IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. **RICHARD LONNIE BOOKER,** Defendant/Appellant.	Case No. SO83899

Automatic Appeal From the Superior Court of the State of California
County of Riverside (Case No. CR67502)

The Honorable Edward Webster, Judge

APPELLANT'S OPENING BRIEF

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Under Appointment by the California
Supreme Court

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MISCELLANEOUS

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vs.	
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STATEMENT OF THE CASE

On August 10, 1995, three young Caucasian women, Tricia Powalka, Amanda Elliott, and Corina Gandara, were found dead in their Shelter Creek apartment. (R.T. Vol. 7, pages 887 et seq.) Richard Lonnie Booker, an 18 year old African-American, was arrested. (R.T. Vol. 9, pages 1274-1276.)

On February 28, 1996, Richard Booker was accused, in an Indictment returned by a Riverside County Grand Jury, of multiple capital murders and other felony offenses. The indictment, as subsequently amended, charged:

COUNTS	CHARGES
I.	Murder of Tricia Powalka (Penal Code §187, subdivision (a)); Felony murder (rape) special circumstances (Penal Code §190.2, subdivision (a)(17)(iii)); personal use of a deadly weapon (knife)(Penal Code §§12022, subdivision (b) and 1192.7, subdivision (c)(23).)
II.	Murder of Amanda Elliott (Penal Code §187, subdivision (a)); Personal use of a deadly weapon (knife)(Penal Code §§12022, subdivision (b) and 1192.7, subdivision (c)(23)); Personal use of a firearm (handgun) (Penal Code §§12022.5, subdivision (a) and 1192.7, subdivision (c)(8)).
III.	Murder of Corina Gandara (Penal Code §187, subdivision (a)(3)); Felony murder (rape) (forcible lewd act) special circumstances (Penal Code §192.2, subdivision (a)(17)(iii)(v)); Personal use of a deadly weapon (knife)(Penal Code §§12022, subdivision (b) and 1192.7, subdivision (c)(23)).
IV.	Attempted deliberate and premeditated murder of Eric Stringer (Penal Code §§664/187).
V.	Arson (Penal Code §451, subdivision (b)).
	Multiple murder special circumstances (Penal Code §190.2, subdivision (a)(3)) were alleged as to Counts I, II, and III. (C.T. Vol. 3, pages 666-668.)

Jury selection commenced on September 14, 1999, and continued until September 29, 1999, when a jury was impaneled. (C.T. Vol. 3, page 733.) On October 13, 1999, at the conclusion of the guilt phase trial, the jury retired to deliberate and returned verdicts finding Richard Booker guilty of the first degree murders of Tricia Powalka, Amanda Elliott, and Corina Gandara, the willful and premeditated attempted murder of Tricia's infant son Eric Stringer, and arson. The jury further

found that there were special circumstances since each of the multiple murders was committed during the commission of the others, and since Corina was murdered while Richard was attempting to rape and forcibly molest her. The jury found that Tricia was **not** murdered during a rape. However, they found that Richard had personally used a knife and a handgun. (C.T. Vol. 14, pages 3819-3839.)

On October 19, 1999, at the conclusion of the penalty phase trial, the jury imposed death. (C.T. Vol. 14, page 3869.)

On November 22, 1999, the trial court, having denied the defense motion for modification of the death verdict (Penal Code §190.4, subdivision (e)), sentenced Richard Booker to death for the special circumstances murders. The court additionally imposed consecutive life with possibility of parole and determinate prison terms for the attempted murder and arson offenses. (C.T. Vol. 14, pages 3939-3940, 3951-3954.)

Defendant Booker's appeal to this Court is automatic. (Penal Code §1239, subdivision (b).)

Additional procedural facts are set forth hereinbelow in the Argument section of this brief as necessary to understand the issues presented by this appeal.

STATEMENT OF FACTS

I.

GUILT PHASE EVIDENCE

Tricia Powalka, a 19 year old unwed mother, lived with her eight month old infant son Eric Stringer in the Shelter Creek apartments during the summer of 1995. Eric's 15 year old cousin Amanda Elliott and 12 year old cousin Corina Gandara sometimes visited her and baby sat. (R.T. Vol. 8, page 979.)

Deverick Maddox, who was 21 years old at the time and had recently broken up with his girlfriend, was a close friend of Amanda Elliott, and was introduced by her to Tricia Powalka and Corina Gandara. (R.T. Vol. 8, page 1110.) Deverick went to Tricia's apartment to visit the three young women several times in August 1995. On at least one occasion he stayed the entire night even though, according to him, he had no sexual interest in any of the women. (R.T. Vol. 8, page 1114, and Vol. 9, page 1171.)

On the evening of August 9, 1995, Deverick Maddox again visited Tricia Powalka, Amanda Elliott and Corina Gandara at the Shelter Creek apartment. Amanda suggested that Deverick ask a friend to come over. Deverick telephoned Richard Booker. Richard, who was 18 years old at the time, arrived a short time later. Tricia came home from work and Deverick introduced her to Richard. According to Deverick, the two young men and three young women spent the evening drinking, listening to music, and watching movies, and Deverick fell asleep on the couch. (R.T. Vol

8, pages 1120-1132.) Several of Tricia's neighbors heard music and laughter, and had no reason to believe that anything was amiss as late as 3:00 a.m. (R.T. Vol. 8, pages 979 et seq., 996, 1001-1007, 1018-1023, 1038-1041.)

Deverick Maddox, according to his testimony, was awakened some time during the early morning hours by Amanda Elliott's screams, and saw Richard Booker, with a knife and a gun in his hands, covered with blood. Amanda, after telling Deverick that she had been "sliced," collapsed, fatally wounded. Deverick asked Richard what had happened, and whether there had been some kind of accident. Richard replied that he had killed Amanda because he had to. When Deverick told Richard that they had to call the police, Richard handed Deverick the gun, and told him that he could not live with himself and would rather die than go to prison. Deverick walked down the hall, and was able to see Tricia Powalka's and Corina Gandara's bodies and puddles of blood through the open bathroom and bedroom doors. (R.T. Vol. 8, pages 1134-1141, Vol. 12,page 1200.)

At 6:00 a.m. that same morning Edward Esposito arrived at the Maddox family home. Mr. Esposito worked with Ralph Maddox (Deverick's father) at the post office and the two men had a car pooling arrangement. Mr. Esposito saw Deverick Maddox in the kitchen briefly. He did not notice any blood on him. (R.T. Vol. 9, pages 1259-1262.)

Later that same morning, at about 7:30 a.m., Shelter Creek

apartments maintenance supervisor Steve Kostyshak was told that there was a fire in Tricia Powalka's apartment, and went to investigate. He knocked on the door, received no response, used his master key to open the door, and discovered the victims' bodies lying in the smoke filled apartment. There was blood everywhere. He noticed what looked like a large deposit of ash on the kitchen stove (R.T. Vol. 7, pages 887-900.)

Fire fighters arrived, found Tricia Powalka's eight month old infant son Eric Stringer lying inside a playpen stuffed with blankets and pillows in the bedroom, and carried him out of the apartment. (R.T. Vol. 7, pages 915-921.)

The investigating law enforcement officers, after talking to Tricia Powalka's neighbors, were able to determine that Deverick Maddox was one of the two young men who had visited her the previous night. Deverick was detained for questioning and identified and incriminated Richard Booker.

Richard Booker was arrested and interrogated. After initially denying any responsibility for the victims' deaths, he made a statement describing what had occurred in Tricia's apartment that night. He had been absent-mindedly playing with his knife and Corina Gandara accidentally bumped into it. Corina asked Richard why he was trying to stab her and tried to grab the knife. He hit her. She ran into the bedroom. Tricia Powalka threatened to shoot him even though he told her that the "stabbing" of Corina had been an accident. Tricia ran for the gun. He hit her, and grabbed the gun away from her. Amanda

Elliott, refusing to heed Richard's warning that he was not "playing," charged him. He stabbed her two or three times. He also shot Amanda. Deverick Maddox tried to grab the gun. Richard told Deverick that, after what had happened, he would rather die, and begged Deverick to shoot him. Deverick, instead, left the apartment.

Richard Booker recalled that he had gone into the bathroom and helped one of the "homegirls" (Corina Gandara) to take off her pants. He was drunk at the time and curious, but never intended to "make it" with her. He recalled hitting Corina, perhaps more than once, while she was lying on the bathroom floor.

Richard also recalled going into the bedroom, finding Tricia Powalka lying on the bedroom floor, and taking off her pants. He did not know whether or not she was still alive at that time.

Richard denied that he had deliberately tried to set Tricia Powalka's apartment afire. However, he acknowledged that he may have placed a laundry bag on top of the stove before he left. He denied knowing that Eric Stringer was still alive or that he was even in the apartment that evening. However, he seemed to recall that, at some point during the evening, he had heard a baby cry.

Richard also seemed to recall that, immediately before he finally left the apartment, he had picked up the phone to telephone the police. However, he changed his mind, left the apartment, and went home.

Richard's memory as to the precise nature of, as well as the

sequence of, the events was extremely confused and incomplete. He told the interrogating officers that he had been drinking heavily that evening and snorting something while partying with Deverick Maddox and the three young women, and that his mind had gone blank at times during the tragic events which followed. (C.T. Vol. 3, pages 672-713; R.T. Vol. 7, pages 952-964, and Vol. 9, pages 1264-1267, 1274, 1279-1292.)

Richard described the weapons he had used to kill the victims as being a .22 Beretta handgun and a knife which was actually two steak knives taped together. He showed the investigating detectives where he had hidden the gun in an ivy covered fence, after leaving Tricia Powalka's apartment, and they retrieved it. The knife used to commit the homicides was never recovered. However, Kali Franco, a long term friend of Richard's, testified that she had seen him carrying a similar knife made from two black steak knives placed back to back and taped with black electric tape. Law enforcement officers subsequently obtained a search warrant, searched Richard's bedroom, and found a similar knife. (R.T. Vol. 10, page 1359 et seq.)

An investigation revealed that Amanda Elliott had been shot, that all three victims had been repeatedly stabbed, and that all three were already dead at the time that their bodies were discovered. (R.T. Vol. 10, pages 1369-1408, 1410-1420.)

The evidence concerning whether or not the victims had been sexually assaulted by either Deverick Maddox or Richard Booker

was conflicting and inconclusive. Two of the female victims' (Tricia's and Corina's) pants had been pulled down, and one of the investigating law enforcement officers opined that sexual assaults, or at least attempted sexual assaults, had probably occurred. (R.T. Vol. 9, pages 1264-1267.) However, an analysis of the vaginal swabs and the victims' clothing did not reveal the presence of semen. A comparison of combings of the victims' pubic hair with Richard Booker's and Deverick Maddox's head hair samples proved negative as to Richard, and inconclusive as to Deverick. The examining forensic pathologist did not detect any genital trauma or signs of semen or sexual activity. (R.T. Vol. 9, pages 1294 et seq., 1302-1320 and Vol. 10, page 1386.)

Arson investigators found a bag of dirty laundry on top of the kitchen stove, found that some of the surrounding cabinets and light panels above the stove had been charred, and opined that the fire had been deliberately set even though this would not have been the quickest or surest way to set the apartment ablaze. (R.T. Vol. 8, pages 1044-1062.)

II.

PENALTY PHASE EVIDENCE

The prosecution relied in substantial part on the evidence presented during the guilt phase of the trial, and emphasized the nature and circumstances of the crimes pursuant to Penal Code section 190.3, subdivision (a). (R.T. Vol. 14, pages 1982 et seq.)

The prosecution also presented Penal Code section 190.3, subdivision (b) evidence that Richard Booker had previously stabbed his uncle in the stomach, threatened to kill a neighbor's family for "messing" with his brother, and threatened other persons with a knife. (R.T. Vol. 13, pages 1758-1804.)

The prosecution also presented victim impact evidence. Frankie Sanderson, Tricia Powalka's mother, recalled being informed by the mortuary director that Tricia's body had been so extensively damaged from multiple stab wounds that it could not be "repaired," but electing to have an open casket funeral service anyway. She also believed that Tricia's death had adversely affected her grandmother's health, brought on a heart attack, and accelerated the grandmother's death. Linda Baker, Tricia's sister, testified that, as a result of Tricia's death, she (Linda) had had to raise Tricia's oldest child Brianna. Richard Rene Gandara and Nora Gandara, Corina's father and mother, described how Nora had been unable to cope with their daughter's death, had attempted suicide, and had been in a mental institution. Esther Elliott-Martin, Amanda's mother, described

her relationship with her daughter, her emotions upon hearing that she was dead, and how Amanda's little brother continued to "talk to her." (R.T. Vol. 13, pages 1807-1824, 1838-1852, Vol. 14, pages 1861-1876.)

The defense, on the other hand, presented Penal Code section 190.3, subdivision (k) evidence that Richard Booker's mother had been damaged from birth as a result of a forceps-delivery, had never been able to live independently or take care of her child properly, had been hit by a car when Richard was 13 or 14, and had been in a comatose condition and in a convalescent home ever since. Richard, who was already suffering from learning disabilities prior to his mother's accident, had been devastated. He had never recovered from the loss, and had had problems ever since then. (R.T. Vol. 14, pages 1889-1913.)

ARGUMENT

GRAND JURY AND JURY SELECTION ARGUMENTS

I.

THE TRIAL COURT'S FAILURE TO ADMINISTER THE STATUTORILY REQUIRED OATH TO THE GRAND JURORS UNTIL AFTER THEY HAD ALREADY HEARD SUBSTANTIAL INCRIMINATING EVIDENCE CONSTITUTED FUNDAMENTAL JURISDICTIONAL ERROR - AND DEPRIVED DEFENDANT BOOKER OF HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS - AND REQUIRES REVERSAL OF THE JUDGMENT

A. THE RELEVANT PROCEEDINGS

The prosecutor in this case elected to proceed by way of grand jury indictment rather than filing a complaint and holding a preliminary hearing before a Magistrate.(C.T. Vol. 1, pages 1, et seq.)

On the morning of February 28, 1996, a 19 member grand jury was selected by the presiding Superior Court judge. Neither Richard Booker nor defense counsel were present. (R.T.A. Vol. 1, pages 1-24.)

However, the judge neglected to administer the oath to each of the selected grand jurors required by Penal Code section 911. That Code section reads in relevant part:

> "The following oath shall be taken by each member of the grand jury:
> 'I do solemnly swear (affirm) that I will support the Constitution of the United States and of the State of California, and all laws pursuant to and in conformity therewith, will diligently inquire into, and true presentment make, of all public offenses against the people of this state, committed or triable within this county, of which the grand jury shall have or can obtain legal evidence. . . .' "

The judge proceeded to charge the unsworn grand jurors

concerning their duties, including their duty to return an indictment if the evidence unless explained or contradicted would warrant a conviction by a trial jury, the need for at least 12 of them to agree that the prosecutor had met his burden of proof before returning an indictment, and their limited right to ask questions, in accordance with Penal Code section 914. (R.T.A. Vol. 1, pages 24-37.)[1]

Later that same morning the grand jurors re-convened. Once again neither Richard Booker nor defense counsel were present. (C.T. Vol.1, page 46.) The grand jury foreman admonished "any member of the grand jury who ha[d] a state of mind in reference to the case or to either party which [would] prevent him from acting impartially and without prejudice to the substantial rights of either party to retire" (C.T. Vol. 1, page 48), but did not administer the statutorily required oath.

The still unsworn grand jurors listened to the prosecutor's opening statement (C.T. Vol. 1, page 48 et seq.), the testimony of Riverside Police Detective Ron Sanfilippo concerning his investigations of the deaths of Tricia Powalka, Corina Gandara and Amanda Elliott (C.T. Vol. 1, page 56 et seq.), and an audio tape of Richard Booker's post-arrest statements (C.T. Vol. 1, pages 75 et seq.), and adjourned for lunch.

Following the noon recess, the judge entered the grand jury room, admitted that there was a "slight problem" that the judge

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[1] Defendant has filed a motion to augment the record to include the Reporter's Transcript of the relevant proceedings pursuant to Rule 12(a) of the California Rules of Court.

described as being in the "whoops category," since he should have administered the oath before the grand jury was charged and commenced hearing evidence, and purported to "take care" of the problem by belatedly "administer[ing] the oath to . . . [the grand jurors] right now." (C.T. Vol. 1, pages 78-81.)

The grand jury then heard additional tape recorded post-arrest statements made by Richard Booker, and further testimony from Detective Sanfilippo. (C.T. Vol. 1, pages 81 et seq.)

Detective Hector Heredia also testified concerning the police investigation. (C.T. Vol. 1, pages 89 et seq., 101-104.)

Numerous photographs of the victims' bodies and the "crime scene" were introduced as exhibits. (C.T. Vol. 1, page 45.)

The prosecutor instructed the grand jury concerning the requisite burden of proof for an indictment, the legal elements of first degree premeditated and felony murder, attempted murder and various lesser included homicide offenses, rape, attempted rape, forcible sexual molestation, attempted forcible sexual molestation, arson, "special circumstances" murder perpetrated during the commission of sexual offenses, and "special circumstances" multiple murders. (C.T. Vol. 1, pages 6-28.), answered various questions posed by the grand jurors (e.g. C.T. Vol. 1, pages 105-106), and presented a closing argument (C.T. Vol. 1, pages 112 et seq.)

The grand jurors, following deliberations, returned a true bill and indictment. (C.T. Vol. 1, pages 135-138.)

Richard Booker filed a Penal Code section 995 motion seeking

to dismiss the indictment on a number of grounds including, inter alia, the court's failure to swear the grand jurors prior to hearing evidence. (C.T. Vol. 1, pages 143 et seq.) He argued that "the indictment is invalid because the majority of the 'evidence' was presented to the prospective grand jurors before they comprised a grand jury and they were never charged by the court [after they were sworn]." (C.T. Vol. 1, pages 160-162.)

The prosecutor filed a memorandum of points and authorities in opposition to the motion. (C.T. Vol. 1, pages 184 et seq.) He argued, inter alia, that "the delay in administering the oath to the grand jury does not warrant dismissal of the indictment." (C.T. Vol. 1, pages 194-195.)

A Superior Court judge, following a hearing, denied the motion. (C.T. Vol. 2, page 287; R.T. Vol. 1, pages 26-32.)

A defense Petition for a Writ of Mandate and Prohibition, challenging the denial of the Penal Code section 995 motion, was summarily denied by the Court of Appeal. (C.T. Vol. 3, page 646.)[2]

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[2] Defendant Booker has filed a request for this Court to take judicial notice of the extraordinary writ proceedings in the Court of Appeal (Booker v. Superior Court, Case No. E018917) pursuant to Evidence Code §§452 and 459.

B. DISCUSSION

1. This Issue is Reviewable on Appeal

The issue of whether the Superior Court's failure to administer the statutorily required oath before the commencement of the grand jury proceedings constitutes a fundamental jurisdictional error and compels reversal of the subsequent judgment is properly before this Court.

The issue has not been waived since it was raised and litigated during the pre-trial proceedings. It is true that defense counsel did not raise this issue during the grand jury proceedings, and that as a general rule where the adequacy of an oath taking is not timely raised the issue is deemed waived on appeal. However, since neither Richard Booker nor his counsel were present during the grand jury proceedings, there can be no waiver imputed to Booker. (In re Heather H. (1988) 200 Cal.App.3d 91, 95-96.) Defense counsel raised the issue at the earliest possible opportunity in their motion to quash the indictment and in an extraordinary writ petition challenging the Superior Court's denial of that motion pursuant to Penal Code sections 995 and 999, thus preserving this issue for appeal.

The Court of Appeal's summary denial of the defense Petition for a Writ of Mandate - Prohibition, without issuing an order to show cause or hearing oral argument or issuing a written opinion on the merits, is not conclusive under the doctrines of res judicata or law of the case, and cannot preclude direct appellate review. (People v. Medina (1972) 6 Cal.3d 484, 490-491;

Kowis v. Howard (1992) 3 Cal.4th 888; In re Mario C. (2004) 124 Cal.App.4th 1303, 1311.)

Thus, this issue must be addressed on its merits.

2. The Trial Court's Failure to Administer the Statutorily Required Oath to the Grand Jury Until After They Had Already Heard Substantial Incriminating Evidence Was Fundamental, Jurisdictional and Constitutional Error

It is indisputable that the Superior Court judge presiding over the grand jury proceedings should have administered the oath to the grand jury immediately after they were selected, before they were charged, and certainly before they commenced to hear evidence. The language of Penal Code section 911 requiring the grand jurors to take an oath to "diligently inquire into" alleged "public offenses" presented to them and to perform their constitutional and legal duty during that inquiry, as well as the location of Penal Code section 911 mandating the juror's oath immediately **after** the provisions governing the formation and selection of the grand jurors and immediately **before** the provisions relating to charging them and describing their duties to hear evidence in criminal cases, deliberate, and return an indictment, in Title 4 of the Penal Code (Penal Code §§888 et seq.) make any other conclusion impossible.

Furthermore, the failure to swear the grand jurors constituted a fundamental jurisdictional error, which rendered any further proceedings a nullity, and the subsequent convictions and death sentence null and void. (Vasquez v. Hillery (1986) 474 U.S. 254; Bank of Nova Scotia v. United States (1988) 187 U.S.

250, 256-257.)

It follows that defendant Booker was denied the process he was due - i.e. pre-indictment consideration of the evidence by a duly constituted grand jury - , and hence due process in violation of the Fourteenth Amendment.

Moreover, since "traditional" constitutional rights - including Fourteenth Amendment rights - also apply to the penalty phase of a capital trial (Satterwhite v. Texas (1988) 486 U.S. 249; Estelle v. Smith (1981) 451 U.S. 430; Arizona v. Rumsey (1984) 467 U.S. 203; Ake v. Oklahoma (1985) 470 U.S. 68; Gardner v. Florida (1979) 430 U.S. 349), the error necessarily implicated defendant Booker's Eighth Amendment rights.

The record reflects that the Superior Court judge presiding over the grand jury did not fulfill his duty in this regard, and the judge himself admitted that he had made a "slight mistake."

The judge could not cure the error by belatedly administering the oath and having the grand jurors swear to conduct a diligent unbiased inquiry and fairly evaluate evidence which they had already heard and considered after the fact (as he attempted to do). While he might have remedied the problem by dismissing the grand jury, and selecting, properly administering the oath to, and charging a new grand jury, and directing them to re-hear the entire case, he chose not to do this.

Thus, it is clear that an error was made, and the question becomes whether or not that error was of sufficient magnitude to compel a reversal of the subsequent judgment. For the reasons

explained below, the answer to that question must be in the affirmative.

3. The Judgment Must be Reversed

In People v. Pompa-Ortiz (1980) 27 Cal.3d 519, this Court held that irregularities in the preliminary examination which are not jurisdictional in the fundamental sense are reviewable on appeal under the appropriate standard of prejudicial error and require reversal only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice. This Court has subsequently applied the Pompa-Ortiz rule in the grand jury context. (People v. Towler (1982) 31 Cal.3d 105, 123; People v. Jablonski (2006) 37 Cal.4th 774.) The rationale underlying the Pompa-Ortiz rule is that, by encouraging defendants to raise preliminary hearing or grand jury irregularities by pre-trial extraordinary writ petitions, the matter can be expeditiously returned to the Magistrate or Superior Court judge for proceedings free of the charged defects. (People v. Pompa-Ortiz, supra, 27 Cal.3d at 529.)

However, this Court seems to have indicated that a defendant need only **seek** pre-trial relief to be entitled to relief without an affirmative showing of actual prejudice. Thus, this Court has held that "it is not unreasonable to require a felony defendant who does **not** seek or obtain pretrial relief to demonstrate actual prejudice when reversal of a judgment is sought on this ground on appeal." (Serna v. Superior Court (1985) 40 Cal.3d 239, at 263, emphasis added.)

This Court has never expressly considered whether "prejudice" need be shown when the defendant has exhausted his pre-trial remedies in the trial and appellate courts pursuant to Penal Code sections 995 and 999 to no avail. However, in light of the fact that the appellate courts have discretion to deny pre-trial relief even when the petition might in fact have merit (People v. Medina, supra, 6 Cal.3d at 491), any rule requiring an affirmative showing of prejudice on appeal following denial of a 995 motion and 999 extraordinary writ petition would be fundamentally unfair and a denial of equal protection.

It follows that defendant Booker, who unsuccessfully challenged the grand jury indictment in his pre-trial 995 motion in the Superior Court and his 999 Petition for a Writ of Mandate - Prohibition in the appellate court on the same grounds he now asserts on appeal, is entitled to a reversal without an affirmative showing of actual prejudice regardless of whether the "irregularity" may be classified as a structural or fundamental jurisdictional error.

Moreover, since the failure to swear the grand jurors until after they had already heard substantial incriminating evidence did constitute a structural error of constitutional magnitude and a fundamental jurisdictional error, Defendant Booker is entitled to a reversal, pursuant to the decisions of this Court and the United States Supreme Court, without any affirmative showing of prejudice. (Pompa-Ortiz, Towler, and Jablonski, cited supra; Vasquez v. Hillery, supra; Bank of Nova

Scotia v. United States, supra.)

The grand jury is a judicial body that is part of the judicial branch of government. The role of the grand jury in an indictment proceeding is to determine whether probable cause exists to accuse a defendant of a particular crime. In this capacity, the grand jury serves as the functional equivalent of a magistrate who presides over a preliminary examination on a felony complaint. Like the Magistrate, the grand jury must determine whether sufficient evidence has been presented to support holding a defendant to answer. Thus, the grand jury serves as part of the charging process in very much the same manner as does a Magistrate in a prosecution initiated by complaint. (Guillory v. Superior Court (2003) 31 Cal.4th 168, 174.)

Only a duly enrobed and sworn magistrate has jurisdiction to conduct the preliminary examination and hold the defendant to answer pursuant to Article VI of the California Constitution and California Penal Code sections 858 et seq.[3] Similarly, only a duly impaneled and sworn grand jury has jurisdiction to conduct a preliminary inquiry, return an indictment, and require the defendant to stand trial in a felony case. (Penal Code §911; Samish v. Superior Court of Sacramento County (1938) 28 Cal.App.2d 685.) In other words, the grand jurors' authority to perform their official duty is derived from, and defined by, the

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[3] Unless, of course, the parties stipulate that a commissioner or temporary judge may preside (Article VI, §21).

oath. (Samish v. Superior Court, supra; Clinton v. Superior Court of Los Angeles County (1937) 23 Cal.App.2d 342; see also Gendron v. Burnham (1951) 146 Me. 387, 82 A.2d 773.)

It follows that the "grand jurors" lacked jurisdiction to conduct any inquiry or hear evidence in this case on the morning of February 28, 1996 since they had not yet been sworn, that the indictment should have been quashed since it was based in substantial part on evidence that the grand jurors were not entitled to hear, that this fundamental jurisdictional defect rendered all subsequent proceedings a nullity, and that the entire judgment must now be reversed.

Alternatively, even assuming arguendo that the grand jurors, once they were sworn, had jurisdiction to proceed and return an indictment based solely on the evidence subsequently presented during the February 28, 1996 afternoon session, reversal would nonetheless be required. The nature of the violation - i.e. the failure to administer the oath before the commencement of the grand jury proceedings - makes it impossible to determine whether the return of the indictment was based solely upon the evidence presented during the afternoon session, and prejudice must be presumed. (People v. Jablonski, supra and Bank of Nova Scotia v. United States, supra, 487 U.S. at 256-257.)

The entire judgment must be reversed and the case remanded for further appropriate proceedings.

II.

THE TRIAL COURT COMMITTED REVERSIBLE WITT-WITHERSPOON ERROR - AND VIOLATED DEFENDANT BOOKER'S RIGHT TO A FAIR TRIAL, IMPARTIAL JURY, AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS - BY EXCUSING SEVERAL PROSPECTIVE JURORS FOR CAUSE DESPITE THEIR WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

A. PROCEEDINGS BELOW

At the commencement of the trial, each of the prospective jurors completed a written juror questionnaire, which included several questions concerning his or her views on the death penalty, pursuant to Code of Civil Procedure section 223. (C.T. Vol. 3, page 734 - Vol. 13, page 3668.)

Prospective juror John Ong indicated that, while he was generally in favor of the death penalty (7 out of 10 on a scale of 1-10, with 10 being most strongly in favor of the death penalty, 5 having no opinion, and 1 being most strongly against the death penalty), he would follow the court's instructions on the law rather than his personal beliefs, "evaluate the case by the evidence presented," and "would consider all of the evidence and the jury instructions as provided by the court and impose the penalty [death or life without possibility of parole][that] is appropriate." (C.T. Vol. 8, pages 2275 et seq., responses to questions 32, 43, 45, and 47c.)

Prospective juror Gloria Anne Hunter stated in her questionnaire responses that, even though she had read a "shocking" description of the charged offenses, her feelings were not so strong that they would impair her ability to be fair to

Richard Booker, that she would require the prosecution to prove beyond a reasonable doubt that the Defendant was guilty since she had heard of many cases where an innocent person had been wrongfully accused, that she believed that she was a fair person, and that even though she believed that the death penalty has a place in the criminal justice system and was moderately in favor of it (8 out of 10), it would not be difficult for her to vote for life without the possibility of parole if the evidence warranted this. (C.T. Vol. 10, pages 2828 et seq., questionnaire responses 29, 32, 33, 34, 43, 45, 47c.)

Prospective juror Christine Clothier stated in her questionnaire responses that, while she disliked violence and had been raised as a Catholic to respect life, she nonetheless believed in the death penalty (7 out of 10), and would consider voting for the death penalty after closely examining the evidence. (C.T. Vol. 10, pages 2649 et seq., questionnaire responses 30, 45, 46, 47c.)

