant was whether he ordered a subordinate gang member to commit the murders. Thus, testimony that he had ordered another murder was particularly prejudicial as it demonstrated a propensity to order others to kill. In addition, "evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated." *People v. Warren*, 45 Cal.3d at 481 (citing *People v. Hannon*, 19 Cal.3d 588, 600 (1977); *People v. Weiss*, 50 Cal.2d 535, 554 (1958)).

Given the inflammatory nature of the evidence, the trial court should have undertaken a careful analysis under Evidence Code section 352 before permitting this evidence to be admitted. The balancing process mandated by Evidence Code section 352 requires "consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons

cited in [Evidence Code] section 352 for exclusion." *People v. Wright*, 39 Cal.3d 576, 585 (1985). The prejudice to which Evidence Code section 352 refers is that which occurs when the proffered evidence tends to evoke an emotional bias against a defendant and which has very little effect on the issues. *Id.*

The trial court failed to consider the inflammatory impact of the evidence in comparison to the lack of any probative value. The court simply ruled that the prosecution was entitled to elicit evidence of the witness's fear and the various reasons for that fear without considering that fear was not relevant to the witness's credibility. The court then dismissed any prejudice by inappropriately blaming appellant's conduct: "one of the problems here is your client has led such a colorful and active life ...." RT 3637.

In light of its minimal probative value and unreliable nature, weighed against its extremely prejudicial effects, evidence that appellant threatened to kill Jelks was erroneously admitted in violation of California Evidence Code, sections 352 and 1101. Moreover, the emotional impact of this evidence unfairly prejudiced and inflamed the jurors against appellant, and its admission infected the trial with unfairness and lightened the prosecution's burden of proof in violation of appellant's rights to due process and a fair trial and impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and analogous provisions of the California Constitution. The introduction of evidence that a witness was told by others that appellant ordered the witness to be killed although not offered for the truth of the matter and therefore not technically hearsay, violated appellant's Sixth and Fourteenth Amendment rights to due process and to confront and cross-examine witnesses. The trial court's

failure to apply the California Evidence Code in a non-arbitrary manner also violated appellant's liberty interest in violation of due process. In addition, the introduction of this evidence infringed upon appellant's right to a reliable determination of guilt and penalty as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the California Constitution.

The jury was informed that appellant had ordered the murder of Freddie Jelks for being a witness against him. This did not merely constitute evidence of appellant's bad character and criminal disposition generally, but went to the critical issue in the case – whether appellant had the propensity to order another to commit murder. Significantly, the jury was likely to give credence to this otherwise dubious testimony because, as discussed above in Argument VII, they were told by a gang expert that Jelks's fear of retaliation for his cooperation with law enforcement was legitimate. Given the closeness of the case and the inflammatory nature of this evidence, the admission of this evidence, particularly in combination with the other bad character evidence discussed in Arguments VI, VII, VIII, IX and XI, was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24.

XI.

THE INTRODUCTION OF PHOTOGRAPHS OF GANG MEMBERS WIELDING GUNS WAS OUTSIDE THE SCOPE OF PROPER REBUTTAL EVIDENCE

The trial court permitted the prosecution to introduce under the guise of rebuttal, inflammatory evidence of appellant's fellow gang members wielding firearms. The evidence was not proper rebuttal, had no probative value and was extremely prejudicial. Once again, the court abdicated its

responsibility to carefully weigh the probative value of evidence against its prejudicial effect. The result was the admission of additional evidence which inflamed the jury and rendered the trial fundamentally unfair.

A. Proceedings Below

Various witnesses identified the shooter at the car wash as wearing a black jacket. Willie Clark testified that the shooter was wearing a black windbreaker. RT 3273-3275. Freddie Jelks identified coappellant Allen as the shooter, and testified that at the time of the shooting he was wearing a black windbreaker. RT 3558. Eulas Wright testified that the jacket was a black Raiders jacket. RT 3875.

The defense presented the testimony of James Galipeau, a gang expert, who testified that black Oakland Raiders jackets are associated with Crips, not Bloods. RT 4944-4946. Galipeau agreed that Bloods have been known to wear black windbreakers but not black Raiders jackets. RT 4953, 4954. "If you wore a black Raiders jacket to a shooting, I think you would be identifying yourself as a Crip. You could possibly wear a black windbreaker to a shooting, and you are not identifying yourself as anybody but somebody who has a black windbreaker." RT 4956.

In rebuttal, the prosecution sought to introduce photographs which showed 89 Family members in black jackets: "There are two photographs which depict 89 Family members. One of them is wearing a black windbreaker-style jacket similar to a Raiders jacket, and the other one is a black jacket also similar to a Raiders jacket." RT 5019. One of the photographs, Exhibit 49 – which did not depict appellant or coappellant – showed one man with a black jacket and two other individuals brandishing firearms – one holding a shotgun and another with an SKS rifle. RT 5021, 5022.

As the defense pointed out, the photographs did not contradict Galipeau's testimony, which was that Bloods do not wear Raiders jackets, but may wear black windbreakers. RT 5019.

> Your Honor, they don't contradict the testimony of Mr. Galipeau. Mr. Galipeau said that Bloods don't wear Raiders jackets. He said that anybody could wear a black windbreaker. And there is no photograph of somebody in a Raiders jacket. So, the fact that they have photographs of people in black windbreakers tends to substantiate Mr. Galipeau's testimony, it doesn't rebut it.

RT 5019.

The defense objected to the photographs not only because they constituted improper rebuttal but because they were prejudicial insofar as they showed purported gang members posing with rifles. RT 5020. The defense suggested that the two men with guns could be cut out of one of the photographs, leaving the one individual wearing a black windbreaker, thus eliminating the prejudicial impact of showing the weapons.

The trial court found nothing prejudicial about the photographs, stating that the jury was aware that gang members often possess guns, and permitted the photographs to be introduced. As the court stated, "that's what gang members do." RT 5020. The court refused to take any steps to minimize the prejudicial impact of the photograph by cutting out the men holding guns. RT 5021-5023; *see* People's Exhibits 47-49.

Detective Barling was questioned before the jury about Exhibit 47, which was a collection of 16 photographs of gang members. Barling testified that appellant, who was identified in #3 of the 16 photographs, was wearing a jacket "similar in style to a Raiders jacket." RT 5036. However, on cross-examination, Barling admitted that it was not actually a black

Oakland Raiders jacket. RT 5042.

Barling described Exhibit 48 as a photograph "showing a group of people flashing hand signs, one person with their back towards the picture with an 89 Family black shirt with gang writing on it." RT 5038. As Barling admitted on cross-examination, there was nothing in this photograph that reflected a member of the 89 Family wearing a black Raiders jacket. RT 5042-5043.

Finally, the prosecution asked Detective Barling about Exhibit 49, which allegedly portrayed four members of the 89 Family, one of whom was wearing a black jacket. RT 5039. Again, on cross-examination, Barling conceded that this was not a black Raiders jacket. RT 5043.

B. The Trial Court Erred In Permitting The Photographs Of Gang Members With Guns

The trial court erred in permitting the photographs to be introduced because they were not proper rebuttal evidence. Evidence offered by the prosecution in rebuttal "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." *People v. Daniels,* 52 Cal.3d at 859. Rebuttal evidence "must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." *People v. Fierro,* 1 Cal.4th at 238.

The defense did not present evidence that members of appellant's gang did not wear black jackets, but only that they did not wear black Raiders jackets. In fact, James Galipeau, appellant's expert witness, testified that they had been known to wear black windbreakers. Thus, the photographs showing members of appellant's gang in black jackets did not

counter any new evidence introduced by the defense, and was not proper rebuttal.

In addition to their failure to rebut defense evidence and the lack of any probative value, the photographs of fellow gang members with guns were highly inflammatory and should have been excluded under Evidence Code section 352. This section provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." It applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. *People v. Coddington,* 23 Cal.4th at 588. 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,* 14 Cal.4th at 204, n. 14.

As discussed above, gang evidence has a unique tendency to evoke emotional bias. Where, as here, gang evidence was not in dispute and/or was only "tangentially relevant" it should not have been admitted given its "highly inflammatory impact." *People v. Cox*, 53 Cal.3d 618, 660 (1991). "Erroneous admission of gang-related evidence, particularly regarding criminal activities, has frequently been found to be reversible error, because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability." *People v. Bojorquez*, 104 Cal.App.4th at 345 (citing *People v. Maestas*, 20 Cal.App.4th 1482, 1498-1501 (1993); *People v. Perez*, 114 Cal.App.3d 470, 479 (1981); *In re Wing,* 67 Cal.App.3d 69, 79 (1977)).

The trial court failed to recognize that the evidence had no probative

value. As discussed above, the court repeatedly ignored the likelihood that the jury would be prejudiced by its unrelenting exposure to gang-related conduct and violence. The court blithely rejected defense objections that evidence of photographs with gang members standing defiantly, exhibiting gang signs, and holding guns would unduly inflame the jury. The court remarked, "that's what gang members do .... are you suggesting that the jury is not aware at this point in time that gang members often possess guns?" RT 5020-5021. The court's failure to properly assess the prejudice from the photographs compared to their probative value was an abuse of discretion under Evidence Code section 352.

The improper admission of this evidence as rebuttal unfairly prejudiced and unduly inflamed the jurors against appellant, and its admission infected the trial with unfairness and lightened the prosecution's burden of proof in violation of appellant's rights to due process, a fair trial and impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and analogous provisions of the California Constitution. The trial court's failure to apply the California Evidence Code in a non-arbitrary manner also violated appellant's liberty interest in violation of due process. In addition, the introduction of this evidence infringed upon appellant's right to a reliable determination of guilt and penalty as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the California Constitution.

The photographs of appellant's fellow gang members casually holding guns, together with the onslaught of other unreliable and irrelevant but prejudicial evidence described above in Arguments VI-X, led the jury to believe that appellant was the leader of a murderous gang and was the kind

of person who would commit the charged offenses. Given the closeness of the case and the inflammatory nature of this evidence, its admission was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24.

XII.

THE TRIAL COURT UNDULY RESTRICTED APPELLANT'S ABILITY TO IMPEACH THE PROSECUTOR'S KEY WITNESSES

Two critical witnesses against appellant were Freddie Jelks and Donnie Adams. Jelks's testimony was the linchpin of the prosecution's case, establishing, if believed, that appellant had ordered coappellant Allen to do the shooting, had provided Allen with the murder weapon, and had directed the manner in which the shooting occurred. Adams provided critical corroboration for Jelks, testifying that appellant admitted his role in the murders.

Both witnesses had motives to fabricate evidence against appellant, and undermining their credibility was a crucial aspect of the defense case. However, the trial court's restrictions on cross-examination severely hampered appellant's attempts to demonstrate that the witnesses were biased and unworthy of belief.

The trial court refused to allow Jelks to be cross-examined on the fact that he had been threatened by the police with murder charges if he did not cooperate, and that murder charges were pending against him at the time of his testimony. Instead, the defense was limited to referring to the murder as a "serious charge."

As with Jelks, the defense was not allowed to explore the charges against Adams in any significant detail. Adams had pleaded guilty to a

single federal continuing criminal enterprise charge. The defense was restricted to informing the jury of the single count, and was precluded from eliciting evidence that before Adams entered into his agreement to testify against appellant, he was facing a 14-count indictment with a much higher prison term exposure. The defense was also precluded from asking about other areas relevant to Adams's credibility and bias, including whether he was a drug dealer and whether appellant had accused him of committing murder.

These restrictions, individually and collectively, violated long-standing state law principles as well as appellant's Fifth, Sixth, and Fourteenth Amendment rights to confront and cross-examine witnesses, to a fair trial, and to present a defense, and his Eighth Amendment right to a reliable sentencing determination.

A. The Court's Restrictions On Cross-Examination Violated Appellant's Rights Under State Law And The State And Federal Constitutions

It is well established that "a prosecution witness can be impeached by the mere fact of pending charges." *People v. Martinez*, 103 Cal.App.4th 1071, 1080 (2002). "Such a situation is a 'circumstance to show that he [] may, by testifying, be seeking favor or leniency (citations omitted)." *Id.* (quoting 3 Witkin, Cal. Evidence, Presentation at Trial, § 271, at 343 (4th ed. 2000)). In addition, "the pendency of criminal charges is material to a witness's motivation in testifying even where no express 'promises of leniency or immunity' have been made." *People v. Coyer*, 142 Cal.App.3d 839, 842 (1983).

The jury is entitled to know the nature and extent of the potential charges a witness is facing, and the circumstances underlying the witness's cooperation. As stated in *People v. Pantages*, 212 Cal. 237 (1931):

> It should require neither argument nor authority as the basis for an assertion that if it be established as a fact that by the use of direct or even by veiled threats, or through insinuations, or innuendo, or intimidation, or menace of any sort, or by means of promises of assistance, or of influence to be exerted in his behalf, expressly made, or but ambiguously suggested by or through anyone either actually or assumedly in authority in the premises, or even by an utter stranger or interloper in the proceedings, or by any way, method, or manner whatsoever, a witness be thereby induced either to give false testimony, or to color the truth of his sworn statements – the jury should be placed not merely in possession of the affirmative ultimate fact of the bias of the witness, or his denial thereof, but, if necessary, should hear the basic facts, if any, upon which such conclusion be founded.

Id. at 253-254 (error for the trial court to refuse to permit cross-examination regarding whether witness believed he had been indicted in another state and whether any promises had been made or implied in exchange for testifying favorably for the prosecution).

Under the Confrontation Clause, a defendant has a right to "engag[e] in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). In *Davis v. Alaska*, 415 U.S. 308 (1974), the United States Supreme Court held that the defendant in a burglary case had a constitutional right to cross-examine a crucial prosecution witness about a juvenile burglary adjudication for which the witness was on probation, notwithstanding a state rule making evidence of juvenile adjudications inadmissible. The Court emphasized that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his

testimony are tested," adding that the juvenile's testimony "provided 'a crucial link in the proof ... of [the defendant's] act.'" *Id.* at 316, 317 (citation omitted). "In this setting," the Court concluded, "... the [Sixth Amendment] right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319.

It is true that not every restriction of cross-examination amounts to a constitutional violation, and the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. *See Delaware v. Van Arsdall*, 475 U.S. at 678-679. However, where the defendant can show the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" (*Van Arsdall*, 475 U.S. at 680), the court's exercise of its discretion in this regard violates the Sixth Amendment and the California Constitution. *See People v. Frye*, 18 Cal.4th 894, 946 (1998).

B. The Trial Court Impermissibly Restricted The Cross-Examination Of Freddie Jelks

Freddie Jelks testified at trial that he was at appellant's residence at the time of the shooting, RT 3520, that once it was discovered that there were Crips at the car wash, appellant asked who wanted to "serve them," i.e., shoot them, RT 3542, that after coappellant Allen volunteered, appellant provided him with an Uzi, RT 3545, that appellant directed Allen with regard to how to accomplish the shooting, RT 3557, 3562, that after the shooting, Allen gave the gun back to appellant, RT 3570, and that appellant gave the gun to another person who disposed of it. RT 3570-3571. Jelks confirmed that appellant was a shot-caller and had ordered the shooting. RT 3624-3625. Jelks provided further details regarding the shooting, including Allen's description. RT 3580-3582.

Questions were raised at trial regarding Jelks's credibility. He admitted that he had been smoking marijuana at the time of the incident, which may have impaired his ability to recall events accurately. RT 3525-3536, 3655. In addition, his testimony at trial differed in several respects from his earlier grand jury testimony as well as his statement to the police. *See, e.g.,* RT 3700 (testified at trial to a discussion regarding the owner of the car as possibly being someone named "Baba," but did not so testify before the grand jury) RT 3563, 3708 (testified at trial that Allen was driven to scene but told police that Allen had walked); RT 3573, 3650-3651, 3706-3709 (testified at trial that Angie Williams drove Allen away after the shooting but had not mentioned Angie in previous statements or testimony); RT 3648-3650 (testified at trial that he could see the car wash from appellant's house but denied this to the police).

The jury, however, was precluded from learning the most significant factor in assessing Jelks's credibility – that Jelks initially provided information about the crimes to the police only after they had threatened to arrest him on an unrelated charge of murder.

During the course of the December 6, 1994, interrogation of Jelks, Detective McCartin asked whether Jelks wished to see his kids for Christmas, and suggested that in order to do so he needed to "keep a nice flow of information coming." CT IV Supp. 4:866-867. McCartin then informed Jelks that he had been identified as being involved in the murder of Tyrone Mosley. *Id.* at 871-873. Jelks's initial reaction was to deny involvement, saying, "I don't know nothing about that." *Id.* at 873. McCartin responded that Jelks was going to be charged with the Mosley murder if he did not cooperate: "Because what's going to happen is ultimately you're going to get booked for murder, okay? Because that case

is still open. Nobody's been booked for that yet." *Id.* McCartin then reiterated that Jelks would want to be home for Christmas to see his family, "so we need to hear what happened out there .... I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that we want to hear, okay?" *Id.* at 873-874.

When Jelks remained reluctant to provide any information about the Mosley murder, McCartin threatened to simply end the interrogation and book him for murder. *Id.* at 876. Jelks then pleaded with McCartin: "Wait a minute, man. I don't – I don't – don't – don't do my life like that, man." *Id.* McCartin responded that Jelks needed to provide information regarding unresolved cases: "There's people that are dead out there. And we're trying to figure this out and goddamn clear them ... If you want to cooperate and clear this shit up for us, then let's hear it." *Id.* at 876-877.

Jelks then acknowledged that there were many unsolved murders on which he could provide information in exchange for leniency: "I want you to help me. I want you to give me my freedom. But I don't want you to shut these doors on me, man ... I don't want this, man. But what I'm saying to you is this. You have stacks of files of ... open cases ... I know everything." *Id.* at 879-881. He then agreed to cooperate, if the police would allow him to go home to his family. *Id.* at 883. Jelks asked, "If I talk to you ... am I going home, man?" and McCartin responded affirmatively. *Id.* at 889-890.

Jelks implicated appellant in the Mosley murder but denied his own involvement. *Id.* at 891-903. After McCartin indicated that he knew that Jelks was lying and that other witnesses had indicated that Jelks had been the driver, Jelks conceded that he had, in fact, been the driver, but was reluctant to say much more about the incident. *Id.* at 904-914. Jelks continued to implicate appellant in the Mosley shooting, while minimizing his own

culpability, admitting he was the driver but claiming he did not know there was going to be a shooting. *Id.* at 915, 924.

During the same interrogation, Detective Mathew made clear to Jelks the significance of being charged with murder: "You're looking at some serious stuff, okay? Murder is the ultimate crime. Never goes away. You have to look for your best interest, all right? ... You're looking at some serious time and some shit goes down, okay? And if we – we want to work something out, you have to look out in your best interest. Because we have you implicated in murders. Not one murder. Many murders, okay?" *Id.* at 976-979.

The police repeatedly sought to get Jelks to provide information about murders that appellant had allegedly committed. *See* CT IV Supp. 4:896-897, 958-960, 965, 980, 985. During the course of the interrogation, Jelks implicated appellant and coappellant Allen in the car wash killings. *Id.* at 934-945.

As summarized by coappellant's counsel: "During the interrogation ... the police hold the murder case under which [Jelks is] presently handcuffed over him and say, 'if you talk to us we'll let you go.' And so Mr. Jelks talks to him, and they say, well, you better keep talking, otherwise this other officer is going to book you on the murder warrant. He talks to him, they let him walk out of the police station." RT 3500. (Jelks was subsequently arrested for the Mosley murder in August, 1995. RT 3501).

Appellant's counsel sought to cross-examine Jelks on the fact that he was a murder suspect and was informed by the police that he would be arrested on murder charges if he did not cooperate, but could go home if he did. RT 3500. Counsel argued as follows: "[Jelks] was told by the police that he was either going to leave the police station as a witness for the police,

or he was going to be booked on the murder, in essence, and he was given a choice, and he made a choice to provide information. I think it goes to bias. I think it goes to motive. I think it goes to his credibility." RT 3503, *see also* RT 3591-3592.

Defense counsel also sought to impeach Jelks with the fact that the murder charges were still pending at the time of trial, stating that he wanted to present to the jury that Jelks "is sitting here with a murder charge hanging over his head, and has a hope that by providing the testimony he's providing in this case that he will lessen, or perhaps avoid any criminal punishment for that murder case, or certainly lessen it." RT 3604. As counsel indicated, "the fact that he is still pending these charges after the indictment suggests to me that the jury may well find that the fact that the case is still pending after this time is itself being used as a lever to encourage the testimony from the witness." RT 3606.

The trial court ruled that if the defense questioned Jelks regarding the fact that the police had threatened him with murder charges to obtain his cooperation, it would open the door to evidence that appellant was also a suspect for that murder. RT 3606-3607. Defense counsel responded that it was appropriate to inform the jury of Jelks's bias and the motivation for cooperating which impacted on his credibility without introducing evidence of inadmissible character evidence against appellant. RT 3604, 3607. As defense counsel stated: "And the fact that Mr. Johnson is also charged in that case ... is not relevant to that desire on the part of Mr. Jelks. Mr. Jelks would have that same desire were he charged alone, were he charged with Mr. Johnson, were he charged with some third party who is not a party to this case." RT 3604.