Prospective juror Rachel Saldate stated in her questionnaire responses that, while the nature of the charged offenses might make it difficult for her to be fair to Richard Booker, she would follow the judge's instructions on the law, require the prosecution to prove guilt beyond a reasonable doubt, had no preconceived opinions about the death penalty (5 of 10), and would consider all of the evidence and the jury instructions and vote for the penalty - death or life without possibility of parole - she felt appropriate. (C.T. Vol. 9, pages 2341 et seq.,

questionnaire responses 29, 32, 33, 34, 45, 47c.)

Prospective juror Sharon Kay Conklin responded to the written questions posed by stating that, while she had heard about the instant case, and might have some difficulty in being fair to Richard Booker after viewing the bloody photographs of the victims, she believed that every person had a right to assert their innocence and had to be presumed to be innocent even if they exercised their constitutional right not to testify. She had no preconceived opinions about the death penalty (she circled 5 of 10), and stated that in the event the case reached the penalty phase she would consider all of the evidence and the jury instructions and could impose either death or life without possibility of parole. (C.T. Vol. 10, pages 2674 et seq., questionnaire responses 28, 29, 30, 31, 32, 33, 45, 47c.)

The trial court and counsel for the parties, after reviewing the written questionnaires, agreed that it would be "much more efficient" for defense counsel to stipulate to excuse some of the "anti-death" prospective jurors, and for the prosecutor in return to stipulate to excuse some of the "pro-death" prospective jurors, whether or not they were actually excusable for cause based solely on their written responses, and to "get these people out of here rather than . . . having to bring them in here [for verbal questioning] and clear out the courtroom." (R.T. Vol. 5, pages 486-487.)

The court opined that Mr. Ong had failed to fully answer the relevant questions regarding his views on the death penalty,

noted that he might be confused, and stated that the court "just had questions about him" based upon some of his responses. (R.T. Vol. 5, pages 487-488.)

The court noted that Gloria Hunter had answered one of the questions by stating that she had feelings about the nature of the charges that might make it difficult for her to be fair and impartial. (R.T. Vol. 5, pages 488-489.)

The court, after noting Ms. Clothier's juror responses and expressing some of the court's concerns, stated that "I think she will [eventually] go out for cause, but since she would consider [the death penalty], if . . . [defense counsel] wouldn't stipulate I wouldn't excuse her for cause at this point." (C.T. Vol. 5, pages 493-494.)

Defense counsel noted that "Ms. Saldate, based on some of her responses, . . . [was] in the middle of the road on the death penalty, but . . . indicate[d] [that] based on the nature of the charges she couldn't be fair" and that "she [had also] indicated . . . [that] she believed the death penalty might bring closure for the victims' families." (R.T. Vol. 5, page 505.)

Neither the court nor counsel expressed any particular concerns regarding Sharon Conklin. (Id.)

Nonetheless all these prospective jurors were excused "for cause," by stipulation, pursuant to the above described agreement, to promote judicial efficiency, and without even bothering to question any of them orally in order to clarify their written responses. (C.T. Vol. 5, pages 488, 489, 505, 506.)

B. DISCUSSION

The trial court committed Witt-Witherspoon error in excusing prospective jurors John Ong, Gloria Hunter, Christine Clothier, Rachel Saldate, and Sharon Conklin for cause based solely upon their checked answers and brief written comments concerning capital punishment on juror questionnaires. The questionnaires did not elicit sufficient information from which the court could properly determine whether these prospective jurors suffered from a disqualifying bias for or against the death penalty. (People v. Stewart (2004) 33 Cal.4th 425.) Defense counsel's failure to object and acquiescence in the excusals for reasons of judicial efficiency does not constitute a waiver of Defendant Booker's right to raise this issue on appeal. (Wainwright v. Witt (1985) 469 U.S. 412, at 434-435; People v. Schmeck (2005) 37 Cal.4th 240, 262.) Since the improper exclusion of even one prospective juror under the Witt-Witherspoon standard is reversible penalty phase error per se, the death sentence must be set aside. (Davis v. Georgia (1976) 429 U.S. 122, 123; Gray v. Mississippi (1987) 481 U.S. 648; People v. Stewart, supra, 33 Cal.4th at 454.)

1. The Trial Court Erred

The United States Supreme Court held, in Wainwright v. Witt, supra, that state courts may exclude from capital sentencing juries prospective jurors only if their views would "prevent or substantially impair the performance of . . . [their] duties as a juror in accordance with . . . [their] instructions and . . . [their] oath." The new Witt standard clarified the rule

previously announced in Witherspoon v. Illinois (1968) 391 U.S. 510 that exclusion for cause of a prospective juror is proper only if that juror makes it "unmistakably clear . . . that [he or she] would **automatically** vote against the imposition of capital punishment without regard to any evidence which might be developed at the trial of the case." (Witherspoon, supra at 391 U.S. 522, f.n. 21; Morgan v. Illinois (1992) 504 U.S. 719.) Neither indecisive prospective jurors nor jurors willing to follow the court's instructions and obey their oaths regardless of their personal feelings about the death penalty are excludable. (Adams v. Texas (1980) 448 U.S. 38; Gray v. Mississippi, supra; Brown v. Lambert (9th Cir. 2006) 451 F.3d 946.)

Witt-Witherspoon error constitutes a violation of the defendant's Sixth Amendment right to an impartial jury, his due process rights under the Fourteenth Amendment, and his right to a reliable penalty determination under the Eighth Amendment.

In order to determine whether a juror is fit to serve in a capital case, the Court should analyze the juror's voir dire as a whole rather than simply focus on isolated statements. (People v. Mason (1991) 52 Cal.3d 909, 953.)

Recent decisions of this Court have emphasized the importance of meaningful death - qualifying voir dire. This Court has stressed the trial court's duty to know and follow proper procedure, and to devote sufficient time and effort to the process. (People v. Stewart, supra, 33 Cal.4th 425, 454-455;

People v. Heard (2003) 31 Cal.4th 946, 966-967.) At bottom, both the trial court and counsel "must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views [on capital punishment] would 'prevent or substantially impair' the performance of his or her duties." (People v. Stewart, supra, 33 Cal.4th at 445.) It is reversible error to excuse prospective jurors for cause based solely upon their checked answers and brief written comments concerning capital punishment on juror questionnaires without further inquiry. (People v. Stewart, supra; see also People v. Heard, supra, 31 Cal.4th at 964-966 [court erroneously excused a prospective juror for cause based upon isolated answers on juror questionnaire which had been lost or destroyed and ambiguous answers to imprecise or incomplete oral examination]; but Cf. People v. Stitely (2005) 35 Cal.4th 514 [no Witt-Witherspoon error where both the court and counsel posed follow-up questions where necessary to glean prospective jurors' views on penalty].)

In this case, just as in Stewart, the trial court erred in excusing five of the prospective jurors, based solely on their checked answers and brief written comments concerning capital punishment on juror questionnaires.

All five prospective jurors expressly stated that they would put their personal beliefs aside, would not automatically vote for or against the death penalty in the event that Richard Booker were found guilty of first degree murder with special

circumstances, and would determine the appropriate penalty based solely upon the court's instructions regarding the applicable law and the evidence.

The court may have had "questions" about prospective juror John Ong, based upon his failure to elaborate upon his views regarding the death penalty (he stated that his views were "confident[ial]"). However neither the court nor counsel asked any follow-up oral questions designed to elicit clarifying information before excusing him.

The court correctly noted that prospective juror Gloria Anne Hunter had answered one of the questions by stating that her feelings about the nature of the charges might make it difficult for her to be fair and impartial, but totally ignored her statements that her feelings would not be so strong that they would impair her ability to be fair to Richard Booker, that she would require the prosecution to prove beyond a reasonable doubt that the Defendant was guilty to make certain that he was not an innocent person who had been wrongfully accused, and that even though she believed that the death penalty might be appropriate in some cases, it would not be difficult for her to vote for life without the possibility of parole if the evidence warranted this. Once again, as in the case of juror Ong, the court and counsel asked nary a clarifying oral follow-up question before excusing her.

The court acknowledged that juror Christine Clothier was not excusable for cause, based solely upon her written comments,

since she stated that she would consider the death penalty. Nonetheless she was excused.

The court expressed no concerns whatsoever about Ms. Saldate's fairness or willingness to consider both the death penalty and life without possibility of parole, and defense counsel noted that she was in the middle of the road on the death penalty. Nonetheless she was excused.

Neither the court nor counsel expressed **any** concerns regarding prospective juror Sharon Conklin. However she was excused "for cause."

In summary, even assuming that there may have been some legitimate questions and concerns about these jurors' checked answers and brief responses on their questionnaires, none of them were even arguably excusable for cause under Witt-Witherspoon.

2. The Issue Has Not Been Waived

The failure of defense counsel to object to the excusal of the jurors for cause does not forfeit the right to raise this issue on appeal. (Witt, supra, 469 U.S. at 434-435.) Moreover, while counsel not only failed to object but actually stipulated that the jurors could be excused, this does **not** suggest that they had concluded that the jurors were excusable for cause under Witt-Witherspoon. (Cf. Witt, supra; Schmeck, supra, 37 Cal.4th 262; Brown v. Lambert, supra.) The stipulated excusals in the instant case were based solely upon the agreement between the court and counsel to expedite the jury selection process and "get these people out of here" as soon as possible in the interest of

judicial efficiency regardless of whether or not they were actually excusable for cause.

3. The Death Sentence Must be Reversed

The improper exclusion of even one juror under the Witt-Witherspoon standard is reversible penalty phase error per se even if the prosecutor could have gotten rid of the juror anyway by using one of his unexhausted peremptory challenges. (Davis v. Georgia, Gray v. Mississippi, People v. Stewart, People v. Heard, all cited supra.)

Here, five prospective jurors were improperly excused.

Defendant Booker's rights to an impartial jury, due process of law, and a reliable penalty determination, under the Sixth, Eighth, and Fourteenth Amendments, were violated.

Therefore, the death sentence must be vacated and the case remanded for a new penalty trial.

III.

THE DENIAL OF DEFENDANT BOOKER'S WHEELER-BATSON MOTION - DESPITE THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES AGAINST FOUR AFRICAN AMERICAN JURORS - VIOLATED THE REPRESENTATIVE CROSS-SAMPLE GUARANTEE OF THE CALIFORNIA CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. PROCEEDINGS BELOW

Richard Booker, an African-American, was charged with murdering three young Caucasian women. (C.T. Vol. 1, pages 1-30.) The case was tried in mostly white Riverside County. The trial judge noted that only 6 or 7% of the residents of Riverside County were African-American. (R.T. Vol. 6, pages 842-843.) Defense counsel noted that, according to the completed written juror questionnaires, 64% of the prospective jurors were Caucasian whereas a mere 8% - 10 out of 132 - were African-American. (R.T. Vol. 6, pages 672-673; jurors' responses to question 1D of written juror questionnaires at C.T. Vol. 3, page 734 - Vol. 13, page 3668.)

The prosecutor, during jury selection, continuously challenged the prospective African-American jurors despite repeated defense objections.

Prospective African-American juror Michelle Williams responded to the questionnaire by stating that she was a "religious" person who personally believed that the death penalty was generally an unnecessary punishment since those committing serious criminal offenses "will always have to answer to God and that's much worse than facing death." Thus she was generally not

in favor of the death penalty (she circled number 3 on the 10 point scale). However she was confident that she could "serve as an unbiased juror . . . [and] set . . . [her] personal beliefs aside." She acknowledged that the death penalty could serve a legitimate purpose in cases where an individual committed a serious crime. She stated that she would be able to impose the ultimate penalty if she were convinced, based upon all of the evidence and the jury instructions, that this was appropriate. (C.T. Vol. 8, pages 2055 et seq.; responses to questions 14, 43, 45, 46, 47, 50.)

The prosecutor challenged Ms. Williams for cause based upon her "conflicting" responses. Defense counsel objected. The court denied the challenge on the basis that Ms. Williams had said that she could set her personal beliefs aside and vote for the death penalty if appropriate. (R.T. Vol. 5, pages 501-502.)

The court, during the oral voir dire, did not question Ms. Williams concerning her views on the death penalty or her willingness to impose it. (R.T. Vol. 5, pages 559-563.) However, both defense counsel and the prosecutor did. Ms. Williams repeatedly assured both counsel that, while she was not particularly favorable to the death penalty due to her religious views, she would be able to set these views aside if selected as a juror, follow the court's instructions, and impose the extreme penalty if appropriate based solely upon the law and the evidence. She stated that her personal and religious feelings against the death penalty were not so strong that the prosecutor

would have an "uphill job" persuading her to impose the death penalty. (R.T. Vol. 5, pages 620-621, 649-651.)

Prospective African-American juror Monique Williams indicated in her questionnaire responses that she was a "religious person" whose religious beliefs would not in any way prohibit or make it difficult for her to sit as a juror. She was willing to follow the court's instructions on the law even though they might differ from her personal beliefs or opinions because "the law is the law." She understood that the prosecutor had the burden to prove Richard Booker guilty beyond a reasonable doubt and that he was innocent until proven guilty. She was moderately in favor of the death penalty (she circled number 6 on the 10 point scale), and believed that it might be appropriate in cases "when a person deliberately and maliciously causes severe harm to others and affect(s) others' lives . . . [in ways] that are uncalled for." However, she personally believed that "the death penalty should only be used in instances where there can be no rehabilitating . . . [the convicted defendant] and the danger . . . [to] others . . . [is] at stake." She recognized that the death penalty served a legitimate purpose in that "it protects the lives of others that could have possibly come in contact with . . . [the convicted defendant]." She would consider all of the evidence and the jury instructions and impose the penalty - either death or life without possibility of parole - she felt was appropriate. (C.T. Vol. 12, pages 3405 et seq., questionnaire responses 14, 32, 33, 43, 45, 47.)

Ms. Williams, during the oral voir dire, stated that she understood that the fact that a convicted defendant may have been rehabilitated was only one of the relevant factors in determining whether or not the death penalty was an appropriate punishment. She also understood that the mere fact that there might be a conflict in the evidence did not necessarily mean that there was a reasonable doubt of the defendant's guilt. (R.T. Vol. 5, pages 598-599, 644-645, 666.) The prosecutor later acknowledged that Ms. Monique Williams had given all of the "correct verbal answers." (R.T. Vol. 5, page 676.)

Prospective African-American juror Johnny Monroe did not indicate, in response to a question on the written questionnaire, whether or not any of his close friends or relatives had ever been accused of a **crime**. (Questionnaire at C.T. Vol. 6, pages 1529 et seq., at C.T. 1535, question No. 19.) When the prosecutor pointed out during the oral voir dire that Mr. Monroe's son had been "prosecuted" as a **juvenile**, Mr. Monroe stated that he had not responded to the relevant question because he did not know whether or not it was applicable to juvenile court proceedings. (R.T. Vol. 5, pages 656-658.)

Mr. Monroe also stated in his written questionnaire responses that he would be able to follow the court's instructions regardless of any conflicting personal beliefs that he might have, that he had no preconceived opinions about the death penalty (he circled No. 5 of 10), that he believed that "the death penalty is the ultimate price one pays for viciously

taking the life of another depending on the circumstances," that the death penalty served a legitimate purpose "as a deterrent against serious crimes," and that he could consider all of the evidence and jury instructions and impose the penalty (either death or life without possibility of parole) that was appropriate. (C.T. Vol. 6, pages 1538 et seq., questionnaire responses 32, 33, 43, 45, and 47.)

Prospective African-American juror Darryl Jackson indicated in his questionnaire responses, and also during the oral voir dire, that he had been a loss prevention agent for Montgomery Wards and May Company for almost 20 years and had testified for the prosecution numerous times. He had a number of relatives in law enforcement including a sister-in-law who was a bailiff in Los Angeles County. His younger brother had been accused of murder, but was ultimately convicted of the lesser included offense of manslaughter, and was serving time in prison. The brother had failed to catch his infant child while tossing him in the air. Mr. Jackson felt that the result was fair under the totality of the circumstances and that the justice system had worked properly.

He felt that the death penalty was needed, so long as it was rendered fairly, and was moderately in favor of it (6 out of 10). The death penalty served a legitimate purpose as a "deterrence to others," and he would have no difficulty in imposing the extreme penalty if appropriate based upon the law and the evidence, even though his church (the Church of Christ) was against it. (C.T.

Vol. 6, pages 1505 et seq., questionnaire responses 5, 12, 14, 16, 19, 21, 23, 45, 46, 47; R.T. Vol. 5, pages 701-707, 729-730, 733, 739-741.)

The prosecutor exercised one of his first two peremptory challenges against prospective African-American juror Michelle Williams. The defense made a Batson-Wheeler motion. The court found that a prima facie case of racial discrimination in the exercise of the prosecutor's peremptory challenges had not been made. The court nonetheless felt compelled to "indicate for the record [that] Miss Michelle [Williams] was against the death penalty for religious reasons, and I think that a prosecutor would have concerns about that." Therefore the motion was denied. (R.T. Vol. 5, pages 667-669.)

The prosecutor exercised further peremptory challenges against several more prospective African-American jurors, including Mr. Monroe and Ms. Monique Williams, over defense objections. (R.T. Vol. 5, pages 669-672.)[4]

The defense made a second Batson-Wheeler motion after the prosecutor had exercised four of his first seven peremptory challenges against African-Americans. The court noted the disproportionate percentage of the prosecutor's peremptory challenges exercised against African-Americans, but stated that "even given that breakdown" the defense had failed to make a prima facie case of racial discrimination since the court was

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[4] The defense did not object to the peremptory challenge of another prospective African-American juror named Garth Newberry. (R.T. Vol. 5, page 674.)

able to discern race-neutral reasons for challenging the African-Americans in question.

The court stated:

> "As to Michelle Williams, she did write in her questionnaire, 'I am against the death penalty. I feel death isn't one of . . . [the appropriate penalties].' Then she was [only] a 3 [out of a possible 10 in favor of the death penalty]. And then she put a religious overtone to it, which I would guess causes real concern by . . . [the prosecutor]. So I believe that that would be a [race-neutral] basis to excuse . . . [her].
>
> I would also note that [Caucasian prospective juror] Mr. Markley was excused when he started talking about a potential conflict with religion as well, although I probably would have kept Mr. Markley, but that's just me.
>
> As to Johnny Monroe, Jr., he was obviously hiding something. And when we found out his son had a juvenile history and he didn't think he was accused of a crime, and then there was some defensiveness in his posture, I could see no alternative but . . . for the prosecution to excuse him as well.
>
> As to Monique Williams, she says . . . 'the death penalty should only be used in instances where there can be no rehabilitating . . . [the convicted defendant] and the danger to others . . . [is] at stake.' She also said that she is highly opinionated. And I think there were a couple other answers that would have caused me concern as well.
>
> . . . And so . . . I don't find that a prima facie showing has been made in this case for the reasons that I have stated.
>
> Now, I find non-racial, compelling . . . reason(s) for excusing each of these persons . . .
>
> And so . . . [the prosecutor] does not even need to state his reasons. . . . I

think I have made the record clear. But if . . . [the prosecutor] want(s) to for the purpose of preserving the record if somebody second-guesses me, I will allow . . . [him] to do so. But I'm not going to compel . . . [him] to do so." (R.T. Vol. 5, pages 673-675.)

The prosecutor then took the opportunity afforded him by the court. The prosecutor stated:

"The reasons the court gave [for excusing the African American jurors] were exactly the [same] reasons [I had] on all of them. But I would like to add a couple of things about them. To start with, Johnny Monroe, Jr., Mr. Monroe's son, has a very very lengthy [juvenile history] - - there would be no way he could not have understood that question [on the written questionnaire]. And when he left it blank I marked it from the beginning. When the court asked and under oath he lied to you, at least I believed he lied, I thought I wouldn't keep him no matter what he said at that point. . .

Monique Williams gave the correct verbal answers, but I didn't get a feeling from her that she was really able to vote for death, because I do think - - she said I honestly believe a person is innocent [until proven guilty] and she also said that she, if there was any chance of rehabilitation, . . . wouldn't vote for death.

. . . I don't think defense counsel is going to keep people just because they say the right things. If we use that standard, we could, I guess use it, but I don't think that's a good enough reason.

. . . And Michelle Williams. Your honor, I wrote down several of . . . [her statements]. She wrote, 'I am against the death penalty,' and she had conflicting answers back and forth on that on the questionnaire. And even today when she said she could set aside her views, . . . when its a religious view I have great concern about it that somewhere along the way . . . [she is] going to feel that . . . [she has] sinned

> or is going to hell. . . . I don't know what religion she is but I couldn't take that chance with her." (R.T. Vol. 5, pages 675-677.)

Defense counsel noted that he was particularly concerned with the prosecutor's exercise of a peremptory challenge against Ms. Monique Williams. (Id.)

However, the court reiterated that there were race-neutral reasons for excusing her since she had stated that the death penalty should only be used in instances where there could be no rehabilitation, and stated her honest belief that a person is innocent until proven guilty which - in the court's view - confused reality with the legal presumption of innocence and the prosecutor's legally required burden of proof. Thus, the second defense Batson-Wheeler motion was denied. (R.T. Vol. 5, page 677.)

Jury selection resumed.

The court, outside the presence of the prospective jurors, asked the prosecutor whether or not he was going to exercise a peremptory challenge against African-American juror Darryl Jackson. The prosecutor stated that he needed to think about this and weigh the pluses and minuses. Nonetheless, without waiting for the prosecutor to make up his mind, the court suggested that there was a valid race-neutral reason for excusing Mr. Jackson, that any objections would be overruled, and that any further Batson-Wheeler motion would be denied. The court stated:

> "He's the African-American gentlemen, and I assume that there will be another

> Wheeler motion made. I would indicate that I would let . . . [counsel] make your record . . .[but] I would see [race-neutral] reasons . . . because I thought when I talked to. . . Mr. Jackson] yesterday, he said no true Christian [could believe in the death penalty] . . . He's come off that today [during the verbal questioning] . . . but I believe there's a logical basis [for excusing him]. There's a consistency that . . . [the prosecutor] has been excusing those people that have had that kind of equivocal feeling about the death penalty. . . I would allow you to make your record. I would say - - even if he does excuse him . . . all . . . [defense counsel] have to do is say I'm making a motion again, and we will make the record clear when we take our break." (R.T. Vol. 6, pages 746-747.)

The prosecutor did exercise a peremptory challenge as to Mr. Jackson, and the defense objected. (R.T. Vol. 6, page 805.)[5]

Jury selection continued, further peremptory challenges were exercised, and both the prosecution and the defense eventually accepted the panel as then constituted. The jury selected to try the cause included two African-Americans. (R.T. Vol. 6, pages 806, 842.)

The prosecutor had, at this point, exercised six of his 14 peremptory challenges against African-Americans.

The defense made a third - and final - Batson-Wheeler motion, which incorporated by reference the previous similar motions. Defense counsel additionally stated that they felt that African-American Darryl Jackson had been improperly challenged by

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[5] The prosecutor also excused another African-American juror named Michael Robinson. However, defense counsel stated that he would not be making any Batson-Wheeler motion as to this particular juror. (R.T. Vol. 6, page 837.)

the prosecutor for racial reasons since he had indicated on his questionnaire that he was "middle of the road" on the death penalty and could follow the law, and that as a loss prevention agent (and prosecution witness) for almost 20 years, it was highly unlikely that he could be somehow biased against the prosecution in the instant case. (R.T. Vol. 6, page 842.)

However, the court once again ruled that the defense had failed to make even a prima facie case of racial discrimination. The court noted that Mr. Jackson had stated on his questionnaire that Christians did not believe in the death penalty even though he had later modified and toned down this assertion. The court reiterated that the prosecutor's excusal of Mr. Jackson was consistent with the prosecutor's exercise of peremptory challenges against all prospective jurors - whether Caucasian or African-American - whose religious views indicated that they might have difficulty imposing the death penalty. (Id.)

The court also noted, more generally, that the jury included two African-Americans, that this constituted approximately 16% of the jury even though the African-American population of Riverside County was only 6 or 7%, and that this was an indication that race didn't really play a role in jury selection in the instant case. (Id.)

The court also suggested that the disproportionate exclusion of African-Americans **as a group** was justified since they were less inclined to be strongly in favor of the death penalty than the population in general. Thus, according to the court, the

exclusion of African Americans "for death penalty reasons" didn't mean that they were being excluded simply because of their race. (R.T. Vol. 6, pages 843-844.)

The court then stated that, even though no prima facie case had been shown, and the prosecutor did not have to justify his reasons for excluding African-Americans in general or Mr. Jackson in particular, he was free to do so in order to make the record clear.

The prosecutor once again availed himself of the opportunity afforded him. He insisted that none of the peremptory challenges which he had exercised - either against the African-American jurors in general or Mr. Jackson in particular - had anything to do with race. The prosecutor stated that his biggest fear was that, since Mr. Jackson had stated that no Christian or Christian church would be in favor of the death penalty and identified himself as a Christian, he might have some "hidden agenda," even though he said that he would follow the law. The prosecutor couldn't take the chance that he would be unable to reconcile his Christian beliefs with his duty as a juror. The prosecutor noted that it had been his consistent practice to excuse jurors - white or black - who might believe that their mortal souls might be in danger if they voted for the death penalty. (R.T. Vol. 6, pages 844-845.)

The prosecutor also noted that two African-Americans, whom he had not excused, had been selected to serve as jurors. (Id.)

B. DISCUSSION

The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by both the California and United States Constitutions. (Batson v. Kentucky (1986) 476 U.S. 79, 89; People v. Wheeler (1978) 22 Cal.3d 258, 276-277; People v. Silva (2001) 25 Cal.4th 345, 384-386.) The Batson-Wheeler rule has now been codified.

"A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." (California Code of Civil Procedure, §231.5.)

A party may challenge systematic exclusion of members of a cognizable racial group by making an appropriate motion. (Powers v. Ohio (1991) 499 U.S. 400; People v. Farnam (2002) 28 Cal.4th 107.) Resolution of a Batson-Wheeler motion requires a three step process. "Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (Purkett v. Elem (1995) 514 U.S. 765, 767; People v. Silva, supra, 25 Cal.4th at 384.)

In the instant case the trial court erred in (1) finding that a prima facie case of systematic exclusion of African-

American jurors had not been made, (2) failing to require the prosecutor to state race-neutral reasons for excluding the African-Americans, and (3) allowing these jurors to be excused based upon allegedly race-neutral reasons that were either constitutionally invalid or pretextual.

1. The Defense Established a Prima Facie Case

The defense clearly stated a prima facie case of racial discrimination in regard to the second and third Batson-Wheeler motions. The trial court's contrary findings were clearly erroneous.

In Johnson v. California (2005) ___ U.S. ___, 162 L.Ed.2d 129, 125 S.Ct. 2410, the United States Supreme Court held that, in order to establish a prima facie case, the moving party need only show an "inference" of racial bias." (Johnson, supra, ___ U.S. at p. ___, 125 S.Ct. at p. 2416.)

Here, Defendant Booker established that he is African-American and that the prosecutor used four of his first seven, and six of his 14 peremptory challenges to remove African-Americans from the jury. In addition, it appears that a mere 8% - 10 out of the 132 prospective jurors - were African-American.

These bare facts present a statistical disparity which, in and of itself, establishes a prima facie case. (Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083, at 1091; Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, at 1077-1080; Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, at 812; Williams v. Runnels (9th Cir.

2006) 432 F.3d 1102.)

Prior to the issuance of the High Court's opinion in Johnson, the Ninth Circuit had held that a statistical disparity was sufficient to make a prima facie inference of bias, even though such a presumption could be rebutted by other relevant circumstances (Paulino, supra, 371 F.3d at 1091; Fernandez, supra, 286 F.3d at 1079) and Johnson implicitly reaffirms this perspective. In Johnson, the Court reiterated that a defendant may rely on "any other relevant circumstances" to raise an inference of discriminatory purpose. Previously, in Batson, the Court noted that, in deciding whether the defendant has made the requisite showing, the trial court should consider all "relevant circumstances," which may support or refute an inference of discriminatory purpose. (476 U.S. at 96-97.) It follows that, when reviewing a Batson claim, courts should consider any other relevant circumstances brought to their attention that may support or refute an inference of discriminatory purpose and whether or not a prima facie case of discrimination was established. (Williams v. Runnels, supra.)

While the High Court has never defined the other relevant circumstances appellate courts may consider in reviewing a Batson step one claim based on statistical disparity, it is clear that possible race-neutral reasons which the trial court may be able to discern are not among them. Thus, the Court noted in Johnson, citing Paulino, that it "does not matter that the prosecutor might have had good reasons; what matters is the real reason

[potential jurors] were stricken." (Johnson, supra at 125 S.Ct. 2418.)

This concern was reiterated in Miller-El v. Dretke (2005) 545 U.S. 231.) There the Court stated:

> "But when illegitimate grounds like race are an issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the [prosecutor's] stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (125 S.Ct. at 2332; Williams v. Runnels, supra, quoting from Miller-El.)

Accordingly, to rebut an inference of discriminatory purpose based on statistical disparity, the "other relevant circumstances" must do more than indicate that the record would support race-neutral reasons for the questioned challenges. (Williams v. Runnels, supra.)

In the instant case the trial court, as noted ante, found that there was no prima facie case of racial discrimination, despite the disproportionate percentage of the prosecutor's peremptory challenges exercised against African Americans, because the trial court was able to discern race-neutral reasons from the record. However, this does not matter since, under Johnson, Miller-El and Williams v. Runnels, supra, only the **prosecutor's** stated reasons for challenging the jurors may be considered. The trial court's speculations about what the prosecutor's reasons might have been do not matter a tinker's

damn.

Accordingly, the trial court erred in ruling that, in regard to the second and third Batson-Wheeler motions, the defense had not made a prima facie case of racial discrimination.