The trial court recognized that the fact that the witness had a pending

murder case was relevant for the jury to consider "insofar as it was mentioned by the officers and was perhaps an inducement to get him to talk in the first instance ...." RT 3505. The court ruled, however, that the defense could only elicit that Jelks was facing a "serious charge," not murder, because appellant was also allegedly involved in the same murder.

The trial court ruled that it would allow the defense to elicit from the witness the following:

> That he is facing a case. That he has a pending case wherein he faces a potential life sentence. And you may ask him if he's been made offers, and we'll see what he says, or if he has expectations that his testimony here will assist him in that pending case. [¶] If you want to get into the nature of the case I'll allow you to, but then we are going to get into the facts of the case as well, and I'll allow him to testify to the jury as to what the facts were, or at least I'll allow a tape to be played to the jury, assuming he'd want to invoke his right against self-incrimination. We'd determine that, and assuming so, then the court would allow the jury to hear the facts of the case, and his involvement, and your client's involvement. [¶] The important thing, as far as I can tell, is as you have argued, he's looking at a good deal of time on a pending case, and the charge in the case is one that I don't believe fairly should be given to the jury absent an opportunity of the witness to explain what it is that went on .... In terms of the statements made to the witness by the officers early on, they are relevant, there's no question. I'll allow you to elicit from him the following: That they informed him he was a suspect in a serious crime, and that they promised him, or told him that he could go home – whatever they say in there, however they phrased it. You can get out

> of here tonight, we won't book you, we'll give this to the D.A. later, and they'll do what they are going to do but. If you want to get out of here tonight, tell us what happened in these various matters. [¶] I'll allow you to elicit that.

RT 3608-3610.

At trial, during direct examination, Jelks maintained that he was not concerned about potential charges against him, that no promises had been made to him, and that nothing was said to him with regard to how his testimony would affect his case. RT 3627-3628. He testified that the reason he was testifying was in order to effect change in the community. RT 3628.

Defense counsel sought to demonstrate that Jelks was biased, and was motivated to implicate appellant in order to avoid murder charges with which the police threatened him and to obtain leniency once those charges were ultimately brought. However, because of the court's ruling, the defense was limited to vague references to "serious charges" which conveyed a very different impression than if the jury had been aware that the police had information that Jelks was the driver in a drive-by shooting, that he initially denied all involvement and then tried to minimize involvement, and that only after police threatened him with murder charges did he ultimately cooperate and implicate appellant in the car wash murders.

Thus, on cross-examination, Jelks conceded that he was in custody and had been charged with a "serious offense" in which the maximum penalty was life in state prison. RT 3682-3683. He also agreed that during the police interrogation in December, 1994, he was told that he was going to be "booked for a serious crime." RT 3716. But Jelks repeatedly resisted the notion that he was told that if he gave information he would be permitted to go home, and that this was the motivation behind implicating appellant. RT

3716-3718. He did acknowledge that he provided information to the police after which he was permitted to go home. RT 3718-3722.

The prosecutor took advantage of the vague nature of the permissible impeachment, and was able to rehabilitate Jelks, who testified that he was more afraid of being labeled a snitch and being killed than he was being charged with the unspecified "incident." RT 3733, 3754. Because appellant's counsel was precluded from delving into the details of the interrogation, the defense was unable to successfully convey to the jury how the police used the threat of murder charges to elicit Jelks's cooperation. If counsel had been able to demonstrate that this "incident" was in fact a murder, the prosecution's attempts to minimize Jelks's motivation for cooperating with the police would have been rejected by the jury.[31]

In *Wilkerson v. Cain*, 233 F.3d 886 (5th Cir. 2000), the defense was permitted to question Riley, a key witness, regarding whether he had received anything of value in exchange for his testimony, but was precluded from questioning Riley about letters he had written to prison administrators requesting a transfer. The Fifth Circuit ruled that the defendant's Sixth and Fourteenth Amendment rights were violated:

> Although the defense was able to challenge Riley's credibility in general, we are not persuaded that Wilkerson was afforded an

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[31] The true nature of the interrogation of Jelks was further obscured by the testimony of Detective McCartin who maintained that Jelks was threatened only with an arrest for traffic warrants if he did not cooperate. RT 4167, 4169. McCartin initially denied threatening Jelks with being arrested for a "serious offense," RT 4181, but ultimately conceded that Jelks was told that he stood to be arrested on a "serious offense" which "carried a potential life sentence." RT 4185.

> adequate opportunity to cross-examine him on the issue of his credibility tightly focused on his veracity in the instant trial. While defense counsel was allowed to inquire whether Riley actually received anything in exchange for his testimony, "counsel was unable to make a record from which to argue why [Riley] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." Even more critical, because of the limited extent of cross-examination permitted, the jury may well have inferred that defense counsel merely was "engaged in a speculative and baseless line of attack" on Riley's credibility.

Id. at 891 (citing *Davis v. Alaska*, 415 U.S. at 316, 318).

Similarly, while appellant was able to question Jelks generally about his bias, the defense was hampered in its ability to mount a "tightly focused attack," and thus, the prosecution was able to deflect concerns regarding Jelks's bias. The jury was therefore left with the impression that any reluctance to cooperate with the police was due to fear of retribution from appellant as opposed a lack of knowledge about the crimes.

The prosecutor spent a great deal of her argument trying to convince the jury that Jelks was a credible witness without a motive to fabricate his testimony. RT 5123-5125, 5127-5131. As a result of the restrictions on cross-examination, the prosecutor was able to argue credibly that the jury should believe Jelks because "despite efforts by the defense to unearth some other motive, or some payment, nobody has been able to bring a shred of evidence into court that would indicate that Mr. Jelks got his information from any source other than his own memory." RT 5124. The prosecutor noted that back when Jelks first spoke with the police there was no case against him. RT 5129, 5130. *See People v. Daggett*, 225 Cal.App.3d 751

(1990) (error in refusing to permit evidence was compounded by prosecutor's argument which misleadingly asked jury to draw inference they might not have drawn if they had heard the excluded evidence); *People v. Varona,* 143 Cal.App.3d 566 (1983) (not only did court err in excluding evidence that alleged rape victim was a prostitute but prosecutor, committed misconduct in arguing to the jury there was no proof the woman was a prostitute when by his objections he had prevented the defense from proving that fact).

In sum, Jelks was threatened with an arrest for a murder unrelated to the murders for which appellants were on trial. Jelks initially denied any involvement in the murder, but faced with pressure from his interrogators, subsequently admitted his role. Despite his admission, he was released after providing information about appellant's involvement in the instant case (and others). This was an extraordinarily significant set of circumstances about which the jury should have been made aware in assessing Jelks's credibility and bias. Instead of being informed that Jelks was first confronted with and later faced murder charges, the jury was merely told that he had been threatened with a "serious offense" for which he was ultimately arrested. This limitation on cross-examination allowed the prosecution not only to downplay Jelks's motivation for cooperating with the police and testifying against appellant but again to focus the jury on appellant's allegedly threatening conduct.

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C. The Trial Court Impermissibly Restricted The Cross-Examination Of Donnie Adams

Adams had been convicted previously of possession of narcotics.[32] In addition, he was awaiting sentence on a conviction for conspiracy to distribute cocaine, for which punishment was 20 years to life. RT 4348-4349. The defense sought to inform the jury that prior to pleading to the one conspiracy count, Adams was actually facing a 14-count federal indictment, including a violation of 21 U.S.C. § 848(A) – intentionally engaging in a continuing criminal enterprise – for which the punishment was also 20 years to life. RT 4349.

The trial court ruled that counsel would be permitted to impeach Adams only with the fact that he had been convicted and was awaiting sentencing on a narcotic conspiracy case, and that his potential exposure was 20 years to life.

Trial counsel then sought to explain to the court that it was critical to be able to impeach Adams regarding all the charges pending at the time he agreed to testify in this case to put in context his plea agreement:

> And that is that Mr. Adams was pending numerous charges in the United States District Court in Louisiana. There were 14 counts filed against him. He was subject to being sentenced on any or all of them if he went to trial and was convicted. And it would seem to me that having made a statement as part of some agreement with the government to limit his – or to lessen his punishment, that the full scope of the punishment that he was facing would be relevant.

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[32] This prior conviction under Health & Safety Code section 11350 was not proper impeachment because it was not a crime of moral turpitude. RT 4349-4350.

RT 4351. The court denied the request. RT 4351.

Adams testified that after he learned about the shooting, he went to the crime scene, and then walked to appellant's residence to find out what had happened. Adams claimed that appellant told him that that two Crips had been shot and that he had provided the gun to the shooter. RT 4411-4416.

On cross-examination, Adams admitted that he had been arrested and had faced federal charges in Louisiana. RT 4420-4421. Adams admitted to pleading guilty to a continuing criminal enterprise involving drugs, and that he was awaiting sentencing. RT 4421-4422. Adams understood that the penalty was 20 years to life, and conceded that he was hoping that by testifying in this case that his sentence would be reduced. RT 4423. An objection to a question about whether this was based on a 14-count indictment was sustained. RT 4421. Thus, the jury never learned that even *prior* to his testimony, the charges against Adams had been significantly reduced.

The defense also sought to question Adams with regard to whether he was dealing drugs at the time of the crimes in this case on the theory that if he were a drug dealer, it would have been unlikely that he would have gone to the crime scene. RT 4426. Defense counsel explained: "I think that the jury would believe that someone who is a drug dealer would not go up to the scene where there's a number of police officers and put himself up into that position at that time." RT 4427. The court denied the request, stating that counsel could ask Adams if he was a drug dealer only if he also asked him whether appellant was a drug dealer. RT 4426.

The defense also sought to question Adams about a conversation he had with Detective Tapia prior to providing information regarding

appellant's involvement in the homicides, during which Tapia told Adams that appellant had accused him of being involved in a murder. RT 4402-4403. Appellant argued that this would provide Adams with an additional motive to fabricate charges against appellant. The trial court ruled that if appellant questioned Adams about this conversation, it would open the door to Adams testifying that he was aware of appellant having committed other murders. RT 4404-4405.

As discussed above, the trial court had ruled that if the defense questioned Jelks about the fact that he was facing a murder charge, it would open the door to the fact that appellant was also liable for that particular crime. Similarly, the court restricted the defense questioning of Adams by ruling that "if you are going to suggest that he has an improper motive to fabricate, it seems to me tit for tat is okay." RT 4404. Thus, the defense could question Adams about legitimate areas of potential impeachment, including whether he was a drug dealer and thus, not likely to go to a crime scene, and whether appellant had accused Adams of being involved in a murder. *See, e.g.*, 3 Witkin, Cal. Evidence, Presentation at Trial, § 277, at 349 (4th ed. 2000) (hostility towards party is appropriate impeachment). However, this would open the door to Adams being permitted to testify regarding his awareness of appellant's drug dealing and commission of other murders. As with Jelks, evidence about other bad acts allegedly committed by appellant was irrelevant to the potential bias of the witness. The fact that Adams allegedly claimed that appellant may have dealt drugs or committed other murders was irrelevant to whether he had a motive to fabricate evidence. The court's ruling put appellant in a position of having to sacrifice his constitutional rights to confront and cross-examination witnesses in order to preclude the admission of highly inflammatory

evidence that was irrelevant and inadmissible.

These restrictions on cross-examination permitted the prosecutor to argue forcefully that Adams was a credible witness, and to minimize his motives for cooperating with the prosecution. RT 5138-5139. As the prosecutor put it, "he told you that it was just something that had to be done to come here and testify." RT 5139.

D. The Restrictions On Cross-Examination Were Prejudicial

Jelks and Adams were the only two witnesses who testified at trial that appellant was involved in the murders at the car wash. The court's restrictions on cross-examination prevented appellant from demonstrating that Jelks had a strong motive to implicate appellant in order to obtain leniency on murder charges and from undermining the contention that he feared retribution by appellant rather than arrest, prosecution and incarceration for murder. Similarly, the restrictions on the testimony of Donnie Adams seriously hampered the defense in demonstrating his bias. Individually and in combination, the trial court's rulings were not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24.

XIII.

THE TRIAL COURT ERRONEOUSLY PERMITTED A POLICE OFFICER TO VOUCH FOR THE CREDIBILITY OF A KEY PROSECUTION WITNESS

As discussed above, Carl Connor claimed to be an eyewitness to the shooting. His trial testimony and prior statements to the police were introduced which, if believed, established that coappellant committed the murders, after having retrieved a gun from appellant's residence, and returned to appellant's residence to return the gun after the shootings. Connor, however, was a very problematic witness for the prosecution.

Material aspects of his testimony were diametrically opposed to testimony of the State's other witnesses. For example, Connor testified that the shooter was angled in front of the victims' car, closer to the driver's side. RT 3347, 3422, 3443, 3473. This was contradicted by three prosecution witnesses – a police officer, a ballistics expert, and a forensic pathologist – all of whom stated that the shooter could not have been standing where Connor claimed to have seen him. RT 3804-3805, 3844, 3860, 4111-4114. In addition, Connor testified that the shooter fled the scene by heading west, RT 3358-3359, which was at odds with the testimony of two disinterested witnesses, Willie Clark and Eulas Wright, who saw the shooter running north. *See* RT 3267-3268, 3276.

In addition, Connor's trial testimony was inconsistent with his statements to the police and his grand jury testimony. Connor testified, for example, that the shooter walked away from the scene, but testified before the grand jury that he ran. RT 3427-3430. He also told the police that he saw the shootings because he was at the car wash, and that "a lot of people" were there, getting their cars washed. People's Exhibit 22; CT IV Supp. 2:372. In his grand jury testimony, Connor stated that he went to the car wash to look at a friend's car that was being painted. RT 3424. According to Eulas Wright, there was no one else at the car wash that day. RT 3885. Wright also testified he did not paint cars at the car wash. RT 3884-3885. Perhaps to conform to Wright's anticipated testimony, Connor changed his testimony at trial, claiming that he was not at the car wash but that he was at the adjacent auto repair shop, talking to his friend Robert about engines. RT 3340, 3397.

As discussed in Arguments VII and VIII, Connor denied knowledge at trial of appellant's involvement in the murder, which was in contradiction

to his grand jury testimony and police statement. RT 3358-3359, 3364, 3377, 3379. The prosecutor contended that this discrepancy was due to Connor's fear of retaliation. *See* RT 5221. However, the numerous inconsistencies in Connor's statements could not be explained away by fear, and when considered in toto, Connor's implausible testimony strongly supported the defense theory that it had been fabricated.

In addition, the defense introduced Connor's employee time card, which indicated that he was at work at the time of the shooting, casting even further doubt on the truthfulness of his testimony. RT 4859-4860; Defense Exhibit E. Connor attempted to explain how he could be at the scene despite the evidence which showed he was at work by claiming that his friend falsified his time card, and that in fact, he was terminated from his employment because of falsifying time cards. RT 3394-3396. Connor was impeached by the testimony of the general manager of Connor's former employer, who testified that Connor was fired not for falsifying time cards but for a completely different reason. RT 4853-4858.

To bolster Connor's credibility, the prosecution was permitted over objection to elicit testimony from a homicide detective that the information Connor provided regarding the murders was "corroborated through other sources." RT 3991-3992. This testimony was grossly improper as it removed a critical issue of credibility from the jury by informing them that an experienced police officer believed that Connor's testimony was truthful. This was inadmissible opinion testimony and was hearsay. In addition, the admission of this testimony violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to an impartial jury, to a fair trial, to confront and cross-examine witnesses, and to a reliable guilt and penalty determination. This testimony alone, and in combination with

Detective Barling's testimony, which also vouched for Connor's testimony (*see* Argument VII), was prejudicial.

A. Proceedings Below

Rosemary Sanchez testified that she had been a police officer for more than sixteen years and a homicide detective for seven years. RT 3971. Detective Sanchez was not the initial investigating officer with regard to the 1991 murders that occurred at the car wash but had interviewed Carl Connor in 1994, when she was investigating an unrelated murder. RT 3971. She testified about her interview of Carl Connor. RT 3973-3974, 3981-3986. On re-direct examination, the prosecutor asked Detective Sanchez the following question: "With respect to the information that was provided to you by Mr. Connor, was that information corroborated through other sources?" RT 3991-3992. Both appellant's counsel and coappellant's counsel objected on the grounds of hearsay and as calling for a conclusion. RT 3992. The objections were overruled, and Detective Sanchez was permitted to answer the question, and responded: "Yes." RT 3992.

B. The Officer's Testimony Was Inadmissible Under State Law

The prosecutor presented a police officer who essentially vouched for the credibility of a witness. By eliciting testimony from Detective Sanchez that Carl Connor's statements were corroborated by "other sources," the prosecution was able to inform the jury that an experienced law enforcement official believed that Connor was telling the truth. However, it is impermissible for the State to place the prestige of the government behind a witness. *See People v. Sergill*, 138 Cal.App.3d 34 (police officer not qualified to testify regarding truthfulness of one who claimed to be victim of crime); *see also People v. Fierro*, 1 Cal.4th at 211; *United States v. Roberts*,

618 F.2d at 533.

Unless some other evidentiary rule applies, witnesses must have personal knowledge of the matter about which they testify. Cal. Evid. Code § 702. Here, Detective Sanchez was not present at the crime scene either when the murders occurred or in the course of any crime scene investigation. She admitted that she was not the initial investigating officer and that she only became involved in the case when she interviewed Carl Connor years later with regard to an unrelated crime. She therefore had no personal knowledge of the details of the crime, and should not have been permitted to testify that the information provided by Connor was reliable.

In *People v. Melton*, 44 Cal.3d 713 (1988), this Court held that the trial court erroneously permitted the prosecution to question a defense investigator regarding his assessment of the credibility of a prosecution witness. Such testimony was deemed inadmissible as either lay opinion or expert opinion testimony.

The Court explained why "[l]ay opinion about the veracity of particular statements by another is inadmissible on that issue." *Id.* at 744.

> With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' (*id.*, § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed [citations]. Finally, a lay opinion about the

> veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (*id.*, § 780, subds. (a)-(k)). Thus, such an opinion has no 'tendency in reason' to [prove or] disprove the veracity of the statements. *(Id.*, §§ 210, 350).

Id. at 744.

As would equally apply here, the Court also held that an inquiry as to whether the investigator believed the witness would not have been admissible as expert testimony. The record did not establish that the investigator in *Melton* – or Detective Sanchez in appellant's case – was an "expert on judging credibility, or on the truthfulness of persons who provide him [or her] with information in the course of investigations." *Id.* There was no evidence suggesting that the investigator in *Melton* – or Detective Sanchez – knew anything about the witness's "reputation for veracity." *Id.* Rather, in each case, the jury was informed of the content of the interviews and should have been left to decide the witness's credibility for itself, "based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to [the investigator or detective] had the essential 'ring of truth.'" *Id.* at 744-745. *See also People v. Smith*, 30 Cal.4th 581, 628 (2003) ("[c]redibility questions are generally not the subject of expert testimony") (citing *People v. Anderson*, 25 Cal.4th 543, 576 (2001); *People v. Sergill*, 138 Cal.App.3d at 39).

Detective Sanchez's testimony also consisted of inadmissible hearsay evidence. As discussed above, she was not at the crime scene and was not involved in the initial investigation of the murders. The information from

"other sources" she was relying upon consisted of out-of-court statements. If she had been asked to relate the particular information that her "other sources" had provided her, the response would have necessarily consisted of inadmissible hearsay. Cal. Evid. Code § 1200(b) & (c).

C. Admission Of The Officer's Opinion As To The Credibility Of A Key Prosecution Witness Violated Appellant's Constitutional Rights

Detective Sanchez's opinion testimony that the information provided by Carl Connor was corroborated by "other sources" usurped the jury's role as fact finder, rendered the trial fundamentally unfair, and lightened the prosecution's burden of proof in violation of appellant's Sixth and Fourteenth Amendment rights to a fair trial, impartial jury, and due process. The admission of testimony regarding "sources" that was based on hearsay deprived appellant of his right to confront and cross-examine witnesses against him in violation of his Sixth Amendment rights. Permitting such testimony in clear violation of California law constituted an arbitrary deprivation of appellant's liberty interest in the application of state evidentiary rules in violation of due process. Finally, the admission undermined the need for heightened reliability at all stages of a capital case in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

D. Admission Of The Officer's Testimony Was Prejudicial

Given the central role of Connor's testimony and prior statements, his impeachment seriously undermined the prosecution's case. However, rather than present credible evidence to corroborate his testimony – e.g., witnesses who observed Connor at the scene – the prosecution relied on improper opinion testimony from police officers to bolster Connor's credibility. As discussed above in Argument VII, Detective Barling testified that the fear of

retaliation expressed by Connor was genuine. And here, Detective Sanchez, another respected, supposedly objective law enforcement official testified that Carl Connor's otherwise implausible and inconsistent testimony was trustworthy.

The prosecutor repeatedly urged the jury to find Connor's testimony credible, *see* RT 5115, 5131-5135, 5221, 5229, and relied on Detective Sanchez's testimony to overcome the serious obstacles to Connor's reliability. In closing argument, the prosecutor argued that despite the fact that witnesses had "baggage" and may not have testified "perfectly" the jury should credit witness testimony where it has been "corroborated either by another witness or by the physical evidence." RT 5115, 5116. She more explicitly argued that "Mr. Connor was pretty honest with Detective Sanchez" and that his testimony was "corroborated by other evidence from other sources ...." RT 5134. The prosecutor further argued that while Connor may not have been "the brightest man that ever walked the earth," he was "earnest and he tried." RT 5134.