2. The Trial Court Erred in Failing to Compel the Prosecutor to State the Prosecutor's Permissible Race-Neutral Justifications

It follows from the above that, since a prima facie showing of racial discrimination was made in the instant case, the trial court additionally erred in not compelling the prosecutor to produce race-neutral explanations for his peremptory challenges of the African-Americans.

A number of cases have held that, so long as the trial court elicited the prosecutor's reasons for the peremptory challenges, the issues of whether the defendant established a prima facie case (step one), and whether the prosecutor should have been compelled to state his reasons (step two) are moot, and the reviewing court may simply proceed to the third step of the Batson analysis and, specifically, to the defendant's claim that the prosecutor's justifications were pretextual or otherwise invalid. (Hernandez v. New York (1991) 500 U.S. 352, 359; People v. Schmeck, supra, 37 Cal.4th at p. 267.)

However, this analysis is untenable in the instant case since this Court can have no assurance that the reasons stated by the prosecutor were in fact the **prosecutor's** reasons (as opposed to the possible race-neutral reasons discerned by the trial court). The trial court, as noted ante, engaged in numerous

speculations concerning possible race-neutral reasons for striking the African-American jurors. The trial court then, without ordering the prosecutor to state his reasons for excusing the African-Americans, permitted him to do so. The prosecutor then stated that his reasons for exercising the peremptory challenges "were exactly the [same] reasons" stated by the court. While the prosecutor stated at one point that he "would like to add a couple of things," he in fact said nothing that the trial court had not already suggested. Under these circumstances, this Court can have no confidence that the prosecutor's stated race-neutral reasons were really his own. This being the case, it becomes impossible for this Court to overlook the trial court's errors at steps one and two of the Batson analysis, and to simply proceed to step three which requires an analysis of the **prosecutor's** reasons. In a case such as this, the analysis must stop at step two, and the only possible conclusion is that Batson-Wheeler error was committed.

3. The Proffered "Race-Neutral" Reasons Were Either Constitutionally Impermissible or Pretextual

Even assuming that a step three review of the proffered race-neutral reasons is appropriate in this case, these reasons can not withstand appellate scrutiny.

The trial court's comments at the end of the third Batson-Wheeler hearing suggest that the systematic exclusion of African-Americans from jury service in a capital case is justifiable, not on racial grounds, but because African-Americans are generally

less strongly in favor of the death penalty than the general population.

However, this analysis is clearly wrong. The whole point of Batson-Wheeler is that the systematic exclusion of a cognizable racial group, based upon group rather than individual differences, is constitutionally impermissible.

Both the trial court and the prosecutor repeatedly stated that the primary non-racial reason for excluding three of the four African-Americans (i.e. Michelle Williams, Monique Williams, and Darryl Jackson) was that they were affiliated with religious groups or had religious views which would make it difficult or impossible for them to impose the death penalty. While they nonetheless stated that they could impose the death penalty, neither the prosecutor nor the trial court was willing to take the jurors' answers at face value. This Court has suggested in the past that, even though these religious reservations or scruples may be insufficient to challenge a prospective juror for cause, such skepticism may constitute a valid race-neutral reason for a peremptory challenge. (People v. Boyette (2002) 29 Cal.4th 381, at p. 422; People v. Panah (2005) 35 Cal.4th 395.)

However, the problem with the above conclusion is that it merely substitutes constitutionally impermissible religious discrimination for constitutionally impermissible racial discrimination as a justification for the exercise of prosecutorial peremptory challenges. Religious groups are cognizable under Wheeler (Wheeler, supra, 22 Cal.3d at p. 276;

People v. Gutierrez (2002) 28 Cal.4th 1083, 1122; People v. Schmeck, supra at 37 Cal.4th at p. 266.) Moreover, the California Legislature has declared that prospective jurors may not be excluded on the basis of religion. (Code of Civil Procedure, §231.5.) Thus, in the instant case, the prosecutor could not exclude these three jurors merely because they may have been affiliated with particular religious groups (such as the Church of Christ) which generally oppose the death penalty.

It is true that the prosecutor had consistently excused Caucasian as well as African-American jurors who were affiliated with religious groups who oppose the death penalty since he could not take the chance that these jurors might elect not to follow the law for fear of "committing a mortal sin" or "endangering their souls." For example, the prosecutor peremptorily challenged prospective Caucasian Catholic juror Beatrice Bravo, (after unsuccessfully challenging her for cause) for this very same reason. (C.T. Vol. 4, pages 1093, 1102; R.T. Vol. 5 pages 489-491, 691-695, Vol. 6, pages 716, 737.) However, while this type of comparative analysis is perfectly appropriate under Miller-El v. Dretke, supra, the conclusion must be that the Caucasian Catholic jurors, just like the "religious" African-American jurors, were impermissibly excused. Otherwise, every single prospective Catholic juror would be automatically excludable in every capital case, based solely on the Catholic church's well-known opposition to the death penalty, despite individual Catholic jurors' assurances that they could put their

religious beliefs aside and follow the law.

The remaining reasons proffered for excusing the African-Americans were obviously pretextual.

The trial court and the prosecutor opined that juror Johnny Monroe had concealed his son's lengthy juvenile history, and the prosecutor even went so far as to claim that Mr. Monroe had deliberately "lied" since he had not revealed this information in response to one of the questions on the written questionnaire (question 19).

However, the question asked whether any of the juror's close friends or relatives had ever been accused of a **crime** and, as Mr. Monroe explained, he was unsure as to whether or not this applied to Welfare and Institutions Code section 602 **juvenile** proceedings. There is no reason to believe that Mr. Monroe deliberately concealed this information from the prosecutor, much less that he had some hidden agenda or would be biased against the prosecutor as to either guilt or penalty.

The trial court and the prosecutor's reasons for excusing Monique Williams, even though the prosecutor expressly stated that she had given all of the correct verbal answers, based solely upon the prosecutor's "feeling" that she would be unable to vote for the death penalty, were even more of a "stretch." Ms. Williams did state at one point that she did not believe that the death penalty should be imposed if there was any chance of rehabilitation. However this was **before** the trial court explained to her that this was merely one of numerous relevant

factors that needed to be weighed under the law in determining the appropriate penalty. Ms. Williams assured the court and counsel, once this had been explained to her, that she would have no difficulty in following the law and considering other relevant factors, and there is no reason to disbelieve her.

Ms. Williams' belief that Richard Booker was innocent until proven guilty, and her failure to recognize the "distinction" between "reality" and a "legal construct" applicable only to the prosecutor's burden of proof, could not constitute a valid race-neutral reason for excluding her since the Due Process Clause recognizes no such distinction.

The prosecutor's reliance upon the "body language" of the African-Americans (poor posture, nervousness, etc.) as a justification for excusing them was obviously an afterthought and pretextual. While prospective jurors' body language may constitute an acceptable reason for excusing jurors, provided that there is some indication that this would cause them to be biased against the prosecutor (People v. Turner (1994) 8 Cal.4th 137, 668; People v. Perez (1994) 29 Cal.App.4th 1313, 1328), here there was none.

The fact that two African-Americans were selected as jurors does not mean that race played no part in the jury selection process or that there were no Batson-Wheeler violations in the instant case. The exclusion by peremptory challenge of a single juror on the basis of race, regardless of whether or not members of that same race were permitted to serve, is an error of

constitutional magnitude requiring reversal. (People v. Silva, supra, 25 Cal.4th, at p. 386.)

The Equal Protection and Due Process Clauses prohibit a prosecutor from excluding qualified and unbiased persons from the jury on grounds of race. (Miller-El v. Dretke, supra; Batson v. Kentucky, supra; Powers v. Ohio (1991) 499 U.S. 400; J.E.B. v. Alabama (1994) 511 U.S. 127.) This type of discrimination is also prohibited under the analogous provisions of the California Constitution and by the California Code of Civil Procedure.

Accordingly, the entire judgment must be reversed.

IV.

THE FAILURE TO ADEQUATELY QUESTION PROSPECTIVE CAUCASIAN JURORS CONCERNING RACIAL BIAS AGAINST AFRICAN-AMERICANS DENIED RICHARD BOOKER A FAIR TRIAL BY AN IMPARTIAL JURY, IN VIOLATION OF UNITED STATES AND CALIFORNIA CONSTITUTIONAL GUARANTEES, AND REQUIRES REVERSAL

A. RELEVANT PROCEDURAL HISTORY

Richard Booker was one of a small number of African-Americans residing in mostly Caucasian Riverside County where this case was tried. (C.T. Vol. 6, pages 842-843.) He was accused of sexually assaulting and murdering three young Caucasian females.

The panel of 132 prospective jurors was 64% Caucasian, whereas only 8% were African-American jurors, and the prosecutor used his peremptory challenges to excuse most of these. (R.T. Vol. 6, pages 672-673; jurors' response to question 10 of written juror questionnaires at C.T. Vol. 3, page 734 - Vol. 13, page 3668.)

The written questionnaires contained only a single question which might be construed as referring to possible racial bias. This was question No. 44 which asked "Is there anything about the appearance of the defendant that might bias you for or against either side?" The jurors were asked to check either "yes" or "no" and, if their answer was "yes," to "please explain." Unsurprisingly, none of the potential jurors admitted that Richard Booker's African-American appearance would in any way affect their decision.

Defense counsel, at least insofar as the record reflects,

did not request, and the court did not ask, any further questions of the overwhelming white jury pool concerning biases and prejudices against African-Americans in general or the African-American defendant on trial in this case in particular.

During the oral voir dire, defense counsel asked only a single question relating to possible racial bias: "You can all see that my client is an African-American male. I believe that you will hear, should you sit as a juror in this case, that the victims are not African-American. Now, is there anybody in this group of 20 [prospective jurors] that has a reaction to the fact that the victims are of a different race than my client?

Ms. Williams, what do you think?"

Prospective African-American juror Michelle Williams responded: "No. It should have no factor on the case, because the situations as far as being a juror you are - you are not suppose to take that into consideration."

Prospective Caucasian juror Amato responded: "I don't - there is no reaction to it. I mean, if a life was taken, it doesn't matter on their skin."

None of the other prospective jurors disagreed. (R.T. Vol. 5, page 629.)

Ultimately, a jury, which included only two African-Americans was selected to try the case. (R.T. Vol. 6, page 842.)

B. DISCUSSION

1. Both the Trial Court and Counsel Failed to Adequately Explore the Prospective Caucasian Jurors' Possible Racial Biases

The trial court and counsel should have asked the overwhelmingly Caucasian jury panel additional questions designed to ferret out their hidden prejudices against African-Americans like Richard Booker accused of heinous crimes. The court and counsel had a duty to do this under federal constitutional and California law.

The United States Supreme Court has repeatedly held that the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that an adequate inquiry be made regarding the possibility of racial prejudice against African-American defendants in capital cases. (Ham v. South Carolina (1974) 409 U.S. 524; Turner v. Murray (1986) 476 U.S. 28; Mu'min v. Virginia (1991) 500 U.S. 415.)

The California appellate courts have similarly ruled that it is error to fail to propound specific questions designed to reveal racial prejudice. (People v. Wells (1983) 149 Cal.App.3d 721; People v. Taylor (1992) 5 Cal.App.4th 1299.) As Justice McClosky wrote in Wells:

> "Because racial, religious or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence -and sometimes even good faith efforts to be objective - judges must not foreclose counsel's right to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or

unconsciously held." (Wells, supra at 149 Cal.App.3d 727.)

The fact that an African-American defendant is being tried in a predominately Caucasian community may not **alone** require a detailed and specific race bias inquiry in cases where the alleged crimes are not inter-racial. However, even in the absence of a "classic" inter-racial factual scenario, where the issue of race is inextricably bound up with the issues to be tried, this, **in addition to the defendant's minority status,** mandates such an inquiry. (Ristaino v. Ross (1976) 424 U.S. 589; People v. Chaney (1991) 234 Cal.App.3d 853.) Consequently, where race is "inextricably bound up with the issues to be tried," and where the scope of voir dire fails to create any reasonable assurances that prejudice will be discovered if present, reversible error is committed. (United States v. Baldwin (9th Cir. 1979) 607 F.2d 1295; People v. Chapman (1993) 15 Cal.App.4th 136.)

The above recited legal principles compel the conclusion that Richard Booker was denied his constitutional right to a fair and impartial jury by reason of the failure of the trial court and counsel to adequately probe the Caucasian jurors' biases.

Richard Booker, an African-American, was accused of committing violent inter-racial crimes against three young Caucasian women. This case thus presented the "classic" inter-racial factual scenario. It is precisely the type of case where Caucasian jurors' likely biases against African-Americans and

their perceptions about the propensities of African-Americans to commit crimes could well have improperly influenced their ability to follow their oaths and impartially determine Richard Booker's guilt or innocence, as well as whether or not he should receive the death penalty.

This case demanded careful questioning in the area of race-bias, particularly since the case was being tried in a largely Caucasian community and the jury pool was overwhelmingly Caucasian. At a minimum, careful questioning into the perceived propensities of African-Americans to commit crimes, by the court and counsel, was essential to assure that Richard Booker received a fair trial. The single general question contained in the written questionnaire, and defense counsel's single question posed to a panel of only 20 of the 132 prospective jurors, were completely inadequate. Neither the court nor counsel made more than a pro forma effort to probe the jurors' attitudes about African-Americans, or their perceived propensities to commit violent crimes against Caucasians. Each of these subjects presented a real and substantial risk of juror bias and potentially affected the jurors' ability to fairly judge the evidence in this case.

Both the trial court and counsel therefore committed serious omissions in not asking the jurors further questions about racial biases and attitudes.

2. The Issue Should be Addressed on Direct Appeal

Defendant Booker anticipates that this Court may be tempted

to dismiss this issue as not cognizable on direct appeal since defense counsel, who apparently had an opportunity to participate in the drafting of the written questionnaire, and was not precluded from asking further race bias questions during the oral voir dire, never asked the court to pose further questions to the prospective jurors. Thus, a credible argument can be made that this point has been waived. (People v. Staten (2000) 24 Cal.4th 434, at 452.)

Defendant Booker submits nonetheless that this issue should be considered on direct appeal.

The trial court had a sua sponte duty to adequately probe the Caucasian jurors' attitudes about African-Americans in order to guarantee Defendant Booker the fundamentally fair trial to which he was entitled as a matter of constitutional right.

Thus, even though defense counsel may be partly to blame, this issue should nonetheless be addressed on direct appeal rather than in a future habeas corpus action. (See People v. Taylor, supra. 5 Cal.App.4th at 1311-1312.)

3. The Failure to Adequately Explore the Subject of Race Bias on Voir Dire Requires Reversal

Because the right to trial by an impartial jury is a fundamental federal constitutional right, its violation is reversible per se. (Ham, Turner, and Wells, all cited supra.) In all of these cases the appellate court, having concluded that the trial court erred in not probing sufficiently into prospective jurors' racial biases, simply reversed the convictions and did not require the defendant to affirmatively show that he had been

"prejudiced." The court's reasoning in those cases was that the risk that racial prejudice may have infected the jury's deliberations was enough to invalidate the convictions.

A further reason for adopting a per se reversible standard in these cases is that the very nature of the error makes it all but impossible for any criminal defendant ever to make an affirmative showing of prejudice. Few, if any, jurors are ever going to admit straight out in open court on the record that they are so bigoted against defendants of a minority race that they cannot fairly judge the evidence. If the trial court and trial counsel do not dig out clues as to racial prejudice during voir dire, it is virtually impossible for a defendant to later establish in any other way the biases which may lay concealed in the jurors' minds and hearts.

Respectfully assuming that this Court agrees with the above analysis, the inquiry is at an end and the convictions in the instant case must be reversed.

However, even assuming that prejudice must be shown, and the federal constitutional error test of "harmless beyond a reasonable doubt" (Chapman v. California (1967) 386 U.S. 18) applies, the convictions must still be reversed.

Unlike in People v. Holt (1997) 15 Cal.4th 619, the voir dire in this case was so inadequate (indeed virtually non-existent) that this Court cannot say beyond a reasonable doubt that the resulting trial was fundamentally fair and free of racial prejudice. (Cf. Holt, at 15 Cal.4th 661.) Moreover,

unlike in People v. Robinson (2005) 37 Cal.4th 592, at 616-619, there was no hung jury or partial acquittal which would indicate that the jurors fairly evaluated the evidence. Indeed, the jury found Defendant Booker guilty as charged, found all of the alleged special circumstances but one true, and condemned Defendant Booker to death without extensive deliberations.

In summary, this Court cannot say **beyond a reasonable doubt** that a jury more carefully screened to weed out potential racial prejudices might have been unable to convict Defendant Booker or impose the death penalty.

Accordingly, the judgment must be reversed.

GUILT PHASE ARGUMENTS

V.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT EITHER THE JUDGMENTS OF CONVICTION OR THE SPECIAL CIRCUMSTANCES FINDINGS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. STANDARDS OF REVIEW

The constitutionally mandated test to determine a claim of insufficiency of the evidence in a criminal case, pursuant to the Due Process Clause of the Fourteenth Amendment, is well established. The critical inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes of which the defendant stands convicted proven beyond a reasonable doubt. (In re Winship (1970) 397 U.S. 358; Herrera v. Collins (1993) 506 U.S. 390; Jackson v. Virgina (1979) 433 U.S. 307; Juan H. v. Allen (9th Cir. 2005) 408 F.3d 1262; People v. Johnson (1980) 26 Cal.3d 557, 578; People v. Maury (2003) 30 Cal.4th 342, 396; People v. Guerra (2006) 37 Cal.4th 1067, 1129; In re Ryan N. (2001) 92 Cal.App.4th 1371.)

The prosecution's burden is a heavy one. To justify a criminal conviction, the trier of fact must have been reasonably persuaded to a near certainty, and reasonably rejected evidence and reasonable inferences drawn therefrom that undermine confidence in the verdict. (People v. Hall (1964) 62 Cal.2d 104, 112.) Moreover, while the appellate court will not itself reweigh the evidence, and must be ever mindful that it is the exclusive province of the trier of fact to determine the

credibility of witnesses and the truth or falsity of the facts upon which a determination depends (People v. Jones (1990) 51 Cal.3d 294, 314; People v. Guerra, supra), evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. (People v. Redman (1969) 71 Cal.2d 745, 755; In re Ryan N., supra, 92 Cal.App.4th at 1372.) Whether the evidence presented at trial is direct or circumstantial, the relevant inquiry on appeal remains whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (People v. Kraft (2000) 23 Cal.4th 978, 1053.)

The same standard of review applies in evaluating the sufficiency of the evidence to support special circumstances findings. (People v. Maury, supra, 30 Cal.4th at 396; People v. Guerra, supra, at 37 Cal.4th 1129.)

Here, as will be explained, the evidence is insufficient to establish: (1) that Richard Booker premeditated the killings of Tricia Powalka, Amanda Elliott, and Corina Gandara; (2) that Corina was killed while he was attempting to rape or forcibly molest her, (3) that he committed arson; (4) that he attempted to murder infant Eric Stringer; or (5) the multiple murder special circumstances.

B. PREMEDITATION AND DELIBERATION

Penal Code section 189 provides, in relevant part,: "all murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing . . . is murder of the first degree."

In People v. Anderson (1968) 70 Cal.2d 15, this Court, synthesizing the holdings of previous cases, identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in People v. Pride (1992) 3 Cal.4th 195, 247: "Anderson does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. Anderson was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of pre-existing reflection rather than unconsidered or rash impulse." Thus, while premeditation and deliberation must result from careful thought and weighing of considerations, the process of premeditation and deliberation does not necessarily require an extended period of time. (People v. Manriquez (2005) 37 Cal.4th 547, 577.) The defendant's post-offense statements may provide substantial insight into his thought processes in the crucial moments before the act of killing, and are thus highly relevant in assessing the sufficiency of the evidence to support an inference of premeditation. (People v. Mayfield (1997) 14 Cal.4th 668, 768;

People v. Manriquez, supra, 37 Cal.4th, at 577.)

In the present case, Richard Booker acknowledged to Deverick Maddox and the police that he killed Tricia Powalka, Amanda Elliott, and Corina Gandara (C.T. Vol. 3, pages 687 et seq.; R.T. Vol. 8, pages 1134 et seq. and Vol. 9, pages 1264 et seq.). The trial court ruled that there was insufficient substantial evidence to instruct the jury on the lesser included offense of manslaughter. (R.T, Vol. 11, pages 1499-1505 and Vol. 12, pages 1530-1531.) Thus the critical issue was whether this was a case of first or second degree murder. The prosecutor argued that multiple first degree murder convictions were appropriate based upon a theory of premeditation and deliberation. (R.T. Vol. 12, pages 1576 et seq.)

However, the subsequent first degree murder convictions rendered by the jury cannot be sustained on this theory since the evidence shows that the killings occurred as the result of unconsidered or rash impulse rather than pre-existing reflection.

The only direct evidence of what occurred that night in Tricia Powalka's apartment, since the victims did not survive and Deverick Maddox claimed that he was asleep on the couch during most of this time, consists of Richard Booker's post-offense statements. Richard told the police that he had been absent-mindedly playing with his knife and accidently nicked Corina Gandara. Corina over-reacted and asked Richard why he was trying to "stab" her and tried to grab the knife. He hit her. She ran into the bedroom. Tricia threatened to shoot him even though he

told her that the "stabbing" had been an accident. Tricia ran for the gun. He hit her, and grabbed the gun away from her. Amanda Elliott, refusing to heed Richard's warning that he was not "playing," charged him. He stabbed her two or three times. He also shot Amanda and fatally stabbed Tricia during the melee. Richard told Deverick that he had to kill the three young women. The only reasonable interpretation of this statement, taken in context, was that Richard believed that he had to kill Tricia and the other young women since, otherwise, they were going to kill him. (C.T. Vol. 3, pages 687-689; R.T. Vol. 8, pages 1134 et seq., and Vol. 9, pages 1286-87, 1291.)

It also appears that Richard Booker's ability to reflect upon what was happening while all of this was going on was substantially impaired by his lack of maturity (he was only 18 years old at the time) and his consumption of a considerable quantity of Thunderbird wine. (C.T. Vol. 3, page 703; R.T. Vol. 8, pages 1120 et seq.)

The above summarized evidence strongly suggests that this was a case of imperfect self-defense manslaughter or at worst second degree murder, and certainly **not** a case where the victims' deaths were the result of cold, calculated judgment. (See Argument VIII post.)

The prosecutor, despite the above, speculated that the victims were killed, after Richard Booker sexually assaulted Corina Gandara and she and the other young women resisted, so that he could escape and avoid going to prison for what he had

done. According to the prosecutor, Richard, after attacking Corina in the living room and fighting her all the way down the hall and into the bathroom, stopped his attack, barricaded Corina in the bathroom, went into Tricia Powalka's bedroom and killed her, killed Amanda Elliott when she tried to intervene, and then went back into the bathroom and finished off Corina. According to the prosecutor, Richard Booker's statement to Deverick Maddox immediately after the killings that "he had to kill the girls," and that "he did not want to go to jail," were proof positive that the victims were killed in order to silence them so that he could avoid the consequences of his actions. (R.T. Vol. 12, pages 1584 et seq.)

However, this is pure prosecutorial speculation, based upon isolated bits of evidence taken out of context, rather than a reasonable inference based upon the record as a whole. We do not know the actual sequence of events - except as described by Richard Booker himself - and the prosecutor's statements during argument, as juries are routinely reminded, are not evidence. (CALJIC jury instruction 1.00.)

Moreover, the prosecutor failed to explain why, if Richard were really engaged in a calculated effort to eliminate all of the possible witnesses and avoid being arrested and punished at any cost, he failed to kill Deverick Maddox. While "D" might have been Richard's "homeboy," D's silence could not be guaranteed. Richard, who was holding the gun when Deverick woke up and discovered what had occurred, and who was supposedly

intent on avoiding the consequences of his actions, not only did not shoot D, but actually gave D the gun and asked D to shoot Richard. (R.T. Vol. 8, pages 1134-1141, 1200.)

Finally, the manner in which the victims were repeatedly stabbed and one also shot suggests that these were impulsive rather than premeditated killings. (See testimony of forensic pathologist Ditraglia at R.T. Vol. 10, pages 1369 et seq.)

In summary, the evidence does not establish that Tricia Powalka, Amanda Elliott, or Corina Gandara were killed as the result of any premeditated plan rather than an unconsidered or rash impulse, and is thus insufficient to support first degree murder convictions based upon a theory of premeditation and deliberation.

C. ATTEMPTED RAPE AND FORCIBLE MOLESTATION

A killing "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including rape and forcible sexual molestation, is first degree murder. (Penal Code §189.) The rape - murder and sexual molestation - murder special circumstances apply to murders "committed while the defendant was engaged in . . . the commission or attempted commission of" these crimes. (Penal Code §190.2, subdivision (a)(17)(C) and (E).) Forcible rape is an act of "sexual intercourse accomplished with a person not the spouse of the perpetrator against the person's will by means of force or violence." (Penal Code §261, subdivision (a)(2).) Forcible sexual molestation is a "lewd or lascivious act," "perpetrated upon or with the body" of a "child who is under the age of 14 years," "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child," "by use of force." (Penal Code §288, subdivisions (a) and (b)(1).) An attempt to commit rape or sexual molestation has two elements: the specific intent to commit rape or molestation and a direct but ineffectual act done towards its commission. The act must be a direct movement beyond preparation that would have accomplished the crime of rape or molestation if not frustrated by extraneous circumstances. (People v. Dillon (1983) 34 Cal.3d 441.)

Numerous cases have held that, in the absence of physical evidence that a sexual assault has occurred (e.g., the presence

of semen or vaginal trauma), an intent to commit the sexual act on the victim may not be inferred even if the victim was unclothed.

In People v. Granados (1957) 49 Cal.2d.490, the defendant killed the 13-year-old daughter of the woman he was living with. This Court reversed the jury's verdict of first degree murder with directions to enter a judgment of second degree since the evidence was insufficient to establish sexual child molestation. There were no contusions on the private parts of the victim and no spermatozoa there. An inference of a sexual assault or felony murder was thus impermissible even though the killing appeared to be sexually motivated and to have occurred when the victim repulsed the defendant's attempts to commit lewd acts.

In People v. Craig (1957) 70 Cal.2d 313, 49 Cal.2d 313, this Court found that evidence that the victim's nightgown, slip and panties had been torn open and that she was found on her back with her legs spread was insufficient to establish that the defendant had the specific intent to rape.

In People v. Anderson, supra, the victim's shredded, blood stained dress, the nudity of the victim, the fact that the crotch of the victim's panties was ripped out, and the presence of a post-mortem rectal-vaginal wound was found to be insufficient evidence to establish that the killing in that case was committed during an attempt to perform a lewd act on a minor.

In People v. Johnson (1993) 6 Cal.4th 1, this Court determined that evidence that the deceased victim was found

without clothes on from the waist down was legally insufficient to establish an actual or attempted rape.

On the other hand, in People v. Holloway (2004) 33 Cal.4th 96, this Court concluded that there was sufficient evidence from which the jury could reasonably infer the defendant's intent to rape, not withstanding the absence of physical evidence. However, in that case, there was evidence that the nude victim had been bound at her wrist and ankles during the attack, and that the defendant had also committed a sexual assault on the victim's sister. (Holloway, supra, 33 Cal.4th at 138-139.)

Most recently, in People v. Guerra, supra, this Court held, in a decision in which four Justices joined, that evidence that the defendant had manifested a pre-existing sexual interest in the victim, fabricated a reason to remain at a remodeling site after all of the construction workers had left for the day in order to catch her alone, and poke wounds and slash wounds on each of the victim's breasts, considered collectively, was sufficient to support a first degree murder conviction based upon the theory that the defendant killed the victim while engaged in an attempted rape and the related attempted rape special circumstance. The majority opinion, authored by Justice Chin, relied heavily on Holloway. (Guerra, supra 37 Cal.4th at 1129-1133.) However, the dissenting opinion, authored by Justice Werdegar, distinguished Holloway as involving much stronger evidence, and concluded that, even viewing the record in the light most favorable to the judgment, there was simply

insufficient credible evidence of solid value from which a reasonable jury could conclude beyond a reasonable doubt that the defendant, when he attacked the victim, intended to force sexual intercourse on her. (Guerra, supra, 37 Cal.4th at 1167-1168.)

In the instant case, as noted ante, Richard Booker acknowledged that he had killed the victims. The trial court refused to instruct the jury on the lesser included offense of manslaughter. The critical issue was therefore whether this was a case of first or second degree murder. The prosecutor argued that the jury could find that the murder of Corina Gandara was of the first degree since it was committed during an attempted rape or sexual molestation. The prosecutor relied heavily on evidence that Corina's body, when discovered the following morning, was partially nude and that her legs were spread apart. He also noted that Richard had stated during his interrogation that he might have helped Corina take her pants off even though Richard claimed that this was done merely out of curiosity and not because he wanted to "make it" with her. (R.T. 1576 et seq.)[6]

However, notwithstanding the prosecutor's argument, the evidence is legally insufficient to support the first degree murder conviction and related rape - molestation - murder special circumstances finding as to Corina Gandara.

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[6] The prosecutor also urged the jury to find that the murder of Tricia Powalka was of the first degree and find a related rape-murder special circumstance allegation true on the same basis. However, the jury clearly did not base its first degree murder verdict as to Ms. Powalka on this theory since they found the related rape-murder special circumstance allegation not true.

First, as in Granados, Craig, Anderson, and Johnson, all cited supra, the evidence that the deceased victim was found partially nude in a compromising position does not - in and of itself - constitute legally sufficient evidence of any actual or attempted rape or forcible molestation. This is especially true since the post-mortem analysis of the vaginal swabs and the victim's clothing did not reveal the presence of semen and the examining forensic pathologist did not detect any genital trauma or other signs of sexual activity. (R.T. Vol. 9, pages 1294 et seq., 1302-1320 and Vol. 10, page 1386.)