Since the jury likely would have rejected the testimony of a key witness because of the substantial contradictions in his testimony, the admission of testimony of law enforcement officials who vouched for the witness's credibility and represented that the information he gave had been corroborated by others was highly prejudicial.

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XIV.

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

The trial court delivered three related instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, unsupported by the evidence, and constituted improper pinpoint instructions.[33]

The trial court gave CALJIC 2.04, which stated as follows:

> If you find that a defendant [attempted to] [or] [did] persuade a witness to testify falsely or [attempt to] [or] [did] fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

CT 858.

The court also gave CALJIC 2.05, which stated as follows:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized such effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for you to decide.

CT 859.

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[33] A fourth instruction pertaining to an inference of consciousness of guilt from flight was also given. This instruction purportedly applied only to coappellant Allen since there was no evidence of any flight by appellant.

The court also gave CALJIC 2.06, which stated as follows:

> If you find that a defendant attempted to suppress evidence against [himself] in any manner, such as [by intimidation of a witness] this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

CT 860.

Evidence of the defendant's attempts to avoid or obstruct prosecution is said to constitute circumstantial evidence of guilt on the theory that the inference of consciousness of guilt supports a second inference of guilt in fact. *People v. James,* 56 Cal.App.3d 876, 890 (1976); *see* McCormick on Evidence, § 263 (4th ed. 1992), at 181 (evidence of defendant's evasive conduct after the crime is received "as circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself").

In appellant's case, these instructions permitted the jury to infer appellant's guilt from unreliable and ambiguous evidence purportedly showing that appellant sought to procure false testimony as well as from alleged acts of intimidation unrelated to the charged offenses. Where, as here, the question of appellant's guilt was close and based in large part on the credibility of witnesses who implicated appellant, delivery of these instructions was prejudicial error. The instructions unfairly highlighted evidence favorable to the prosecution and invited the jury to draw critical but irrational inferences against appellant related directly to the question of guilt.

The instructional errors, especially when considered in combination, deprived appellant of due process, equal protection, a fair jury trial, and a fair and reliable jury determination of guilt, special circumstances, and

penalty. U.S. Const. amends. V, VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15, 16, & 17.[34]

A. The Consciousness Of Guilt Instructions Improperly Duplicated The Circumstantial Evidence Instruction

The instructions under CALJIC No. 2.04, 2.05, and 2.06 were 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,* 26 Cal.4th 334, 362-363 (2001); *People v. Ochoa,* 26 Cal.4th 398, 444-445 (2001). Here, the trial court instructed the jury on circumstantial evidence with the standard CALJIC No. 2.00 and 2.02. CT 856, 857. 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. This unnecessary benefit to the prosecution violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Wardius v. Oregon,* 412 U.S. 470, 479 (1973);

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[34] The jury was also instructed at the penalty phase with CALJIC 2.03 (Consciousness of Guilt – Falsehood); 2.04 (Efforts by Defendant to Fabricate Evidence); 2.05 (Efforts Other Than By Defendant To Fabricate Evidence); and 2.06 (Efforts to Suppress Evidence). For the same reasons described herein, the delivery of these instructions at the penalty phase pertaining to the finding of aggravating factors undermined the fairness and reliability of the jury's sentencing determination in violation of appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights, and require that the death judgment be vacated.

Lindsay v. Normet, 405 U.S. 56, 77 (1972).

B. The Consciousness Of Guilt Instructions Were Unfairly Partisan And Argumentative

The trial court must refuse to deliver any instructions which are argumentative. *People v. Sanders,* 11 Cal.4th 475, 560 (1995). 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*, 45 Cal.3d 1126, 1135-1137 (1988). 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,* 170 Cal. 657, 672 (1915).

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,* 2 Cal.4th 408, 437 (1992) (citations omitted). Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence," *People v. Daniels,* 52 Cal.3d at 870-871, or "imply a conclusion to be drawn from the evidence," *People v. Nieto Benitez,* 4 Cal.4th 91, 105, n. 9 (1992), are argumentative and hence must be refused. *Id.*

Judged by this standard, the consciousness of guilt instructions given in this case are impermissibly argumentative. Structurally, they are almost identical to the defense "pinpoint" instruction which this Court found to be argumentative in *People v. Mincey*, 2 Cal.4th 408, 437. All four instructions – the three in this case and the one in *Mincey* – tell 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 three instructions at issue here should be held argumentative as well.

In *People v. Nakahara,* 30 Cal.4th 705, 713 (2003), this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey*, 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,* 43 Cal.2d 517, 526-527 (1954) (quoting *People v. Hatchett,* 63 Cal.App.2d 144, 158 (1944); *accord Reagan v. United States,* 157 U.S. 301, 310 (1895). 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.*, 490 U.S. 504, 510 (1989); *Wardius v. Oregon,* 412 U.S. at 474, and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. *Lindsay v. Normet,* 405 U.S. at 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*, 30 Cal.4th at 713; *People v. Bacigalupo,* 1 Cal.4th 103, 123 (1991) (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*, 45 Cal.3d at 1137.

The argumentative consciousness of guilt instructions 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. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const. amend. 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. There Was Insufficient Evidence To Support the Instructions

There was insufficient evidence that appellant sought to fabricate evidence or suppress evidence in this case, and by focusing the jury on such considerations, the instructions impermissibly lightened the prosecution's burden of proof. For example, with respect to CALJIC 2.04 and 2.05, the prosecutor offered that the evidence comprised of appellant contacting Carl Connor's brother, Billy, and "instructing Billy to school his brother." RT 4916. The prosecutor contended:

> Defendant Johnson contacted people, tried to convince them to testify – to be schooled, which is subject to interpretation as to whether that means don't show up or whether that means if you show up, say something that's favorable to me. He did that not only by contacting these

> people directly, but also by the use of conduits, calling people on the outside to contact the witnesses to try to get at them and tell them that they needed to conform with his request. And I think under those circumstances, that efforts by – they constitute efforts by the defendant to fabricate evidence and efforts by others on behalf of the defendant to fabricate evidence.

RT 4917.

The prosecution merely surmised that "schooling" could be interpreted to mean altering or fabricating evidence, but there was nothing in the record to support this. As defense counsel argued, there was insufficient evidence to warrant these instructions. With regard to the conversation with Connor's brother, "in no place in that conversation is it ever suggested that his brother should make up something or is given some particular type of information that was to be relayed to him that he was to provide in court." RT 4917-4918. Indeed, as the trial court indicated when the prosecutor sought to admit the evidence, appellant was trying to get witnesses to change their testimony "either because he thinks they're lying on him, or because he thinks they're telling the truth ...." RT 4704-4706. The instruction, however, put the court's imprimatur on the interpretation of the evidence suggested by the prosecution.

With regard to CALJIC 2.06, evidence that appellant allegedly intimidated individuals who may have been witnesses against appellant was not connected to the witness's testimony in this case. For example, Freddie Jelks testified that he had been told that appellant wanted to kill him for cooperating with the police, but that cooperation was not tied to this specific case. *See, e.g.,* RT 3631-3633. In fact, Jelks had informed the police that appellant had been involved in other murders. CT IV Supp. 3:891-903. So,

even assuming the alleged threats to Jelks evidenced consciousness of guilt, there was nothing to indicate that it showed consciousness of guilt as to these particular charges.

Moreover, Carl Connor testified about his fear in light of his awareness that a witness in another case – Nece Jones – had been killed, implicitly at appellant's behest. RT 3383-3385. In addition, the note seized by a jail deputy and read to the jury regarding appellant's alleged ability to intimidate a witness had nothing to do with this case but related to that witness's cooperation with regard to another murder. RT 4804. Even assuming these witnesses felt intimidated by appellant's actions, none of those actions were tied to efforts to suppress evidence in this case.

Evidence is admissible to prove consciousness of guilt only when there is some evidence from which a juror may infer that the defendant was conscious of guilt of the charged offense, and that he did not act out of consciousness of guilt of some other offense or because of another factor. *People v. Rankin,* 9 Cal.App.4th 430, 435-36 (1992) (evidence of defendant's falsehoods inadmissible to prove consciousness of guilt where the jury could only infer he made the false statements to protect someone else); *United States v. Myers,* 550 F.2d 1036, 1049 (5th Cir. 1977) (the probative value of circumstantial evidence of consciousness of guilt depends on strength of evidence that the defendant was conscious of guilt of the charged crime); *People v. Williams,* 44 Cal.3d 1127, 1143, n. 9 (1988).

Here, there was insufficient evidence that appellant acted out of consciousness of guilt as to the charged crimes as opposed to other crimes to warrant the giving of CALJIC 2.06.

D. CALJIC 2.06 Embodies An Irrational Permissive Inference

In this case, the giving of CALJIC No. 2.06 allowed appellant's jury

to make a permissive inference. *See People v. Ashmus,* 54 Cal.3d at 977. It permitted the jury to infer one fact, consciousness of guilt, from other facts, i.e., appellant's alleged efforts at witness intimidation to suppress evidence. Because these inferences lacked a rational basis, however, the giving of this instruction violated the due process guarantees of the state and federal Constitutions. U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Ulster County Court v. Allen,* 442 U.S. 140, 157 (1979); *People v. Castro,* 38 Cal.3d 301, 313 (1985).

The rational connection required between a fact and permissive inference is not merely a connection that is logical or reasonable; it is rather a connection that is more likely than not. Permissive inferences must satisfy the test stated in *Leary v. United States,* 395 U.S. 6 (1969):

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend.

Id. at 36; *see also Ulster County Court v. Allen*, 442 U.S. at 165-167, and n. 28.

The only "consciousness of guilt" evidence that could be probative in any given case is evidence of "consciousness of guilt" of the particular offense for which a defendant is being charged and tried. Obviously, if a defendant acts in a manner that demonstrates a guilty mind concerning a particular crime, that does not make it any more likely that he has reason to feel guilty about a different crime. CALJIC 2.06, however, does not make this distinction, and indeed suggests to a jury that if it finds a factor supposedly showing some "consciousness of guilt" of some unstated crime,

this is evidence of guilt of the crime for which the defendant is on trial. However, as in this case, that is not a logical inference, because a defendant may have "consciousness of guilt" of an uncharged offense just as easily as he might have "consciousness of guilt" of a charged offense, and it may be impossible to tell which is true because the record shows more than one offense of which the defendant might be feeling guilty.

As discussed above, appellant is alleged to have threatened to kill Freddie Jelks for providing information to the police implicating appellant in various murders. However, there was no evidence which established that the alleged threats had to do with Jelks implicating appellant in this particular case. Similarly, there was evidence that other witnesses were intimidated by threats, but nothing to suggest that those threats were related to their cooperation in this case. Moreover, the defense theory of the case was that these witnesses were fabricating evidence against appellant. Thus, threats against witnesses – even if tied to this case – may have reflected not consciousness of guilt, but appellant's anger at being falsely accused.

In such circumstances, there is no logical connection between the evidence and the defendant's guilt of the offense for which he is being charged and tried. The instruction permitted the jury to infer a given mental state from the defendant's acts, when it was impossible to tell whether those acts showed that particular mental state or a different mental state. Any conclusion as to which inference to draw would be speculation, not rational inference. Conviction based on speculation lightens the prosecution's burden of proving each element of a crime beyond a reasonable doubt, and thereby violates a defendant's right to due process. *See In re Winship*, 397 U.S. 358.

Furthermore, since this presents a situation where there is no rational

– as opposed to speculative or conjectural – connection between the underlying facts (suppression by witness intimidation) and the sought-after inference (consciousness of guilt of the offense charged), instructing the jury that it may draw the desired inference from the underlying facts is a violation of a defendant's right to due process of law. *Ulster County Court v. Allen,* 442 U.S. 140, 157, 165.

Because the consciousness of guilt instructions permitted the jury to draw irrational inferences of guilt against appellant, the delivery of those instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15). It also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const. amends. VI, XIV; Cal. Const. art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial. U.S. Const. amends. VIII, XIV; Cal. Const. art. I, § 17.

E. The Giving Of The Pinpoint Instructions On Consciousness Of Guilt Was Not Harmless Beyond A Reasonable Doubt

Because the erroneous delivery of the consciousness of guilt instructions violated several provisions of the federal Constitution, the judgment must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24. It was not.

The jury was given not one, but three unconstitutional instructions, which magnified the argumentative nature of the instructions as well as their impermissible inferences. The prosecutor repeatedly elicited evidence of the

intimidation and fear purportedly felt by the witnesses, ostensibly to bolster their credibility, as discussed above. However, these instructions permitted the jury to rely on this evidence not merely in assessing credibility, but also as substantive evidence of guilt.

The centerpiece of the prosecution's case was a portrayal of appellant as a violent gang leader who ordered others to do his bidding and resorted to threats and violence at every opportunity. Instructions which told the jury to especially consider appellant's intimidation of witnesses to either suppress or fabricate evidence thus endorsed the prosecution's theory of the case, and made it more likely that the jury would believe appellant was capable of ordering the murders in this case, an issue that was strongly contested. Therefore, the judgment must be reversed.

XV.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

CT 873.

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process, and a reliable

verdict in a capital case. U.S. Const. amends. V, VI, VIII, XIV; Cal. Const. art. I, §§ 7 & 15.

A. The Instruction Allowed The Jury To Determine Guilt Based On Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. *Jackson v. Virginia*, 443 U.S. 307, 320 (1979) (a "mere modicum"of evidence is not sufficient). Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. *See, e.g., United States v. Mitchell,* 172 F.3d 1104, 1108-1109 (9th Cir. 1999) (motive based on poverty is insufficient to prove theft or robbery).

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. *See, e.g.,* CT 858, 859, 860, 874 (CALJIC Nos. 2.04, 2.05, 2.06, 2.52, stating with regard to attempts to suppress or fabricate evidence and flight that each circumstance "is not sufficient by itself to prove guilt ...."). The placement of the motive instruction, which was read immediately before the flight instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction

obviously would say so. *See People v. Castillo,* 16 Cal.4th 1009, 1020 (1997) (Brown, J., concurring) (deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction).

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

People v. Dewberry, 51 Cal.2d 548, 557 (1959); *see also People v. Salas,* 58 Cal.App.3d 460, 474 (1976) (when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error).

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. U.S. Const. amends. V, VI, VIII, XIV; Cal. Const. art. 1, §§ 7 & 15.

B. The Instruction Shifted The Burden Of Proof To Imply That Appellant Had To Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty. The instruction

effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. 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*, 397 U.S. at 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,* 447 U.S. at 637-638 (reliability concerns extend to guilt phase).

C. Reversal Is Required

The prosecution's theory of the case was that appellant ordered the murders of two Crips who had strayed into 89 Family territory. To support its case, evidence was introduced regarding gang culture, including notions of respect and the consequences for violating gang boundaries, as well as appellant's hatred of rival gang members. This evidence of motive was essentially uncontroverted. On the other hand, evidence which actually connected appellant to the murders was contested, with the defense seeking to show that it was based in large part on the testimony of biased and untrustworthy witnesses.

The motive instruction given in this case thus lessened the prosecutor's burden of proof by erroneously encouraging the jury to find appellant guilty, despite serious questions regarding the reliability of the prosecution's evidence, because appellant had the motive to commit the crimes. Accordingly, the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24.

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XVI.

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR AND RELIABLE SENTENCING DETERMINATION BY REFUSING TO GRANT A SEVERANCE DESPITE COAPPELLANT'S INTENT TO PRESENT A DEFENSE ANTAGONISTIC TO APPELLANT

Coappellant Allen's strategy at the penalty phase was clearly aimed at persuading the jury that he was less deserving of death than appellant; that appellant was the "shot-caller" who had exerted undue influence over Allen in ordering him to commit the capital offenses. Prior to the commencement of the penalty phase, appellant moved for severance based on Allen's anticipated attacks on appellant. Appellant argued that Allen's stance would undermine any lingering doubt the jury might have as to appellant's role in the murders, that it would impede appellant's ability to defend against aggravating evidence, and that it would restrict the jury's consideration of appellant's mitigation. The trial court denied the motion. The joint penalty phase in which Allen presented a defense antagonistic to appellant violated appellant's Eighth and Fourteenth Amendment rights to a fair, reliable, and individualized sentencing determination.

A. Proceedings Below

Prior to the commencement of the penalty phase, counsel for coappellant Allen made an offer of proof regarding a purported gang expert he wished to present, which clearly revealed that Allen's strategy at the penalty phase would be antagonistic towards appellant. Allen's counsel stated that the witness would testify that Allen was not the shot-caller, and that he was susceptible to following orders of gang leaders because of his "tender years" and "troubled childhood." RT 5630-5631.

Appellant initially requested that the penalty phase evidence in his case be heard and that the jury verdict be rendered prior to the presentation

of Allen's penalty phase case:

> It is becoming clear to me that what is going to happen in this penalty trial is that Mr. Johnson is going to be prosecuted from both sides of the table here. [¶] If Mr. Orr [coappellant's counsel] is going to join in as the assistant prosecutor, or Mr. Murphy [coappellant's co-counsel], and take the position that Mr. Johnson is a shot caller and Mr. Johnson is responsible for these crimes, that there is going to be an apparent comparison of his culpability versus that of Mr. Allen, it will be instructed to the jury that the death penalty is appropriate for Mr. Johnson, but not appropriate for Mr. Allen. [¶] The jury will be invited to make these comparisons and these – this weighing of relative merit of culpability of the death penalty of the two defendants not by the prosecution simply, but it is going to be echoed by counsel for the co-defendant. [¶] And we are going to lose the individualized determination by the jury.

RT 5636-5638.

Appellant's counsel further argued the prejudice to his client if the cases were tried together:

> I think ... the prejudice that is going to be heaped upon Mr. Johnson, is when the District Attorney presents her evidence, we present our evidence, then ... [coappellant's counsel] present their evidence, and then we proceed to argument before any decision has been made as to Mr. Johnson, it sounds to me that what will happen on behalf of Mr. Allen is that there is going to be evidence presented negative to Mr. Johnson because the perception of Mr. Allen's attorney is that that is favorable to Mr. Allen. And they will join in with the attack on Mr. Johnson. [¶] And it appears they are going to suggest to the jury that

> in an assessment of where the death penalty should fall here, it should fall on Mr. Johnson but not Mr. Allen because of the tender years – because he was a tender lad of 18 when the crime occurred and that he was in the grips of the shot caller or whatever else .... What we will lose here is that Mr. Johnson is not simply going to have a decision as to what is appropriate as to him, but the jury will compare and contrast him with Mr. Allen and be assisted in that by the argument of Mr. Allen's attorneys.

RT 5638-5639.

The court denied appellant's request for severance. RT 5640, 5648.

In his opening statement, Allen's counsel adopted the facts underlying the capital murder as presented at the guilt phase by the prosecution, in which appellant sought to have the two Crips killed, provided Allen with a gun, and told him what to do. RT 5829-5830. Allen's counsel argued that appellant "dominated the murder," and "dominated activities of the 89 Family Bloods" from 1991 until his incarceration in 1993, and implied that appellant was responsible for ordering Allen to commit another murder for which Allen was convicted. RT 5830-5831.

Appellant's counsel moved for a mistrial based on Allen's opening statement "in which he appears to have joined forces with the prosecution against Mr. Johnson," and sought to sever the penalty trials "so that we could defend against the People, but not have to defend on a second attack from the lawyers for Mr. Allen ...." RT 5832-5833. The request was denied. RT 5833. After appellant further argued that Allen was essentially adopting the prosecution's aggravating evidence against appellant, the court responded, "that is just the way it shakes out sometimes in terms of the evidence" and denied the motion. RT 5838-5839.

Appellant objected to the testimony of Allen's purported gang expert, Reverend Douglas. After Allen's counsel provided an offer of proof, appellant argued that such testimony "appears to be another example of the efforts on behalf of the attorneys for Mr. Allen to try the penalty trial and make Mr. Johnson a focus of their attacks in order to try to save Mr. Allen from a death sentence." RT 6595. As counsel pointed out, the witness was going to compare appellant to Charles Manson, and he was prepared to testify that Allen was under the domination of appellant, who was a shot-caller at the time Allen murdered Chester White – a crime for which appellant was never implicated. RT 6595-6596. Appellant argued that such evidence was not only beyond the witness's expertise, but also prejudicial and inflammatory with regard to appellant. RT 6596.

With only minor limitations,[35] the testimony of Reverend Douglas was essentially unfettered. Douglas described a shot-caller as someone who was an all-powerful, manipulative figure, with total control over his subordinates. He testified that a shot-caller is a "centralized figure that would lead the activities of a particular gang or group that is exclusively operating on their own." RT 6694. He further testified that a shot-caller "would be the leading figure, or the commanding person within a particular group that would have subjects or subordinates that would respond to the dictates or the commands of whatever his thinking was for that particular group." RT 6695. "The shot-caller is the individual that is the guy that is

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[35] The court did limit the testimony of Reverend Douglas to the extent he could not speculate regarding appellant's influence on the Chester White murder. RT 6610. The court also agreed that Douglas should not make a comparison between appellant and Charles Manson. RT 6617.

given the autonomy in order to empower the other group subordinates to do whatever the objective is." RT 6695. He described a shot-caller as "charismatic" and "very manipulative." RT 6695. "He has to be a cut above the edge, have more extreme behaviors and characteristics of maturity than as opposed to subordinates, who would be more or less subject to his commands or his influence." RT 6695. Douglas testified that based on the evidence he reviewed, appellant was the shot-caller in the 89 Family. RT 6699. He further testified that Allen was under the domination of the gang. RT 6703.

Douglas provided additional inflammatory and prejudicial testimony on cross-examination by the prosecutor and on re-direct examination related to appellant's potential for being a danger if sentenced to life in prison without possibility of parole. Douglas surmised that people can be shot-callers in jail and in prison, and that shot-callers can continue to order "missions" from prison. RT 6706, 6708-6709. Douglas further testified about Allen being under the dominance of the gang by comparing Allen to figures in the Godfather and, in violation of the court's earlier ruling, the Charles Manson family. RT 6709. He also testified that Allen was susceptible to domination by the gang. RT 6711-6716.

At the conclusion of Douglas's testimony, appellant again asked for a mistrial due to the witness's comparison of appellant to Charles Manson. RT 6717. The motion was denied. RT 6718-6719.

The closing arguments of the prosecutor and Allen's counsel cemented the case against appellant, rendering a fair, reliable, and individualized sentencing determination impossible. Allen's closing argument was particularly prejudicial in his comparison and contrast of the two defendants.

Allen's counsel argued that Allen acted under the substantial domination of appellant. He argued that the evidence established that appellant was a shot-caller, that members of the gang followed appellant's orders, and that others were scared of appellant because they knew he would kill them and think nothing of it. RT 7495-7496. Allen's counsel endorsed the prosecution's case in aggravation against appellant, including aggravating evidence of appellant's commission of sexual assaults, the Mosely murder, and the solicitations to commit murder. He also discussed evidence showing that appellant was the shot-caller of the gang, and focused on evidence which suggested that appellant was a dominating, threatening, violent personality. RT 7496-7497. Coappellant's counsel concluded that "there is no question, absolutely no question that Mr. Johnson dominated everybody in the gang ...." RT 7498. With regard to the capital murders, he again affirmed the prosecution's case, and contended that appellant "is dominating this whole thing." RT 7498-7499. After describing the facts as portrayed by the prosecution, counsel argued: "We have here a case of the defendant acting under substantial domination of another." RT 7499; *see also* RT 7501, 7519.

B. The Court Abused Its Discretion And Violated Appellant's Constitutional Rights In Refusing To Grant Severance

Penal Code section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be jointly tried, unless the court orders separate trials." Generally, the decision whether to grant severance is left to the discretion of the trial judge. *People v. Cummings*, 4 Cal.4th 1233, 1286 (1993). While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a

fair trial." *Williams v. Superior Court*, 36 Cal.3d 441, 451-452 (1984). A reviewing court may therefore reverse a conviction when because of joinder, "gross unfairness" has deprived the defendant of a fair trial. *People v. Ervin*, 22 Cal.4th 48, 69 (2000) (quoting *People v. Pinholster*, 1 Cal.4th at 932).

Severance is appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." *People v. Massie,* 66 Cal.2d 899, 917 (1967); *see also People v. Champion*, 9 Cal.4th at 904. In *Zafiro v. United States*, 506 U.S. 534 (1993), the United States Supreme Court held that severance is proper "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 1081. As this Court noted in *People v. Massie,* in assessing a claim of improper denial of severance, an appellate court "[m]ust weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." *People v. Massie,* 66 Cal.2d at 923.

In *People* v. *Keenan*, 46 Cal.3d 478, this Court observed: "Severance motions in capital cases should receive heightened scrutiny for potential prejudice." *Id.* at 500. This principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 376 (1988).

In *People v. Ervin,* 22 Cal.4th 48, a claim that the trial court erred in refusing to sever the penalty phase trials of codefendants was rejected. There are crucial factual differences, however, between the *Ervin* case and appellant's case, differences which illustrate the gross unfairness resulting in

the failure to grant appellant's motion. In *Ervin*, the defendant claimed that his "case for life" was prejudiced by the mitigating evidence offered by his codefendants which tended to "eclipse" the evidence favorable to him. *Id.* at 95. Here, it was not that coappellant's mitigation case was more powerful than appellant's, but that it constituted a direct, explicit attack on appellant. Furthermore, in *Ervin*, the defendant did not dispute his role in the murder, and the facts did not, as here, involve one defendant placing responsibility for the capital murders on the other. Appellant's case thus presents far more serious prejudice. The failure to sever resulted in having essentially two prosecutors against appellant in which the presentation of otherwise inadmissible evidence against appellant by coappellant was extremely inflammatory and undermined any claim of lingering doubt.

More recently, in *People v. Cleveland*, 32 Cal.4th 704, 759 (2004), in a bifurcated trial where the jury determined the codefendant's penalty first, this Court recognized potential problems if the same penalty jury heard evidence and argument from one defendant which blamed the other defendant for the capital crimes. That is exactly what occurred here. While appellant did not in any way concede his guilt for the capital offenses, Allen acknowledged that the shootings occurred in the manner portrayed by the prosecution, but attempted to stress that Allen was a mere victim of appellant's domination. This undermined any consideration of lingering doubt which, given the difficulties the jury had with the case during guilt phase deliberations, was not an insignificant factor.

Moreover, Allen presented evidence through an expert which portrayed appellant as being a future danger. Such evidence would have been inadmissible if offered against appellant by the prosecution. *See People v. Murtishaw*, 29 Cal.3d 733, 773-775 (1981) (expert testimony that a

defendant would pose a future danger in prison if sentenced to life without possibility of parole is inadmissible). Allen also relied on expert testimony and the additional aggravation presented by the prosecution against appellant to argue that appellant was not only more blameworthy than Allen, but also, by having dominated Allen, appellant was responsible for Allen's conduct. In contrast to *Cleveland*, the codefendant's mitigating evidence was "aggravating" not "irrelevant" to appellant. *People v. Cleveland*, 32 Cal.4th at 760.

While such a strategy may have made sense for Allen, it violated appellant's due process and Eighth Amendment rights to a fair, reliable, individualized, and non-arbitrary sentencing determination.

Beginning with *Woodson v. North Carolina*, 428 U.S. 280, the United States Supreme Court has stressed the principle that "the fundamental respect for humanity underlying the Eighth Amendment" requires an "individualized" sentencing determination in which the jury considers "the character and record of the individual offender and the circumstances of the particular offense ...." *Id.* at 304; *see also Zant v. Stephens*, 462 U.S. at 879 ("What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime").

In *Lockett v. Ohio,* 438 U.S. 586, the Court further recognized that "an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases." *Id.* at 605. Again, in *Penry v. Lynaugh*, 492 U.S. 302, the Supreme Court reaffirmed the principle "that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319. It is critical that

the sentencer treat the defendant "as a 'uniquely individual human bein[g],' and has made a reliable determination that death is the appropriate sentence." *Id.* (quoting *Woodson v. North Carolina,* 428 U.S. at 304-305). "'Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime.'" *Id.* (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring)(emphasis in original)).

The jury's consideration of appellant's case was undermined by the coappellant's case in mitigation, which adopted the prosecution's theory of appellant's culpability for the capital offenses as well as endorsing the additional aggravating evidence introduced against appellant. Allen's case also stressed his own vulnerability and sought to lay responsibility for his violent history on appellant's dominance as the shot-caller in the gang.

The double attack by the prosecutor and coappellant prevented the jury from determining the appropriate sentence based on appellant's background, character and crime. Because an individualized sentencing determination must be based on the "character of the individual and the circumstances of the crime" *(Zant v. Stephens,* 462 U.S. at 879), the background and culpability of codefendants have no place in the jury's decision. Evidence of coappellant's upbringing which allegedly caused him to be more vulnerable to the gang and appellant's alleged exploitation of this vulnerability should have played no part in the jury's determination of the appropriate sentence for appellant. A process that encourages the jury to compare and contrast defendants to determine which one should receive the death penalty cannot withstand constitutional scrutiny.

Appellant's death sentence was the direct result of joinder. The prosecution's case against appellant was significantly bolstered by

coappellant's counsel's acknowledgment that the capital offenses occurred as portrayed by the prosecution at the guilt phase and that appellant was a feared, violent, shot-caller who dominated others, including coappellant. Moreover, evidence of the coappellant's background, appellant's alleged culpability for other crimes committed by coappellant, expert testimony regarding appellant's future dangerousness, and comparisons between appellant as leader and his coappellant as follower would never have been permitted if appellant were tried separately.

C. The Trial Court's Erroneous Failure To Sever The Penalty Trials Of Appellant And Coappellant Requires Reversal

A basic principle underlying the concept of a fundamentally fair trial is that the culpability of every criminal defendant on each charge will be determined solely on the basis of evidence regarding him individually. *See, e.g., People v. Mitchell,* 1 Cal.App.3d 35, 39 (1969). The Eighth Amendment of the United States Constitution requires that in determining whether a death sentence is appropriate, the jury must make an "individualized determination" based on the character of the defendant and the circumstances of the crime. *See, e.g., Zant v. Stephens,* 462 U.S. at 879. When carrying out this task, the jury must focus on the defendant as a "uniquely individual human being." *Woodson v. North Carolina,* 428 U.S. at 305. Also, considerations not relevant to defendant's personal responsibility and moral guilt should not play any part in the jury's determination of whether defendant should receive the death penalty. *Id.*

In addition, under California law, only evidence pertaining to the statutory factors is admissible in aggravation. The consideration of non-statutory evidence introduced by coappellant and described above violated California law, *People v. Boyd*, 38 Cal.3d at 771-776, as well as appellant's

constitutional rights. *Hicks v. Oklahoma*, 447 U.S. at 346-347.

For all of the foregoing reasons, appellant's Fifth, Sixth, Eighth, and Fourteenth Amendments rights to fundamental fairness and a reliable, fair, and individualized sentence, as well as his corresponding rights under California law, were violated as a result of the trial court's erroneous denial of appellant's severance motion. The error was prejudicial and appellant's judgment of death therefore must be vacated.

XVII.

THE TRIAL COURT PERMITTED THE INTRODUCTION OF UNRELIABLE, INFLAMMATORY, AND MISLEADING EVIDENCE OF ALLEGED PRIOR UNADJUDICATED CRIMINAL ACTIVITY AT THE PENALTY PHASE

During the penalty phase of this case, the prosecution introduced in aggravation what it claimed was evidence of nine previously unadjudicated acts of force or violence under the authority of Penal Code Section 190.3(b). *See* CT 1037.

It is argued as a general matter below, *see* Arguments XXI and XXIII, that reliance on such unadjudicated criminal activity during the sentencing phase deprived appellant of his constitutional rights. Even assuming a jury may properly rely upon this type of evidence in determining penalty, the jury's reliance on the unadjudicated criminal activity in this case involving alleged solicitations to commit murder was inappropriate given the misleading, unreliable, and inflammatory nature of the evidence. Its admission violated appellant's rights to due process, a fair trial, an impartial jury, and a reliable, non-arbitrary, and individualized penalty determination. Appellant's death judgment must be reversed.

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A. Evidence Purported To Establish Solicitation Of Murder Of Detective Mathew Was Improperly Introduced In Aggravation

1. *Proceedings Below*

The defense objected to the introduction of evidence alleging that appellant solicited the murder of Los Angeles Police Detective Tom Mathew. Appellant argued that there was insufficient evidence to establish that appellant committed any crime with respect to Detective Mathew, and that consideration of the proffered evidence in aggravation would be highly prejudicial and inflammatory. CT 938-941.

The prosecution provided an offer of proof based on tape recorded telephone conversations made by appellant to unidentified individuals on August 23, 1994, and October 7, 1994, while he was incarcerated in Ironwood State Prison. According to the proffer, while appellant was in prison on a narcotics-related conviction, detectives from the Los Angeles Police Department, including Detective Mathew, interviewed him regarding several unsolved homicides. Mathew had been a CRASH officer for several years prior to his assignment as a homicide detective. He had numerous contacts with appellant and other members of appellant's gang, which resulted in appellant having a degree of hostility towards Mathew. CT 949; RT 5604-5605.

In the first conversation, appellant stated as follows:

> Motherfucker, I'm down to something like 50 something days, you know what I'm saying. I'm trying to get this tease off of my back and I'm gonna be rolling up out there. And David already told me he gonna make sure I get some paper real quick like, you know what I'm saying, and after I do that, I'm gonna be able to have a scope for old Matthews and watcha all him, you

know what I'm saying. Just something for they bad ass. And after that motherfucker would be able to kick back, you know what I'm saying.

CT 949; People's Exhibit 52A; CT IV Supp. 2:443.

On October 7, 1994, a second phone conversation was intercepted which, according to the prosecution, indicated that appellant had sought the assistance of the person to whom he was speaking[36] to acquire a rifle for the purpose of killing Detective Mathew:

CJ: Hey.
M: What?
CJ: I need one of them Barlim Barlims.
M: Barlim Barlim?
CJ: Yeah.
M: What's that?
CJ: Them ... uh .. uh .. The Barlim Barlims
M: [unintelligible]
CJ: Barlim 30's.
M: Huh?
CJ: Say it twice.
M: [Laughter]
CJ: And put an eye on that motherfucker.
M: Yeah.
CJ: You know what I'm saying?
M: Yeah.
CJ: Say it twice, and put a eye – put a [unintelligible] glass – put a pair of binoculars on that mother –
M: [unintelligible]
CJ: Huh?
M: [Unintelligible] that [unintelligible] heat.
CJ: Oh, is that right?
M: Yup.
CJ: Oh. [Laughter]
M: He got his self worse [unintelligible]

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[36] The prosecution could not confirm the identity of the other person on the call. RT 5605.

CJ: Um ... worse than what?
M: [unintelligible] huh?
CJ: Oh, that – that –
M: Body mutilator.
CJ: [Laughter] The body mutilator. So well, so uh, I wanna hook up something for, for your friend.
M: Who, Matthews?
CJ: Yeah, fucking indian. [unintelligible]
CJ: Who he sweating?
M: [unintelligible] Reco [unintelligible]
CJ: Is that right? I don't want him to see me till its too late. [laughter]
M: When he see you it'll be the last time.
CJ: Yeah, he be talking about "why me?" [laughter] "Why me?" [laughter] You know what I'm saying. But ah, why don't you price one out for me. Tell David I say get it.
M: [Laughter]
CJ: I can't hear you.
M: Said where the hell is David?
CJ: Just tell him, right – I almost called his ass!
M: [unintelligible]
CJ: You ain't got his number?
M: Nah.
CJ: Tell that yellow girl around the corner to call.

CT 950; People's Exhibit 53A, CT IV Supp. 2:445-447.

The prosecutor claimed that the content of the taped telephone calls comprised the corpus of the crime. RT 5604. However, as the defense argued in its motion, there were no statements by appellant which constituted a solicitation or a direction to commit murder:

> In almost every single case of solicitation reported in California, the "solicitor" either offers to pay a particular person to kill someone else or specifically directs a particular person to kill someone else. Neither of these instances is present here. Defendant Johnson did not offer to pay any person to kill Detective Mathew.

> Defendant Johnson did not offer to give any person any consideration to kill Detective Mathew. Defendant Johnson did not direct any person to kill Detective Mathew. Defendant Johnson's statements may evidence a dislike of Detective Mathew, but his statements do not amount to solicitation under the law ....

CT 941.

The trial court initially agreed with the defense, stating that the conversation did not appear to comprise a solicitation to commit murder: "To me a solicitation to commit murder is if I come up to you and I say, I want you to go kill so and so for me. Here is who it is. I'll pay you, or whatever – that's not even necessary, payment. But if I ask you to go kill somebody for me, and I have the requisite state of mind, I'm guilty of solicitation, assuming you have legally sufficient proof of those facts." RT 5736-5737.

The trial court stated that while appellant was talking about killing an officer, it was not a solicitation "under any stretch."

> What's going on in his mind one would have to draw some inferences. But one inference is that he's serious about this, he doesn't like this guy, the guy is getting in his way, and he intends to kill him at some point. He even talks about how he'll do it, and how he'll laugh about it after the fact, and how he'll do it with a telescope on a 30-30 rifle, and so forth. I don't have a problem reading a little bit between the lines and seeing what he's saying. The problem is that there's no stretch that I can see, absent some secret code that hasn't been broken yet, where he is asking somebody to go do it. The closest he gets is to ask somebody to go price out a gun or a scope for him. I think at one point he says, you go check on how much that will cost me. When I

> get out I will do it. He never says, you go do it. He says, when I get out of here – I'm going to be out pretty soon, when I get out I'm going to go and kill him.

RT 5737.

The prosecutor then argued that by asking someone to price and/or obtain a gun, he was asking the other person to join in the commission of the crime. According to the prosecutor, "procuring a weapon, pricing a weapon, getting a weapon, are all part and parcel of joining in the commission of a crime, and that crime is articuably under this statement murder." RT 5738-5739.

After a further colloquy with the prosecutor, RT 5740-5745, the court continued to hold that there was insufficient evidence of soliciation:

> [O]n first blush it strikes me that what you've got is a guy talking about a crime he believes he may commit in the future, perhaps stretched to its broadest sense engaging someone in a conspiracy to commit a homicide. But the problem from the People's point of view is no overt act ... or no provable conspiracy to commit murder, not an attempt to commit murder. Because the acts fall far short, it would seem to me, of an attempted homicide. When you are talking about arranging the means and manner of the killing, you know, by obtaining a price on a gun, or what have you, you are well short.

RT 5745-5746.

The following day, despite having found that the facts merely supported a request by appellant to price a gun for use in a crime that might occur sometime in the future, the trial court inexplicably reversed itself. It held that the evidence supported a claim of solicitation of murder and was admissible as an aggravating circumstance under Penal Code section

190.3(b). RT 5788-5790, 5951-5954.

The two intercepted telephone calls quoted above were played for the jury. RT 5994-6000. In addition, Detective Barling testified about appellant's adverse relationship with Mathew. RT 6005-6037.

2. *There Was Insufficient Evidence to Establish the Crime of Solicitation to Commit Murder*

The prosecution may not introduce aggravating evidence that is not relevant to the statutory factors listed in Penal Code section 190.3. *People v. Boyd,* 38 Cal.3d at 774. One such factor, factor (b), consists of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Cal. Penal Code § 190.3(b).

Factor (b) evidence must constitute a crime, and that crime must include a requisite degree of force or violence. *People v. Boyd*, 38 Cal.3d at 776-777. It may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt. *People v. Clair*, 2 Cal.4th 629, 672-73 (1992). It is the responsibility of the trial court to determine that the evidence meets this high standard of proof. *People v. Boyd*, 38 Cal.3d at 778 (citing *People v. Johnson*, 26 Cal.3d 557, 576 (1980) (quoting *Jackson v. Virginia*, 443 U.S. at 318-319). A trial court's decision to admit evidence pursuant to factor (b) is reviewable for abuse of discretion. *People v. Smithey*, 20 Cal.4th at 991.

The trial court in this case abused its discretion because, "[v]iewing the totality of the evidence presented," a rational jury could not have concluded from the evidence that appellant committed the specified offense of solicitation. *See People v. Rodrigues*, 8 Cal.4th 1060, 1168 (1994).

The trial court misconstrued the elements of the crime of solicitation

in ultimately determining that the conversations described above constituted solicitation to commit murder. Even viewing the facts in the most favorable light for the prosecution, the most that can be gleaned from these conversations, as even the trial court recognized, was that appellant, who was in custody, expressed that he would like to get a rifle at some time in the future and shoot the officer, and asked the person he was speaking with to find out how much a rifle would cost.

"The essence of criminal solicitation is an attempt to *induce another to commit* a criminal offense." *People v. Herman*, 97 Cal.App.4th 1369, 1381 (2002) (emphasis in original) (citing Witkin & Epstein, Cal. Criminal Law, Elements of Crime, § 31, at 237 (3d ed. 2000). Thus, "a defendant can ordinarily be convicted under a general solicitation statute only if, had the solicitation been successful, the person solicited would have been guilty of the underlying offense." *Id.* "The crime of solicitation to commit murder occurs when the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing." *People v. Bottger*, 142 Cal.App.3d 974, 981 (1983).

For example, in *People v. Phillips*, 41 Cal.3d 29 (1985), the defendant wrote a letter which provided sufficient evidence from which a jury could have found solicitation of murder. The purported victims were all potential witnesses against the defendant in his upcoming capital trial, and he had threatened some of them previously. In that context, "the letter's directions to 'knock out,' 'nail' and 'blast' these witnesses," together with additional specific instructions, tended "to support the conclusion that defendant was seeking their murder." *Id.* at 76-77.

Here, there was nothing more than general banter which included appellant musing about killing the police officer and wondering how he

would obtain a gun to do it once he got out of prison. There was no request to have the person with whom appellant was speaking commit murder. At most, appellant asked him to price a rifle. If the individual actually determined the price of a rifle and subsequently reported the price to appellant, and appellant, upon his release from prison, purchased the gun and killed the officer, the individual would not have been guilty as an accomplice of the underlying offense of murder. *See* Cal. Penal Code §§ 31, 1111. There was therefore no solicitation.