Second, it is unclear whether Corina Gandara was still alive at the time any actual or attempted rape or molestation may have occurred. Obviously, if she were already dead at the time, then any actual or attempted "rape" or "molestation" would have been merely incidental to the murder and a case of after-formed intent, and the felony murder theory would be inapplicable. Indeed, it is legally impossible to rape or molest a dead body. (See Argument VII, post.)

In summary the evidence is insufficiently substantial to support the first degree murder conviction or the related special circumstances finding, in regard to Corina Gandara, on a felony murder theory.

D. ARSON

The crime of arson is committed when the defendant willfully and maliciously sets fire to an inhabited "dwelling house" or apartment. While arson is a general intent crime, the willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act as distinguished from an accidental or unintentional ignition or act of setting a fire; in short, a fire of incendiary origin. (Penal Code §451; People v. Atkins (2001) 25 Cal. 4th 76, 88; People v. Glover (1991) 233 Cal.App.3d 1476, 1479 et seq.)

A willful and malicious burning is almost always shown by circumstantial evidence including a number of separate and distinct fires in different parts of the premises, the presence of kerosene or other inflammatory material combined with rags and other articles, motive including over-insurance and heavy indebtedness, or a history of pyromania. (People v. Patello (1932) 125 Cal.App.480; People v. Freeman (1955) 135 Cal.App.2d 11; People v. Andrews (1963) 222 Cal.App.2d 242; People v. Beagle (1972) 6 Cal.3d 441; People v. Glover, supra.)

Here, although Richard Booker may have placed a bag of dirty laundry on top of the kitchen stove before leaving Tricia Powalka's apartment, there is no evidence that he did so with the intention of starting a fire in the apartment in order to destroy the "crime scene" as the prosecutor opined. Indeed, even the prosecution's arson investigator Timothy Dale Rise was forced to admit on cross-examination that (1) merely placing a laundry bag

on a stove was not the quickest or surest way to start a fire, (2) **none** of the usual indicia of arson (such as other sources of ignition or kerosene soaked rags) were found, and (3) the only damage done to the apartment consisted of some charring of the immediate area. (R.T. Vol. 8, pages 1060 et seq.)

In summary, despite the prosecutor's speculation, there is insufficient substantial evidence to support the arson conviction.

E. ATTEMPTED MURDER

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act towards accomplishing the intended killing. (People v. Swain (1996) 12 Cal.4th 593, 604-605; People v. Lee (2003) 31 Cal.4th 613, 623; People v. Smith (2005) 37 Cal.4th 733, 739.) To be guilty of attempted murder, the defendant must harbor express malice - i.e. an intent to unlawfully kill - the victim. Express malice requires a showing that the defendant either desires the death of the victim or knows to a substantial certainty that the death will occur as the result of the defendant's actions. (People v. Smith, supra, 37 Cal.4th 739.) While the crime of attempted murder is not divided into degrees, the prosecution may seek a jury finding that an attempted murder was "willful, deliberate, and premeditated" for purposes of sentence enhancement. (People v,. Bright (1996) 12 Cal.4th 652, 665-669; People v. Smith, 37 Cal.4th at 740.)

In People v. Smith, supra, a majority of this Court held that the defendant could be convicted of the murder of an infant, as well as the infant's mother, after the defendant fired a single bullet into a slow moving vehicle, narrowly missing both victims. The intent to kill the baby, as well as the mother, could be inferred since the defendant had claimed at trial that the mother was his ex-girlfriend, and had just arrived on the scene with a new boyfriend and their baby, and the defendant may have felt animus toward both the mother and her baby when he

started shooting. Furthermore, both victims were directly in the defendant's line of fire, and both were visible to defendant when he fired at both of them. (Smith, supra, 37 Cal.4th at 738-748.) The dissenters, while they agreed that the evidence established implied malice or conscious disregard for the infant's life, concluded that the prosecution had not proven express malice - the specific intent to kill - the baby. (People v. Smith, supra, 37 Cal.4th at 749-758.)

Here, the prosecutor argued, and apparently persuaded the jury, that Richard Booker could be found guilty of the premeditated attempted murder of Tricia Powalka's infant son Eric Stringer since the natural consequence of setting the laundry bag on the lighted kitchen stove, and leaving the baby in his crib in Tricia's bedroom, was that the baby would be burned to death. (R.T. Vol. 12, pages 1580 et seq.)

However, the prosecution did not even come close to proving that Richard had a premeditated specific intent to kill baby Eric.

According to Richard's uncontradicted post-arrest statements, he did not know that Eric Stringer even existed.

However, even if Richard did know that baby Eric was alive and lying in Tricia's bedroom, there is literally **no** evidence in this record from which a rational trier of fact could conclude that he specifically intended to kill the baby. The prosecutor's theory of the case was that the victims were killed, following an initial sexual assault, in order to silence them so that Richard

would not have to go to prison. (See section B of this argument, ante.) However, this could not possibly have been Richard's intent - let alone his premeditated intent - in regard to baby Eric who was incapable of testifying against Richard. Even assuming arguendo that Richard intended to destroy the crime scene, as the prosecutor's arson investigator opined (see section D, ante), this does **not** translate into a premeditated specific intent to kill baby Eric.

Moreover, the evidence does not show that Richard Booker's placing the laundry bag on the kitchen stove constituted a direct but ineffectual act aimed at killing baby Eric who was lying in the bedroom. The reasons why the evidence is insufficient to show that Richard committed an arson which was reasonably likely to set any portion of the Powalka apartment ablaze have been discussed hereinabove in section D of this argument, and need not be repeated. The extreme improbability that any fire would spread so far as the bedroom, according to the testimony of the prosecution's own expert, completely undermines the idea that Richard could have believed that merely setting the laundry bag on the kitchen stove would naturally or probably result in baby Eric's death.

In summary, there is insufficient substantial evidence to support the premeditated attempted murder conviction.

F. MULTIPLE MURDERS

It follows, from the above analysis, that the multiple murder special circumstances findings must be stricken.

The death penalty may be imposed in this state if "the defendant, in this [capital] proceeding, has been convicted of more than one offense of murder in the first or second degree." (California Penal Code §190.2, subdivision (a)(3).) However, at least one of the multiple murders must be of the first degree. (People v. Williams (1988) 44 Cal.3d 883, 923; People v. Miller (1990) 50 Cal.3d 954, 995; People v. Cooper (1991) 53 Cal.3d 771, 828; People v. Danks (2004) 32 Cal.4th 269, 315.)

Here, for the reasons stated in sections B and C ante, the evidence is legally insufficient to support the jury's findings that any of the murders in the instant case were of the first degree on either a premeditation or felony murder theory.

It follows that, since none of the murders were of the first degree, the multiple murder special circumstance findings cannot stand.

Alternatively, only one multiple murder special circumstance, and not three, would be permissible in any event. It is improper to allege, let alone allow a jury to find true, multiple murder special circumstances for each of several murder counts joined for trial. (People v. Harris (1984) 36 Cal.3d 36, 67; People v. Daniels (1991) 52 Cal.3d 815, 876; People v. Danks, supra.)

Therefore, at a minimum, two of the three multiple murder

special circumstances findings must be set aside. (People v. Diaz (1992) 3 Cal.4th 495, 565 [defendant was improperly charged with 12 multiple murder special circumstances, all of which were found true; 11 were set aside].)

G. THE APPROPRIATE REMEDIES

Since the evidence is legally insufficient to support the first degree murder, arson, and attempted murder convictions, or the rape - molestation - murder or multiple murder special circumstances findings, all these convictions and findings must be set aside. Since the evidence is sufficient to support second degree murder convictions, this Court may simply modify and reduce the degree of the murder convictions accordingly. (Penal Code §1260.) However, the arson and attempted murder convictions, as well as the special circumstances findings, cannot be reduced, modified, or salvaged in this way. Therefore, since double jeopardy bars any retrial as to these offenses and special circumstances (Burkes v. United States (1978) 437 U.S. 1), they must be dismissed with prejudice.

VI.

THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 - AND DEPRIVED DEFENDANT BOOKER OF DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT - BY ADMITTING INFLAMMATORY, GRUESOME, CUMULATIVE, AND TOTALLY UNNECESSARY PHOTOGRAPHS OF THE VICTIMS' BODIES AND THE SURROUNDING "CRIME SCENE"

A. PROCEEDINGS BELOW

Defendant Booker filed a pre-trial motion to exclude various "gruesome" photographs of the victims' bodies and the blood stained crime scene. He urged the trial court to exercise its Evidence Code section 352 discretion and exclude the photos in order to preserve his constitutional rights to a fundamentally fair trial. He argued: (1) photographs of the victims while alive were not relevant to any disputed issue; (2) the probative value of the photographs of the victims' dead bodies was outweighed by the substantial danger of undue prejudice and inflaming the passions of the jury; (3) the photographs were cumulative with respect to other evidence which the prosecution could use to prove the same facts. (C.T. Vol. 2, pages 522-536.)

The prosecution filed an Opposition, arguing: (1) the People were not barred from using photographs in the instant murder case simply because the defense was willing to stipulate to facts depicted in the photographs; (2) the photographs were highly relevant and their probative value outweighed any possible prejudicial effect. (C.T. Vol. 3, pages 635-641.)

The trial court and counsel discussed the admissibility of the photographs during several hearings held outside of the presence of the jurors. The prosecutor and defense counsel

reiterated the arguments made in their motion and opposition papers. The defense expressed particular concerns about the autopsy photos which depicted the victims' multiple injuries in gory detail, and offered to stipulate to the cause of the victims' deaths. Nonetheless, the trial court ultimately ruled that over **100** of the photographs were admissible. (R.T. Vol. 2, pages 273-304, Vol. 7, pages 849-855, 970, Vol. 8, page 976, Vol. 10, pages 1367-1368.)

The prosecutor used the photographs in conjunction with the testimony of various witnesses during the guilt phase trial. (See e.g. testimony of maintenance supervisor Steve Kostyshak at R.T. Vol. 7, pages 887 et seq.; testimony of fire fighter Ralph Wilson at R.T. Vol. 7, pages 921 et seq.; testimony of detective Hector Heredia at R.T. Vol. 9, pages 1264 et seq.; testimony of forensic pathologist Robert Ditraglia at R.T. Vol. 10, pages 1369 et seq.)

The photographs were introduced into evidence. (See R.T. Vol. 1, Index to Plaintiff's Exhibits listing photographs admitted and excluded and citations to Reporters' Transcript contained therein.)

The prosecutor made extensive use of the photographs, showed them to the jury and referred to them at every possible opportunity during closing argument. (R.T. Vol. 12, pages 1580, 1581, 1584, 1593, 1598.)[7]

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[7] Defendant Booker will file an appropriate notice designating the photographic exhibits he wishes transmitted to this Court for review, pursuant to Rules 18 and 36.1 of the California Rules of Court, when this case has been scheduled for oral argument.

B. DISCUSSION

Richard Booker now renews his objections to the introduction of these photographs since the trial court abused its discretion and irreparably prejudiced his constitutional rights to a fair trial and due process by ruling as it did.

1. This Issue Has Been Properly Preserved for Appeal

Inasmuch as Defendant Booker filed an appropriate pre-trial motion objecting to the introduction of these photographs on the same grounds he now asserts on appeal, and inasmuch as the admissibility of these photographs was extensively litigated and considered by the trial court, this issue has been preserved for appellate review. (Evidence Code §353.) The defense objections were made before the commencement of the prosecution's case and at a time when the trial court had all of the information necessary to decide this question. Furthermore, defense counsel reiterated his objections to the introduction of individual autopsy photos immediately prior to the testimony of forensic pathologist Ditraglia and prior to the introduction of the individual photographs. (See People v. Morris (1991) 53 Cal.3d 152, 187-191.)

Even assuming arguendo that this Court were to conclude that defense counsel inadequately articulated the constitutional due process objection in the trial court, that issue would nonetheless be preserved for appellate review. The trial court's error in overruling the Evidence Code section 352 objection had the legal consequence of prejudicing the jurors through exposure

to inflammatory and gruesome photographs, and thus denied Defendant a fundamentally fair trial and due process of law in violation of the Fourteenth Amendment. (People v. Partida (2005) 37 Cal.4th 428, at 431-439.)

2. The Trial Court Abused Its Discretion and Violated Defendant Booker's Constitutional Rights

The trial court has broad discretion in the first instance to decide whether photographs of the victim should be admitted and whether the probative value of such evidence outweighs any prejudicial impact under Evidence Code section 352. (People v. Carpenter (1997) 15 Cal.4th 312, 385; People v. Scheid (1997) 16 Cal.4th 1; People v. Staten (2000) 24 Cal.4th 434, 462-464; People v. Vieira (2005) 35 Cal.4th 264, 291-292.)

Nonetheless, this Court, as well as the Court of Appeal, have found in a number of previous cases that the trial court abused its discretion in allowing such evidence to be presented to the jury.

In People v Burns (1952) 109 Cal.App.2d 524, the Court of Appeal held that the trial judge abused his discretion in admitting into evidence enlarged or blown-up photographs of the victim of a homicide, taken after the autopsy, where it was obvious that the only purpose of exhibiting such photographs was to inflame the jury's emotions against the defendant.

In People v Love (1960) 53 Cal.2d 843, this Court held that the trial judge abused his discretion in admitting a face-up photograph of the victim which tended to prove only that the victim died in unusual pain. This Court reasoned that the

admission of such a photograph, coupled with admission of a tape recording of her dying groans, was prejudicial error since this evidence served primarily to inflame the passions of the jurors in the penalty phase of a capital case.

In People v Smith (1973) 33 Cal.App.3d 51, at 69, the Court of Appeal, in condemning the admission of gruesome photographs of the two victims' bodies, stated:

> "[T]here were ample descriptions of the positions and appearances of those two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification . . . they supplied no more than a blatant appeal to the jury's emotions."

In People v Gibson (1976) 56 Cal.App.3d 119, at 134-135, the Court of Appeal similarly condemned the admission of certain gruesome photographs of the deceased. In that case the prosecutor represented that the photographs were relevant to illustrate the expected testimony of the coroner regarding the cause of death and the trial court admitted the photographs for this purpose. The Court of Appeal reversed the subsequent conviction. The court stated:

> "The two photographs, to which objection was made, are gruesome, revolting and shocking to ordinary sensibilities. In light of the many other photographs of the deceased victim used in connection with the testimony of Deputy Coroner Phillips, . . . [these photographs] represented cumulative evidence of slight relevancy. Their probative value was substantially outweighed by the danger of undue prejudice to defendant."

In People v Ramos (1982) 30 Cal.3d 553, the prosecutor sought to introduce a photograph of the victim while alive to show she was a human being and that she was alive one day and found dead the next. After offering to stipulate to these facts, defense counsel argued that, given the stipulation, the photograph was not relevant to any disputed fact in issue. This Court agreed, holding that the picture had been improperly admitted since it "had no bearing on any contested issue in the case." (Id. at page 578.)

In People v. Hendricks (1987) 43 Cal.3d 584, this Court found the introduction of a similar photograph erroneous because:

> "There was no dispute as to the identity of the person killed - evidentially the only issue on which the photograph was relevant - and therefore the photograph should have been excluded because it bore on no contested issue. (Id. at page 594.)

In People v Poggi (1988) 45 Cal.3d 306, at 322-323, this Court held that the trial judge had improperly admitted two photographs of the murder victim, one depicting the victim while still alive and a second autopsy photograph showing incisions that the surgeons made performing a tracheotomy, rather than revealing the stab wounds inflicted during the offense, after defense counsel offered to stipulate that the victim was a human being, that she was alive before the attack, and that she died as a result of the attack. This Court stated:

> "The admission of the photographs was error. It is true, as the People argue, that the admissibility of photographs lies

> primarily in the discretion of the trial court . . . But it is also true that the court has no discretion to admit irrelevant evidence.
> . . . The photographs here are not relevant to any disputed material issue. The only matters on which they have probative value are the following: . . . [the victim] was a human being; she was alive before the attack, and she is now dead. In view of defense counsel's offer to stipulate, these issues were removed from the case as matters in dispute. When, as here, a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury . . ."

In the instant case the admission of over **100** photographs of Tricia Powalka's, Amanda Elliot's, and Corina Gandara's wounded bodies, and the surrounding blood soaked "crime scene," was error for the same reasons as in the cases discussed above.

First, the photographs had little or no probative value relating to any disputed issue in the case. Richard Booker admitted to Deverick Maddox and the police that he had killed all three victims. Although the issue of Richard's intent (or lack thereof) at the time the alleged sexual assaults and homicides were committed was very much in dispute, none of the photographs had any tendency in reason to prove that these offenses were premeditated as opposed to being impulsive, rash, unconsidered acts. Furthermore, just as in the Poggi case, the photographs could not be admitted for the purpose of establishing the cause of death (or the nature and extent of the victims' injuries) since the defense never contested these points.

Second, the photographs were cumulative and unnecessary to

"corroborate" the testimony of forensic pathologist Ditraglia and the investigating officers as to what had been done to the victims. The testimony of the prosecution witnesses was quite clear and there was no need to amplify or corroborate it with graphic photographs of the kind admitted here.

Third, the photographs of the victims, while alive, just as in the Ramos and Hendricks cases, were irrelevant since there was no dispute as to the identity of any of the persons killed.

Fourth, the photographs were cumulative in the additional sense that only a few, and not over 100, were needed to make the prosecution's point.

Last, but certainly not least, any probative value that these photographs might have had was substantially outweighed by their enormous prejudicial impact on the jury.

In this case the prosecutor showed the jury an entire series of close up photographs showing the 12, 15, and 19 year old victims' bloody wounds and also a "revolting portraiture" displaying their "horribly contorted facial expressions" over and over again in the most gruesome way and the way most likely to inflame the passions of the jurors and cause them to vote guilty regardless of any lack of criminal intent. (People v. Scheid, supra at 16 Cal.4th 19; People v. Turner (1984) 37 Cal.3d 302, 320, 321 and f.n. 9.)

In summary, the probative value of these photographs was substantially outweighed by their prejudicial effect, and their admission denied Richard Booker any real possibility of a fair

trial. Therefore, it must be concluded that the trial court abused its discretion under Evidence Code section 352, and violated Richard Booker's due process rights under the Fourteenth Amendment, in admitting these photographs.

3. The Error Was Prejudicial

Since the error was of federal constitutional dimensions, a reversal is compelled unless the prosecution can persuade this Court that the error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18.)

Alternatively, even viewed as state law evidentiary error, a reversal would be compelled if there is even a reasonable probability that the defendant would have obtained a more favorable result - i.e. an acquittal or a mistrial on any of the charges or special circumstances allegations - had the jurors not been erroneously exposed to the inflammatory photographs. (People v. Watson (1956) 46 Cal.2d 818; People v. Poggi, supra, at 45 Cal.3d 323.)

However, there is no need to discuss the appropriate standard of "prejudice" further since, under any standard, a reversal is appropriate.

The evidence established that Richard Booker killed Tricia Powalka, Amanda Elliott, and Corina Gandara. However, it was hotly debated whether this was a case of first degree premeditated or felony murder as opposed to a lesser homicide offense, and whether special circumstances, arson or attempted murder had been proven.

Richard Booker has argued ante that the evidence is legally insufficient to support the jury's verdicts and related special circumstances findings on these issues. However, even assuming that this Court disagrees, the evidence is not so overwhelming that at least some of the jurors could not have concluded, in the absence of the inflammatory photographs, that there was a reasonable doubt.

Thus, regardless of the "prejudice" standard, the judgment should be reversed, and this case should be remanded for a new trial.

VII.

THE FAILURE TO INSTRUCT THE JURY THAT NEITHER RAPE NOR FORCIBLE SEXUAL MOLESTATION ARE POSSIBLE WHEN THE VICTIM IS DEAD - IN VIOLATION OF MR. BOOKER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS - REQUIRES REVERSAL OF THE CORINA GANDARA MURDER CONVICTION AND FELONY MURDER SPECIAL CIRCUMSTANCES FINDING

A. INTRODUCTION

Richard Booker was charged with murdering Corina Gandara. Both rape and "lewd act by force with a minor" (forcible sexual molestation) special circumstances were alleged. The jury was instructed in relevant part that Richard could be found guilty of first degree murder if the murder occurred during the commission of or attempted commission of either rape or forcible sexual molestation, and similarly each special circumstance could be found true if the murder occurred during the commission of or attempted commission of the relevant felony. The jury found Richard guilty of first degree murder and of committing the murder during the commission of or attempted commission of both rape and forcible sexual molestation.

In this case, there is evidence that victim Corina Gandara was dead at the time of the alleged sexual conduct. In order for Richard Booker to be found guilty of murder in the commission of rape and of forcible sexual molestation - as opposed to murder during the commission of attempted rape and attempted forcible sexual molestation - the victim had to be alive at the time of the commission of the felonious act. Nonetheless, the jury, was never instructed that rape and forcible sexual molestation can

only be committed on a **live** person. Since it is impossible to know whether the jury relied upon an erroneous legal theory, i.e. rape or forcible sexual molestation of a dead body, in finding Richard Booker guilty of murder and the special circumstances in question true, the murder conviction must be reversed, as must the special circumstances findings. In addition, the penalty determination, which was based in part on the jury's special circumstances findings, must be reversed. (United States Constitution, Fifth, Sixth, Eighth, and Fourteenth Amendments; California Constitution, Article I, §§7, 15 and 17.)

B. RELEVANT PROCEDURAL AND FACTUAL HISTORY

Richard Booker was accused, in the amended indictment, of murdering Corina Gandara while engaging in the commission, or attempted commission, of rape and forcible sexual molestation. (C.T. Vol. 3, page 667)

The evidence presented at trial established that the partially nude body of Corina Gandara had been discovered lying on the bathroom floor in Tricia Powalka's apartment on the morning of August 10, 1995. Corina's underpants had been pulled down and her legs were spread apart. (R.T. Vol. 7, pages 887 et seq., Vol. 9, pages 1264 et seq.) No semen was discovered on the victim's clothing. A comparison of combings of the victim's pubic hair with Richard Booker's proved negative. The examining forensic pathologist failed to detect any genital trauma or signs of sexual activity. (R.T. Vol. 9, pages 1294 et seq., 1302-1320 and Vol. 10, page 1386.)[8]

The evidence, viewed in the light most favorable to the prosecution, established that Richard had been invited to a party the night before, had spent the evening drinking, listening to music, and watching movies with Deverick Maddox, Corina, and two other young women, and had killed all three of the young women while Deverick was asleep on the couch. Richard told Deverick, when Deverick woke up just in time to see one of the young women collapse after being fatally wounded, that he had killed them

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[8] A single hair "consistent" with prosecution witness Deverick Maddox's head hair sample was found intermingled with Ms. Gandara's pubic hair.

because he had to. (R.T. Vol. 8, pages 1134-1141, and Vol. 12, page 1200.)

Richard Booker was arrested and interrogated. He initially denied any responsibility for the victims' deaths. However, he ended up admitting that he had killed them after Corina Gandara had accidentally bumped into his knife, she over-reacted and called for help, and Tricia Powalka had threatened to shoot him. (C.T. Vol. 3, pages 687 et seq.) He also admitted that, at some point, he may taken off Corina Gandara's pants, while she was lying on the bathroom floor **after** he stabbed her. The relevant colloquy reads as follows:

DETECTIVE HEREDIA: "Ok. Let me ask you a couple of questions . . . The girl in the bathroom [Corina Gandara], how did she end up in the bathroom?"

MR. BOOKER: "We got to fighting when her homegirl [Tricia Powalka] tried to pull the gun on me . . . "

DETECTIVE HEREDIA: "Ok, so both of them were awake, you were fighting with both of them?"

MR. BOOKER: "She, she was gonna try to shoot me and I was like, like I threw [the] homegirl in the bathroom and locked, I closed the door. - - homegirl - and I went over there - . I hit her, I hit here - "

DETECTIVE HEREDIA: "Ok, . . ., you know when you hit the girl in the bathroom . . .?"

MR. BOOKER: "Yeah, the first one, I was playing around cause I was drunk a lot. I was playing around, I had . . . a

Thunderbird and a half."

DETECTIVE HEREDIA: "Did you put something in front of the door of the bathroom so she couldn't get out?"

MR. BOOKER: "Nah uh, I just closed it."

DETECTIVE HEREDIA: "You closed it?"

MR. BOOKER: "Yeah I just closed it." . . .

DETECTIVE HEREDIA: "Why, why did two of the girls have their clothes off?"

MR. BOOKER: "I took homegirl's pants off . . . "

DETECTIVE HEREDIA: "Ok, wait a minute. Which one is homegirl?"

MR. BOOKER: "The one in the bathroom [Corina Gandara]. I took her pants off . . . "

DETECTIVE HEREDIA: "So you were going to make it with her?"

MR. BOOKER: "Nah, hell no. I wasn't going to do nothing with her but I mean, I knew I was going to go down [i.e. going to prison] and everything, and I was like, I'm fucked."

DETECTIVE HEREDIA: "Was she already bleeding when you took her pants off?"

MR. BOOKER: "Naw - **she wasn't like stabbed all the way, I only cut her a little bit** - I told her to take her pants off."

DETECTIVE HEREDIA: "So you opened the bathroom door and you had her take her pants off? Is that what you said? or did you take her pants off?"

MR. BOOKER: "Well I kind of helped her."

DETECTIVE HEREDIA: "It's one way or the other. **I think you**

took them off, is that right?"

MR. BOOKER: **"That's what I said,** I kinda helped her - ."

DETECTIVE HEREDIA: "Well she didn't help very much though, right? Ok, was she standing up or was she already laying down?"

MR. BOOKER: **"She was laying down."** . . .

DETECTIVE HEREDIA: **"Did she say anything at all to you?"**

MR. BOOKER: **No."** . . .

DETECTIVE HEREDIA: "You didn't want to make it with her, you just wanted to take her pants off?"

MR. BOOKER: "I mean . . . I don't know if this all happened ok."

DETECTIVE HEREDIA: "Did you try to do anything with her?"

MR. BOOKER: "Na uh."

DETECTIVE HEREDIA: "No?"

MR. BOOKER: "Na uh." - - -

DETECTIVE HEREDIA: "There is just one thing I want to . . . understand . . . the taking off the clothes. I just want to understand that part."

MR. BOOKER: "I figured that I was gonna go down and I was gonna look, you know what I'm saying."

DETECTIVE SANFILIPPO: "So you just did it because you wanted to look?"

MR. BOOKER: "Yeah because I thought what was going down on me."

DETECTIVE SANFILIPPO: "Did you touch them there at all?"

MR. BOOKER: "Na."

DETECTIVE SANFILIPPO: "I'm not going to find your finger prints on them?"

MR. BOOKER: "Uh, no. I touched them when I was taking it off, that's all."

DETECTIVE SANFILIPPO: You didn't touch them down there?"

MR. BOOKER: "I don't know . . . , I might have touched. I don't know."

DETECTIVE SANFILIPPO: "When you pulled her pants down you mean? but you didn't do anything sexual . . . ?"

MR. BOOKER: "Na huh." (C.T. Vol. 3, pages 696-700, 709-710; emphases added.)

The prosecutor urged to the jury to find Richard Booker guilty of first degree felony murder and find the related rape - forcible sexual molestation - felony murder special circumstances allegations true because Corina Gandara "was on the floor squirming around in that dirty bathroom dying but not dead" at the time she was sexually assaulted and before Mr. Booker finally killed her." (R.T. Vol. 12, page 1594.) Accordingly, the standard CALJIC felony murder instructions were given to the jury.

However, this is not what Richard Booker actually said, and it can be reasonably inferred that Corina Gandara may have been dead at the time he removed her pants and may have touched her.

The trial court and counsel did not discuss the possibility that Corina may have died before any sexual assault was committed, or whether the jury should be instructed that Richard

could not be guilty of rape, forcible sexual molestation, or felony murder if they concluded that this was what had occurred, and no such instructions were given.

The jury found Richard Booker guilty of the first degree murder of Corina Gandara. (C.T. Vol. 14, page 1; R.T. Vol. 12, page 1701.)

The jury further found that there were special circumstances inasmuch as Richard murdered Corina while engaged in **either** the commission **or attempted** commission of rape and forcible sexual molestation. (C.T. Vol. 14, pages 27-28; R.T. Vol. 12, pages 1701-1702.)

C. DISCUSSION

1. The Instructional Omission Was Federal Constitutional Error

The United States Supreme Court has held that jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offenses violate the defendant's due process rights under the Fourteenth Amendment. (In re Winship (1970) 397 U.S.358; Sullivan v. Louisiana (1993) 508 U.S. 275, 277-278; People v. Kobrin (1995) 11 Cal.4th 416, 422-423 and f.n. 4 [collecting cases]; People v. Flood (1998) 18 Cal.4th 470, 491.) Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact. (People v. Flood, supra.)

The crimes of rape and forcible sexual molestation defined in Penal Code sections 261 and 288, subdivision (b) require a life victim. (People v. Sellers (1988) 203 Cal.App.3d 1042.) Here, since there was evidence that the victim may have been dead at the time of any sexual touching, the trial court had a sua sponte duty to instruct on this element of the felonies relied upon by the prosecutor to establish first degree murder. (People v. Cummings (1993) 4 Cal.4th 1233, 1311; People v. Flood, supra.)