Appellant's case is much closer to the facts in *People v. Walker*, 47 Cal.3d 605, 635 (1988), in which the evidence of a solicitation was deemed too ambiguous to be admissible. *Walker* involved a monitored conversation between the defendant and his cousin at the police station in which the defendant told his cousin he would have to get the gun from "Danny," identified as a police officer, and that "Danny" would have to be "offed." This Court rejected the contention that this evidence was admissible under factor (b) as a solicitation of defendant's cousin to murder the officer: "the words used by the defendant are at best ambiguous and equally supportive of an inference that he was merely relating to [his cousin] how *he* (defendant) would have to get the gun back and 'off' Danny." *Id.* at 639. The evidence was inadmissible because it did not constitute evidence of an actual crime. *Id.*

Similarly, the evidence here was ambiguous and failed to constitute sufficient evidence of a crime to warrant admission under factor (b). A telephone conversation in which appellant, while in prison, merely mused about his desire to harm the police officer at some unspecified time in the future and appeared to ask about how much a rifle would cost was not an act

of force or violence, and was too tangential to be considered a crime.[37] There was no evidence of any efforts made to price or purchase a rifle, and nothing to suggest that any attempt was made on Mathew's life. It therefore should not have been admitted under factor (b).

In *People v. Bell*, 201 Cal.App.3d 1396 (1988), the court of appeal held that one who solicits another to aid and abet in the solicitor's commission of the underlying offense is still guilty of solicitation. In other words, solicitation does not apply only where the solicitor seeks another to commit the crime, but also encompasses aiders and abettors. It was the *Bell* case that persuaded the trial court here to find sufficient evidence of solicitation to admit the evidence against appellant. *See* RT 5948-5953. What the trial court failed to realize, however, was that the evidence was inadequate to establish that the second individual, who was merely asked to price a gun, did not have the identity of interest to be considered an accomplice – he could not be charged with having committed the identical offense, i.e., murder, that appellant would have been charged with if the crime had been carried out. Cal. Penal Code § 1111.

An aider and abettor is chargeable as a principal only to the extent he or she actually knows and shares the full extent of the perpetrator's specific criminal intent, and actively promotes, encourages, or assists the perpetrator with the intent and purpose of advancing the perpetrator's successful

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[37] Whether appellant was seeking the cost of a rifle to be used against Mathew in this call is not at all clear. Given the ambiguous nature of the conversation it is extremely difficult to discern what is being discussed. Moreover, if, as the prosecution contended, appellant stored guns in a pigeon coop at his residence, the likelihood that he would need to learn the price for and then purchase a gun for this purpose is remote at best.

commission of the target offense. *People v. Beeman*, 35 Cal.3d 547, 560 (1984). Agreeing to price a gun is at most providing assistance with knowledge of the perpetrator's criminal purpose. However, this is insufficient to establish liability as an accomplice. *See People v. Sully*, 53 Cal.3d 1195, 1227 (1991). There was therefore insufficient evidence of solicitation, since had appellant ultimately committed the murder, the individual with whom he was speaking would not have been guilty of aiding and abetting in the murder. *Jackson v. Virginia,* 443 U.S. at 314-316.

3. *The Evidence Was Inflammatory and Prejudicial and Should Have Been Excluded under Evidence Code Section 352*

The trial court permitted the jury to consider as aggravating evidence appellant's purported desire to kill a police officer. Although the evidence did not constitute a crime, it was extremely inflammatory for the jury to hear that appellant, while in prison, was talking about murdering a law enforcement official. Even if the conversation was preliminary at best, it reflected that appellant had a propensity for violence, had no respect for the law, would be a future danger in prison, and showed no remorse for the underlying capital crimes.

The trial court permitted not merely the evidence of the phone conversation cited above, but also additional circumstantial evidence to establish appellant's animus towards the police officer in question. Thus, Detective Christopher Barling was permitted to testify that appellant was upset with Officer Mathew's conduct towards appellant and his fellow gang members, and repeatedly expressed his hostility towards Mathew to Barling. RT 6006-6013.

In addition, over objection, the evidence of the telephone conversation included an epithet in referring to Mathew as that "fucking

Indian." (Mathew was of East Indian descent). Appellant sought to at least have this reference redacted. As trial counsel put it: "It seems to me it's not needed to put in the derogatory ethnic comment in order to establish that its Mathew. It has no probative value. It certainly has a prejudicial effect It seems to me under 352 the court should exclude it." RT 5981. Yet, the court refused to exclude the reference. RT 5982-5984.

This Court reaffirmed that a trial court may exclude factor (b) evidence under Evidence Code Section 352.

> Neither factor (a) nor section 190.3, factor (b) (factor (b)) ... deprives the trial court of its traditional discretion to exclude 'particular items of evidence' by which the prosecution seeks to demonstrate either the circumstances of the crime (factor (a)), or violent criminal activity (factor (b)), in a 'manner' that is misleading, cumulative, or unduly inflammatory.

People v. Box, 23 Cal.4th 1153, 1201 (2000) (citation omitted).

As noted above, the content of the telephone conversation was ambiguous. At most, appellant sought to learn the cost of a rifle so that when he was released from prison he could buy it and then use it to shoot a police officer. Although the evidence simply detailed a preliminary discussion, it was used to infer a concrete plan to kill the officer. This was far more prejudicial than probative given the tangential nature of the evidence. As stated by trial counsel: "It is a highly inflammatory charge that will be presented to the jury on the most minimal of facts which the jury is going to be invited to draw the conclusion that this is a solicitation to commit murder which they may be all too willing or able to do given the fact that they have convicted Mr. Johnson in the primary case." RT 5951.

The trial court abused its discretion in failing to exclude this evidence

under Evidence Code section 352.

4. *The Admission of this Evidence Violated Appellant's Constitutional Rights*

The admission of this unreliable and inflammatory evidence was so prejudicial that it rendered appellant's trial fundamentally unfair and resulted in an unreliable, arbitrary, and non-individualized sentencing determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens,* 462 U.S. at 885) undermined the heightened need for reliability in the determination that death is the appropriate penalty. *Johnson v. Mississippi*, 486 U.S. at 585. In addition, the evidence was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of due process. *Payne v. Tennessee,* 501 U.S. 808, 825 (1991) .

The jury's consideration of non-statutory aggravation violated California law. *People v. Boyd,* 38 Cal.3d at 774. Its use arbitrarily deprived appellant of his state-created liberty interest to have his sentence determined without consideration of such evidence in violation of due process. *Hicks v. Oklahoma,* 447 U.S. at 346-347.

According to the prosecution, the evidence showed appellant cavalierly discussing the killing of a police officer while in prison. As such, it portrayed appellant as an unrepentant, vengeful, violent man with no respect for authority. The evidence furthered the prosecutor's incessant attempts to demonstrate that appellant was an evil person. For example, in her closing argument, the prosecutor urged the jury to listen to the tape, and listen to appellant's laugh at the end of the call: "Ask yourself whether that laugh is the laugh of a man who deserves mercy or whether that laugh is the

man who maniacally and regularly plots and seeks the demise of people for the sake of killing them, for the sake of eliminating them, for the sake of improving his sordid little life." RT 7463; *see also* RT 7465 ("We are dealing with a man who has a moniker which is amazingly accurate in its descriptiveness"); RT 7479 (he is "a malevolent predator").

The prosecutor also stressed that the solicitation occurred while appellant was in prison, providing strong support for the prosecution's and coappellant's argument that appellant must be given the death penalty because as long as he remained alive in prison he would continue to be a danger. *See, e.g.* RT 7435 ("do you want to give a guy the opportunity to live in prison when he is soliciting murders, calling hits on witnesses ..."); RT 7435-7436 ("Does the community deserve to be protected? Because if he is in prison, he has a phone. He has the opportunity"); RT 7459 ("How safe should the community feel knowing that this man is in prison with a phone for the rest of his life if LWOP is your decision?"); RT 7463-7464 ("That, ladies and gentlemen, happened while the defendant was in custody and that, ladies and gentlemen, is a very clear scriptor of how it is that the defendant behaves even while locked up in prison"); RT 7480 ("he poses a continuing and unending danger to the community at large"); RT 7481 ("Cleamon Johnson is a threat even when he is locked up in a single man cell. His voice speaks to the boundless and violence that he will perpetrate even from behind prison walls").

The Court should have excluded this evidence for the reasons discussed above. Assuming the error is subject to harmless error analysis, the admission of this evidence was not harmless beyond a reasonable doubt.

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B. Evidence Purported To Establish Solicitation Of Murder Of Georgia "Nece" Jones Was Improperly Introduced As Aggravation

1. *Proceedings Below*

The prosecution sought to introduce evidence that appellant was guilty of solicitation of the murder of Georgia "Nece" Jones. This was also based on a telephone conversation from prison that was seized by law enforcement.

The phone conversation on June 8, 1994, allegedly was between appellant and Reco Wilson:

> CJ: Hey, hey Dog. Ah, three homicides just left from up here, up here, and shit. They fucking with me, right. You know Tweet up here right. You know these phones are kinda like fucked up, right. So, ah, pretty much, that's it, you know. Lay down, you know what I'm saying. Clean up, know what I'm saying. Ah, what's been going on? Huh? You all right?
>
> Reco: Yeah.
>
> CJ: Yeah. You know what I'm saying. This mother fucking Mathews, right.
>
> Reco: Yeah.
>
> CJ: This mother fucker and shit. They, they came up here with all this old bullshit. You know what I'm saying. They searching. You know what I'm saying.
>
> Reco: Yeah.
>
> CJ: They searching. They seeking shit, right. So, I'm pretty sure I ain't got to say anything else. You know what I'm saying. Ah, lock everything down around there, you know what I'm saying. No contact. You know. Who all over there? Who else over there?
>
> Reco: [inaudible]

CJ: Just you and Cap? And, ah, where Base at? Huh?

Reco: At home.

CJ: At the county building. He don't stay behind, over there anymore. He don't?

Reco: Uh-uh.

CJ: Cause they even sweating the O.G. You know what I'm saying. Ah, open your mind for me. Ah, Ya-Ya house next door. All right, open your mind. Ah, I think, they trying to put some shit on us, you know what I'm saying. From my speculation. You know, so let us know, Dog.

Reco: [inaudible]

CJ: Huh?

Reco: Four of them rolling around in a Monte Carlo.

CJ: Four of them, rolling around in a Monte Carlo? Is that right? It's supposed to be feds involved too. So you gonna have to, you have to, really watch that ass. You know what I am saying, they trying. They, they go ah, from what they told me they got a special thing. They, they ain't fucking with nobody but us. They trying to say that we got an organization and shit. They trying to hit us with that, that ah terrorist act, saying that we terrorists and shit, that we supposed to have everybody around there doing what we say and all that old bullshit. You know what I'm saying. They trying to gather up any damn thing they can. They ain't just looking for a motherfucker for homicide. They looking for a mother fucker for extortion for motherfuckers for, ah, contracts, and all that old bullshit. They trying to say that, that some heavy shit dog. You know what I'm saying, ah,

them three smokers out there? Ah, man put a leash around their ass, by any means necessary. You know what I'm saying. It's either, it's either your way or no way. You know what I'm saying.

Reco: Yeah.

C.J.: That's real. You know. Damn, these mothers. They talking about they might be sending a motherfucker back down to the county for some bull, for that bullshit, right. But I'm looking at it like this: they didn't have to come up here and let me know they was going to do it unless they, you know what I'm saying. Unless they had enough shit to do it. You know what I'm saying. They ain't done it, you know what I'm saying. So it's, it's up, up to you know, the streets. If they can't pull no fish up out of the water, then they don't eat. You know what I'm saying. So, so, anything else, don't even slang or nothing. Nothing Dog, you know. Hey, you be getting at David? Get at Tiffany. Tell David I'm gonna call him tomorrow about 12 o'clock, 12:30. I'm gonna call him at the office at 12:30. Tell him I'm gonna need for him, cuz they trying to sweat Sin, too. They sweating, they was on Sin's dick too. Tell him I'm gonna need for the lawyer to be there too. Alright, I need the lawyer to find some shit out.

Reco: [inaudible]

CJ: Huh?

Reco: [inaudible]

CJ: Huh?

Reco: [inaudible]

CJ: I can't hear you.

Reco: [inaudible]

CJ: Them three smokers. The homies. Who

was that? You know who I'm talking about.

Exhibit 51A; CT IV Supp. 2:438-442.

The prosecution contended that the statement, "you know them three smokers out there? Put a leash around their ass by any means necessary" was, in fact, a solicitation to commit murder. The prosecutor stated as follows: "At that point in time the three smokers that we believe he was talking to were – or talking about were a woman named Amazon, also known as Clarissa Weathered, Nece Jones and their other companion, Old Man Berry, who very often would smoke cocaine with them." RT 5607.

According to the prosecution, one of appellant's "homies," a member of a gang friendly to appellant's gang, Charles Lafayette, had recently been tried for the murder of Willie T. Bogan. Georgia "Nece" Jones was the only testifying eyewitness. A mistrial had been declared, and Nece Jones was placed in protective housing after the trial. RT 5607-5608.

The prosecutor related that four days after the phone call between appellant and Reco Wilson, Nece Jones was on the corner of 87th and Wadsworth with Clarissa Weathered and others when Wilson chased her across the street and shot her. Wilson was subsequently convicted for the murder. RT 5608-5609.

The prosecution argued that "Mr. Johnson contacted Reco Wilson, told him to put a leash around their asses, then in response to that directive Mr. Wilson did in fact go out, put a leash around their asses by killing Nece Jones." RT 5609.

Appellant argued that there was insufficient evidence to present to the jury that appellant solicited the murder of Nece Jones. RT 5609.

In a generalized sense, your honor, I suppose one

> could interpret the statements about – or that are reflected in that telephone call as being a statement which talked about hurting people. But in terms of murdering somebody, I don't think that the specifics are there. The conversation talks about shut everything down, don't do anything, and talks about smokers in a generalized term. The prosecution singles out three people who they say were smokers. There were other people that were smokers.... But to say that because Mr. Johnson has this phone call, and then the fact that Gloria Denise Jones gets killed, allegedly by Mr. Wilson, or the jury having in the other case found by Mr. Wilson, I don't think that makes the connection that that's what Mr. Johnson was taking about.

RT 5763-5764.

The trial court found there was sufficient evidence of solicitation. RT 5764. The court then ruled that not only would the evidence of the alleged solicitation come in through the taped telephone conversation, but the prosecution would be permitted to present evidence detailing the actual murder of Jones. RT 5765-5770. In addition, since Jones was killed allegedly for testifying as a witness in a case involving the murder of Willie T. Bogan, the court would allow evidence of that murder to be introduced as well. RT 6080-6094.

Thus, the above-described taped conversation was played for the jury. RT 5994. In addition, Christopher Barling testified about the murder for which Jones was a witness as well as the Jones murder. He explained that Charles Lafayette, who belonged to the 84 Swans, was convicted of the murder of Willie T. Bogan. RT 6013-6015. Barling testified that Lafayette was one of appellant's "homeboys," meaning an associate or friend, not necessarily a member of the gang. RT 6016. He claimed Jones was an

associate of the 89 Family and "a smoker" of cocaine. RT 6016.

Barling participated in the investigation of the murder of Nece Jones and testified that Reco Wilson was convicted of the murder. RT 6017-6018. He also implied that appellant ordered Wilson to commit the murder, testifying that appellant "would tell Reco Wilson, or ask Reco Wilson to do certain tasks. Cleamon Johnson called the shots in the gang." RT 6024.

Detective Eugene Tapia testified that he responded to the crime scene on June 13, 1994, at which Jones was found dead. RT 6041-6042. Although appellant was incarcerated at the time, Tapia was asked to describe the crime scene in relation to appellant's residence, stating it was "one block south and then east on 88th Street." RT 6043. Detective Tapia testified that Jones was shot in the head two times and that, based on the proximity of the shell casings, she was shot at close range. RT 6049-6060. Over appellant's objection, photographs of the deceased taken at the crime scene were introduced into evidence. RT 6045-6048; People's Exhibits 54-57.

The County Coroner also testified in detail about the autopsy of Nece Jones, stating that she died of multiple gunshot wounds, and describing each of the wounds. RT 6069-6079.

The ubiquitous Carl Connor testified that he witnessed the shooting of Nece Jones. He described the shooting, including that he saw Reco Wilson shoot the victim six or seven times. Connor stated that he had testified against Wilson at his trial, for which he received a reward. RT 6141-6192.

Detective Gary Aspinall also testified. He had investigated the murder of Willie T. Bogan in March, 1993. RT 6115-6116. According to Aspinall, Nece Jones identified Lafayette as Bogan's killer, and Lafayette was arrested for the murder. RT 6116. Jones had concerns for her safety, so

she was placed in protective housing. RT 6117.

Jones testified in Lafayette's trial, but there was a hung jury that resulted in a mistrial. RT 6117-6119. Aspinall testified that the case was scheduled for a retrial, but that Jones was killed – within the territory claimed by the 89 Family – before the trial. Nevertheless, the trial was held and Lafayette was convicted. RT 6118-6119.

Aspinall was also permitted to testify that he interviewed appellant on June 30, 1994, at Ironwood State Prison. RT 6120. Appellant did not admit to any direct knowledge of witnesses being killed, but expressed to Aspinall his attitude with regard to gang members killing witnesses, generally, as: "kill or be killed." RT 6123. Appellant explained that if a witness testified against one of his "homies," then that witness is "expendable," "my homie's life becomes more important ... than his." RT 6124.

2. *The Evidence Was Insufficient to Establish Solicitation*

This evidence should never have been admitted at the penalty phase of appellant's trial. This situation is unlike *Phillips*, where the letter that purported to solicit murder was "somewhat ambiguous as to the conduct it solicits," but in context established sufficient evidence to constitute solicitation of murder. *People v. Phillips*, 41 Cal.3d at 76-77. The letter in *Phillips* specifically named the purported victims, with physical descriptions, and the address and directions for conducting the "business" as to each person. *Id.* at 76, n. 30. In addition, each of the persons was identified as a potential witness in the defendant's upcoming capital trial, and the defendant had made previous threats against these same witnesses. *Id.* at 76-77. "In light of defendant's apparent motive, the letter's directions to 'knock out,' 'nail,' and 'blast' these witnesses tend to support the conclusion that defendant was seeking their murder." *Id.* at 77.

In contrast, Jones was never mentioned during the phone conversation at issue here. There was reference to three "smokers," with no further identifying information. While the prosecutor surmised that Jones was one of the smokers, she also identified Clarissa Weathered as another. Weathered was apparently with Jones when Jones was shot; however she was not harmed or threatened in any way. In addition, Jones was a witness against Charles Lafayette, but Lafayette was not even a member of appellant's gang, and there was no reference in the conversation to Lafayette or to the murder he allegedly committed.

The evidence was ambiguous and was equally supportive of a more benign interpretation, as in *People v. Walker*, 47 Cal.3d at 639, *supra*. It is just as likely – and more probable – that appellant was not asking Wilson to kill anyone, but, to the contrary, was seeking to ensure that no crimes, including drug crimes, were committed while the police were investigating the gang. This interpretation explains appellant's statement that the police had just left and why Wilson needed to "clean up" and "lock everything down" because the police are "searching," "seeking shit," and are "even sweating the O.G.;" "they are trying to put some shit on us." CT IV. Supp. 2:439-440. Appellant stated that law enforcement was trying to say "we got an organization" and calling them "terrorists." *Id.* at 440. They were not merely investigating homicides, but also extortion. *Id.* It is then that appellant referred to "three smokers" and that Wilson needed to "put a leash around their ass, by any means necessary." *Id.* Appellant again instructed Wilson to not do anything: "don't even slang [i.e., sell drugs] or nothing." *Id.* at 441.

The fact that Wilson committed a murder a few days after his conversation with appellant is insufficient to establish that this conversation

was connected to the murder. The trial court therefore erred in permitting as an aggravating factor evidence of solicitation of murder. *See People v. Clair*, 2 Cal.4th at 672-673 ("Evidence of other criminal activity involving force or violence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt"); *see also People v. Boyd*, 38 Cal.3d at 778 (citing *People v. Johnson*, 26 Cal.3d at 576 (quoting *Jackson v. Virginia*, 443 U.S. at 318-19)).

3. *Even Assuming Evidence of the Phone Conversations Was Admissible, Additional Evidence of Two Murders and of Appellant's Statements about Killing Witnesses Should Have Been Excluded*

As with the alleged solicitation of the murder of Detective Mathew, above, ambiguous evidence that appellant may have solicited yet another murder was far more prejudicial than probative. Given the evidence throughout the trial that appellant – and no one but appellant – was calling the shots for the gang, any murder introduced into the trial in which members of the 89 Family were implicated would necessarily be imputed by the jury to appellant. Here, two murders that were at most only remotely connected to appellant were introduced against him at the penalty phase, providing the prosecution with powerful additional evidence to argue that appellant was an evil, violent, dangerous individual – even in prison – and was therefore deserving of death.[38]

The trial court allowed the prosecutor not only to present evidence that appellant solicited the Jones murder from prison, but also to introduce details of the murder itself, replete with photographs, and eyewitness and

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[38] As noted above, coappellant implied that another murder for which Allen was convicted was also attributable to appellant.

autopsy testimony. This evidence was unnecessary to prove the solicitation charge, which does not require consummation of the solicited crime. *People v. Miley*, 158 Cal.App.3d 25, 33 (1984) (crime of solicitation is complete once request is made; no acts need be taken to commit the target offense). It was, however, extremely emotional and inflammatory evidence.