People v. Sellers, supra, is remarkably similar to the instant case, and directly on point. In Sellers, the female victim's nude body was discovered lying on her bed with her legs spread apart. However, there were no semen stains on either the bed clothes or the victim's underpants. The police investigation

led them to arrest Mr. Sellers. Mr. Sellers, under police questioning, told several different versions of the events on the night of the homicide. While he consistently admitted the killing, the facts leading up to the event and following it changed considerably in the various versions. He stated that (1) he didn't "make love" to the victim either before killing her or after, (2) that he had engaged in consensual intercourse with her while she was still alive, and (3) that he had killed her, left the scene, and returned some time later and had intercourse with her dead body. Mr. Sellers was prosecuted on a felony murder theory. The trial court refused to instruct the jury that rape is not possible when the victim is dead. He was found guilty of murder in the first degree and rape, the special circumstance allegation that the murder was committed while he was engaged in committing rape was found true, and he was sentenced to life imprisonment without possibility of parole. (People v. Sellers, supra, 203 Cal.App.3d. at 1044-1049.)

The Court of Appeal reversed, holding that the crime of rape requires a live victim. Penal Code section 261 defines rape as an act of sexual intercourse accomplished with a **person**, against a **person's will** by means of force or fear. A dead body cannot consent to or protest a rape, nor can it be in fear. The essence of the crime of rape consists in the outrage to the person and feelings of the rape victim. A dead body has no feelings of outrage. Since one of several of Mr. Sellers' inconsistent statements constituted substantial evidence that he had had

intercourse with the victim only after she was dead, the failure to instruct that rape is not possible under these circumstances constituted an error of constitutional magnitude. (Sellers, supra, 203 Cal.App.3d at page 1050-1051.)

The reasoning of Sellers is equally applicable in a felony murder prosecution based upon the theory that the defendant killed the under aged victim while engaged in **forcible** sexual molestation. Penal Code section 288(b) requires that the defendant perpetrate a lewd or lascivious act upon the body of **a child** by means of force or against the **child's will**. This is impossible if the child is already dead before any lewd touching occurs. A dead body is not a child. No force is necessary since a dead body is incapable of resisting the perpetrator's lewd advances. The essence of the offense defined by Penal Code section 288(b), like the essence of the crime of rape defined by Penal Code section 261, is the outrage to the victim's feelings and a dead body has no feelings of outrage.

In the instant case, as in Sellers, the failure to instruct the jury on the live victim element of rape and forcible sexual molestation, despite Mr. Booker's statements that Corina Gandara may have died prior to any sexual assault or lewd touching, was serious constitutional error. As in Sellers, the victim's body was found lying in the apartment where she was killed with her legs spread, but the sequence of events is unclear. Mr. Booker's statements that he may have removed the victim's underpants and touched her **after** he stabbed her, left her lying on the bathroom

floor, left the bathroom for a time, and then returned, and that she neither said anything nor resisted, even if inconsistent with some of his other post-offense statements, constituted sufficiently substantial evidence that the killing occurred before any rape or lewd or lascivious touching to require an instruction on the live victim element of these offenses.

2. Both the First Degree Murder Conviction and the Related Felony Murder Special Circumstances Finding Must be Reversed

The only remaining question, is whether the instructional omission was sufficiently prejudicial to compel a reversal.

Since the error relieved the prosecution of the burden of proving one of the essential elements of the felonies relied upon by the prosecution to establish that this was a case of first degree felony murder, the error was one of federal constitutional dimension, and the harmless beyond a reasonable doubt standard applies. (Chapman v. California (1967) 386 U.S. 18; People v. Flood, supra, 18 Cal.4th at pages 502-504; People v. Sellers, supra, 203 Cal.App.3d at page 1051.)

Applying this standard, the only possible conclusion is that the instructional omission was anything but harmless. There was substantial evidence that this was a case of "after-formed intent." The factual question posed by the omitted instruction - i.e. whether the victim was alive or dead when allegedly raped and/or forcibly molested - was not necessarily resolved adversely to Mr. Booker under any other, properly given instructions. (See People v. Bradford (1997) 14 Cal.4th 1005, at 1055-1057 [robbery

conviction reversed where instructions failed to make clear that the defendant was not guilty of robbery if his intent to steal arose only after the fatal assault].)

It is true that the jury in this case, just like the jury in Sellers, was instructed that a conviction of first degree murder could be based on the theory of killing during an **attempted** rape or molestation. If the jury found that Mr. Booker merely **attempted** to sexually assault Ms. Gandara against her will, failed to accomplish his purpose while she was alive, and then killed her to satisfy his desires with her corpse, the killing would be first degree murder. (People v. Goodridge (1969) 70 Cal.2d 824, 838; People v. Seller, supra, 203 Cal.App.3d at 1053.) When a conviction of first degree murder is based solely on the theory of killing during an **attempted** sexual assault, it is irrelevant whether the victim was already dead at the time the assault was consummated. (Id.; People v. Booker (1977) 69 Cal.App.3d 654, 666; People v. Quicke (1964) 61 Cal.2d 155, 158; People v. Kelly (1992) 1 Cal.4th 495, 524-528.)

It also true in this case that the jury was instructed, like the Sellers' jury, on alternative theories of premeditation and felony murder.

However, as in Sellers, because the jury was instructed on alternate theories, one of which was legally inadequate, and the prosecutor did not request special findings, we cannot determine on which of those theories Mr. Booker was convicted of the first degree special circumstances murder of Corina Gandara. (People v.

Sellers, supra, 203 Cal.App.3d at 1055.) Therefore, the conviction and special circumstances finding must be reversed. (People v. Guiton (1993) 4 Cal.4th 1116, 1126.)

Thus, in the instant case, we can only conclude that it is reasonably likely the jury misunderstood the law regarding the felony-murder rule and the rape-special circumstances. Since, as in Sellers, and unlike in Kelly, supra, the jury could reasonably have been misled, both the first degree murder conviction and special circumstances finding regarding Corina Gandara must be reversed.

Furthermore, since, in the absence of the Corina Gandara murder conviction and special circumstances finding, the jury could have come to a different conclusion regarding the appropriate penalty, the death sentence cannot stand. Thus, the violation of Richard Booker's due process and fair penalty trial rights, guaranteed by the Sixth, Eighth, and Fourteenth Amendments and analogous California constitutional provisions, requires that this Court remand for a new penalty trial as to the remaining victims.

VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DEPRIVED DEFENDANT BOOKER OF A RELIABLE VERDICT AND A JURY DETERMINATION OF CRITICAL MATERIAL ISSUES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF IMPERFECT SELF-DEFENSE AND HEAT OF PASSION VOLUNTARY MANSLAUGHTER

A. PROCEEDINGS BELOW

The prosecution's theory was that this was a case of first degree premeditated and felony murder.

However, Richard Booker's post-offense statements to both Deverick Maddox and the police suggest otherwise. Richard stated that he had been drinking, listening to music, and watching movies on the night of the homicides with Tricia Powalka, Amanda Elliott, and Corina Gandara. Richard had been absent-mindedly playing with his knife and Corina accidentally bumped into it. Corina, misperceiving the situation, asked Richard why he was trying to stab her and tried to grab the knife. He hit her. She ran into Tricia's bedroom. Tricia threatened to shoot him even though he told her that the "stabbing" of Corina had been an accident. Tricia ran for the gun. He hit her, and grabbed the gun away from her. Amanda, refusing to heed Richard's warning that he was not "playing," charged him. During the melee Richard fatally stabbed and shot both Tricia and Amanda. When Deverick tried to grab the gun away from Richard, Richard stated that, after what had happened, he had to kill the young women. He also stated, both during his interrogation and while sitting alone in his jail cell, that he had to kill the young women because Tricia

was going to shoot him.

RICHARD BOOKER: "She [Tricia Powalka] said that she was going to shoot me, and it was like, . . . an accident, and then when I was playing with the knife, and . . . I hit the 12 year old [Corina Gandara], she's all 'I'm telling my friend, she gonna shoot you out', I was like 'shoot me for what? It was an accident.' And I telling them, and she, . . . ran to tell her friend to get the gun or whatever, . . . I said, 'you ain't going to shoot me.'" (C.T. Vol. 3, page 687.)

"That's when she pulled the gun on me." (C.T. Vol. 3, page 696.)

"She had a gun to my head." (Id.)

"We got to fighting . . . when her homegirl tried to pull the gun on me. . . . " (C.T. Vol. 3, page 697.)

". . . She was going to try to shoot me . . . " (Id.)

DETECTIVE HEREDIA: "Ok, let me ask you this, after you knocked the gun out of her hand, did you pick up the gun. . . ?"

RICHARD BOOKER: "Yeah."

DETECTIVE HEREDIA: "Did you shoot her. . . "

RICHARD BOOKER: "I shot at the other girl [Amanda Elliott]." . . . I was like . . . 'move back, I'm not playing' . . . , I didn't even know it [the gun] was already cocked, it was like cocked cause she [Tricia Powalka] had already cocked it and I squeezed, pow!" (C.T. Vol. 3, page 701.)

DEVERICK MADDOX: "I was shocked. I was just asking, you know. . . he said he did it and he did it on purpose, and I asked him why, what happened, and he just said . . . he said he 'had to kill them.'" (R.T. Vol. 8, page 1138.)

RICHARD BOOKER: "I accidently hit her [Corina] in the throat." There was blood everywhere and on me. She was going to get her friend's gun to shoot me." (R.T. Vol. 9, page 1284.)

> DEPUTY SHERIFF MONTE: "He [Richard Booker] said that they were watching a video, and they both [Richard Booker and Corina Gandara] got up basically the same time to either change the video or shut it off, and he hit her. For some unknown reason, he ended up hitting her, and he said the next thing he knew he had blood all over him. I believe he also said that after he hit her, she threatened to get somebody from another room to come and get him with a handgun or something like that." (R.T. Vol. 9, page 1291.)

The trial court instructed the jury on first degree premeditated and felony murder and second degree murder. (Penal Code §§187 and 189; CALJIC jury instructions Nos. 8.00, 8.10, 8.11, 8.20, 8.21, 8.30, and 8.31; C.T. Vol. 14, pages 1337 et seq; R.T. Vol. 12, pages 1515 et seq.)

The court refused defense counsel's request to instruct on imperfect self-defense and heat of passion manslaughter. (Penal Code §192; CALJIC jury instruction Nos. 8.40, 8.42, 8.43, 8.44, and 8.50; C.T. Vol. 14, pages 3805-3811; R.T. Vol. 11, pages 1499-1505 and Vol. 12, pages 1530-1531.)

Thus, no manslaughter instructions were given, and the jury was left to decide between the stark alternatives of convicting Richard Booker of multiple murders as charged or absolving him of responsibility for the killings of the victims by acquitting him.

B. DISCUSSION

1. The Trial Court's Duty to Instruct on Lesser Included Manslaughter Offenses Supported by Any Substantial Evidence in a Capital Case

In Beck v. Alabama (1980) 447 U.S. 625, the United States Supreme Court concluded that a state may not constitutionally impose a death sentence if the state prohibits a jury from considering a lesser non-capital offense necessarily included within the capital charge and supported by the evidence. The High Court noted the "value to the defendant of this procedural safeguard," as evidenced by "the nearly universal acceptance . . . in both state and federal courts" that a defendant is entitled to instructions on lesser included offenses warranted by the evidence. (Id.at 637.) Such protection, the Court reasoned, is "especially important" in a capital case, because the risk that a jury will convict of the charged offense as an alternative to complete acquittal when it believes the evidence shows only some lesser crime "cannot be tolerated in a case in which the defendant's life is at stake." (Id. at 637.) "Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case." (Ibid. at 638; quoted and discussed in People v. Breverman (1998) 19 Cal.4th 142, at 167.)

In Schad v. Arizona (1991) 501 U.S. 624, the Court held, consistent with its previous decision in Beck, supra, that a state may not constitutionally coerce a judgment of death

eligibility by preventing the jury from considering a lesser included non-capital charge as an alternative to a total acquittal. The capital jury must be given at least a single non-capital "third option" in order to satisfy Eighth Amendment concerns focused on the reliability of the capital verdict. In other words, where the jury could find from the evidence that the defendant is guilty of one or more lesser included offenses and not guilty of the greater charged offense, the jury must be instructed on at least one of these lesser offenses. The Court made clear that it did **not** mean to suggest that instructing the jury on some lesser offense that was **not** supported by the evidence would satisfy constitutional requirements. (Id., at 646-648; discussed in People v. Breverman, supra at 19 Cal.4th 161, f.n. 8 and 167.)

This Court has held that a defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and that an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. (People v. Sedeno (1974) 10 Cal.3d 703, 720; People v. Breverman, supra at 19 Cal.4th 176; People v. Lewis (2001) 25 Cal.4th 610 at 645.)

This Court has further held that, as a matter of judicial policy, neither the defendant nor the state has any legitimate interest in presenting the jury with an unwarranted all or nothing choice and depriving the jury of a "third option" of conviction of less serious offenses based upon the evidence.

(People v. Barton (1995) 12 Cal.4th 186, 196; People v. Breverman. supra, 19 Cal.4th at 155; People v. Lewis, supra.) Consequently, this Court has held that a trial court must instruct on **all** lesser included offenses supported by substantial evidence **even in the absence of a request.** (People v. Barton, People v. Breverman. and People v. Lewis, all cited supra.)

"Substantial evidence" means any evidence which might persuade the jury to find the defendant guilty of only the lesser included offense. The testimony of even a single witness can constitute substantial evidence requiring the trial court to instruct on its own initiative regardless of whether or not the trial court feels that the testimony is credible. (People v. Turner (1990) 50 Cal.3d 668, 689; People v. Breverman, supra, People v. Lewis, supra.)

Manslaughter, both voluntary and involuntary, is a lesser included offense of murder. (People v. Sedeno, supra, 10 Cal.3d at 719; People v. Barton, supra, 12 Cal.4th at 200-201; People v. Breverman, supra, 19 Cal.4th at 153-154; People v. Blakeley (2000) 23 Cal.4th 82; People v. Lewis, supra, 25 Cal.4th at 645.) The essential distinction between the two crimes is that murder generally requires an intent to kill, whereas manslaughter does not. Manslaughter is, instead, "the unlawful killing of a human being without malice." (Penal Code §192; People v. Lasko (2000) 23 Cal.4th 101; People v. Rios (2000) 23 Cal.4th 450, 460; People v. Cameron (1994) 30 Cal.App.4th 591, 604, 605; People v. Manriquez (2005) 37 Cal.4th 547, 587.)

Under the doctrine of imperfect self-defense, when the jury finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter. (In re Christan S. (1994) 7 Cal.4th 768, 771; People v. Manriquez, supra, 37 Cal.4th at 581.) Thus the trial court must instruct on this doctrine, whether or not instructions are requested by counsel, whenever there is evidence substantial enough to merit consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter. (People v. Barton, supra, 12 Cal.4th at pages 194, 201; People v. Manriquez, supra, 37 Cal.4th at 581.)

The imperfect self-defense manslaughter doctrine requires that the defendant must have had an actual belief in the need for self-defense. The defendant's fear must be of imminent danger to life or great bodily injury. An imminent peril is one that, from appearances, must be instantly dealt with. (People v. Manriquez, supra, 37 Cal.4th 581.)

A killing of a human being without malice, "upon a sudden quarrel or heat of passion," is also voluntary manslaughter. (Penal Code §192, subdivision (a); People v. Breverman, supra, 19 Cal.4th, 154.) An unlawful killing with malice is murder (Penal Code §187.) Nonetheless an intentional killing is reduced to voluntary manslaughter if other evidence negates malice. Malice is presumptively absent when the defendant acts upon a sudden

quarrel or heat of passion or sufficient provocation. (People v. Lee (1999) 20 Cal.4th 47, 58-59; People v. Manriquez, supra, 37 Cal.4th at 583.)

The factor which distinguishes the "heat of passion" form of voluntary manslaughter is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim. The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. Heat of passion arises when, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment. (People v. Berry (1976) 18 Cal.3d 509, 515; People v. Barton, supra, 12 Cal.4th at 201; People v. Lee, supra, 20 Cal.4th at 59; People v. Manriquez, supra, at 37 Cal.4th 584.)

Thus, the heat of passion requirement for manslaughter has both an objective and subjective component. The defendant must actually, subjectively, kill under the heat of passion. But the circumstances giving rise to the heat of passion are also viewed objectively. The heat of passion must be such as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances. (People v. Wickersham (1982) 32 Cal.3d 307, 326-327; People v. Manriquez, supra, 37 Cal.4th at

584.)

To satisfy the objective or "reasonable person" element of this form of voluntary manslaughter, the accused's heat of passion must be due to sufficient provocation. (Id.)

It follows from the above that a trial court has a constitutional duty to instruct the jury on lesser included voluntary manslaughter offenses in any capital case in which there is any substantial evidence that the defendant killed any of the victims in imperfect self-defense or in the heat of passion as defined hereinabove. The defendant's uncorroborated testimony can constitute substantial evidence requiring the trial court to instruct on voluntary manslaughter regardless of whether or not the trial court feels that this testimony is credible. (People v. Breverman, supra, People v. Lewis, supra.)

2. The Trial Court's Error in the Instant Case

On appeal, this Court applies a de novo standard of review. (People v. Waidla (2000) 22 Cal.4th 690, 733; People v. Manriquez, supra, 37 Cal.4th at 581.) In doing so, this Court must examine a record in the present case that is replete with evidence that on the night of the homicides Richard Booker killed at least two of the victims, Tricia Powalka and Amanda Elliott, because he harbored an actual belief in the need for self-defense against an imminent danger to life or great bodily injury. Richard's statements to Deverick Maddox, to the police under interrogation, and in his jail cell indicate that he believed that he had to kill Tricia Powalka because otherwise she was

going to shoot him. Tricia was armed with a gun at the time. This case thus presents substantial evidence of imminent actual danger rather than the mere possibility of some future harm as in Manriquez.

The record also contains substantial evidence which would support an imperfect self-defense manslaughter instruction as to victim Amanda Elliott. While the sequence is unclear, it is reasonably inferable from the record that Amanda charged Richard Booker, ignoring his warnings that he was "not playing," immediately or shortly after Tricia Powalka was threatening to shoot Richard, and he grabbed the gun away from her and killed her. In these circumstances a rational trier of fact could easily conclude that Richard was in imminent fear that, if Amanda was able to wrest the gun and/or the knife away from him, she was going to kill him unless he killed her first.

Nor can it be reasonably argued in this case that Richard Booker was not entitled to imperfect self-defense manslaughter instructions because he was the initial aggressor who stabbed Corina Gandara before Tricia Powalka and Amanda Elliott intervened to protect Corina. This may be one of several possible interpretations of the facts. However, according to Richard Booker, the "stabbing" was **accidental**, and the young women refused to believe Richard, over-reacted, and would have killed Richard if he had not succeeded in killing them first. Even assuming that Richard's belief in the need to defend himself against an imminent threat to his life was unreasonable, he was

entitled to imperfect self-defense voluntary manslaughter instructions.

Moreover, since the victims unlawfully attacked Defendant Booker, it does not matter whether or not he created the situation. For, even assuming that the defendant created the situation, that does not deny him the right to claim imperfect self-defense. (People v. Vasquez (2006) 136 Cal.App.4th 1176.)

Richard Booker was also entitled to heat of passion voluntary manslaughter instructions concerning both Tricia Powalka and Amanda Elliott. The provocation which incited Richard to kill both of these young ladies was caused by Tricia threatening to shoot him with her gun, and Amanda charging him apparently intent on taking his life or at least causing him great bodily injury. According to Richard's testimony, Corina Gandara over-reacted and he was unable to persuade her that the initial "stabbing" had been accidental, the other young women almost immediately intervened, and there was no cooling off period or opportunity for due deliberation or reflection.

Given the circumstances, an ordinary person in Richard Booker's position would naturally be extremely fearful for his life and would have acted as he did since the only alternatives at this point were to kill or be killed.

It is no answer to the above to say that Richard Booker, rather than the victims, was the initial aggressor or provocateur because, according to his uncontradicted testimony, he **accidentally** stabbed Corina Gandara, she refused to believe him,

and all of the young women over-reacted.

Richard Booker's post-arrest statements constitute substantial evidence that he both subjectively and objectively believed that he had to kill Tricia Powalka and Amanda Elliott before they could kill him, and this was more than "sufficient provocation" to warrant a heat of passion voluntary manslaughter instruction.

Furthermore, even assuming that Richard Booke created the situation which led Tricia Powalka and Amanda Elliott to attack him, he was nonetheless entitled to assert imperfect self-defense. (People v. Vasquez, supra.)

None of the above means, of course, that there was not also evidence from which the jury might reach a contrary conclusion. It merely means that there was sufficient substantial evidence that this may have been a case of voluntary manslaughter rather than murder and that the jury should have been instructed accordingly.

Thus, the trial court erred.

3. The Judgment Must be Reversed

The only remaining question is whether the trial court's instructional error requires a reversal of the Tricia Powalka and/or Amanda Elliott murder convictions.

Under the United States Supreme Court's Eighth Amendment analysis in Beck and Schad, supra, a failure to instruct the jury on a lesser included manslaughter offense supported by substantial evidence may be deemed harmless **only** if the trial

court instructs on some other non-capital offense supported by substantial evidence as a "third option."

In People v. Sedeno (1974) 10 Cal.3d 703, this Court held that reversal is required in all cases where the trial court erroneously omitted instructions on lesser included manslaughter offenses unless "the factual question posed by the omitted instructions was necessarily resolved adversely to the defendant under other, properly given instructions."

However, in People v. Breverman, supra, a majority of this Court concluded that, at least in a non-capital case, error in failing to sua sponte instruct on lesser included manslaughter offenses supported by the evidence requires reversal of the convictions of the charged offense if "after an examination of the entire case, including the evidence," it appears "reasonably probable" that the defendant would have obtained a more favorable outcome had the error not occurred.

In People v. Lewis (2001) 25 Cal.4th 610, at 644-648, this Court held that the failure to instruct the jury on lesser included manslaughter offenses was harmless since the jury, by finding the defendant guilty of robbery, burglary and special circumstances felony murder, necessarily had to find that he had the criminal intent to commit the underlying felonies, thus necessarily rejecting Lewis' claim that he was so "balled up inside" and under the influence that he did not know what he was doing.

In People v. Elliot (2005) 37 Cal.4th 453, at 475, this

Court concluded that the jury's verdicts finding the defendant guilty of first degree murder under a felony murder theory necessarily meant that they had to have found beyond a reasonable doubt that the defendant killed the victim during the actual or attempted commission of the underlying felony. In that case, since the elements of felony murder and special circumstances coincided, the true finding as to the felony murder special circumstance established that the jury would have convicted the defendant of first degree murder under a felony murder theory, at a minimum, regardless of whether further instructions were given on lesser included homicide offenses.

In the instant case, the trial court's failure to instruct on the lesser included offense of imperfect self-defense and heat of passion voluntary manslaughter cannot be deemed non-prejudicial regardless of the harmless error test employed. The jury's only options in this case were limited to convicting Richard Booker of murder or acquitting him altogether, and it is impossible to say that the murder verdicts were not improperly influenced by this consideration or that the jury would have "necessarily found" Richard Booker guilty of special circumstances murder - in regard to Tricia Powalka and Amanda Elliott - if they had been given another choice.

Although Richard Booker was prosecuted for the Tricia Powalka homicide based on an alternative felony murder theory which would have allowed a first degree murder conviction even in the absence of any "malice," the jury specifically found that the

felony murder special circumstances allegation was **not** true. This strongly suggests that the Tricia Powalka first degree murder conviction was based solely on a theory of malice and premeditation, and that if the jury had been given a third option, they might not have reached the same conclusion.

The prosecution did **not** proceed on a felony murder theory as to Amanda Elliott. It is therefore impossible for this Court to conclude that the instructional error was harmless because the jury necessarily resolved the murder verses manslaughter issue pursuant to the court's instructions.

Moreover, the jury's implied finding that this was a case of premeditated murder, as to victims Tricia Powalka and Amanda Elliott, was **not** necessarily inconsistent with a finding of imperfect self-defense manslaughter, especially in view of this Court's decisions holding that "premeditation" does not require an extended period of time, so long as the defendant has an opportunity to meaningfully reflect on what he is doing. (People v. Manriquez, supra, 37 Cal.4th at 577.) A jury, properly instructed on the lesser included offense of imperfect self-defense manslaughter, could easily have concluded that Richard Booker "meaningfully reflected" on the situation confronting him after Tricia threatened to shoot him and Amanda charged him, and concluded that this was a case of "kill or be killed."

Therefore, the Tricia Powalka and Amanada Elliott murder convictions must be reversed.

IX.

THE PROSECUTOR'S ARGUMENT THAT THE PRESUMPTION OF INNOCENCE HAD VANISHED BEFORE THE JURY HAD HEARD ALL OF THE EVIDENCE AND COMMENCED DELIBERATIONS SHIFTED THE BURDEN OF PROOF - IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT - AND COMPELS REVERSAL

A. RELEVANT PROCEEDINGS

The court instructed the jury, at the conclusion of the guilt phase trial, that:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction of the truth of the charge." (CALJIC jury instruction No. 2.90; C.T. Vol. 14, page 3729; R.T. Vol. 12, page 1549.)

The prosecutor, during his closing guilt phase argument, stated:

> "I had the burden when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden. Its all on the prosecution. I'm the prosecutor. That's my job.
>
> The defendant was presumed innocent until the contrary was shown. **That presumption should have left many days ago.**

He doesn't stay presumed innocent."

Defense counsel objected: "Your Honor, I'm going to object to that, because I don't think they [i.e. the jury] can make that decision until they are all together."

The court then told the jury:

> "Well, ladies and gentlemen, the presumption of innocence is the point at which you start the case. At some point you come to the conclusion the person is guilty, the presumption is gone. On the other hand, if you find the person not guilty, the presumption of innocence is always still there. Again, you have to interpret how to use that."

The prosecutor resumed his argument, and stated:

> "As the court instructed you, I was correct that the defendant starts out with the presumption of innocence. That doesn't stay. That isn't an automatic thing forever. That's why we have a trial. **Once the evidence convinces you he is not longer innocent, that presumption vanishes. That's all it is.**
>
> What does beyond a reasonable doubt mean? You've heard the instruction over and over. Ask yourself this: After listening to all the evidence and interpreting in your own minds and listening to argument today, is it okay for you to have some possible or imaginary doubt? The law says yes. You can have some. Reasonable doubt doesn't go to necessarily every detail of the case. . . . That would be nice, but there's no requirement that every single thing be proven beyond a reasonable doubt. My burden is to prove each of the elements of the crime, the things that make the crime true, beyond a reasonable doubt. So if you still have questions about the fill-in details, they may never get answered.

> . . . You may never know all the surrounding details, and that's why the law doesn't put extra burdens on you, doesn't make me prove motive, doesn't make me prove every single detail. It would be humanly impossible.
>
> If you read histories about the theory of reasonable doubt . . . and the presumption of innocence, you'll understand . . . . They could never prove everything absolutely to anybody as long as it had to do with human affairs. There was no way to ensure that, so you were allowed some possible or imaginary doubt. The real test, as the law says, is do you have an abiding conviction as to the truth of the charges. **Don't you already before we go through it?**" (R.T. Vol. 12, pages 1586-1588.)

A recess was declared, and the jurors left the courtroom.

The following discussion then took place:

THE COURT:

> "You [defense counsel] made objection to [the prosecutor's] characterization of when the presumption of innocence vanishes, and I hadn't ever really thought of that. Clearly it vanishes once the jury decides beyond a reasonable doubt. I don't know if it still stays there when they walk into the jury room. If you really think about it, once you get past the [Penal Code section] 1118.1 [motion for acquittal], the presumption of innocence is almost a useless concept in real application, [except] perhaps just to confirm the burden of proof lies with the People. When you argue the case and they deliberate, no one is going to talk about whether there is a presumption of innocence. The discussion is about if the District Attorney proved the case. I don't think the discussion is on is the defendant still innocent, and is he presumed to be innocent. Has the District Attorney proved the case beyond a reasonable doubt? So I'm not sure that we aren't talking about angels on the head of pins,. . . [although]. . . its

interesting . . . conceptionally,. . . [but] its not anything in practicality.

Say you heard this and had not deliberated. Jurors are going to have to come to some conclusion or thoughts at some point in time. I guess technically in [the] sense of the minuet, maybe the assumption lasts all the way until you get to the jury room. I have a hard time answering the question. Since I really didn't know the answer, I kind of overruled it. I figured the case would take care of it if you want to make the lynch pin argument of when the presumption of innocence ceases."

DEFENSE COUNSEL:

"That isn't the lynch pin of my argument. The court does admonish the jury they are not to decide the case until they are all together in the deliberation room. Our position is that they don't make that decision until they are in the deliberation process.

I think there was a further characterization about . . . haven't you already decided guilt beyond a reasonable doubt. So its along the same lines. I didn't object to it at that time because I didn't want to interrupt further [the prosecutor's] argument, and the suggestion about [the] defense presenting evidence, again shifting the burden of proof. So I would object. . .[along] those same lines, but submit it."

THE COURT:

"I think . . . [the prosecutor] was very careful to say that . . . [the jurors could] disagree with what the witness[es] said . . . [and] not mentioning Mr. Booker . . . . I guess its debatable because its the kind of debate that lawyers can talk about but in reality has very little application.

Again your objection is noted for the record, and I'll overrule it."

DEFENSE COUNSEL: "Sixth, Eighth, and Fourteenth . . . "

THE COURT: "On all state and federal grounds." (R.T. Vol. 12, pages 1600-1602.)