The jury also heard details of the murder of Willie Bogan. Given the lack of any tangible evidence connecting appellant to this murder, the prejudicial impact was far greater than the probative value.

These two murders, as the prosecutor stressed, highlighted for the jury appellant's future dangerousness, his vengefulness, and his evil character. This negative characterization was exacerbated by the evidence that appellant stated as a general matter that witnesses must be killed. It also colored the jurors' view of appellant such that they were more likely to conclude appellant did solicit murders, despite the patently insufficient evidence to support those offenses.

None of this evidence was relevant to the solicitation of murder. It constituted additional non-statutory aggravation, and should have been excluded under Evidence Code section 352 and Penal Code section 190.3(b).

4. *The Admission of this Evidence Violated Appellant's Constitutional Rights*

The evidence of the solicitation of the murder of Nece Jones (and the evidence of the Jones and Bogan murders and appellant's statements to Detective Aspinall) was irrelevant, unreliable, and inflammatory. This evidence was so prejudicial that it rendered appellant's trial fundamentally unfair and resulted in an unreliable, arbitrary, and non-individualized sentencing determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. *See Johnson v. Mississippi,* 486 U.S. at 584,

585; *Payne v. Tennessee,* 501 U.S. at 825; *Hicks v. Oklahoma,* 447 U.S. at 346-347; *Zant v. Stephens,* 462 U.S. at 885.

The solicitation evidence was powerful evidence that undoubtedly inflamed the jury. The prosecutor used the charge to cast appellant as an evil, violent predator who was a future danger as long as he was alive. RT 7435-7436, 7459, 7480, 7481. Assuming the error is subject to harmless error review, the trial court's failure to exclude it was not harmless beyond a reasonable doubt.

C. The Alleged Criminal Activity Cannot Be Considered In Aggravation Because It Was Not Required to Be Found True Beyond a Reasonable Doubt By A Unanimous Jury

As argued below in Argument XXI, the application of *Blakeley v. Washington*, 124 S. Ct. 2531 (2004), *Ring v. Arizona,* 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000) to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon unadjudicated criminal activity in aggravation, such alleged activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in appellant's case was instructed that the prosecutor had the burden of proving the other crimes evidence beyond a reasonable doubt, the jury was specifically instructed that the jury need not be unanimous for a juror to consider these acts in aggravation. CT 1037. Indeed, unanimity is not required under California's sentencing scheme.

The jurors' consideration of this evidence thus violated appellant's rights to due process of law, to trial by jury, and to a reliable capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

D. Admission Of Other Crimes Evidence Was Prejudicial Error Requiring Reversal of Appellant's Death Sentence

The improper introduction of other crimes evidence violated a host of constitutional guarantees and requires that appellant's death sentence be vacated since the error is not subject to harmless error review. *See Maynard v. Cartwright*, 486 U.S. 356, 363-66 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 432-433 (1980).

This Court has taken the view that its own harmless error determination is an acceptable substitute for proper jury consideration of aggravating and mitigating facts. *People v. Avena*, 13 Cal.4th 394, 430-432 (1996). Appellant submits that *Avena* was wrongly decided in this respect and should be reconsidered. Moreover, the continued viability of *Clemons v. Mississippi*, 494 U.S. 738 (1990), upon which *Avena* and its predecessor decisions rely, has been called into question by the high court's recent cases. *Clemons* was premised on the understanding that the Constitution does not require that a jury impose a sentence of death or make the findings prerequisite to imposition of such a sentence – regardless of the state statutory scheme. This conclusion is directly at odds with the Court's ruling in *Ring v. Arizona*, which extended *Apprendi* to capital sentencing and requires that the specific findings on which the legislature conditions a death sentence be made by a jury and proven beyond a reasonable doubt. In California, the finding and weighing of aggravating circumstances are "elements" of capital murder, which must be found by the jury and proven beyond a reasonable doubt. Since appellant's jury did not – and was not required to – make written findings regarding aggravating circumstances, this Court cannot conduct a harmless error review without making findings that go beyond "'the facts reflected in the jury verdict alone.'" *See Ring v.*

Arizona, 536 U.S. at 589 (quoting *Apprendi*, at 530 U.S. at 483).

Nevertheless, the issue is academic, for the errors in this case were clearly prejudicial and require reversal even under the harmless error standard articulated by this Court.[39] "In light of the broad discretion exercised by the jury at the penalty phase of a capital case" and the "difficulty in ascertaining '[t]he precise point which prompts the [death] penalty in the mind of any one juror,' past decisions establish that 'any substantial error occurring at the penalty phase of trial ... must be deemed to have been prejudicial.'" *People v. Robertson*, 33 Cal.3d 21, 54 (1982) (citations omitted). An error is substantial if "there is any reasonable possibility that [such] error affected the verdict." *Id.* at 63 (Broussard, J. concurring); *see also People v. Brown*, 46 Cal.3d 432, 448 (1988). This heightened standard of review is necessary because in capital cases the Eighth Amendment demands "reliability in the determination that death is the appropriate punishment in a specific case." *People v. Brown*, 46 Cal.3d at 448 (quoting *Woodson v. North Carolina*, 428 U.S. at 305, and citing *Satterwhite v. Texas*, 486 U.S. 249 (1988)).

The potential for prejudice is greatest where, as here, the errors involve factor (b) "other crimes" evidence since such evidence "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." *People v. Robertson*, 33 Cal.3d at 54

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[39] Appellant maintains that the asserted errors are of federal constitutional dimension and must be scrutinized under the "reasonable doubt" standard of *Chapman v. California*, 386 U.S. at 24. Since this Court has recognized that the "reasonable possibility" standard of review for penalty phase error and the "reasonable doubt" standard of *Chapman* "are the same in substance and effect" *People v. Ashmus*, 54 Cal.3d at 965; *People v. Clair*, 2 Cal.4th at 678, the analysis is the same.

(quoting *People v. Polk*, 63 Cal.2d 443, 450 (1965)). The evidence that should not have been admitted involved murders and solicitation to commit murders, which, as described above, was extremely prejudicial. The prosecutor seized on this evidence to inflame the jury with disturbingly graphic details and argue that appellant was an evil, dangerous predator who deserved to die.

When taken either individually or cumulatively, the introduction of the other crimes evidence deprived appellant of a fair penalty phase proceeding. The death sentence must be vacated.

XVIII.

THE TRIAL COURT PRECLUDED THE DEFENSE FROM INTRODUCING EVIDENCE TO CAST DOUBT ON THE RELIABILITY OF THE PROSECUTION'S CASE IN AGGRAVATION

As discussed above, it was improper to allow the prosecution to present as an aggravating factor the solicitation of the murder of Nece Jones. Assuming it was not error to admit this evidence, appellant should have been permitted to introduce evidence demonstrating that another individual may have been responsible for the murder. Particularly given the ambiguous nature of the so-called solicitation by appellant, this third-party culpability evidence should have been permitted. The trial court denied appellant's request to present this evidence. The court's erroneous ruling violated appellant's constitutional rights and requires reversal of the death sentence.

A. Proceedings Below

The issue regarding the defense request to inform the jury of third-party culpability evidence first arose during the testimony of Detective Tapia, who testified at the penalty phase on direct examination regarding

Jones's murder. RT 6049-6065. On cross-examination, appellant's counsel asked whether Tapia had determined subsequent to the Jones killing, "whether or not [Jones] had contacted the police and made a report earlier that morning of some problem that she had." RT 6065. The prosecutor objected on relevance grounds and a discussion was had at the bench. RT 6065-6066.

Appellant's counsel noted that there was a police report indicating that on the day of her death Jones was involved in an altercation with a man who was unrelated to the 89 Family Bloods. Counsel stated that the man had hit Jones and she responded by throwing a brick at the man. In addition, the man was seen in the area of the homicide and had been arrested shortly after it occurred. It was also established that the man had changed his clothes by the time he was picked up by the police. RT 6067. As counsel stated: "The inference to be drawn is that Mr. Wilson did it on behalf of Mr. Johnson and I think we are at least entitled to present the fact that she had a problem with somebody else that day that was reported to the police." RT 6067.

The court sustained the objection without prejudice to making a showing that there was legally sufficient, admissible evidence to enable the defense to present third-party culpability evidence. RT 6068.

Accordingly, appellant filed a motion to admit evidence of third-party culpability evidence. CT 980-985. The motion provided the following offer of proof: 1) Jesse Pipkin was in the immediate vicinity of the murder at the time of the shooting; 2) Pipkin physically assaulted Jones the morning of the murder; 3) Jones made a report to the police that Pipkin beat her that morning; 4) Pipkin had no alibi for his whereabouts at the time of the murder; and 5) Pipkin changed his clothes the morning of the murder. CT 983.

Appellant argued that his state and federal constitutional rights would be violated if such evidence were excluded and requested that he be permitted to cross-examine the detectives in the Jones case about their investigation into Pipkin's involvement in the murder. CT 980-985 (citing *People v. Hall*, 41 Cal.3d 826 (1986); *United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir. 1995); *People v. Jackson*, 235 Cal.App.3d 1670 (1991); *People v. Sandoval*, 4 Cal.4th 155 (1992); *People v. Edelbacher,* 47 Cal.3d 983, 1017 (1989)).

A hearing was held at which appellant's counsel made a further offer of proof, which included a police report made by Jones the morning she was murdered that Pipkin beat her up and the testimony of investigating officers that Pipkin was observed in the vicinity at the time of the shooting. RT 7009-7010. There was also a statement made by Pipkin, in which he admitted that he went up to Jones and hit her in the face and that she threw a brick at him. Officers also observed Pipkin near the scene of the crime with a change of clothes in his hands approximately a half hour after the murder. RT 7012. In addition, one of the witnesses when interviewed at the scene said that somebody named "Pipking" committed the murder. RT 7014.

The court determined that Pipkin's statement as to what occurred was hearsay and inadmissible. The court agreed, however, that Jones's statement to the police was admissible under Evidence Code section 1370. RT 7025, 7027. Thus, the offer of proof considered admissible by the court included the statement by the victim that she was struck in the face by Pipkin on the morning of her death, corroboration of her statement by an officer who saw pinkness on her cheek, and an observation of Pipkin with a change of clothes in the area of the murder a half an hour after the murder. RT 7025-7027.

The court denied the motion to present third-party culpability

evidence: "it seems to me that what you have is a situation where a witness – or where a victim has been struck in the face by an individual prior to her being shot to death, several hours before her being shot.... What you have shown is weak evidence of motive, arguably some evidence of ill will between that person and Ms. Jones. But you have not shown anything whatsoever to suggest that the person was involved in the homicide ...." RT 7055-7058.

B. The Court Erred In Precluding Appellant From Informing The Jury Of Third-Party Culpability Evidence

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." *People v. Hall*, 41 Cal.3d at 833. However, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Id.* In assessing the admissibility of third-party culpability evidence, the trial court must consider whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. *People v. Bradford*, 15 Cal.4th at 1325. The trial court's determination of this issue is reviewed for abuse of discretion. *People v. Lewis,* 26 Cal.4th at 372.

Particularly here, where the evidence of appellant's involvement in the murder was so tenuous, the third-party culpability evidence was highly relevant. Appellant was in prison. The alleged solicitation to "put leashes around the ass of three smokers" in the face of police scrutiny did not

specifically identify Jones or indicate that anyone should be killed. It was only considered to have been an order to kill Jones because the person to whom the statement was made reportedly committed the killing within several days of the conversation. Otherwise, there was nothing to connect the statement to the murder. By contrast, Pipkin had a physical confrontation with Jones on the morning of her death, was seen in the area within a half hour after the shooting, and apparently had a change of clothes.

Appellant's case is most similar to the case of *United States v. Crosby*, 75 F.3d 1343, in which the Ninth Circuit reversed the lower court for excluding third-party culpability evidence in a case where the defendant was convicted of assault resulting in serious bodily injury. The defense had sought to introduce evidence that a third person named Hoskie, the victim's estranged husband, had pled guilty to brutally assaulting the defendant nine months earlier and was apparently jealous that the defendant was dating the victim; that Hoskie had beaten the victim on prior occasions; and that Hoskie was in the general area at the time of the assault. *Id.* at 1346. As the appellate court stated, the excluded evidence was exactly the kind of evidence that tended to prove that another person other than the defendant committed the crime:

> It showed that someone other than [defendant] had the opportunity, ability and motive to commit the crime. Hoskie lived a mere five miles from where the assault occurred and was in the general area at the time. His prior beatings of [defendant] and [victim] showed that he possessed the requisite strength and emotional instability. Most important, the excluded evidence showed that Hoskie was angry at his wife for having an intimate relationship with [defendant], and that this had driven him to

> violence in the past. In short, the excluded evidence supported an alternative theory of how the crime might have been committed.

Id. at 1347.

Likewise, the third-party here had the motive, opportunity, and ability to kill the victim. He was seen in the area of the crime, had a violent confrontation with the victim the very morning of her death, and engaged in suspicious behavior (i.e., changing his clothes) after the killing took place.

C. The Trial Court's Ruling Violated Appellant's Constitutional Rights

The trial court's ruling violated appellant's due process right to present a defense and to a fair trial, his Sixth Amendment right to an impartial jury and to cross-examine and confront witnesses, and his Eighth Amendment right to a fair, reliable sentencing determination.

Although appellant's alleged role in the Jones murder was based solely on an ambiguous telephone call with the purported shooter, the circumstances surrounding Jones's murder was a central focus of the prosecution's case in aggravation. The evidence included not simply appellant's telephone conversation that allegedly comprised the solicitation, but also graphic details of the Jones murder itself as well as evidence of another murder that Jones had witnessed. These incidents combined to demonstrate to the jury that appellant could order murders while in prison, and that he continued to be a violent and ruthless force regardless of incarceration. Given the tenuous connection between appellant and the Jones murder, evidence that cast doubt on the prosecution's theory would have seriously undermined the prosecution's theme. Thus, the trial court's erroneous refusal to allow the defense to introduce evidence of an alternate theory of who had committed the Jones murder was not harmless beyond a

reasonable doubt.

XIX.

THE TRIAL COURT RESTRICTED APPELLANT'S ABILITY TO PRESENT AND HAVE THE JURY CONSIDER MITIGATING EVIDENCE THAT WOULD HAVE HUMANIZED APPELLANT

With both the prosecution and coappellant seeking to demonize appellant at the penalty phase, it was critical that appellant demonstrate to the jury that he was a human being with positive qualities. In this regard, the defense sought to show that appellant's family believed that if appellant were given a life without possibility of parole sentence he could have a positive impact on his son. The trial court, however, precluded appellant from presenting this evidence and instructed the jury that it could not consider appellant's positive qualities as reflected in the impact the verdict would have on appellant's family. The restriction on the jury's consideration of this valid mitigating evidence violated California law and appellant's constitutional rights, resulting in an unfair and unreliable sentencing determination. The trial court's error requires that appellant's death sentence be vacated.

A. Proceedings Below

A significant theme of appellant's case in mitigation was that appellant was an important person to his young son. *See* RT 6725-6726. During the course of appellant's mother's testimony, she was asked about appellant's son. She testified that Cleamon Johnson, Jr., was three years old, and identified a photograph taken of appellant and his son in December 1994. Defendant's Exhibit N; RT 6748. Appellant's mother then testified that despite the fact that appellant had been convicted of two murders, she believed he could have a positive impact on his son: "I would like for the

jury, since he has been convicted, to give him life and not to – so that he could at least help guide his son." RT 6749.

At this point, the court asked to see counsel at the bench. RT 6749. The court stated that it was going to instruct the jury that it is "not appropriate for them to base their decision on your client's son nor is it appropriate for you to elicit that type of testimony." RT 6750. The court then instructed the jury:

> Ladies and Gentlemen, as emotional as the testimony gets from time to time, your duty in this case – however your verdicts come out is of no importance to the court as long as they are arrived at appropriately. [¶] But you may not base your decision, I will tell you that now, either for life in prison or the penalty of death, on either defendant based on the effect that your verdict will have on any other person other than the defendant.

RT 6751.

The trial court further admonished trial counsel that it was not appropriate "to ask a jury to come back with a particular result in a case for the benefit of another person, in this case Mr. Johnson's son." RT 6772. Appellant's counsel responded that it was "appropriate to have family members express their belief that the defendant should not get the death penalty ... and ... the reasons for that belief, or why they hold that belief." RT 6772.

Appellant's counsel argued that he had sought through appellant's mother to present not merely evidence that appellant had a son, but that she believed that appellant, if given a life sentence, would be able to prevent his son from making the same mistakes he did, "and she is expressing the view that he will do that, and that that is a positive aspect of his character. And

it's something that the jury should be entitled to consider as they weigh the decision that they have to make." RT 6773. The trial court disagreed and prevented appellant from presenting such evidence. RT 6773-6774.

During the course of appellant's testimony, the trial court refused to allow any additional photographs of appellant and his son. RT 6887-6888.

Appellant was permitted to testify that he did not want his son to make the same choices he did, and that he believed that he could lead him away from choosing a gang lifestyle. RT 6898. As noted above, however, the court explicitly informed the jurors that they could not consider in mitigation "the effect that your verdict will have on any other person other than the defendant." RT 6751.

At the conclusion of the penalty phase, the trial court further instructed the jury that their "decision cannot be arrived at based upon speculation about the effect your decision may have on any person not a defendant in this case, or in an attempt to cause or prevent any such effect." CT 1053.

B. The Trial Court Erroneously Restricted Appellant's Case In Mitigation

The Eighth Amendment prohibits limiting the scope of mitigating evidence to only that evidence which relates directly to the defendant's culpability for the crime he or she committed. *See Hitchcock v. Dugger,* 481 U.S. 393, 397-398 (1987); s*ee also Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (while inferences about a defendant's ability to make a positive adjustment to prison "would not relate specifically to petitioner's culpability for the crime he committed ..., there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'").

This principle was explicitly reaffirmed in *Tennard v. Dretke*, 124 S. Ct. 2562 (2004), where the Fifth Circuit's restrictive gloss on the scope of mitigating evidence was rejected. In *Tennard*, the United States Supreme Court stressed the expansiveness of the relevance standard applicable to mitigating evidence in capital cases:

> "the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard – "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" applies.

Id. at 2570 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)).

"Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Id.* at 2570 (citing *Boyde v. California*, 494 U.S. 370, 377-378 (1990) (citing *Lockett v. Ohio,* 438 U.S. at 604); *Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and also citing *Payne v. Tennessee*, 501 U.S. at 822 ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death .... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings v. Oklahoma*, 455 U.S. at 114)).

Moreover, the Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the

Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. at 305; *see also, Godfrey v. Georgia,* 446 U.S. at 427-28; *Mills v. Maryland,* 486 U.S. at 383-384.

California Penal Code section 190.3(k) permits a capital defendant to present evidence of "any other circumstance which extenuates the gravity of the crime ...." As interpreted by this Court, that section incorporates the constitutional requirement, set out by *Eddings* and *Lockett*, that jurors cannot be precluded from considering mitigating evidence of *any* aspect of the defendant's character or record that he offers as a basis for a sentence of less than death. *People v. Boyd,* 38 Cal.3d at 775; *People v. Easley*, 34 Cal.3d 858, 878 (1983). This Court has construed factor (k) as "an open-ended provision permitting the jury to consider any mitigating evidence," *People v. Boyd*, 38 Cal.3d at 775, and has held that "any restriction on a sentencing body's consideration of mitigating factors is unconstitutional." *People v. Robertson*, 33 Cal.3d at 58.

While this Court has held that "sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation," *People v. Ochoa*, 19 Cal.4th 353, 456 (1998), *see also People v. Smithey*, 20 Cal.4th at 1000, it is clear that a defendant is still entitled to "offer evidence that he or she is loved by family members and others, and that these individuals want him or her to live." *People v. Ochoa*, 19 Cal.4th at 456; *see also People v. Brown*, 31 Cal.4th at 575-576 (testimony from a relative of the defendant concerning her "feelings" about the sentencing decision was admissible); *People v. Heishman*, 45 Cal.3d at 194 (trial court erred in excluding proffered mitigating evidence showing that defendant's former wife did not believe that he should be sentenced to death). Such evidence "is relevant because it

constitutes indirect evidence of the defendant's character." *People v. Ochoa*, 19 Cal.4th at 456.

Moreover, a defendant may present testimony by family members about the impact of an execution "if by doing so they illuminate some positive quality of the defendant's background or character." *Id.* What is impermissible, according to this Court, is for a jury to spare a defendant's life simply because it feels sorry for defendant's family members or because it believes the impact of the execution will be devastating to the defendant's family members. *See People v. Carter*, 30 Cal.4th 1166, 1205 (2003) ("Counsel's bare invitation to the jury to consider the likely effect of a death sentence on defendant's friends and family did not articulate a factor relevant to the jury's penalty determination").

Here, the defense sought to present evidence that appellant had redeeming qualities that rendered the death penalty inappropriate, i.e., that appellant's family believed he would provide a positive influence on his son. The trial court refused to permit this testimony, and instructed the jury that it could not consider the impact of appellant's sentence on his family for any purpose whatsoever.

The trial court's exclusion of this evidence violated California law and appellant's Eighth and Fourteenth Amendment rights. Information such as that excluded from appellant's trial regarding his potential role in the life of his son, and his family's perception of that role, was highly relevant to the jurors' informed decision as to whether life or death is the "appropriate" sentence under all the relevant circumstances. This was particularly true when viewed as rebuttal to the prosecutor's portrayal of appellant as an uncaring, malevolent predator who continued to participate in gang activity.

In addition, because the proffered evidence either contradicted or

provided a sympathetic explanation for factors that the prosecution argued in aggravation, its exclusion also resulted in a death sentence that was unconstitutionally "imposed, at least in part, on the basis of information which [appellant] had no opportunity to deny or explain." *Gardner v. Florida,* 430 U.S. at 362.

Exclusion of this favorable evidence violated appellant's right to present a defense (U.S. Const. amends. VI, XIV; Cal. Const. art. I, §§ 7 & 15; *Chambers v. Mississippi,* 410 U.S. 284 (1973)), his right to introduce relevant mitigating evidence (U.S. Const. amends. VIII, XIV; Cal. Const. art. I, §§ 17 & 28, subd. (d); Cal. Evid. Code § 351; *Lockett v. Ohio,* 438 U.S. at 604), his right to a fair trial (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *In re Murchison,* 349 U.S. 133, 136 (1955)), and his right to a fair and reliable capital sentencing hearing. U.S. Const. amends. VIII, XIV; Cal. Const. art. I, § 17; *Beck v. Alabama,* 447 U.S. at 638.

C. The Preclusion Of Mitigation Offered By Appellant Requires Reversal

Violations of appellant's federal constitutional rights require reversal unless the prosecution can establish that the errors were harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. at 24. Violations of state law at a capital penalty trial require reversal if there is a reasonable possibility that the errors affected the penalty verdict. *People v. Brown,* 46 Cal.3d at 447-448. Under either test, the exclusion of appellant's mitigating evidence was reversible error.

The prosecutor's theme throughout the trial was to portray appellant as evil, inhuman, and uncaring. *See, e.g.,* RT 7465 ("We are dealing with a man who has a moniker which is amazingly accurate in its descriptiveness"); RT 7479 (appellant "is a malevolent predator whose only goal is his own

pleasure, his own power over little girls, over his gangster pals, over unwilling victims and the legal system"); RT 7481 (appellants have "murder in their hearts and satan in their souls ..."). The prosecutor argued that appellant had used his family and friends "for his own personal gain at whatever cost." RT 7479. The prosecutor also relied on the evidence of appellant's sexual assaults to argue that appellant was so evil that he even terrorized his own family. *See* RT 7477. The prosecutor concluded that appellant was a "bully," a "killer," a "manipulative ... abuser," who poses a "continuing and unending danger to the community at large." RT 7480. Finally, the prosecutor argued that there was no evidence that appellant had in any way changed or that he would ever "back off" of his gang activity, RT 7436, and ridiculed appellant's testimony that he wanted to be a positive influence on his son and lead him away from gang activity. RT 7475.

A powerful response to these arguments would have been that appellant had redeeming qualities that made him worthy of a sentence less than death as evidenced not only by his own statements, but by his family's belief that he would benefit his son if he were spared. Evidence in support of this theme would have demonstrated that appellant did not care only about himself but was concerned about the future of his son and hoped to have a positive impact on his son's life. However, the defense was prevented from making this presentation and the jury was precluded from considering – for any purpose – the impact of appellant's sentence on his family.

Because the trial court's restriction of appellant's mitigation hampered the defense ability to challenge the central theme of the prosecutor's case for death, the error cannot be considered harmless beyond a reasonable doubt.

XX.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases. As shown below, this failure violates appellant's Eighth and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Constitutional Protections Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" *Barclay v. Florida*, 463 U.S. 939, 954 (1976) (plurality opinion, alterations in original) (quoting *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality 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*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. at 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*, 465 U.S. 37 (1984), the United States Supreme Court ruled that the 1977 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 51. Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. *See People v. Farnam,* 28 Cal.4th 107, 193 (2002).

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 [], 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, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 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, 512 U.S. 967, 995 (1994) (Blackmun, J., dissenting). The time has come for *Pulley v. Harris* to be reevaluated, since, as this case illustrates, the 1978 California statutory scheme fails to limit capital punishment to the "most atrocious" murders. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). Comparative case review is the most rational – if not 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.[40]

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

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[40] *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,* 283 So.2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell*, 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State*, 417 NE.2d 889, 899 (Ind. 1980); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977) comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State*, 548 S.W.2d 106, 121 (Ark. 1977).

"there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *Pulley v. Harris*, 465 U.S. at 51. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code 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 XXI-XXIII, 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 – including appellant, who was not the actual killer – 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.

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XXI.

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" (Cal. Penal Code § 190.3) and that "death is the appropriate penalty under all the circumstances." *People v. Brown*, 40 Cal.3d 512, 541 (1985), *rev'd on other grounds*, *California v. Brown*, 479 U.S. 538; *see also People v. Cudjo*, 6 Cal.4th 585, 634 (1993). 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.[41]

Here, the jury was specifically instructed that no burden of proof was required in determining penalty. The jury was told that the "State of California expresses no preference as to which punishment is appropriate ... but in all cases the determination of the appropriate penalty remains a question for each individual juror based upon a consideration of aggravation and mitigation." CT 1054.

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*, 16 Cal.4th 1223, 1255 (1997); *see also People v. Stanley*, 10 Cal.4th 764, 842 (1995); *People v. Ghent*, 43 Cal.3d at 773-774. This Court's reasoning, however, has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey,* 530 U.S. 466, *Ring v. Arizona,* 536 U.S. 584, and *Blakeley v. Washington*, 124 S. Ct. 2531.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second

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[41] There are two exceptions to this lack of a burden of proof. The special circumstances (Cal. Penal Code § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Cal. Penal Code § 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b) below and in Argument XXIII.

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*, 530 U.S. at 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 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 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*, 536 U.S. at 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 593.

Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona*, 497 U.S. 639 (1990), 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*, 536 U.S. at 609.[42] 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." *Id.*

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*, 124 S. Ct. at 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. *Id.* The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. *Id.* at 2543.

In reaching this holding, the Supreme Court stated that the governing

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[42] 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*, 536 U.S. at 610 (Scalia J., concurring).

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*, 124 S. Ct. at 2537 (emphasis 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.[43] Only California and

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[43] *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 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

(continued...)

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*, 16 Cal.4th at 1255; *see also People v. Hawthorne,* 4 Cal.4th 43, 79 (1992) (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.[44] As set forth in California's "principal sentencing instruction," *People v. Farnam,* 28 Cal.4th 107, 177 (2002), which was read to appellant's jury, "an aggravating factor is any

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[43](...continued)
(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,* 65 P.3d 915 (Az. 2003).

[44] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant ...." *People v. Brown,* 46 Cal.3d at 448.

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." CT 1066; 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.[45] 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 notwithstanding these factual findings.[46]

In *People v. Anderson,* 25 Cal.4th 543, 589 (2001), 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.,*

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[45] In *Johnson v. State,* 59 P.3d 450 (Nev. 2002), 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 460.

[46] 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*, 42 Cal.3d 1222, 1276-1277 (1986); *People v. Brown,* 40 Cal.3d at 541.

People v. Prieto, 30 Cal.4th 226, 263 (2003) ("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*, 30 Cal.4th 43 (2003).

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*, 530 U.S. at 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*, 536 U.S. at 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 out that crime." *Blakeley v. Washington*, 124 S. Ct. at 2551 (Breyer, J., dissenting) (emphasis 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*, 530 U.S. at 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 (Cal. Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." *Ring v. Arizona*, 536 U.S. at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. at 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*, 536 U.S. at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. at 494), and are "essential to the imposition of the level of punishment that the defendant receives." *Ring v. Arizona*, 536 U.S. at 610 (Scalia, J., concurring). They thus trigger *Blakeley-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*, 30 Cal.4th at 126, n. 32 (citing *People v. Anderson*, 25 Cal.4th at 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*, 30 Cal.4th at 275; *People v. Snow*, 30 Cal.4th at 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 *Blakeley* 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*, 512 U.S. at 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." *People v. Prieto*, 30 Cal.4th at 263 (emphasis added). This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence.

See People v. Duncan, 53 Cal.3d 955, 977-978 (1991).

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*, 65 P.3d at 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*, 107 S.W.3d 253 (Mo. 2003); *Woldt v. People*, 64 P.3d 256 (Colo. 2003); *Johnson v. State*, 59 P.3d 450 (Nev. 2002).[47]

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

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[47] *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).

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*, 124 S. Ct. at 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 beyond a reasonable doubt.[48]

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[48] In *People v. Griffin,* 33 Cal.4th 536 (2004), in this Court's first post-*Blakeley* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 437 (2001), 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*, 33 Cal.4th at 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, 532 U.S. at 429. This finding, which was a prerequisite to the (continued...)

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring,* and *Blakeley* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence 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*, 30 Cal. 4th at 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

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[48](...continued)
award of punitive damages, is very like the aggravating factors at issue in *Blakeley*. *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 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.

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, 536 U.S. at 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,* 524 U.S. at 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, 536 U.S. at 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,* 357 U.S. 513, 520-521 (1958).

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,* 397 U.S. at 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,* 430 U.S. at 358; *see also Presnell v. Georgia,* 439 U.S. 14 (1978). 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*, 397 U.S. at 363-364; *see also Addington v. Texas,* 441 U.S. 418, 423 (1979). 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*, 397 U.S. at 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,* 455 U.S. 743, 755 (1982); *see also Matthews v. Eldridge,* 424 U.S. 319, 334-335 (1976).

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*, 375 U.S. at 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*, 397 U.S. 364 (adjudication of juvenile delinquency); *People v. Feagley,* 14 Cal.3d 338 (1975) (commitment as mentally disordered sex offender);

People v. Burnick, 14 Cal.3d 306 (1975) (same); *People v. Thomas,* 19 Cal.3d 630 (1977) (commitment as narcotic addict); *Conservatorship of Roulet,* 23 Cal.3d 219 (1979) (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*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation]. 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, 455 U.S. at 755 (quoting *Addington v. Texas*, 441 U.S. at 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*, 455 U.S. at 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*, 397 U.S. at 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*, 428 U.S. at 305.

The need for reliability is especially compelling in capital cases. *Beck v. Alabama,* 447 U.S. at 637-638. No greater interest is ever at stake. *See Monge v. California*, 524 U.S. at 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*, 524 U.S. at 732 (quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981) (quoting *Addington v. Texas*, 441 U.S. at 423-424) (emphasis added). The sentencer of a person

facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only 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,* 33 Cal.4th at 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, 833 A.2d 363, 408, n.37 (Conn. 2003).

In sum, the need for reliability is especially compelling in capital cases. *Beck v. Alabama,* 447 U.S. 625, 637-638; *Monge v. California*, 524 U.S. at 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 (Mitchell)*, 5 Cal.4th 1229, 1236 (1993)), 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*, 52 Cal.3d 577, 643 (1990). 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*, 455 U.S. at 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*, 428 U.S. at 260 (punishment should not be "wanton" or "freakish"); *Mills v. Maryland*, 486 U.S. at 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* Cal. Penal Code §190.3), and may impose such a sentence even if no mitigating evidence was presented. See *People v. Duncan*, 53 Cal.3d at 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. Penal Code Section 190.4(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."[49]

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 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); Cal. Evid. Code § 520 ("The party claiming that a person is guilty of crime or wrongdoing

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[49] 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.

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,* 447 U.S. at 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*, 486 U.S. at 374; *Myers v. Ylst*, 897 F.2d at 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*, 455 U.S. at 112. It is unacceptable – "wanton" and "freakish," *Proffitt v. Florida*, 428 U.S. at 260 – the "height of arbitrariness," *Mills v. Maryland*, 486 U.S. at 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*, 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 v. Louisiana*, 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*, 501 U.S. 624, 632-633 (1991).

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*, 1 Cal.4th at 147; *see also People v. Taylor*, 52 Cal.3d 719, 749 (1990) ("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*, 435 U.S. 223, 232-234 (1978);

Woodson v. North Carolina, 428 U.S. at 305.)[50]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) – 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." *Id.* at 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*.[51]

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 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*, 447 U.S.

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[50] 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*, 59 U.S. (18 How.) 272 (1855); *Griffin v. United States*, 502 U.S. 46, 51 (1991).

[51] 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*, 30 Cal.4th at 265. Appellant raises this issue to preserve his rights to further review.

323, 334 (1977). Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524 U.S. at 732; *accord Johnson v. Mississippi,* 486 U.S. at 584; *Gardner v. Florida*, 430 U.S. at 359; *Woodson v. North Carolina*, 428 U.S. at 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,* 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.[52] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his

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[52] 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., 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).

sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. *See, e.g.*, Cal. Penal Code § 1158(a). Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (*see Monge v. California*, 524 U.S. at 732; *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)), – 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. Y1st*, 897 F.2d at 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*, 11 Cal.4th 694, 763-764 (1995)), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States*, 526 U.S. 813, 815-816 (1999), the United States 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 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*, 4 Cal.4th at 79;

People v. Hayes, 52 Cal.3d at 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 7264-7271. This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. *See Mills v. Maryland*, 486 U.S. at 374; *Lockett v. Ohio*, 438 U.S. at 604; *Woodson v. North Carolina*, 428 U.S. at 304.

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." *Boyde v. California*, 494 U.S. 370, 380 (1990). 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." *Id.* 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,* 957 F.2d 1495, 1501 (8th Cir. 1992), *rev'd on other grounds*, 501 U.S. 272 (1993). 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*, 79 Cornell L. Rev. 1, 10 (1993).

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,* 494 U.S. at 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. *Id.*; *see also Mills v. Maryland*, 486 U.S. at 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*, 425 U.S. 501, 503 (1976). 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*, 94 Yale L.J. 351 (1984); cf. *Delo v. Lashley*, 507 U.S. 272 (1983). Indeed, appellant's jury was instructed explicitly that "the law of the State of California expresses no preference as to which punishment is appropriate. In other words, neither death nor life without possibility of parole is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each

individual juror based upon a consideration of aggravation and mitigation." CT 1054.

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*, 13 Cal.4th 92 (1996), 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 XX, XXII and XXIII 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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XXII.

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 each defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the

> various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

CT 1066-1067.

This instructions, 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,* 486 U.S. at 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." CT 1066. "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*, 486 U.S. at 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 361-362. A death penalty scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth and Fourteenth Amendments. *Id.*

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*, 486 U.S. at 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*, 224 S.E.2d 386, 391 (Ga. 1976), 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*, 462 U.S. at 867, n. 5.

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as

> "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

224 S.E.2d at 392.[53]

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*, 1 Cal.4th 281, 316, n. 14 (1991). 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*, 224 S.E.2d at 392. The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*id.* (emphasis 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

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[53] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. *See Gregg v. Georgia*, 428 U.S. at 202.

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 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 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,* 446 U.S. at 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,* 503 U.S. 222 (1992). 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*, 428 U.S. at 305; *People v. Edelbacher*, 47 Cal.3d at 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*, 40 Cal.3d at 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*, 9 Cal.4th at 948; *People v. Milner*, 45 Cal.3d 227, 256-257 (1988); *see also Murtishaw v. Woodford*, 255 F.3d 926, 962 (9th Cir. 2001). 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 1328. By contrast, "appropriate" is defined as "especially suitable or compatible." *Id.* at 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*, 6 Cal.4th 457, 462, 464 (1993). 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*, 40 Cal.3d at 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*, 66 Cal.App.2d 894, 909 (1944). 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*, 34 Cal.3d at 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*, 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." (Cal. Penal Code § 190.3.)[54] 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*, 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

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[54] 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*, 40 Cal.3d at 544, n. 17.

not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

The misleading nature of the instruction was exacerbated in appellant's case by the refusal of the trial court to give a requested defense instruction that would have informed the jury that "if the mitigating evidence gives rise to sympathy or compassion for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty." CT 1073. The jury would have further been informed that "a mitigating factor does not have to be proved beyond a reasonable doubt" and that "[a] juror may find that a mitigating factor exists if there is any reason to support it." *Id. See* RT 7267-7271. While the requested instructions were merely permissive, without them, reasonable jurors deliberating appellant's sentence surely would not have understood that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction given to appellant's jury violated due process. *See Hicks v. Oklahoma*, 447 U.S. at 346.

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. *Sullivan v. Louisiana*, 508 U.S. at 281 (emphasis 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*, 53 Cal.3d at 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*, 43 Cal.2d at 526-529; *People v. Costello*, 21 Cal.2d 760 (1943); *People v. Kelley*, 113 Cal.App.3d 1005, 1013-1014 (1980); *People v. Mata*, 133 Cal.App.2d 18, 21 (1955); *see also People v. Rice*, 59 Cal.App.3d 998, 1004 (1976) (instructions required on "every aspect" of case, and should avoid emphasizing either party's theory); *Reagan v. United States*, 157 U.S. at 310.[55]

People v. Moore, 43 Cal.2d 517, is instructive on this point. There,

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[55] There are due process underpinnings to these holdings. In *Wardius v. Oregon*, 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,* 388 U.S. 14, 22 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court,* 54 Cal.3d 356, 372-377 (1991); cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180-1192 (1960). 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*, 412 U.S. at 474. Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

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 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 any defense theory supported by substantial evidence. *See People v. Glenn*, 229 Cal.App.3d 1461, 1465 (1991); *United States v. Lesina*, 833 F.2d 156, 158 (9th Cir. 1987). The denial of this fundamental principle in appellant's case deprived him of due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Hicks v. Oklahoma*, 447 U.S. at 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*, 457 U.S. 202, 216-217 (1982).

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*, 438 F.Supp. 455, 469-470 (D.S.D. 1977), *aff'd* 573 F.2d 1027, 1028 (8th Cir. 1978); *cf. Cool v. United States*, 409 U.S. 100 (1972) (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, particularly in the absence of the requested defense instructions, *see* Argument XXIV, and together with CALJIC 8.85, discussed below in Argument XXIII, 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.

XXIII.

THE INSTRUCTIONS REGARDING THE MEANING OF MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION IN APPELLANT'S CASE RESULTED IN AN UNCONSTITUTIONAL DEATH SENTENCE

The jury was instructed on Penal Code 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 (CT 1055-1056) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of aggravating and mitigating factors. CT 1066-1067. 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 the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Subsection (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 defendants were convicted in the present proceeding and the existence of any special circumstance found to be true." CT 1055.

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*, 512 U.S. at 975.

An analysis of how prosecutors actually use section 190.3(a) shows that they have subverted the essence of the 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,* 505 U.S. 333, 341 (1992). 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*, 486 U.S. at 362.

As applied in California, however, section 190.3(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*, 45 Cal.3d 26, 78 (1988). 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*, 54 Cal.3d 551, 581-582 (1991)), sought to conceal evidence three weeks after the crime (*People v. Walker*, 47 Cal.3d at 639, n. 10), threatened witnesses after his arrest (*People v. Hardy* 2 Cal.4th 86, 204 (1992)), or disposed of the victim's body in a manner precluding its recovery. *People v. Bittaker*, 48 Cal.3d 1046, 1110, n. 35 (1989).

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*, 512 U.S. at 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.[56]

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*, 486 U.S. at 363 (discussing the holding in *Godfrey v. Georgia,* 446 U.S. 420).

In this case, the prosecutor urged the jury to consider the manner in which the murders were committed, including the fact that the victims "were sitting in their car, waiting for a car to be detailed mid-day." RT 7430. The prosecutor described how the second individual to be shot watched the first one:

> Donald Loggins watched as the passenger was shot bullet by bullet. Can you imagine his fear? Donald Loggins is sitting in the driver's seat of the car and he is watching the man sitting next to him be blown away piece by piece, watching his eyeball pop out, seeing the shooter only feet away pointing an Uzi and then feeling himself fall within the cross hairs of that particular

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[56] 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 XXI.

> defendant and feeling the bullets go into his body and eventually kill him.

RT 7430.

The prosecutor asked the jury "how it would feel to be those people when all you can do is suffer like a caged animal," and that they "must consider those circumstances" in reaching a verdict: "to know that you were sitting in a car on a warm afternoon and were going to die is something that you must consider in standing in the shoes of the victim." RT 7431.

The details of the murder were deemed significant by the prosecutor, including the fact that the shooter "approached the victims from the rear to increase their vulnerability, to increase his opportunity for success. To ambush those men." RT 7431. In addition, coappellant was armed with an Uzi, which the prosecutor described as "a killing weapon, a terrorizing weapon." He shot the victims from "close range," with "bullet by bullet penetrating the body and skull" of one of the victims, and then shot the other, with "bullet by bullet into the head and torso of Donald Loggins dislodging his brain and disfiguring his face." RT 7431.

The prosecutor also exhorted the jury to find that appellant's attitude in committing the crimes to be aggravating, including that he was a man "who saw potential victims, capitalized on their vulnerability, and for his own self-gratification sent one of his homeboys on a mission after providing him with a gun." RT 7433. The prosecutor further argued that after the killings appellant "paraded around those bodies with pride." RT 7433.