The prosecutor, following the recess, concluded his argument. He stated:

> "The one thing I want to make clear to you about reasonable doubt and presumption of innocence . . . is this: until you reach a verdict, of course the defendant is not guilty. **If a presumption attaches to a defendant when the trial starts, if they are then found guilty somewhere along the way, of course that presumption has vanished."**
>
> If there were no evidence presented, nothing happened, I didn't meet my burden beyond a reasonable doubt, for instance, or just didn't do anything, then of course your verdict would have to be not guilty.
>
> What I am suggesting to you . . . is that the evidence in this case is so vastly overwhelming, it isn't like . . . [both] sides in this trial didn't know what the evidence was. You all didn't know, but we have known for a long time.
>
> We also are aware that when you are sitting here and its coming in from witness to witness you don't have the whole picture. That's one of the reasons why there is an opportunity for an opening statement as well as a closing one, to try to pull together what people have spent a long time studying and knowing about.
>
> **And I never want to minimize anything I might have said this morning**. . . [but] in case I forgot this - it's your individual responsibilities to deliberate and come up with a verdict. . . ." (R.T. Vol. 12, pages 1603-1604.)

Defense counsel presented his closing argument. (R.T. Vol. 12, pages 1604-1623.)

The prosecutor presented his rebuttal argument. (R.T. Vol. 12, pages 1623-1639.)

The trial court then read to the jury a final set of instructions which included the following:

> "The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. Each of you must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors." (CALJIC jury instruction No. 17.40; C.T. Vol. 14, page 3764; R.T. Vol. 12, page 1639.)

The jury retired to deliberate, and returned verdicts finding Mr. Booker guilty as charged, and finding all but one of the special circumstances allegations true.

B. DISCUSSION

1. The Presumption of Innocence

Criminal defendants have a constitutional right to the presumption of innocence and to have the Government prove guilt beyond a reasonable doubt. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not expressly articulated in the constitution, is a basic component of a fair trial under our system of criminal justice. (Estelle v. Williams (1976) 425 U.S. 501, 503.) It is the duty of the prosecution to establish guilt beyond a reasonable doubt. This notion - basic in our law and rightly one of the boasts of a free society - is a requirement and a safeguard of "Due Process." (In re Winship, supra, 397 U.S. 362.)

The presumption of innocence does **not** disappear when evidence to the contrary is received; it is overcome **only by evidence convincing the jury beyond a reasonable doubt. Moreover, the presumption of innocence goes with the jury when it deliberates.** (United States v. Cummings (9th Cir. 1972) 468 F.2d 274, at 280.)

The recent case of United States v. Perlaza (9th Cir. 2006) 439 F.3d 1149, is remarkably similar to the instant case, and directly on point.

In Perlaza, the prosecutor stated during his closing argument:

> "In a short period of time, the case will be handed to you. You're going to go

> back into the deliberation room and that presumption of innocence, that presumption of innocence that these men have all been cloaked with. . . , that presumption. . . is going to vanish. . . and that's when the presumption of guilt is going to take over you. . . ."

Defense counsel responded to this statement with a flurry of objections, all of which the trial judge overruled. Indeed, the trial court stated that "That's proper rebuttal. Go ahead. You are all right."

The prosecutor refused to retract his remarks and confirmed:

"That's what I said, when they get back there and start looking at it is when the presumption takes over, the presumption of guilt."

The trial court concluded that the prosecutor's statement did not constitute misconduct and denied a motion for a mistrial, but finally agreed to give a curative instruction.

The trial judge instructed the jurors, following argument, that:

> "There is no such thing as a presumption of guilt in a criminal case. All defendants in a criminal case are presumed to be innocent unless or until such time as the evidence establishes their guilt. The Government has the burden of proof of proving every element of each charge beyond a reasonable doubt. . . No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that a defendant did not testify."

The court then provided a fairly comprehensive explanation of the legal standard for proof beyond a reasonable doubt.

Nonetheless, the Ninth Circuit reversed. The prosecutor's intentional and improper burden - shifting statements violated the defendants' rights under the Due Process Clause. Moreover, the prosecutorial misconduct was not harmless. First, the trial court had initially ratified it. Second, the trial court's curative instruction was inadequate in that it did not specify that the presumption of innocence goes with the jury when it deliberates, and delivery of the instruction was also delayed over a period that spanned more than fifty pages of transcript. Furthermore it failed to tie explicitly the instruction to the prosecutor's and the court's earlier statements.

The Ninth Circuit recognized that the trial court, in its prepared jury instructions, had properly explained the reasonable doubt standard and told the jury that the Government bears the burden of proving every element of the charged offenses beyond a reasonable doubt. However, the proper instruction regarding the burden of proof became only one of several conflicting instructions, and the Ninth Circuit could have no assurance that the jury understood which of these instructions should be followed and which should be ignored.

In People v. Hill (1998) 17 Cal.4th 800, at 831, this Court concluded that the prosecutor had committed misconduct since her "somewhat ambiguous" remarks could be reasonably interpreted as suggesting to the jury that she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt, and that the defendant had the burden of producing

evidence to demonstrate a reasonable doubt of his guilt.

2. The Prosecutor's Burden - Shifting Remarks in the Instant Case

The prosecutor's remarks in the instant case - which were very similar to those in Perlaza and much more egregious than those in Hill - constituted an improper effort to shift the burden of proof. Indeed, the prosecutor's arrogant insistence that he was "correct" in asserting that the presumption of innocence had vanished long before the jury had heard all of the evidence, despite defense counsel's objections, makes this crystal clear. The real question is whether these remarks were serious enough to compel a reversal. As will now be explained, the answer to that question is a resounding **yes**.

3. The Judgment Must be Reversed

The usual preliminary step at this point in the analysis would be to determine the correct standard to be employed in evaluating whether or not the prosecutor's comments constituted reversible error.

Defendant Booker submits that, since the prosecutor's remarks - ratified by the trial court's comment that it was up to each individual juror to decide when the presumption of innocence had been overcome - improperly informed the jury about the prosecutor's burden of proof, the error is reversible per se. (Sullivan v. Louisiana (1993) 508 U.S. 275.)

Alternatively, since the misconduct involved federal constitutional error, a reversal would be required unless the prosecution can establish beyond a reasonable doubt that the

error did not contribute to the jury's verdict. (Chapman v. California, supra; Neder v. United States (1999) 527 U.S. 1, 15; People v. Herring (1993) 20 Cal.App.4th 1066, 1077.)

Even assuming that this Court were to view what happened here as merely a case of prosecutorial misconduct, a reversal would still be in order if there is even a reasonable probability that the prosecutor's remarks deprived Defendant Booker of a fundamentally fair trial. (California Constitution, Article VI, §13; People v. Watson (1956) 46 Cal.2d 818, 836; People v. Hill, supra, 17 Cal.4th at 844; People v. Herring, supra, 20 Cal.App.4th 1077.)

In People v. Hill, supra, this Court found it unnecessary to determine the appropriate standard for deciding the reversibility of prosecutorial misconduct during closing argument involving reasonable doubt and the presumption of innocence. The arguably improper remarks of the notorious prosecutor in that case, combined with numerous other instances of prosecutorial misconduct, as well as serious errors committed by the trial court, when viewed in the aggregate, warranted a reversal under the cumulative error doctrine.

In Perlaza, however, the Ninth Circuit determined that the prosecutor's improper comments could not be deemed harmless under any test, and that this misconduct alone required reversal. The trial court had exacerbated the prosecutor's misconduct by overruling defense objections, and the curative instruction was inadequate, conflicted with the standard reasonable doubt

instruction, and came too late.

In our case, even assuming that the prosecutor's remarks did not constitute reversible error per se, and that some form of harmless error analysis is appropriate, the judgment cannot stand. Here, the prosecutor's improper argument about the vanishing presumption of innocence was exacerbated by the trial court's erroneous overruling of defense objections, as well as the court's improper comments that it was up to each individual juror to decide for themself when the presumption had been overcome, which implied that they could make that decision before hearing all of the evidence or commencing their deliberations. The prosecutor's further remarks that he had been correct, and that the presumption of innocence had been overcome many days ago, made the problem even worse.

While the prosecutor, after the recess,made a half-hearted effort to clean up his earlier remarks, he nonetheless refused to "minimize" or disavow them, or admit that he had been wrong. These belated half-hearted remarks by the prosecutor were no substitute for an adequate curative instruction by the court, and could not "unring the bell."

It is true that the trial court in this case, just like the trial judge in Perlaza, gave appropriate reasonable doubt instructions, and also told the jurors immediately before they retired to deliberate that, while each of them should decide the case for themselves, they should not do so until they had discussed the evidence and instructions with the other jurors.

However, just as in Perlaza, these instructions did not specifically address the prosecutor's improper vanishing presumption of innocence comments, and were thus inadequate. This is especially true since the entirely appropriate standard CALJIC instructions were separated from the prosecutor's remarks by many pages of transcript. The standard reasonable doubt instruction was given 37 transcript pages before the prosecutor's misconduct occurred, and the concluding instruction was given 53 transcript pages afterwards. This Court can have no confidence that, under these circumstances, the jurors made the connection and followed the appropriate instructions rather than the prosecutor's improper comments.

Thus, the prosecutor's serious misconduct constitutes yet another reason for reversing the judgment.

X.

THE EVIDENTIARY ERRORS AND INSTRUCTIONAL OMISSIONS COMMITTED DURING THE GUILT PHASE, CONSIDERED COLLECTIVELY, WARRANT REVERSAL

Even assuming that the errors and omissions committed during the guilt phase trial are insufficient to compel a reversal when considered individually, the **cumulative** effect of **all** of these errors and omissions necessitates this result.

The cumulative effect of multiple errors may compel reversal even though any one error - in and of itself - does not warrant this. (People v. Buffum (1953) 40 Cal.2d 709, 726; People v. Cruz (1978) 83 Cal.App.3d 308, 334; People v. Guzman (1975) 48 Cal.App.3d 380, 388.)

Here, the combined effect of the admission of over 100 inflammatory and gruesome photographs of the victims' bodies and the surrounding blood soaked crime scene, **and** the instructional omissions which misled the jury into believing that they could convict Mr. Booker of the special circumstances felony murder of Corina Gandara even if she was already dead at the time she was sexually assaulted and this was a case of "after-formed intent," **and** the court's refusal to instruct on the lesser included manslaughter offenses which would have given the jury a third option between the stark alternatives of convicting Mr. Booker of the charged murders or outright acquittal, **and** the prosecutor's improper comments regarding the vanishing presumption of innocence, was to destroy any chance of an objective evaluation of guilt or innocence based solely upon the applicable law and

the evidence.

The cumulative effect of **all** of these serious errors and omissions, which were of federal constitutional dimension, thus mandates a reversal of the judgment.

PENALTY PHASE ARGUMENTS

XI.

THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 - AND DEPRIVED DEFENDANT BOOKER OF A RELIABLE PENALTY DETERMINATION, DUE PROCESS AND A FUNDAMENTALLY FAIR PENALTY TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS - BY RE-ADMITTING INFLAMMATORY, GRUESOME, CUMULATIVE, AND UNNECESSARY PHOTOGRAPHS DURING THE PENALTY PHASE

A. PROCEEDINGS BELOW

Defendant Booker, as noted ante, filed an unsuccessful pre-trial motion to exclude various "gruesome" photographs of the victims' bodies and the blood stained crime scene. (C.T. Vol. 2, pages 522-536.) The trial court ultimately ruled that over 100 of the photographs were admissible (R.T. Vol. 2, pages 273-304, Vol. 7, pages 849-855, 970, Vol. 8, page 976, Vol. 10, pages 1367-1368.)

The prosecutor, during the guilt phase trial, made extensive use of the photographs, and showed them to the jury and referred to them at every possible opportunity, both during the testimony of prosecution witnesses, and during his closing argument. (R.T. Vol. 7, pages 887 et seq., 921 et seq., 1264 et seq., Vol. 10, pages 1369 et seq., Vol. 12, pages 1580-1581, 1584, 1593, 1598.)

The prosecutor, during the penalty phase trial, reminded the jury of the previously introduced photographs of the deceased victims' badly mutilated corpses which were "the results of a cold, calculated, horrible slaughter" (R.T. Vol. 13, page 1745), and contrasted this with additional photographs of the "feisty," fun loving, and "good" victims when alive. (R.T. Vol. 13, pages

1810-1811, 1844, and Vol. 14, page 1857.)

The trial court, after noting that "the photographs tell their own tale," and made the circumstances of the crime "pretty clear" (R.T. Vol. 14, pages 1935-1936), instructed the jury that they were permitted to determine the relevant facts from the evidence received during the entire trial (including the photographs introduced during the guilt phase) (CALJIC jury instruction No. 8.84.1; C.T. Vol. 14, page 3872; R.T. Vol. 14, page 1966.)

The prosecutor, during his penalty phase argument, reminded the jury of the "cruel," "savage," and "monstrous" nature of the murders, as depicted in the photographs introduced during the guilt phase. (R.T. Vol. 14, pages 1982 et seq.)[9]

A short while later, during defense counsel's argument, a juror became ill. The record does not expressly reveal the physical reactions of the other jurors. However, defense counsel quickly concluded his argument, and both attorneys agreed to waive their rebuttal arguments. (R.T. Vol. 14, pages 2022 et seq.)

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[9] See footnote 7 ante.

B. DISCUSSION

The law regarding the admissibility of graphic photographs in homicide cases has been summarized ante in Argument VI. The general rule is that, while the trial court has broad discretion to decide whether such photographs should be admitted under Evidence Code section 352, that discretion may be abused where the prejudicial impact on the jury's emotions outweighs any probative value. (People v. Poggi, supra.)

Defendant Booker has argued ante that the trial court abused its Evidence Code section 352 discretion, and deprived him of a fundamentally fair trial of the issues of guilt or innocence, by admitting the photographs during the guilt phase trial.

However, even assuming that the introduction of these photographs during the guilt phase was not sufficiently prejudicial to compel a reversal of the entire judgment, the re-introduction of the photographs during the penalty phase, the use of these photographs to remind the jurors of the way in which the victims had been "horribly slaughtered," and the probable impact as indicated by the illness of one of the jurors, and the attorneys' decision to spare the jurors' emotions by waiving their rebuttal arguments, deprived Defendant Booker of his rights to due process, a fair trial, and a reliable penalty determination in violation of the Eighth and Fourteenth Amendments.

Therefore, the death sentence must be reversed.

XII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - AND DEPRIVED DEFENDANT BOOKER OF A RELIABLE PENALTY DETERMINATION, DUE PROCESS AND A FUNDAMENTALLY FAIR PENALTY TRIAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS - BY ALLOWING THE JURY TO CONSIDER UNDULY PREJUDICIAL EVIDENCE OF OTHER UNCHARGED CRIMES

A. RELEVANT PROCEDURAL HISTORY

The prosecutor served notice on defense counsel, prior to trial, that he intended to introduce evidence of uncharged crimes during the penalty phase pursuant to Penal Code section 190.3, subdivision (b). The alleged uncharged crimes included (1) an incident in June 1996, wherein Richard Booker threatened Armando Ascencio, (2) an incident in 1995 wherein he was involved in a fight in front of Norte Vista High School and brandished a knife, (3) an incident wherein he chased a student down the sidewalk and beat him with a broom handle, and (4) an incident in March, 1994, wherein he stabbed his uncle Robin John Stewart. (C.T. Vol. 2, pages 323-325.)

The defense, in response, filed a motion to exclude the evidence of uncharged criminal acts on the grounds that (1) they did not constitute violent criminal conduct within the meaning of Penal Code section 190.3, subdivision (b), and (2) they would unfairly persuade the jury to sentence Richard Booker to death based upon his supposed violent propensities rather than the crimes he actually committed in the instant case, and thus deny him a reliable penalty determination. (C.T. Vol. 2, pages 567-582.)

The trial court, after hearing the prosecutor's offer of proof and holding an Evidence Code section 402 hearing, ruled that the other crimes evidence was admissible. (R.T. Vol. 12, pages 1673-1682, Vol. 13, pages 1715-1739.)

Damian Camacho and Maricely Ascencio testified that in 1994 Richard Booker's brother had come to their house and started an argument. Five minutes later Richard Booker came over and said he was going to kill them if they were "messing" with his brother. Mr. Camacho was not personally frightened by Richard's threats. However, Ms. Ascencio, who was afraid of Booker, telephoned the police. (R.T. Vol. 13, pages 1785-1796.)

Ronald Maxim testified that, in 1995, he had seen Richard Booker and several other young men arguing. Several of these young men starting fighting. Richard, although he was holding a knife, was **not** involved in the fight. He did **not** "stick anybody with [his] knife" or use it in any way. (R.T. Vol. 13, pages 1804-1806.)

Damian Camacho also testified that he had seen Richard Booker chasing a student down the street with a stick or a broom handle. He did **not** see Richard hit the student. (R.T. Vol. 13, pages 1796-1797, 1801-1802.)

Robin Stewart, Richard Booker's uncle, had lived with him at various times while Richard was growing up. On March 22, 1994, Richard had stabbed him in **self defense**. Robin, who weighed almost 300 pounds, was jealous of his 120 pound nephew because "he used to get all the girls," and had been bullying Richard for

months. Stewart "slinged [Richard] up against the wall, and . . . started slapping him around, punching him around." Richard "hit the wall [and] started to go down." The uncle picked Richard up and threw him out the door, taunted Richard and physically threatened him. Richard finally stabbed his uncle in the stomach and ran away. (R.T. Vol. 13, pages 1758-1782.)

Defense counsel filed a written motion to dismiss the uncharged other offenses on grounds of insufficiency of the evidence, and also argued that allowing the jury to consider this unduly prejudicial evidence would violate his right to a reliable penalty determination, a fundamentally fair penalty trial, and due process. (C.T. Vol. 14, pages 3858-3865.) The defense argued, in the alternative, for a mistrial.

The trial court ruled that there was sufficient evidence to establish that Richard Booker had uttered a criminal threat against Ms. Ascencio and assaulted Mr. Stewart, that the evidence regarding the other two relatively minor incidents was not in and of itself unduly prejudicial, and that Defendant Booker could receive a fair trial and obtain a reliable penalty determination based upon the totality of the evidence, including the victim impact evidence. (R.T. Vol. 14, pages 1877-1885.)

The jury was instructed that they could consider, in determining whether or not to impose the death penalty, any previous criminal activity by Richard Booker which involved the use or attempted use of force or violence or the express or implied threat to use force or violence so long as any of them

were convinced beyond a reasonable doubt that such criminal activity had occurred. (CALJIC jury instruction Nos. 8.85 and 8.87; C.T. Vol. 14, pages 3884 and 3886; R.T. Vol. 14, pages 1970-1973.)

The jury, after hearing the above described evidence and receiving these instructions, retired to deliberate, and shortly thereafter returned a death penalty verdict. (R.T. Vol. 14, page 2032.)

B. DISCUSSION

1. The Admissibility of Prior Crimes Propensity Evidence During the Penalty Phase Pursuant to Penal Code Section 190.3, subdivision (b)

Penal Code section 190.3, subdivision (b) provides that the jury, in determining whether to impose the death penalty or life imprisonment, may consider a number of factors including ". . . criminal activity by the defendant which involves the use or attempted use of force or violence or the express or implied threat to use force or violence." This code section allows evidence of violent criminal acts committed at any time, whether adjudicated or not, to show the defendant's propensity for violence. (People v. Ray (1996) 13 Cal.4th 313, 349.)

The United States Supreme Court and the federal Circuit Courts of Appeal have held that the admission of prior crimes propensity evidence, at least where not carefully limited, is contrary to firmly established due process principles deeply rooted in Anglo-American jurisprudence. (Spencer v. Texas (1967) 385 U.S. 554, 558, 563-64; Estelle v. McGuire (1991) 502 U.S. 62, 74-75; Panzavecchia v. Wainwright (5th Cir. 1981) 658 F.2d 337, 341; Murray v. Superintendent, Ky. State Penitentiary (6th Cir. 1981) 651 F.2d 451, 453; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1370.)

The admissibility of other crimes propensity evidence, during the penalty phase of a capital trial, is constitutionally suspect. A reliable penalty determination, based solely on the jury's objective evaluation of relevant factors, is critical to a

valid death judgment under the Eighth Amendment. (Woodson v. North Carolina (1976) 428 U.S. 280, 304-305; Gardner v. Florida (1977) 430 U.S. 349, 359-361.) Permitting a penalty jury to consider unadjudicated other crimes undermines the reliability of the jury's penalty determination. The jury that "convicts" the defendant of the uncharged acts is not an impartial trier of fact. Rather, it is the jury that, by definition, has just convicted the defendant of capital murder and special circumstances. In this situation, the penalty jury may well conclude that the defendant committed the alleged prior criminal conduct based on evidence that would not have convinced a neutral jury of his guilt at a separate trial. This in turn leads to a significant likelihood that the death penalty will be unfairly, erroneously and undeservingly imposed.

The danger of the penalty determination becoming skewed by the introduction of prior crimes propensity evidence is real and apparent. The jury, having just convicted the defendant of special circumstances murder, may feel justifiably punitive toward him, but not so punitive as to return the ultimate punishment of death. However, when the prosecution is permitted to introduce evidence of **additional** unadjudicated violent crimes during the penalty phase trial, the jury is both much more likely to find that the prior unadjudicated crimes occurred because of their recent exposure to capital murders of which they have just found the defendant guilty, and also much more likely to impose the death penalty on the habitually violent defendant. In this

situation the purported prior violent criminal conduct, having been established by an inherently unfair fact-finding process, provides the additional weight needed to tip the scales in favor of a death sentence which might not otherwise be imposed.

Incidents not deemed worthy of prosecution at the time they occurred are frequently dredged up to persuade the jury that the defendant is an incurably violent habitual offender who should be sentenced to death. The inevitable consequence of permitting these unadjudicated prior crimes to be introduced during the penalty phase of a capital trial is that the jury will be unable to remain neutral - as to both the adjudication of the alleged prior offenses and the determination of an appropriate penalty for the current offenses - thus substantially undermining the reliability of the penalty determination.

This danger is particularly great when the prosecution is permitted to introduce disparate alleged other criminal incidents spanning a period of several years, which could never be consolidated in a joint non-capital trial, en masse during the penalty phase.

Many courts which have considered this issue have concluded that the introduction of unadjudicated prior crimes during the penalty phase renders the penalty determination so inherently unreliable as to be constitutionally impermissible under the Eighth and Fourteenth Amendments. (Commonwealth v. Hoss (1971) 455 Pa. 96, 113; State v. Barthollomew (1984) 1 Washington 2d 631; State v. McCormick (1979) 272 Indiana 272; Cook v. State

(Alabama 1979) 369 So.2d 1251, 1257; Scott v. State (1983) 297 Md. 235, 245-247; Province v. State (Florida 1976) 337 So.2d 783, 786; Landry v. Lynaugh (5th Cir. 1988) 844 F.2d 1117, 1121.)

This Court, notwithstanding the above, has repeatedly upheld the constitutionality of Penal Code section 190.3, subdivision (b). (People v. Balderas (1985) 41 Cal.3d 144, 204; People v. Howard (1988) 44 Cal.3d 375, 425; People v. Cain (1995) 10 Cal.4th 1, 71; People v. Gurule (2002) 28 Cal.4th 557, 653; People v. Griffin (2004) 33 Cal.4th 536.)

However, this Court has limited the scope of evidence admissible in aggravation in the penalty phase of a capital trial to exclude criminal activity not involving violence, and criminal activity of which the defendant was acquitted. (People v. Boyd (1985) 38 Cal.3d 762, 772.)

Furthermore, this Court has made clear that the jury may only consider uncharged other criminal offenses in determining the appropriate penalty if they are convinced that the uncharged priors have been proven beyond a reasonable doubt, and that this necessarily implies that the trial court must not permit the penalty jury to consider uncharged crimes as aggravating factors unless a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (People v. Boyd, supra, 38 Cal.3d 762, 778; People v. Griffin, supra, 33 Cal.4th at 584-585.)

Further, although a trial court may not categorically exclude evidence of other violent criminal activity on the

grounds of undue prejudice, inasmuch as evidence of this sort is expressly made admissible by Penal Code section 190.3, subdivision (b), it may exclude "particular items of [such] evidence" on that ground insofar as any item might "unfairly persuade" the jury to find that the defendant engaged in the other violent criminal activity in question. (People v. Griffin, supra, 33 Cal.4th at 587-588.)

2. The Other Crimes Propensity Evidence in the Instant Case Rendered the Penalty Determination Constitutionally Unreliable

Defendant Booker respectfully suggests that this Court should reconsider its holding in Balderas and hold that the introduction of unadjudicated prior crimes propensity evidence during the penalty phase of a capital trial is per se violative of both the Eighth Amendment and Due Process Clause of the Fourteenth Amendment. The danger that the jury will base its penalty determination on the defendant's supposed violent propensities, rather than upon a careful evaluation of what he actually did in the instant case, is simply too great, and the instructional safeguard is illusory.

As Justice Jefferson wrote in People v. Gibson, supra, 56 Cal.App.3d at page 130, three decades ago:

> "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial [prior crimes] evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal

> principles with respect to the admissibility of other-crime evidence. . . if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner."

However, this Court need not go so far in order to conclude that the admission of the unadjudicated priors in the instant case irreparably prejudiced Defendant Booker's constitutional rights to a fair and reliable penalty determination.

First, it bears repeating that in issue here are **uncharged** alleged crimes, at least two of which (the criminal threats against Ms. Ascencio and Mr. Camacho and the stabbing of Robin Stewart) were known to the police at the time, which did not even result in an arrest, let alone conviction.

Second, the four alleged prior incidents were lumped together and introduced en masse even though they took place over a period of several years, were unrelated to one another, and never would have been cross-admissible in a joint non-capital trial.

Third, the evidence was not "substantial" and was insufficient to establish that Richard Booker was engaged in any violent criminal activity.

Damian Camacho, one of the victims of the criminal threat supposedly uttered by Richard Booker in violation of Penal Code section 422, testified that he experienced **no** fear - let alone sustained fear - . Furthermore, a careful reading of Mr. Camacho's and Ms. Ascencio's testimony reveals that, while the

threats were supposedly directed primarily at Armando Ascencio, he was asleep at the time and never heard them. Thus, an essential element of the offense was lacking as to these victims.

Mr. Maxim testified, concerning the incident "wherein the defendant [Booker] was involved in a fight in front of Norte Vista High School in which he brandished a knife," that Richard Booker was **not** involved in the fight, and that he merely stood some distance away holding, rather than "brandishing" his knife.

Mr. Camacho's abbreviated testimony concerning "the incident wherein the defendant [Booker] and two others chased a student down the sidewalk," [while] "the defendant was carrying what appeared to be a broom handle," "eventually catching and beating [the student]," was that Richard Booker in fact never struck the student with the broom handle or otherwise beat him. The student himself did not testify.

The testimony of Robin Stewart established that Richard Booker stabbed his uncle Robin **in self defense** after the nearly 300 pound Stewart had bullied him for months, and after Stewart had slapped, punched, and "slung" his nephew up against the wall, in a desperate effort to simply get away.

In summary, we do not have in this case **substantial** evidence from which a **rational** jury could possibly conclude **beyond a reasonable doubt** that Richard Booker was going around willy-nilly committing violent crimes, much less that he had an incurable propensity for violence, before the tragic events in Tricia Powalka's apartment occurred.

Fourth, the evidence was "unfairly persuasive" (People v. Griffin, supra) in that it generally was not detailed enough - particularly regarding the Norte Vista High School and broom handle incidents - for the jury to meaningfully evaluate whether Richard Booker really was engaged in violent criminal activity.

Thus, this evidence never should have been admitted.

The only remaining question is whether the improperly admitted Penal Code section 190.3, subdivision (b) evidence was sufficiently prejudicial to require a reversal of the penalty determination.

The answer to this question must be in the affirmative. Richard Booker was depicted by the prosecutor as "brandishing" a knife very similar to the one he used in Tricia Powalka's apartment, and actually stabbing his uncle Robin with it. Of course the evidence actually showed that Richard was merely holding the knife during the fight outside the high school and standing some distance away, and that he stabbed his uncle Robin only in self defense according to the uncle himself. But the jury was likely to conclude, and almost certainly did conclude, that Richard Booker was a dangerous knife wielding assassin who simply had to be executed to protect the public, without engaging in any careful weighing of the aggravating verses the mitigating circumstances. The prior crimes evidence was thus both misleading and enormously prejudicial.

The trial court's comments that the prior crimes evidence was non-prejudicial, given the weight of the other aggravating

circumstances, including the victim impact evidence, were not well taken since, as will be demonstrated, that evidence was also inadmissible and unduly prejudicial.

There is simply no getting around the conclusion that the erroneously admitted prior crimes propensity evidence unfairly skewed the penalty determination, and deprived Richard Booker of any possibility of the fair penalty trial and reliable penalty determination to which he was entitled under the Eighth and Fourteenth Amendments. The death sentence cannot stand.

XIII.

THE JURY'S CONSIDERATION OF HIGHLY EMOTIONAL AND INFLAMMATORY VICTIM IMPACT EVIDENCE, DESPITE REPEATED DEFENSE OBJECTIONS, DEPRIVED DEFENDANT BOOKER OF A FUNDAMENTALLY FAIR PENALTY TRIAL AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

A. RELEVANT PROCEDURAL HISTORY

The prosecutor served notice on defense counsel, prior to trial, that he intended to introduce evidence of "the effect of each victim's death, including, but not limited to, the manner of death, notification of [the] fact of the killing, and the circumstances regarding the impact of the killings on families, friends, and acquaintances . . . " during the penalty phase (C.T. Vol. 2, page 324.)

The defense, in response, filed a motion to exclude - or at least limit - the victim impact evidence. The gist of the motion was that the admission of irrelevant, cumulative, and unduly prejudicial and inflammatory victim impact evidence would focus the jury's attention on the victims' morality and worth rather than on the statutorily prescribed aggravating and mitigating factors, appeal to the jurors' emotions rather than their reason, and deprive Defendant Booker of the fundamentally fair penalty trial and reliable penalty determination to which he was constitutionally entitled. (C.T. Vol. 3, pages 1583 et seq.)