As this case illustrates, the 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*, 486 U.S. at 363. 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 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 nine unadjudicated incidents pursuant to 190.3(b) which it contended were criminal acts involving force or violence. As discussed in Argument XVII and Argument XXI, 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, 486 U.S. at 584-587; *State v. Bartholomew,* 683 P.2d 1079, 1086 (Wash. 1984); *State v. Bobo,* 727 S.W.2d 945, 954-955 (Tenn. 1987); *State v. McCormick,* 397 N.E.2d 276, 279-281 (Ind. 1979); *Cook v. State,* 369 So.2d 1251, 1257 (Ala. 1978); *Commonwealth v. Hoss,* 283 A.2d 58, 69 (Pa. 1971).

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,* 498 U.S. 308, 321 (1991) (quoting *Spaziano v. Florida,* 468 U.S. 447, 460 (1984)).

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,* 470 U.S. 68, 87 (1985) (Burger, C.J., concurring); *Eddings v. Oklahoma,* 455 U.S. at 117-118 (O'Connor, J., concurring); *Lockett v. Ohio,* 438 U.S. at 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,* 46 Cal.3d 1035, 1057 (1988). 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,* 45 Cal.3d at 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,* 2 Cal.4th at 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*, 48 Cal.3d 527, 567 (1989). 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,* 52 Cal.3d 1210, 1258-1261 (1991). It has also held that evidence of juvenile misconduct is admissible under factor (b) (*People v. Burton,* 48 Cal.3d 843, 862 (1989)), as is an offense dismissed pursuant to a plea bargain. *People v. Lewis,* 25 Cal.4th 610, 658-659 (2001).

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,* 405 U.S. at 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,* 41 Cal.3d 247, 280-281 (1985). As to each such offense, the defendant is entitled to the presumption of innocence (*see Johnson v. Mississippi*, 486 U.S. at 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.[57] Cf. *Groppi v. Wisconsin,* 400 U.S. 505, 508-509 (1971) (where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand); *Irvin v. Dowd,* 366 U.S. at 721-722; *Donovan v. Davis,* 558 F.2d 201, 202 (4th Cir. 1977).

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. Moreover, several of the unadjudicated offenses were similar to the charged offense insofar as appellant was deemed to be responsible as the shot-caller for gang-related murders, attempted murders

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[57] 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*, 510 U.S. 383, 393 (1994); *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Bullington v. Missouri*, 451 U.S. at 446. Similarly, due process protections apply to a capital sentencing proceeding. *See e.g., Gardner v. Florida*, 430 U.S. at 358.

and solicitations to commit murder, making it impossible for the jury that had just convicted appellant to fairly evaluate the evidence. 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*, 397 N.E.2d at 280; *see also People v. Frierson,* 39 Cal.3d 803, 821-822 (1985) (Bird, C.J., concurring).

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,* 24 Cal.3d 199, 208 (1979) ("a conviction cannot stand if even a single juror has been improperly influenced"); *United States v. Aguon,* 813 F.2d 1413, 1421 (9th Cir. 1987), *modified* 851 F.2d 1158 (9th Cir. 1988) (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,* 551 F.2d 553, 554 (3rd Cir. 1977) (relying on *Leonard v. United States,* 378 U.S. 544 (1964) (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,* 583 F.2d 25, 27 (1st Cir. 1978).

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*, 897 F.2d at 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,* 447 U.S. at 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,* 530 U.S. 466; *Ring v. Arizona,* 536 U.S. 584; *Blakeley v. Washington*, 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 United States 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*, 430 U.S. at 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*, 438 U.S. at 604. For this reason, the 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*, 472 U.S. at 328-330; *Green v. Georgia*, 442 U.S. 95 (1979); *Lockett v. Ohio*, 438 U.S. at 605-606; *Gardner v. Florida*, 430 U.S. at 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*, 430 U.S. at 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. Cal. Penal Code § 190.3(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. CT 1037-1038.

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*, 406 U.S. at 388-389 (Douglas, J., dissenting); *Ballew v. Georgia*, 435 U.S. 223; *Brown v. Louisiana*, 447 U.S. 323.

In *Johnson v. Louisiana*, 406 U.S. at 362, 364, a plurality of the United States 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 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*, 435 U.S. at 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*, 447 U.S. at 333; *see also Allen v. United States*, 164 U.S. at 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*, 406 U.S. at 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 neither been debated, deliberated, nor even discussed is unreliable and, therefore, constitutionally impermissible.

C. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. *See* Cal. Penal Code § 190.3(c)-(j). Yet, the trial court did not delete those inapplicable factors from the instruction. CT 1055-1056. 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*, 21 Cal.4th 1016, 1064 (1999)), 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*, 28 Cal.4th at 660; *People v. Montiel*, 5 Cal.4th 877, 944-945 (1993). 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" one or two 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*, 4 Cal.4th 1116, 1131 (1993). The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived 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*, 477 U.S. 399, 411, 414 (1986); *Beck v. Alabama*, 447 U.S. at 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*, 48 Cal.3d 1142, 1184 (1989); *People v. Edelbacher*, 47 Cal.3d at 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 304; *Zant v. Stephens*, 462 U.S. at 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,* 503 U.S. 222, 235 (1992).

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 973 (quoting *Gregg v. Georgia*, 428 U.S. at 189) and help ensure that the death penalty is evenhandedly applied. *Eddings v. Oklahoma*, 455 U.S. at 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 (CT 1055-1056), 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*, 124 S. Ct 2562; *Mills v. Maryland*, 486 U.S. 367; *Lockett v. Ohio*, 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. 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 543; *Gregg v. Georgia*, 428 U.S. at 195.

California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances. *Tuilaepa v. California*, 512 U.S. at 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*, 372 U.S. 293, 313-316 (1963). 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*, 2 Cal.4th 792, 859 (1992)), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. 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*, 11 Cal.3d 258 (1974). 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 267. The same reasoning must apply to the far graver decision to put someone to death. *See also People v. Martin*, 42 Cal.3d 437, 449-450 (1986) (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.*; Cal. Penal Code § 1170(c). Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. *Harmelin v. Michigan*, 501 U.S. at 994. Since providing more protection to noncapital than to capital defendants violates the Equal Protection Clause of the Fourteenth Amendment (*see Myers v. Ylst*, 897 F.2d at 421; *Ring v. Arizona*, 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*, 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 383, n. 15. The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, 52 Cal.3d at 643), and "moral" (*People v. Hawthorne*, 4 Cal.4th at 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.[58] California's failure to require such findings renders its death penalty procedures unconstitutional.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code 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 Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the

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[58] *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).

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*, 524 U.S. at 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*, 17 Cal.3d 236, 251 (1976). "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights ... It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) ...." *Commonwealth v. O'Neal*, 327 N.E.2d 662, 668 (Mass.

1975).

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*, 2 Cal.3d 765, 784-785 (1970). 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*, 316 U.S. 535, 541 (1942).

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,* 42 Cal.3d at 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*, 42 Cal.3d at 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,* 481 U.S. 279 305 (1987).

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*, 481 U.S. at 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,* 42 Cal.3d at 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 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*, 477 U.S. at 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*, 428 U.S. at 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*, 42 Cal.3d at 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*, 30 Cal.4th at 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*, 30 Cal.4th at 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*, 531 U.S. 98 (2000). 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,* 249 F.3d 941, 951 (9th Cir. 2001).

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*, 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*, 124 S. Ct. 2531; *Ring v. Arizona,* 536 U.S. 584.[59] These procedural protections are especially important in meeting the acute need for reliability and accurate 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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[59] 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 588, 609.

XXIV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING SEVERAL JURY INSTRUCTIONS REQUESTED BY THE DEFENSE

The trial court refused several specially-tailored instructions appellant requested which would have helped to alleviate confusion engendered by the instructions that were given, and would have informed the jury about how to evaluate the mitigating evidence in this case. None of these instructions was argumentative, or contained incorrect statements of law, and they were not properly refused on either of those grounds. *See People v. Sanders,* 11 Cal.4th at 560; *People v. Mickey,* 54 Cal.3d 612, 697 (1991). Moreover, the instructions were offered to pinpoint appellant's theory of the case, rather than specific evidence, and were thus proper. *See People v. Kraft,* 23 Cal.4th 978, 1068 (2000); *People v. Adrian,* 135 Cal.App.3d 335, 338 (1982). Refusing to deliver those requested instructions was reversible error.

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. *People v. Sears,* 2 Cal.3d 180, 190 (1970); *People v. Rincon-Pineda,* 14 Cal.3d 864, 865 (1975); *see Penry v. Lynaugh,* 492 U.S. 302. Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." Cal. Stds. Jud. Admin., § 5. It is equally well-established that the right to request specially-tailored instructions applies at the penalty phase of a capital trial. *People v. Davenport,* 41 Cal.3d 247, 281-283 (1985).

The trial court's refusal to give the instructions at issue here deprived appellant of the right recognized in the above-cited cases, as well as his rights to a fair and reliable penalty determination, as guaranteed by the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the analogous sections of the California Constitution.

A. The Trial Court Rejected Appellant's Proposed Instruction That The Jury Need Not Be Unanimous To Consider Mitigating Evidence

The trial court refused to give appellant's proposed instruction which would have informed the jurors that the factors in mitigation need not be found unanimously to be considered in their sentencing determination. RT 7266. The proposed instruction read as follows:

> An individual juror may consider evidence to be a mitigating factor even if no other juror considers that factor to be mitigating. There is no need for the jurors to unanimously agree on the presence of a mitigating factor before a juror may consider it.

CT 1072.

The jury was instructed that "in order to make a determination as to the penalty, all twelve jurors must agree." CT 1067. The jury was also explicitly instructed that it was not necessary for jurors to agree that factor (b) acts existed before they could be considered as aggravating factors. CT 1037-1039. In the absence of an explicit instruction regarding mitigating evidence, there is a substantial likelihood that the jurors believed they had to unanimously agree not only on the ultimate sentence but also on the existence of mitigating factors. Without the proposed instruction, therefore, it was likely that the jury disregarded certain factors in mitigation if all twelve jurors did not agree.

It is well settled that, in a capital case, it is improper to preclude a jury from considering relevant mitigating evidence. *Mills v. Maryland*, 486 U.S. at 373; *McKoy v. North Carolina*, 494 U.S. at 442-443. In *Mills*, the trial

court failed to instruct the jury what it should do if some, but not all, of the jurors were willing to recognize a mitigating factor. *Id.* at 379. The Supreme Court held there was a substantial probability that reasonable jurors may have thought they were precluded from considering mitigating evidence unless *all* twelve jurors agreed on the existence of one particular circumstance. *Id.* at 384. Vacating the imposition of the death penalty, the Court explained, "[t]he possibility that a single juror could block such consideration and consequently require the jury to impose the death penalty, is one we dare not risk." *Id.*

Mitigating circumstances are not rendered irrelevant simply because all twelve jurors do not agree to their existence. Indeed, had the jury explicitly been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. *See McKoy v. North Carolina,* 494 U.S. at 442-443; *Mills v. Maryland*, 486 U.S. at 374. Yet, because the jury in appellant's case was not instructed that they need not unanimously agree on each factor in mitigation, it is reasonably likely the jury disregarded the relevant mitigating circumstances which were not unanimously found.

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 Eighth and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution. The refusal to instruct that the jury need not be unanimous to consider mitigating evidence impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth and Fourteenth Amendments. The failure to so instruct in this case

also created the likelihood that different juries will utilize different standards, and such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Since the reasonable likelihood that the jury failed to consider all of appellant's mitigating evidence could have led to the erroneous imposition of the death sentence, the failure to give appellant's proposed instruction violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair and impartial jury, a fair trial, and a reliable determination of penalty.

B. The Trial Court Rejected Appellant's Proposed Instruction On The Scope And Proof of Mitigation

The trial court also refused appellant's proposed instruction that would have informed the jury that it could reject the death penalty based on evidence that gives rise to sympathy or compassion for the defendant, and that a mitigating factor does not have to be proved beyond a reasonable doubt. RT 7267-7271.

Defendant's proposed instruction read as follows:

> If the mitigating evidence gives rise to sympathy or compassion for the defendant, the jury may, based upon sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to [be] proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it.

CT 1073.

Another rejected proposed instruction would have told the jury that at the penalty phase, unlike the guilt phase, "[y]ou may consider sympathy or pity for a defendant, if you feel it appropriate to do so." CT 1074. In addition, it would have stated that:

> If any of the evidence arouses sympathy,

> compassion or mercy in you to such an extent as to persuade you that death is not the appropriate punishment, you may act in response to these feelings of sympathy, compassion or mercy and impose life in prison without the possibility of parole.

CT 1074.

These instructions should have been given because they comprised a proper statement of law. Rejecting them denied appellant his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (*see, e.g., Skipper v. South Carolina,* 476 U.S. at 4; *Lockett v. Ohio,* 438 U.S. at 604), and to make an individualized determination whether he should be executed, under all the circumstances. *See Zant v. Stephens,* 462 U.S. at 879.

As discussed above, all non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. *Tennard v. Dretke*, 124 S. Ct. at 2571. Furthermore, a capital jury has the right to reject the death penalty based solely on sympathy for the accused. *See People v. Robertson,* 33 Cal.3d at 57-58 (*Lockett* and *Eddings* "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it"); *see also People v. Easley*, 34 Cal.3d at 876; *People v. Brown,* 40 Cal.3d at 536 ("The jury must be free to reject death ... on the basis of any constitutionally relevant evidence ...").

This Court explained in *People v. Haskett,* 30 Cal.3d 841, 863 (1982), why the jury must be allowed to consider such sympathetic factors:

> Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase

> [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on [its] moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience.

Id. See also People v. Easley, 34 Cal.3d 858.

Further, excluding considerations of sympathy from the penalty determination process restricts the range of evidence the defendant is entitled to have the jury consider. Thus, it is impermissible to "[exclude] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind ...." *People v. Lanphear*, 36 Cal.3d 163, 167 (1984) (quoting *Woodson v. North Carolina,* 428 U.S. at 304).

The general "factor (k)" instructions given at appellant's trial clearly did not suffice to inform the jurors they had the power to return a verdict of life without the possibility of parole based solely on considerations of sympathy or compassion. Those instructions merely informed the jurors they shall "consider" any "sympathetic ... aspect of [appellant's] character or record" (CT 1056), but did not tell them that any feelings of sympathy engendered by those aspects of appellant's character were, in and of themselves, a sufficient basis for rejecting a death sentence.

The court also improperly refused to inform the jurors that a mitigating factor need not be proved beyond a reasonable doubt in order to be considered. However, in view of the instructions the jurors was given, it was likely that they would believe that the defendant bore some burden with regard to proving the existence of mitigating factors. *See* Eisenberg &

Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. at 10.

The refusal to give these requested instructions prevented the jury from considering and giving full effect to the mitigating circumstances offered by appellant, in violation of the Eighth and Fourteenth Amendments and the California Constitution (art. I, § 17), and in violation of appellant's rights to a fair trial and a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

C. The Trial Court Rejected Appellant's Proposed Instruction That A Single Mitigating Factor Could Outweigh A Number of Aggravating Factors

The trial court erred in refusing appellant's proposed instruction that would have informed the jury that "the presence of a single mitigating factor is sufficient to support your decision to vote against the death penalty." RT 7276; CT 1075. This instruction was an accurate statement of law which pinpointed a crucial fact in mitigation, and should have been given. *People v. Sears*, 2 Cal.3d at 190.

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." *People v. Brown*, 40 Cal.3d at 540. The jury must be given that freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." *People v. Easley*, 34 Cal.3d at 889; *People v. Haskett*, 30 Cal.3d at 863. Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the

circumstances." *People v. Edelbacher,* 47 Cal.3d at 1035.

The proposed instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death.

People v. Sanders, 11Cal.4th at 557, noted with approval an instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that *a single factor could outweigh all other factors*." *People v. Sanders*, 11 Cal.4th at 557 (quoting *People v. Cooper,* 53 Cal.3d 771, 845 (1991) (emphasis added)). This Court indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process ...." *Id.* at 557; *see also People v. Anderson,* 25 Cal.4th 543, 599-600 (2001) (approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death).

Without proper guidance on how to weigh aggravating and mitigating circumstances, it is unlikely the jurors realized that just one mitigating factor could outweigh all the aggravating factors. Consequently, the court's refusal to give the proposed instruction violated appellant's rights to a fair trial and a reliable, non-arbitrary and individualized penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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XXV.

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,* 536 U.S. at 618 (Breyer, J., concurring); *People v. Bull*, 705 N.E.2d 824 (Ill. 1998) (Harrison, J., dissenting). And, as the Supreme Court of Canada recently 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*, 536 U.S. at 316, n. 21; *Stanford v. Kentucky*, 492 U.S. 361, 389-390 (1989) (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.[60]

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[60] 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.*, 761 F.2d 370, 373 (7th Cir. 1985); (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*, 68 Chi.-Kent L. Rev. 571, 608 (1991)); 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

(continued...)

The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. *United States v. Duarte-Acero,* 208 F.3d 1282, 1284 (11th Cir. 2000); *but see Beazley v. Johnson*, 242 F.3d 248, 267-268 (5th Cir. 2001).

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*, 27 Cal.4th 469, 511 (2002). 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*, 208 F.3d at 1284; *McKenzie v. Day*, 57 F.3d 1461, 1487 (9th Cir. 1995) (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

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[60](...continued)
the treaty. *See* Quigley, *Human Rights Defenses in U.S. Courts*, 20 Hum. Rts. Q. 555, 581-582 (1998).

Western Europe. *See, e.g., Stanford v. Kentucky*, 492 U.S. at 389 (Brennan, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830(1988) (plurality opinion). 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>.)[61]

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*, 78 U.S. 268, 315 (1870) (Field, J., dissenting) (quoting 1 Kent's Commentaries 1); *Hilton v. Guyot*, 159 U.S. 113, 163, 227 (1895); *Sabariego v. Maverick*, 124 U.S. 261, 291-292 (1888). 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*, 78 U.S. at 315-316, n. 57 (Field, J., dissenting).

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[61] 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."

"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*, 356 U.S. at 100. And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. *See Atkins v. Virginia*, 536 U.S. at 316, n. 21 (basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"); *Thompson v. Oklahoma*, 487 U.S. at 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*, 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery*, 59 U.S. 110, 112 (1855) (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.

XXVI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

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*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974) (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"); *Greer v. Miller*, 483 U.S. 756, 764 (1987). 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*, 386 U.S. at 24; *People v. Williams,* 22 Cal.App.3d 34, 58-59 (1971) (applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors).

The improper removal of a juror because he did not believe the prosecution had proven its case should result in reversal alone, as should the failure to remove two other jurors who plotted to remove the excused juror.

Further, once the excused juror was replaced by an alternate, the jury became deadlocked until the court improperly coerced a verdict, thus, providing an additional ground for reversal.

In addition, numerous guilt phase evidentiary and instructional errors resulted in the skewing of the evidence in the prosecution's favor by permitting the consideration of unreliable, irrelevant, and inflammatory evidence against appellant while restricting appellant's ability to challenge the prosecution's case. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, 416 U.S. at 643. Appellant's conviction, therefore, must be reversed. *See Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) ("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*, 64 F.3d 1432, 1438-1439 (9th Cir. 1995) (holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction); *United States v. Wallace*, 848 F.2d 1464, 1475-1476 (9th Cir. 1988) (reversing heroin convictions for cumulative error); *People v. Hill*, 17 Cal.4th at 844-845 (reversal based on cumulative prosecutorial misconduct); *People v. Holt,* 37 Cal.3d 436, 459 (1984) (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 appellant's trial. *See People v. Hayes*, 52 Cal.3d 577, 644 (1990) (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. *See People v. Hamilton*, 60 Cal.2d 105, 136-137 (1963); *see also People v. Brown,* 46 Cal.3d at 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*, 1 Cal.4th 584, 605, 609 (1992) (an error may be harmless at the guilt phase but prejudicial at the penalty phase).

Aside from the erroneous exclusion of a prospective juror, which is reversible per se, the errors committed at the penalty phase of appellant's trial include, inter alia, the failure to sever the penalty phase trials of appellant and coappellant, the introduction of improper, unreliable, and inflammatory aggravating evidence, the restriction of relevant mitigating evidence, and numerous instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. *See Hitchcock v. Dugger*, 481 U.S. at 399; *Skipper v. South Carolina*, 476 U.S. at 8; *Caldwell v. Mississippi*, 472 U.S. at 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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XXVII.

JOINDER IN ARGUMENTS OF APPELLANT ALLEN

Pursuant to Rule 13 of the California Rules of Court, appellant hereby joins in those arguments that will be raised on behalf of coappellant Allen in his opening brief on appeal, to the extent they may inure to his benefit. *See* Cal. Rules of Court, Rule 13 (a)(5).

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 1, 2004

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Andrew S. Love am the Assistant State Public Defender assigned to represent appellant, Cleamon Johnson, 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 107,329 words in length excluding the tables and certificates.

Dated: October 1, 2004

Andrew S. Love

DECLARATION OF SERVICE BY MAIL

Re: People v. Allen and Johnson

No. BA105846-02
(Cal. Supreme Ct. No. S066939)

I, GLENICE D. 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. A true copy of the attached:

APPELLANT'S OPENING BRIEF ON APPEAL

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Mr. Cleamon Johnson (Appellant)
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Each said envelope was then, on October 1, 2004, 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 of perjury that the foregoing is true and correct.

Executed on October 1, 2004, at San Francisco, California.

Glenice Fuller
DECLARANT