The prosecutor, in his trial brief, noted that victim impact evidence, including evidence of the traumatic impact of the killings upon the murder victims' families, was admissible during the penalty phase trial, and argued that the jury's assessment of

the offenses from the victims' viewpoint was germane to their penalty determination. (C.T. Vol. 3, pages 615-618.)

The trial court, after reviewing the defense motion, and without holding an evidentiary hearing, decided to "let some impact evidence in." The defense expressed a concern that allowing an endless parade of the victims' family members to vent their feelings from the witness stand would be unduly prejudicial. The court opined that a total of eight or nine victim family witnesses would not be per se "inappropriate," but invited the defense to renew their objections "if at some point it gets cumulative or too much." (R.T. Vol. 12, pages 1682-1686.)

Frankie Sanderson, Tricia Powalka's mother, testified during the penalty phase about her relationship with her feisty, fun loving daughter and a video tape depicting Tricia was played for the jury. (R.T. Vol. 13, pages 1807-1810.) She described her feelings upon learning that Tricia had been killed. (R.T. Vol. 12, pages 1813-1818.)

She then went on to describe the funeral arrangements.

> THE PROSECUTOR: "When did you finally realize that your daughter was dead - - I mean really?"
>
> MRS. SANDERSON: **"The day that I got to see her in her casket."**
>
> THE PROSECUTOR: "And when was that?"
>
> MRS. SANDERSON: "Almost two weeks after she was killed."
>
> THE PROSECUTOR: "Why did it take so long?"
>
> MRS. SANDERSON: **"The autopsies, the**

investigation, and then when the mortuary finally got a hold of her, he came out and he told my daughter and I both that he didn't know what he could do because the damage was so extensive."

THE PROSECUTOR: "In terms of making her look presentable?"

MRS. SANDERSON: "Yes."

THE PROSECUTOR: **"Did you have an open casket?"**

MRS. SANDERSON: **"I had an open viewing, yes."** (R.T. Vol. 13, pages 1818-1890; emphasis added.)

Mrs. Sanderson went on to relate how she had been compelled, by her daughter's death, to take care of her grandson and granddaughter.

The prosecutor asked about the impact of the protracted legal proceedings.

THE PROSECUTOR: "You knew we were coming to trial this year, finally, after four years, right?"

MRS. SANDERSON. "Yes."

THE PROSECUTOR: "How did you feel?"

MRS. SANDERSON: "Like there was a closure to a chapter, that finally the end is in sight."

THE PROSECUTOR: "What about the other three years, what were they like?"

MRS. SANDERSON: "There is not a day that doesn't go by that I don't think of her. . . . " R.T. Vol. 13, page 1821.)

Mrs. Sanderson described health problems which she attributed to her daughter's death:

THE PROSECUTOR: "What's the impact been on your family?"

MRS. SANDERSON: "Well, my health has been bad. My blood pressure went up. **I have had a heart attack already. I <u>believe</u> it accelerated my mother's death."**

THE PROSECUTOR: "Now your mother - - you mentioned earlier you had to call and tell your mother [about Tricia's death], correct?"

MRS. SANDERSON: "My mother had been diagnosed with lung cancer [in] May of '95, was doing very well until this happened. And I think my mother just gave up. I think my mamma just gave up." (R.T. Vol. 13, page 1823; emphasis added.)

THE PROSECUTOR: "When did you have your heart attack?"

MRS. SANDERSON: "May of this year [i.e. 1999]." (R.T. Vol. 13, page 1823; emphasis added.)

The prosecutor returned to the subject of Tricia Powalka's funeral arrangements.

THE PROSECUTOR: " Was Tricia buried or was she cremated?"

MRS. SANDERSON: **"She was cremated."**

THE PROSECUTOR; **"Where are her ashes?"**

MRS. SANDERSON: **"In my daughter Linda's home. She did not want to be buried. She didn't like bugs."** (Id.; emphasis added.)

The prosecutor concluded by asking Ms. Powalka's mother her feelings upon seeing the photographs, depicting her daughter's body, which had previously been shown to the jury.

THE PROSECUTOR: "Ms. Sanderson, you have seen the photographs of your daughter - - "

MRS. SANDERSON: "Yes."

> THE PROSECUTOR: "I don't mean the ones [of Tricia Powalka alive] today. I mean the one's where she was stabbed."
>
> MRS. SANDERSON: "Yes."
>
> THE PROSECUTOR: "What is that like for a mother to see a child mutilated like that?"
>
> MRS. SANDERSON: "Devastating. I don't understand the bestiality of it. In knowing my daughter, she was a very lovely young woman, not only pretty physically but as a person. And I can't quite comprehend how anybody can do the damage that was done. I have had a real hard time accepting that, very hard time. Why did he have to hurt her so bad?" (R.T. Vol. 13, page 1824.)

Mrs. Sanderson was on the witness stand for more than half an hour. At the conclusion of her testimony, defense counsel asked to approach the bench.

> DEFENSE COUNSEL: ". . . We are in a difficult position here. Obviously its tough to object to this kind of evidence. But . . . [the prosecutor] . . . indicated that he would be fairly brief with these witnesses [and] I note that this witness just took over thirty minutes.
>
> I think it goes well beyond the type of victim impact evidence suggested by Payne and its progeny. You know, we have . . . [permissible testimony about] how unique this individual is and . . . the things about them that they miss and the impact on the family from their loss, but [it is] not [permissible to testify] about . . . their reactions to . . . the funeral and how the person looked in their casket and whether they were cremated or buried.
>
> . . . There . . . [were] numerous instances . . . I think we have to object . . . at this time. This goes clearly so far beyond what is [normally] seen . . . and it also prevents us from having any opportunity to suggest a different punishment [than the death penalty].

I think it renders this trial completely unfair . . . if this type of evidence is allowed in this type of fashion and the length of this type of evidence. I . . . object under the Sixth, Eighth, [and] Fourteenth Amendments . . . "

THE COURT: "I'm going to overrule the objection because I don't know where to draw the line . . . But I think . . . [the prosecutor] went too far. . . .

I think [the prosecutor] just went too far. And if you are going to go thirty-five minutes, you are asking to have victim impact evidence thrown out. I think you have to make it a little shorter, in some fashion, but I don't know where to draw the line because its all victim impact evidence. But if you are going to go into the grandmother and accelerating the death and kids not living together and all this, at some point I think its just goes too far . . . [But] I can't draw the line and say its not impact evidence because it is impact evidence and its admissible. But I think that the jury is still out on impact evidence completely, and if you go too far and it goes on too long and its a half-hour for each of these people and goes on for three days, and then you have everybody in the audience . . . crying and teary-eyed like they are you are running a risk. . . . I don't know where to draw the line . . . But I have enough of a concern that I almost put my hand down . . . because I just . . . had had enough."

THE PROSECUTOR: ". . . I don't think a half-hour is too much to ask of a mother about the death of their child after four years. . . . I would like . . . just to note for the record that [in terms of] asking about the cremation, I thought that they had gone out and dug a grave and I didn't want to say that until I asked her about the cremation . . . . I will take counsel's remarks and the court's into consideration."

THE COURT: "I'm just telling you that I don't know where to draw the line. . . [it] is clearly [victim impact evidence] so it is relevant . . . but its just the totality . .

. , . . . it just kept going on [after] . . . the impact was clear and the point was communicated."

THE PROSECUTOR: "I see what you are saying. [But] she was difficult because she would often answer one word or two and I wanted her to discuss feelings and emotions. . . . and so that's why I kept [asking] . . . the questions."

DEFENSE COUNSEL: "Your Honor, I don't want to belabor this, but we are probably duty-bound and in the interest of caution probably should ask for a mistrial. . . "

THE COURT: "I will deny the motion for mistrial."

DEFENSE COUNSEL: "One other thing. . . I think its clearly unfair to suggest that the court delay [was] having some effect on these . . . [family members]. I don't think that's fair. . . . I think its unfair to suggest that somehow . . . the reason for the court delay would have some impact . . . I'm sure it does . . . but that's not part of victim impact evidence. . . "

THE COURT; ". . . If you . . . bring out what has been found to be continuances for good cause. . . [as] somehow . . . causing impact and making it worse you run a risk . . . .

Well, I had the [same] concern . . . [defense counsel] did . . . "

"You . . . know, asking how you handled the delay between the killing and the trial and what does it bring to you now, it's bringing closure to me now, I think those are all risky areas that are unnecessary . . .

Now I think its a small part in the greater picture of things, and I won't grant the mistrial. But . . . the courts are very sensitive when . . . delays are occasioned . . . which can't be blamed on [the defendant] . . . the delay of the court process . . . [and] then . . . [basing] victim impact upon the effect of that delay .

> . . you don't need to go there. You don't want to run that risk."
>
> THE PROSECUTOR: "She [Mrs. Sanderson] just . . . said it finally got settled . . . you have all those years with nothing settled. I think that's direct impact from the fact that this guy killed her daughter."
>
> THE COURT: "Right. It clearly has impact, the delay . . ., the continuances . . . the fact that . . . [the defendant] has a free attorney . . . and . . . all these rights . . . all [of that] has an impact and . . . [there is] a sense of injustice to a victim. . . . When I was a prosecutor . . . I felt it, and I could see it that way. But I know darn well that to the extent you make that an issue you are just asking for problems. . . .
>
> If you come to court . . . and you think 'this is crap,' you get a real feeling it isn't justice. The fact that you know that the execution isn't carried out, is probably 20 years along, all of that has an impact on the people but, by God, I wouldn't go there by saying that [that] is the kind of impact that the jury can consider." (R.T. Vol. 13, pages 1825-1830.)

At this point, during a recess, one of the members of the courtroom audience was so upset that he approached one of the jurors in the elevator, showed the juror his wallet, and asked "how much would it take for you to leave the courtroom?", implying that the spectator wanted to take the law into his own hands and assume the role of Richard Booker's judge, jury, and executioner. The court, after questioning the juror and being satisfied that this incident would not affect her penalty decision, felt compelled to remind the jurors of their duty.

> "I want to stress how important it is that if you over-hear something . . . , you understand that the decision has to be based upon the testimony presented in the trial in

> court from the witnesses and the other evidence introduced into evidence and the instructions I give you. . . .
>
> You can't . . . help notice that some of the testimony will affect people in the audience and its understandable and you may see people that are teary-eyed, and they probably can't help it. Again, the decision can't be based upon the reaction of people in the audience. It has to be based upon the evidence presented . . . [from] the witness stand.
>
> Its hard for everybody. . . . , But again, that's what you need to do. . . ." (R.T. Vol. 13, pages 1831-1837.)

Linda Baker, Tricia's sister, testified about her feelings, and how she had been compelled to raise Tricia's daughter. (R.T. Vol. 13, pages 1938 et seq.)

Esther Elliott-Martin, Amanda's mother, described her relationship with Amanda, as depicted in photographs and a video tape played for the jury. (R.T. Vol. 13, pages 1842 et seq.)

Ricardo Gandara, Corina and Amanda's grandfather, described his feelings on learning that the victims had been stabbed to death. (R.T. Vol. 13, page 1852.)

Richard Renee Gandara, Corina's stepfather, described his relationship with Corina, and how horrible life had been for him and his wife over the four years which had elapsed since the killings.

Nora Gandara, Corina's mother, described her relationship with Corina and yet another video tape was played for the jury. (R.T. Vol. 14, pages 1872-1873.)

She then described in dramatic terms the impact of Corina's

death, how she no longer wanted to live and had attempted to commit suicide, had twice been committed to a mental hospital, and had had employment and marital difficulties. The prosecutor kept her on the witness stand even after she almost fainted. (R.T. Vol. 14, pages 1874-1876.)

The prosecutor's lengthy victim impact presentation concluded with the introduction of the three video tapes of the victims into evidence. (R.T. Vol. 14, page 1877.)

B. DISCUSSION

1. The Permissible Scope of Victim Impact Evidence

In Payne v. Tennessee (1991) 501 U.S. 808, the United States Supreme Court, reversing its earlier decision in Booth v. Maryland (1987) 482 U.S. 496, held that evidence of a murderer's impact on a victim's family and friends is not per se inadmissible in the penalty phase of a capital trial.

This Court has also held that victim impact evidence is admissible as a "circumstance of the crime" under section 190.3, subdivision (a). (People v. Edwards (1991) 54 Cal.3d 787, 832-836; People v. Roldan (2005) 35 Cal.4th 646, 731; People v. Robinson (2005) 37 Cal.4th 592, 650.)

However, both the High Court and this Court have recognized that victim impact testimony and related photographic evidence should be excluded if it is irrelevant, largely cumulative, and so unduly prejudicial that it renders the penalty phase trial fundamentally unfair, and diverts the jury's attention from its proper role or invites an irrational, purely subjective response. (Payne, supra, 501 U.S. 808, 825; Robinson, supra, 37 Cal.4th 650.)

In People v. Edwards, supra, this Court cautioned that allowing victim impact evidence under factor (a) "does not mean that there are no limits on emotional evidence and argument," and that "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (Edwards, supra, 54 Cal.3d 836, Robinson, supra, 37

Cal.4th at 651-652.)

In Salizar v. State (Texas Criminal Appeals 2002) 90 S.W.3d 330, a case cited by this Court in Robinson, the Texas High Court found that a 17-minute "video montage" tribute to the murder victim containing 140 photographs set to emotional music should not have been admitted. The Court observed that:

> "The punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial. . . . We caution that victim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . . . Hence we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence." (Id. at page 336.)

In Cargle v. State (1996) 1995 OKCR 77 [909 P.2d 806], also cited in Robinson, the Oklahoma Court of Appeals stated: "The more a jury is exposed to the emotional aspects of a victim's death, the less likely its verdict will be a reasoned moral response to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." (Id., at p. 830.)

In People v. Harris (2005) 37 Cal.4th 310, at 351, this Court, held that abbreviated testimony by the victim's mother and grandmother regarding viewing their loved one's body at the mortuary and photographs of the grave site were properly

admitted. However, the prosecution went too far in introducing testimony that at the end of the funeral service the lid to the closed casket mistakenly was opened as it was being put into the hearse, and that several attendees screamed in horror and two people fainted, one falling on the top of the partially opened casket, since this evidence should have been excluded as being too remote from any act committed by the defendant to be relevant to his moral culpability.

2. The Victim Impact Evidence in the Instant Case Was Inadmissible

Applying the above recited legal principles to the instant case, it is clear that much of the victim impact evidence was inadmissible.

First, the three video tapes containing numerous photographs of Tricia Powalka, Amanda Elliott, and Corina Gandara when alive, just like the similar "video montage" tribute to the murder victim in Salizar, should never have been admitted. The prejudice arising from the admission of these photographic eulogies in the instant case was particularly exacerbated since they were contrasted with the feelings of one of the victim's mothers after viewing the photographs showing her daughter's corpse.

Second, as in Cargle, the testimony of the victim's family members - particularly Tricia Powalka's mother Frankie Sanderson - was unnecessarily cumulative. Indeed the testimony of Mrs. Sanderson alone consumed more than 35 minutes and, as the court opined, seemed to go on long after any legitimate point

which the prosecutor wanted to make had been communicated to the jury. While the prosecutor abbreviated the testimony of the other victim impact witnesses, in response to the court's concerns, the cumulative effect of their highly emotional testimony culminating in Corina Gandara's mother nearly fainting on the witness stand before the "teary-eyed" audience, one of whom actually offered a juror money to leave the courtroom so he could take care of Richard Booker, made it extremely unlikely that the penalty verdict would be a "reasoned moral response" to the question of whether or not Richard deserved to die.

Third, Mrs. Sanderson's testimony regarding the open casket viewing of her daughter's body and the subsequent cremation, like the open casket evidence in Harris, supra, was enormously prejudicial, and too remote from Richard Booker's actions to be relevant to his moral culpability since the family could have made alternative funeral arrangements.

Fourth, Mrs. Sanderson's testimony concerning what she **believed** concerning the effect of Tricia Powalka's death on her blood pressure, and how this **may** have contributed to her heart attack and Tricia's grandmother's death, should have been excluded as unduly speculative and prejudicial. Mrs. Sanderson was not a doctor, the grandmother had been diagnosed with lung cancer several months before Tricia was killed, and Mrs. Sanderson's heart attack occurred almost four years after Tricia's death.

Fifth, as the trial court opined, Mrs. Sanderson's testimony

concerning the impact of the protracted legal proceedings in this case was inadmissible. While the victims' families undoubtedly were frustrated by the agonizing delays, which were caused by the changes of defense counsel, the need for painstaking discovery, unusually complicated pretrial motions, and a thorough and adequate investigation, none of this was fairly attributable to Defendant Booker.

Sixth, the testimony of Nora Dorene Gandara, Corina's mother, which included her emotional descriptions of her attempted suicides and commitments to a mental hospital, and which cumulated in her nearly fainting while on the witness stand, was unduly prejudicial and totally unnecessary. The testimony of this clearly distraught and mentally unstable witness added nothing to that of her husband's, was cumulative and unnecessary, and served only to evoke an emotional response in the jurors and decimate any remaining possibility that Defendant might have had of receiving a reliable penalty determination.

For all of these reasons, the victim impact evidence introduced in this case went far beyond the acceptable limits.

In this case, unlike in Robinson and Roldan, supra, the defense did bring an appropriate - and extensive - in limine motion to restrict the admission of this evidence, warned against the danger of unduly cumulative evidence prior to the commencement of the prosecutor's penalty phase presentation, and objected and sought a mistrial when the prosecution witnesses went "over the top." The defense objections were well taken.

The trial court's failure to limit this testimony, or to take appropriate remedial action, even assuming that it was still possible to unring the bell after the jury had already heard the evidence, was an error of constitutional magnitude.

3. Defendant Booker is Entitled to a New Penalty Trial

In determining whether Defendant Booker is entitled to a new penalty trial, the prejudicial effect of the erroneously admitted victim impact evidence must be assessed.

Since the trial court's failure to limit this evidence is an error of federal constitutional magnitude directly implicating Defendant Booker's right to a fundamentally fair penalty trial and reliable penalty determination as guaranteed by the Eighth and Fourteenth Amendments, the harmless beyond a reasonable doubt test must be employed. (Chapman v. California, supra; People v. Harris, supra, 37 Cal.4th at 352.)

Here, it is impossible to conclude beyond a reasonable doubt that the jury's penalty determination was not attributable - at least in part - to impermissible and unduly prejudicial victim impact evidence.

Unlike in Harris, where the impermissible testimony was very brief, related to only a single incident, and consumed only 16 lines of transcript, the testimony in the instant case went on ad nauseam, covered a variety of subjects, and takes up more than 50 pages of the Reporters' Transcript.

Moreover, unlike in Harris, where the defense did not object, the trial court's failure to take remedial action despite

repeated defense objections, and even though the trial court itself recognized that the prosecutor had gone too far in numerous respects, exacerbated the prejudice. The trial court here did not hold any evidentiary hearing to determine what the victim impact witnesses would say before they took the witness stand, did not limit the scope of their testimony in advance, did not strike the impermissible testimony or direct the jury not to consider it, and refused to declare a mistrial. It is true that the court warned the prosecutor that he was putting his case at risk after the jurors had already heard most of this impermissible testimony. However, this was a care of far too little and far too late.

Moreover, the prosecutor, during his penalty phase argument, reminded the jury that they could consider the emotions expressed by the victims' families and the hurt done to them in weighing whether or not Richard Booker should be put to death. (R.T. Vol. 14, page 1986.) While the prosecutor also relied upon the brutality of the murders, and the prior crimes propensity evidence, the victim impact evidence was a significant part of the prosecution's case.

Furthermore, it cannot be said that the aggravating factors in this case were so overwhelming that the jury would necessarily have unanimously concluded that they outweighed the mitigating circumstances in the absence of the victim impact evidence.

Richard Booker was just barely 18 years old at the time he committed the homicide offenses, just old enough to be subject to

the death penalty (Roper v. Simmons (2005) ___ U.S. ___, 125 S.Ct. 1183), and his age and lack of maturity was a significant mitigating factor.

Moreover, Richard repeatedly expressed remorse during his post-offense statements to Deverick Maddox, to the police while undergoing interrogation, and while sitting alone in his jail cell.

It is not inconceivable that at least some of the jurors might have been convinced to spare Richard's life if they had not heard the "open casket," "heart attack," and other inflammatory - and seemingly endless - victim impact evidence.

The victim impact evidence was not harmless beyond a reasonable doubt. Richard Booker is entitled to a new penalty trial.

XIV.

THE TRIAL COURT ERRED - AND DEPRIVED DEFENDANT BOOKER OF A FUNDAMENTALLY FAIR PENALTY TRIAL AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS - BY REFUSING TO INSTRUCT THE JURY THAT HIS AGE WAS A MITIGATING FACTOR

A. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Richard Booker, as noted ante, turned 18-years-old only a few weeks before the homicides in the instant case.

Defense counsel, in their Memorandum of Law on Penalty Phase Jury Instructions, requested a modified version of CALJIC instruction 8.85(i) expressly telling the jury that Richard's age could be considered only as a mitigating factor. (C.T. Vol. 2, page 441.)

Defense counsel reiterated this request during the penalty phase jury instruction conference. (R.T. Vol. 14, page 1941.)

However, the trial judge, while he understood why defense counsel wanted this instruction, refused to give it. (Id.)

Consequently, the jury was instructed, in the standard language of CALJIC 8.85(i), that they could consider "the age of the defendant at the time of the crime," as simply one factor, without specifying whether this factor was aggravating or mitigating. (C.T. Vol. 14, page 3885; R.T. Vol. 14, page 1971.)

B. DISCUSSION

In People v. Brown (2003) 31 Cal.4th 518, at 564-565, this Court held that the defendant was not entitled to the following instruction: "An individual under 18 is not subject to the death penalty. You may consider the fact that Mr. Brown was 19 at the time of his offense." This Court reasoned that the proffered instruction highlighted a single, mitigating aspect of the defendant's age - that he had only recently become eligible for the ultimate penalty - and was thus improperly argumentative.

However, Defendant Booker respectfully submits that the somewhat different instruction proffered in the instant case is constitutionally required in light of the United States Supreme Court's post-Brown decision in Roper v. Simmons (2005) ___ U.S. ___, 125 S.Ct. 1183. Roper held that the Eighth Amendment prohibited the execution of an offender who was under 18 years of age at the time of his offense. It necessarily follows that, where the defendant has turned 18 mere weeks before the homicides, his age can **only** be a **mitigating** factor.

Nor can it be said that instructing the jury on age as a mitigating factor would improperly highlight a single factor favorable to the defendant. Juries in capital cases are routinely instructed on applicable factors, such as the circumstances of the crimes and the existence of special circumstances, which are invariably aggravating. There is no reason why they should not also be instructed that a particular factor like the defendant's youthful age should be considered by

them as a mitigating factor.

The failure to tailor the standard CALJIC factor (i) instruction to fit the facts of Defendant Booker's case is yet another reason to conclude that he did not receive a fundamentally fair penalty trial or a reliable penalty determination, and to set aside the death sentence.

XV.

THE EVIDENTIARY AND JURY INSTRUCTIONAL ERRORS, DURING THE PENALTY PHASE, REQUIRE REVERSAL

The errors and omissions committed during the penalty phase, considered collectively, require that the death sentence be aside.

The cumulative effect of multiple errors, may compel a reversal of the penalty determination even assuming that no one error - in and of itself - justifies this. (People v. Hill, supra; People v. Sturm (2006) 37 Cal.4th 1218.)

Here, the combined effect of reminding the jury of the gruesome photographs of the victims' bodies again and again, contrasting this with video montages eulogizing the victims when alive, and the open casket and other inflammatory victim impact evidence, was to ensure an emotionally - driven death penalty, and to deprive Defendant Booker of any possibility of a fair and reliable penalty determination. The fact that one of the jurors became physically ill after being exposed to this evidence, the "teary eyed" audience, and the fact that a courtroom spectator became so upset that he approached a juror in the elevator and offered her money if she would leave the courtroom so that he could personally perform the role of Defendant Booker's executioner, are all affirmative indications that a fair penalty determination was impossible due to the prosecutor's "over the top" penalty phase presentation and the failure of the trial court to rein in the prosecutor and impose reasonable limits.

The prejudice was exacerbated by the admission of prior

crimes evidence which inaccurately - and unfairly - portrayed Richard Booker as an habitually violent knife wielding assassin.

The court's refusal to clearly instruct the jury on one of the few applicable factors which was clearly mitigating (Richard Booker's age) made it even more likely that the penalty determination would be skewed in favor of death.

The cumulative effect of **all** of the above enumerated violations of Defendant Booker's Eighth and Fourteenth Amendment rights, mandates that the death judgment be set aside.

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED IN DEFENDANT BOOKER'S CASE, IS UNCONSTITUTIONAL

California's death penalty law, both on its face and as applied, is unconstitutional for a variety of reasons.[10]

A. THE DEATH PENALTY IS AN INHERENTLY CRUEL AND UNUSUAL PUNISHMENT AND THUS VIOLATES BOTH THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

In Furman v Georgia (1972) 408 U.S. 238 a majority of the United States Supreme Court held that the imposition of the death penalty under then current state statutes constituted a cruel and unusual punishment. Three members of a five member majority (Justices Douglas, Stewart and White) found it unnecessary to decide the ultimate question of whether the death penalty was an unconstitutional cruel and unusual punishment. Rather they invalidated the death penalty statutes before the Court on the grounds that they were applied in an unconstitutionally arbitrary and capricious manner. However the other two members of the majority (Justices Brennan and Marshall) did reach that question. The opinions of both justices concluded that death is an

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[10] Defendant Booker recognizes that many of the same arguments have been rejected by this Court in a number of previous cases. (See People v. Robinson (2005) 37 Cal.4th 592, at 654-655 and cases cited therein; People v. Stanley (2006) 39 Cal.4th 913, 962-968.) However, he raises these arguments to preserve them for further review by the federal courts on habeas corpus in the event that this Court denies him relief.

unusually severe and degrading punishment, which contemporary American society has rejected by rarely imposing, and that it serves no legitimate deterrent or other rational purpose which cannot be served equally well by the less severe punishment of imprisonment (see opinion of Justice Brennan at 92 S.Ct. 2736 et seq.; opinion of Justice Marshall at 92 S.Ct. 2765 et seq.).

In the same year that Furman was decided, a six to one majority of this Court held, in People v Anderson (1972) 6 Cal.3d 628, that capital punishment is per se unconstitutional. Among the relevant factors cited by this Court to support its finding of "cruelty" were the executions themselves and the pain incident thereto, the brutalizing psychological effect of impending execution, and the growing infrequency with which the death penalty was actually being carried out in California. Among the grounds for finding the death penalty to be "unusual" were the world-wide trend towards abolition of capital punishment in civilized countries and the fact that in California, at that time, the death penalty was rarely imposed and even more rarely carried out. This Court also held that the death penalty was not necessary to achieve any legitimate state purpose because there were far less onerous means of isolating the convicted criminal from society, and because the death penalty's deterrent effect was not substantiated in California, where the execution of the punishment was neither swift nor certain. This Court's decision was based on its independent review of the cruel or unusual punishment prohibition contained in the California Constitution

rather than on an interpretation of the Eighth Amendment.

Both California's Legislature and the Legislatures of other states reacted to the decisions in Furman and Anderson, supra by enacting new death penalty statutes and both the United States Supreme Court and this Court subsequently held the revised statutes passed constitutional muster (see e.g. Gregg v Georgia (1976) 428 U.S. 153; Proffitt v Floria (1976) 428 U.S. 242; Zant v Stephens (1983) 462 U.S. 862; People v Frierson (1979) 25 Cal.3d 142, 174, 185; People v Jackson (1980) 28 Cal.3d 264, 315.)

However, fair review of California's death penalty statute, and the manner in which it has been carried out since reenacted compels the conclusion that the death penalty remains unconstitutional for the same reasons cited by two members of the United States Supreme Court in Furman and six members of this Court in Anderson. The death penalty remains an unusually severe and degrading punishment that has been imposed, since 1976, on only a dozen of thousands of murderers in California. In those dozen cases it has been imposed in a manner involving both unnecessary physical cruelty by way of suffocation by gas or lethal injection and extreme psychological trauma. There remains absolutely no evidence that the death penalty serves any necessary or legitimate purpose whatsoever, that it deters murder, or that it is any more effective in protecting society than the imposition of life imprisonment without parole.

Brennan, Marshall and six members of this Court were right

in 1972. California's entire experience in the 34 intervening years has proven them so. This Court has the power to reconsider its decision in Frierson and to interpret California's Constitution as prohibiting the death penalty. It need not wait for the United States Supreme Court to change its view and again invalidate the death penalty under the Eighth Amendment. (Raven v Deukmejian (1990) 52 Cal.3d 336, 353). This Court should exercise that power and end the barbarous spectacle of the death penalty in California once and for all.

B. IT IS IMPOSSIBLE TO FAIRLY IMPOSE THE DEATH PENALTY WITHOUT VIOLATING THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

In Callins v. Collins (1994) 510 U.S. 1141, Justice Blackmun, dissenting from a denial of a Petition for Writ of Certiorari, demonstrated that the death penalty cannot possibly be fairly imposed within constitutional constraints, despite all of the laborious judicial efforts in capital cases over the more than 20 years since Furman v Georgia, supra was decided. Justice Blackmun's opinion is complete, and there is no need to add to it except to say that the limitations cited therein apply to California post-conviction proceedings as well as federal ones.

Defendant Booker incorporates by reference Justice Blackmun's concurrence in Sawyer v. Whitley (1992) 505 U.S. 333, 357-360, in which he grappled with the likely reality that the ever increasing procedural barriers to meaningful federal habeas corpus relief "undermined the very legitimacy of capital punishment itself." The procedural barriers have continued to mount since Sawyer. (See e.g. Pace v. DiGuglielmo (2005) 544 U.S. 408.) Furthermore, they have now been joined by an ever growing set of procedural barriers in state court as well. (See e.g., In re Clark (1993) 5 Cal.4th 750; In re Sanders (1999) 21 Cal.4th 697.) The severe diminution of the availability of federal habeas corpus relief in combination with the procedural labyrinth a petitioner must navigate to try to obtain it, as well as the ever increasing creation of new procedural barriers in California, operate to render the system of review of capital

convictions and sentences more arbitrary and less reliable than was contemplated when capital punishment was resumed in 1976 (Gregg v. Georgia (1976) 428 U.S. 153), and so aribitray and unreliable as to preclude meaningful post- conviction review.

In this context, it is noteworthy that federal habeas corpus relief was much more readily available in 1976 than it is now; the federal system as it existed at the time of Gregg may have been adequate to guard against arbitrary or capricious imposition of the ultimate sentence in violation of federal constitutional law. (Sawyer v. Whitley, supra, 505 U.S. at 357-360.) With the severe restrictions imposed upon federal habeas relief, that is no longer the case.

Defendant Booker also adopts by reference Judge Noonan's dissenting opinion in Jeffers v. Lewis (9th Cir. 1994) 38 F.3d 411, 425-427.) The circumstances of California's administration of the death penalty, especially as they exist at this time are strikingly similar to those of Arizona discussed in the Jeffers dissent. And the ultimate selection of who lives and who dies will in fact be arbitrary, for those reasons. Compounding the problem is the increasing backlog of death cases in state courts, which can only serve to truncate the review eventually provided the cases caught in the backlog (including this one). (Id. at 426.) In any event, the freakishness of the imposition of the ultimate penalty itself is an Eighth and Fourteenth Amendment violation.

Once again, this Court is free to abolish the death penalty,

based upon its independent review of Article I, section 17 of this state's Constitution, without waiting for the day when a majority of the United States Supreme Court is convinced that Justice Blackmum and Judge Noonon are correct (Raven v Deukmejian, supra.)

C. CALIFORNIA'S HOMICIDE AND DEATH PENALTY LAWS, AS INTERPRETED BY THIS COURT, ARE UNCONSTITUTIONAL BECAUSE THEY DEFINE THE CRIME OF FIRST DEGREE MURDER, DEATH ELIGIBILITY FACTORS, AND DEATH SELECTION FACTORS SO BROADLY THAT VIRTUALLY EVERY HOMICIDE OFFENDER MAY BE PUT TO DEATH, AND THUS FAIL TO PERFORM THE "NARROWING" FUNCTION REQUIRED UNDER THE EIGHTH AMENDMENT

The Eighth Amendment's proscription against cruel and unusual punishment requires a meaningful basis for distinguishing the cases in which the death penalty properly is imposed from those in which it is not. A state statutory scheme which defines the crimes for which the death penalty may be imposed, and death eligibility and selection factors, so broadly that virtually any homicide offender may be put to death fails to serve the "narrowing" function required as a matter of constitutional law by the United States Supreme Court (Godfrey v Georgia (1980) 446 U.S. 420, 433; Tuilaepa v California (1994) 512 U.S. 967.) A legislative definition lacking some narrowing principle to limit the class of persons eligible for the death penalty and having no objective basis for appellate review has been held to be impermissibly vague under the Eighth Amendment (Maynard v Cartwright (1988) 486 U.S. 356; Godfrey v Georgia, supra at 446 U.S. 428; People v Bacigalupo (1994) 6 Cal.4th 457, 465).

California's homicide and death penalty statutes set forth what is essentially a three step process for determining who is to live and who is to die among the many thousands of criminal defendants charged with homicide offenses every year in this state. These statutes have been codified as Penal Code sections

187 through 190.5. During the first stage the jury determines whether the defendant is guilty of murder (Penal Code §187) and whether that murder is of the first degree (Penal Code §189). The second stage involves a determination by the jury as to whether or not the defendant's crimes involve one of 30 specified "special" circumstances which render him or her eligible for the death penalty (Penal Code §190.2). The final stage of the process requires the jury to select which defendants, convicted of first degree murder with special circumstances, shall live, and which shall die, based on a consideration of 11 specified factors (Penal Code §190.3). Defendant Booker submits that the criteria for making each of these three determinations are so broad and amorphous, especially as those criteria have been broadened by decisions of this Court, that they deprive the jury of any meaningful guided discretion in determining who is to die in California. This is true whether each of the three determinations is considered individually or in combination with the other two.

It should be noted that this argument is not foreclosed by the United States Supreme Court's decision in Tuilaepa v California , supra. In that case the United States Supreme Court considered only three of the eleven death selection or third stage factors in isolation (factors (a), (b), and (i) defined by Penal Code §190.3) and concluded that these three factors **alone** were not so vague or over-broad as to render California's death penalty statute as a whole unconstitutional. However, as noted

in at least three of the opinions in Tuilaepa, the Court was not faced in that case with either a challenge to the jury's determinations of first degree murder or death eligibility during stage one or stage two of the capital sentencing process. The Court also did not have to decide if all of the parts of California's death penalty determination scheme, when considered collectively, pass constitutional muster (see majority opinion by Justice Kennedy, concurring opinion by Justice Stevens, and dissenting opinion by Justice Blackmun). It is this broad attack on all three parts of California's death determination statutory scheme, considered both individually and as they work together, which was not decided in Tuilaepa, which Defendant Booker now advances.

1. California's Definition of First Degree Murder is Unconstitutionally Vague and Over Broad

The kinds of homicide offenses which can constitute first degree murder have been continually broadened since the enactment of California's current death penalty statute. Penal Code section 189 now provides, in relevant part,:

> "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, car jacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288(a) or 289 [i.e. sodomy, forcible oral copulation or rape by penetration by a foreign object], or

> any murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree . . . To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."

In other words, premeditation or deliberation may take various forms in addition to such clear indications of pre-conceived intent to kill as murder by poison, lying in wait and torture (People v Thomas (1953) 41 Cal.2d 470, 477). Furthermore the necessary premeditation and deliberation may be inferred from any one of the various methods of killing specified in this code section and may also be inferred from the totality of the circumstances even if the defendant had no opportunity to maturely and meaningfully reflect upon what he was doing. Mr. Booker submits that any competent prosecutor will now be able to find a way to charge any homicide defendant with first degree murder under this broad and virtually all encompassing definition.

This is especially true when the decisions of this Court, interpreting the meaning of the first degree murder criteria, are taken into account.

a. Premeditation and Deliberation

Traditionally this Court defined the term "premeditated" as "on preexisting reflection" and the term "deliberate" as "resulting from careful thought and weighing of considerations" (People v Anderson (1968) 70 Cal.2d 15, 26.) These sharply

limited definitions were consistent with earlier decisions by this Court stating that "premeditated" was not the same as "spontaneous" and that "deliberate" connotated something other than "hasty", "impetuous", "rash", or "impulsive" killing (see generally People v Hilton (1946) 29 Cal.2d 217, 222; People v Thomas (1945) 25 Cal.2d 880, 901). In Anderson, supra, this Court characterized the type of evidence sufficient to sustain a finding of first degree murder by premeditation and deliberation as consisting of (1) planning activity by the defendant prior to the killing, (2) the existence of facts from which the defendant's preexisting motive to kill the victim could reasonably be inferred, and (3) a particular and exacting manner of killing from which a preconceived design to take the victim's life could be inferred. The Anderson court added that, in order to uphold a jury's finding of premeditation and deliberation, there typically must be evidence of all three types (planning, motive, and manner) or at least extremely strong evidence of type (1) or evidence of type (2) in conjunction with evidence of either types (1) or (3) (Anderson, supra at 70 Cal.2d 26-27.)

Unfortunately, however, this Court has basically repealed the limitations on the terms "premeditation" and "deliberation" set forth in Anderson by holding that the Anderson analysis is a mere framework to assist the reviewing court in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of circumstances. In fact this Court has gone so far as to hold that Anderson does not

require that the factors of planning activity, motive, and manner of killing be present in any special combination, that they be given a particular weight, or even that they are the exclusive factors which a jury may consider (People v Thomas (1992) 2 Cal.4th 489, 517; People v Perez (1992) 2 Cal.4th 1117, 1125; People v Pride (1992) 3 Cal.4th 195, 247). In People v Perez, supra, this Court all but overruled Anderson and, over the dissents of Justices Mosk and Kennard, affirmed a first degree murder conviction even though there was no evidence of any pre-planning or preexisting motive to kill, and even though the manner of killing suggested an impulsive attack, rather than the careful thought and weighing of considerations for and against the killing, that had traditionally defined a premeditated and deliberate murder (Perez, supra, Mosk J. dissenting at 2 Cal.4th 1130 et seq. and Kennard J. dissenting at 2 Cal.4th 1147). If what the defendant did in the Perez case is a premeditated and deliberate murder, then so is virtually any homicide offense.

The number of murders which can be found to be premeditated and deliberated has also been vastly expanded by the elimination of criminal defendants' ability to negate the requisite specific intent by showing they lack the capacity to form that intent due to mental illness and/or intoxication. (California Penal Code §§25, 28 and 29; People v. Saille (1991) 54 Cal.3d 1103, 1116; People v. Fitzpatrick (1992) 2 Cal.App.4th 1285, 1295.)

Since premeditation can now be "inferred" from virtually anything, and since it cannot be negated even in cases where the

defendant was obviously so "out of it" that he was incapable of forming that intent, virtually every murder can be charged by a prosecutor as, and construed by a jury as, and upheld by the California courts as, a first degree murder.

b. Lying in Wait

It used to be that criminal defendants were found guilty of first degree murder only in cases where there was substantial evidence that they physically concealed themselves for a substantial period of time in order to ambush and kill their hapless victims. Thus the Court of Appeal in Richards v Superior Court (1983) 146 Cal.App.3d 306 correctly stated that:

> "The gist of lying in wait is that the person places himself in a position where he is waiting and watching and concealed from the person killed with the intention of inflicting bodily injury upon such person or of killing such person" [Id at 146 Cal.App.3d 316 quoting People v Thompson (1953) 41 Cal.2d 470, 473].

This Court has now dramatically expanded the definition of "lying in wait" and held that no physical concealment is required. It is sufficient if the victim is taken unaware even though he sees his murderer (People v Morales (1989) 48 Cal.3d 527; see also People v Edwards (1991) 54 Cal.3d 787, 821-824; People v Ceja (1993) 4 Cal.4th 1134.)

Justice Mosk, dissenting in Morales, correctly noted that the majority definition was so broad in scope as to embrace virtually all intentional killings. This is because, almost always, the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim, and almost never

does he happen on his victim and immediately mount his attack with a declaration of what he is about to do (Morales, supra, Mosk J. dissenting at 48 Cal.3d 575.)

c. Murder by Torture

First degree murder by torture has also been defined by this Court, as well as the California Legislature, in such sweeping terms that it can cover virtually any homicide.

This Court has held that torture murder is committed whenever there is any evidence of (1) an act causing death involving a high degree of probability of death and (2) an intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, **or any other sadistic purpose** (People v Wiley (1976) 18 Cal.3d 162, 168; People v Davenport (1985) 41 Cal.3d 247, 268; People v Steqer (1976) 16 Cal.3d 539). The victim may be unconscious and not even aware that he is supposed to be suffering pain (People v Wiley, supra at 18 Cal.3d 173; People v Demond (1976) 59 Cal.App.3d 574, 583; People v Davenport, supra at 41 Cal.3d 268) and the jury may conclude that the defendant intended to inflict pain, despite the lack of any direct evidence of this, based simply on speculation that the victim's wounds "must have" been inflicted in a slow and methodical manner while the victim was still alive (People v Turville (1959) 51 Cal.2d 620, 632; People v Proctor (1992) 4 Cal.4th 449, 531-532; CALJIC (Fifth Edition) No. 8.24.) Furthermore the defendant's "sadistic purpose" in inflicting the victim's wounds can mean almost anything since this Court has

held that that term need not be defined for the jury (People v Raley (1992) 2 Cal.4th 870, 897.) In other words this Court has interpreted torture murder in such an expansive manner that a prosecutor can charge it, and a jury can find it, even though there is no real evidence of "torture" beyond the fact that the victim suffered grievous wounds during the fatal encounter with the defendant. All of the other required "elements" of torture murder can be "inferred" based on this single fact alone in an extremely large percentage of homicide offenses and can therefore be construed as being first degree murder under this theory.

d. Felony Murder

The California Legislature has further obliterated the traditional distinctions between first and second degree murder by providing that even unintentional killings committed in the perpetration of an ever expanding list of underlying felonies may be construed as murder in the first degree. These felonies now include arson, rape, car jacking, robbery, burglary, mayhem, kidnapping, train wrecking, sodomy, lewd and lascivious acts perpetrated upon a child, and rape by a foreign object.

It is extremely common that victims may be unintentionally killed during the perpetration of the above offenses. Among the most common types of murders occurring in California are those arising from attempts to rob drug dealers, home owner-burglar confrontations, and domestic disputes following the entrance of one estranged spouse into the home of the other. In fact, about the only murders which are not committed during the perpetration

of one of the numerous specified felonies are those in which the defendants simply approach the victims on the street with the sole intent to kill them and even these murders are now of the first degree so long as the defendant approaches by car and uses a firearm. The concept of first degree felony murder, as defined and expanded by the Legislature, has now become so broad that those homicides which can be construed as first degree murder are the rule and those which can only be construed as second degree murder are the rare exception.

e. First Degree Murder Criteria Considered Collectively

So far Defendant Booker has considered only each of several theories under which a murder can be made to be of the first degree individually. However this does not tell the whole story. Here the whole is greater than the sum of its parts. The **combined** or **collective** effect of the constant expansion of the categories of first degree murder by both the Legislature and this Court make the statement contained in Penal Code §189 that "all other kinds of murders are of the second degree" a hollow mockery. There are virtually no other homicides left which cannot be construed as first degree murder if both a prosecutor and a jury wish to do so.

Defendant Booker urges this Court to conclude that the first stage of the statutory death determination process fails to perform any "narrowing" function at all and thus fails to provide the jury with any meaningful guided discretion in separating those defendants who are to live and those who are to die as

required by the Eighth Amendment.

2. California's Death Penalty Law Contains So Many Vague and Overbroad "Special Circumstances" That It Fails to Perform the Constitutionally Required "Narrowing" Function Mandated by the Eighth Amendment

The California Legislature and electorate, in resurrecting the death penalty in 1977 and 1978, originally defined 14 "special" circumstances rendering convicted first degree murderers death eligible. The number of "special" circumstances has now increased to 30, embracing every type of murder that is at all likely to occur.

Defendant Booker contends that the effect of this collection of "special" circumstances is the unconstitutional one of rendering every perpetrator of any first degree murder in California eligible for the death penalty. Indeed, it appears that the proponents of Proposition 7, the initiative enacted into law as Penal Code §190.2, had precisely this unconstitutional purpose in drafting and advocating the expansive array of special circumstances. In their "Argument in Favor of Proposition 7" in the 1978 Voter's Pamphlet, the proponents, in support of their contention that the initiative was necessary, describe certain murders that were not covered by the then existing death penalty statute and then state:

> "and, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. **Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would" [1978 Voters Pamphlet, page 34, emphasis added].**

This is a confession by the drafters of California's death

penalty law that they intended to do exactly what the United States Supreme Court in Godfrey v Georgia, supra said was constitutionally forbidden, i.e., make **every** murderer eligible for the death penalty rather than singling out only the worst cases for the extreme penalty.

This conclusion is only corroborated by looking at a few of the 30 individual special circumstances and how broadly they are defined.

a. Heinous, Atrocious, or Cruel Murders

Special Circumstance 14 specified in Penal Code section 190.2 makes eligible for the death penalty perpetrators of murders which were "especially heinous, atrocious, or cruel, manifesting exceptional depravity" and then goes on to define that phrase as meaning "a conscience-less or pitiless crime which is unnecessarily torturous to the victim".

Of course, from the point of view of the victim and his or her family, all murders are "pitiless" and "conscience-less" and inflict unnecessary pain. The jury can thus infer, without any further definition, that virtually any murder fits within this special circumstance and renders the perpetrator thereof eligible to be executed.

A number of United States Supreme Court decisions have explicitly held that similar language in the death penalty statutes of other states is so overly vague and overbroad as to render the statute itself unconstitutional, either on its face, or as applied in a particular case. In Godfrey v Georgia, supra, it was held that the "outrageously or wantonly vile, horrible,

and inhuman" death eligibility factor contained in Georgia's death penalty statute was unconstitutional because there was nothing in these words that imposed any inherent restraint on the arbitrary and capricious infliction of the death penalty. The Supreme Court correctly noted that every murder can be characterized by a jury as "outrageous" or "wanton" or "vile" or "horrible" and that these words therefore give no guidance whatsoever to the jury on how to select who is to live and who is to die.

In Maynard v Cartwright (1988) 486 U.S. 356 the High Court similarly condemned the death eligibility selection factor of "especially heinous, atrocious and cruel" contained in Oklahoma's death penalty statute as hopelessly over broad and vague, failing to offer any guidance to the sentencing trier of fact, and thus leading to arbitrary and capricious infliction of the extreme penalty in violation of the Eighth Amendment.

In Shell v Mississippi (1990) 498 U.S. 1 the Supreme Court condemned the "especially heinous, atrocious and cruel" death penalty selection factor contained in Mississippi's death penalty statute for the exact same reasons it had used to condemn similar selection language in the Georgia and Oklahoma statues.

There is no significant difference between the statutory language condemned in the above discussed cases and the language contained in Special Circumstance 14 as specified in California Penal Code section 190.2. It follows that this special circumstance, just like the special or aggravating circumstances contained in the Georgia,

Oklahoma, Mississippi and Florida death penalty statutes, is unconstitutionally vague and overbroad and unconstitutionally fails to narrow the class of death eligible defendants in homicide cases.

b. Lying in Wait

Special Circumstance 15 makes eligible for the death penalty any first degree murderer who "intentionally killed the victim while lying in wait".

This language closely parallels the "lying in wait" criterion elevating this type of murder to the first degree contained in Penal Code section 189. Defendant Booker has already discussed hereinabove how the term "lying in wait" has been expansively defined by this Court and how that expansive definition makes virtually every murderer a first degree offender. Similarly the use of this same factor as a special circumstance renders virtually every first degree offender eligible for the death penalty.

c. Felony Murder

Special Circumstance 17 renders eligible for the death penalty the perpetrator of any "murder . . . committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(A) Robbery in violation of [Penal Code] §211.

(B) Kidnapping in violation of [Penal Code] §§207 and 209.

(C) Rape in violation of [Penal Code] §261.

(D) Sodomy in violation of [Penal Code] §286.

(E) The performance of a lewd or lascivious act upon

[the] person of a child under the age of 14 in violation of [Penal Code] §288.

(F) Oral copulation in violation of [Penal Code] §288(a).

(G) Burglary in the first or second degree in violation of [Penal Code] §460.

(H) Arson in violation of [Penal Code] §447.

(I) Train wrecking in violation of [Penal Code] §219.

(J) Mayhem in violation of [Penal Code] §203

(K) Rape by instrument in violation of [Penal Code] §289.

(L) Carjacking as defined in [Penal Code] §215.

Once again this language is very similar to the felony murder criterion used to elevate a wide variety of murders to the first degree under Penal Code §189. Defendant Booker has already discussed the reasons why this concept of felony murder is so amorphous and all encompassing as to make the overwhelming majority of murders first degree murders. Similarly, the use of this same felony murder concept as a death eligibility factor makes the overwhelming majority of first degree murderers death eligible and fails to provide the type of guided discretion constitutionally required for the jury to single out the "worst of the worst" for the ultimate penalty.

d. Murder by Torture

Special Circumstance 18 renders death eligible the perpetrators of "murder[s] [that] were intentional and involved the infliction of torture." "Torture" is defined as "the infliction of extreme physical pain no matter how long its

duration".

Once again, this language is very similar to the language defining murder by torture as a type of first degree murder under Penal Code section 189. Defendant Booker has already explained how this language, especially as it has been interpreted by the California appellate courts, can be construed to apply to virtually every murder and thus fails to narrow the class of murderers whose crimes may be elevated to the first degree. Similarly, the use of this language as a death eligibility factor can be construed and interpreted to make virtually every first degree murderer death eligible. This is hardly the type of "narrowing" function that constitutionally valid special circumstances are supposed to perform.

e. The 30 Special Circumstances Considered Collectively

Once again, as in the case of the criteria used to "distinguish" first from second degree murder, merely looking at the hopelessly overbroad and vague special circumstances used to make a defendant death eligible individually does not give a complete picture of just how expansive and meaningless the death eligibility factors used to distinguish those facing execution from those facing life imprisonment really are. In order to understand this one must look at the entire list of 30 "special circumstances" which include, in addition to the four special circumstances discussed hereinabove, murders perpetrated for financial gain, murders perpetrated by any defendant previously convicted of another first or second degree murder, multiple

murders, all murders committed by bombs or explosive devices, all murders committed in evading lawful arrest or attempting to escape from lawful custody, murders committed by mail bombs, all murders of any California peace officer or federal law enforcement officer or fire fighter, murders of witnesses to crimes committed in order to prevent them from testifying or in retaliation for their testimony, murders of current or former California or federal prosecutors and judges or federal, California or local public officials, all murders by poison, and the soliciting, aiding and abetting, or otherwise assisting in the commission of any of the first degree murders defined in any of the foregoing "special circumstances".

The proponents of Proposition 7, with the aid of the Legislature and the appellate courts of this state, have made good on their promise to render every homicide offender eligible for the death penalty. Once all of the special circumstances are added up, there are simply no circumstances left in which a homicide can be perpetrated without making that homicide "special" and the perpetrator thereof death eligible. This, of course, is precisely what the United States Supreme Court has condemned.

Defendant Booker urges this Court to conclude that the second or "death eligibility" stage of California's death determination process fails to meaningfully narrow the class of murderers facing execution and is therefore in violation of the Eighth Amendment.

3. The "Circumstances of the Crime" Aggravating Factor (Factor (a)) Is Hopelessly Vague and Overbroad, Fails To Perform the Constitutionally Required Narrowing Function, and Allows the Jury to Impose Death on Virtually Every Homicide Offender in Violation of the Eighth Amendment and Article I, Section 17

California Penal Code section 190.3 provides that, in determining which perpetrators of first degree murders convicted under special circumstances shall receive the death penalty and which shall be imprisoned for life, the jury may consider 11 factors. The first of these factors, factor (a), is "the circumstances of the crime of which the defendant was convicted in the present proceeding . . .".

In Tuilaepa v California, supra a majority of the United States Supreme Court held that this factor was not unconstitutionally vague or overbroad on its face. This conclusion will not withstand scrutiny and needs to be reconsidered.

In this case, as in every other capital case, the jury was instructed to consider the existence of any special circumstances which they had previously found true and also to consider "the circumstances of the crime of which the defendant was convicted."

But what does "circumstances" mean? **Every** defendant who comes before a penalty phase jury will have the circumstances of the crime and special allegations which brought him there. How, then, do those "circumstances" distinguish those who live from those who die?

Defendant Booker submits that there is in reality no meaningful basis for making such a distinction using this factor

and that the use of this factor leads to arbitrary and capricious infliction of the death penalty within the meaning of Godfrey v Georgia, supra. What it boils down to is that a jury can give one defendant his life and kill another, with the only "distinction" being that both defendants were convicted.

Unlike the other subdivisions of Penal Code section 190.3, there is nothing objective or ascertainable about "the circumstances". Defendant has discovered no case defining that term in any related legal context. The dictionary definition of the term shows just how vague it is:

> "A specific part, phase, or attribute of the surroundings or background of the event, fact, or thing or of the prevailing conditions in which it exists or takes place: a condition, fact or event accompanying, conditioning or determining another: an adjunct or concomitant that is present or likely to be present . . .: a subordinate detail: an adventitious or non-essential fact or detail . . .: a total complex of essential attributes and attendant adjuncts of a fact or action: the sum of essential and environmental characteristics: arrangements, situation, composition or nature of an event or thing -- usually used in singular without the indefinite article and rarely with the definite article . . .: occurrence, eventuality . . ." (Webster's Third International Dictionary, page 450).

It is not surprising, given the vagueness of the term "circumstances" of the crime, that prosecutors have used it in various cases to mean almost anything and to argue for the death penalty based on diametrically opposed "circumstances" in different cases.

Prosecutors have argued, and jurors are free to find, that

"circumstances of the crime" constitute an aggravating factor because the defendant killed the victim for some purported aggravating motive, such as money, or because the defendant killed the victim for no motive at all; because the defendant killed in cold blood, or in hot blood; because the defendant attempted to conceal his crime, or made no attempt to conceal it, because the defendant made the victim endure the terror of or anticipated a violent death, or because the defendant killed without any warning; and because the defendant had a prior relationship with the victim, or because the victim was a complete stranger (see Blackmun J. dissenting in Tuilaepa v California and California Supreme Court cases cited therein in footnotes 2 through 11).

Defendant Booker submits that such a broadly defined factor does not perform the narrowing function required by the United States Supreme Court and the Eighth Amendment to the Federal Constitution and Article I, section 17 of the California Constitution. Although, as a matter of federal constitutional law, this Court is bound by the United States Supreme Court's majority opinion in Tuilaepa, there is nothing to prevent this court from exercising its independent power to construe Article I, section 17 of the California Constitution as prohibiting the use of this unconstitutionally vague factor (Raven v Deukmejian, supra).

4. California's Statutory Death Determination Scheme Considered in Its Entirety

Defendant Booker has already demonstrated how the jury is

not provided guided discretion or a meaningful basis to distinguish those relatively few defendants who deserve the death penalty from the many who do not at each of the three stages of the death determination process. Virtually any homicide offense can be charged as, and found by a jury to be, a first degree murder. Virtually any defendant convicted of first degree murder can be found to have committed that murder under one of the 29 special circumstances now specified in the code. Finally virtually every defendant found to have perpetrated a first degree murder under special circumstances can then be given the death penalty because of the circumstances surrounding his crime. It follows that, since **none** of the three determinations performs the constitutionally required "narrowing" function, the statute as a whole is unconstitutional and in violation of both the Eighth Amendment and Article I, section 17.

5. Professor Shatz' Comprehenive Study Conclusively Establishes That California's Homicide and Death Penalty Laws Fail to Perform the "Narrowing" Function Required Under the Eighth Amendment

Any lingering doubt about whether or not California's statutory scheme narrows the class of death eligible defendants as required by the relevant United States Supreme Court precedents has now been dispelled by the comprehensive study conducted by Professor Steven F. Shatz, published as "The California Death Penalty: Requiem for Furman?", 72 N.Y.U. Law Review 1283 (1997).

Professor Shatz correctly concludes, based upon exhaustive empirical research, that 83% of convicted first degree murderers

are death eligible, that only 11.6% of those statutorily death-eligible are actually sentenced to death, and that the statutory scheme is even more arbitrary than that in existence at the time Furman v. Georgia, supra, was decided, and is therefore in violation of the Eighth Amendment.

The question left open by the opinions in Tuilaepa v. California, supra has now been answered. When all of the parts of California's death penalty determination scheme are considered collectively in light of the empirical evidence, they fail to pass constitutional muster. (See majority opinions of Justice Kennedy, concurring opinion by Justice Stevens and dissenting opinion by Justice Blackman.)

Consequently, the death sentence must be vacated.

D. THE FAILURE TO REQUIRE THE JURY TO FIND PARTICULAR AGGRAVATING FACTORS TRUE, THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, AND THAT DEATH IS THE APPROPRIATE SENTENCE BEYOND A REASONABLE DOUBT, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, THE JURY TRIAL GUARANTEES OF THE SIXTH AMENDMENT, AND THE RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AMENDMENT, IN LIGHT OF THE UNITED STATES SUPREME COURT'S DECISIONS IN APPRENDI AND RING

1. Introduction

Defendant Booker recognizes that this Court has often held that California's death penalty statute does not require that facts or circumstances in aggravation be proved beyond a reasonable doubt. Similarly, this Court has held that there is no requirement for proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones. Finally, this Court has also concluded that the United States Constitution does not require those safeguards (see e.g. People v. Lucero (2000) 23 Cal.4th 692, 741; People v. Samayoa (1997) 15 Cal.4th 795, 862; People v. Ochoa (2001) 26 Cal.4th 398.) These holdings, however need to be reconsidered in light of the United States Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466 and Ring v. Arizona (2002) 536 U.S. 584.

2. Apprendi

In Apprendi, supra, the United States Supreme Court held that a state may not constitutionally impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence are also submitted to the jury and proved beyond a reasonable doubt.

3. Ring

In Ring, supra, the High Court invalidated Arizona's death penalty law because the ultimate penalty could be imposed based upon factors not found true by a jury by a reasonable doubt in violation of Apprendi. While Arizona struggled mightily to avoid this result, the Court suggested that any other result would reduce Apprendi to a "meaningless and formalistic rule of statutory drafting." Moreover, it is apparent from reviewing California's death penalty laws (as interpreted in the relevant CALJIC jury instructions) that, just like the Arizona death penalty laws invalidated in Ring, many of the findings required are **factual** determinations which need to be made in accordance with the Fifth, Sixth, Eighth and Fourteenth Amendments **beyond a reasonable doubt** and **by a unanimous jury**.

Defendant Booker will discuss (a) this Court's holding in Ochoa, (b) the United States Supreme Court's repudiation of Ochoa's rationale in Ring, and (c) why, contrary to the Ochoa, California Penal Code §190.3 which requires **additional factual** findings to be made before the death penalty can be imposed, cannot be reconciled with Ring. The only possible conclusion, based upon this analysis, is that California's death penalty scheme is unconstitutional, and that this Court must so declare.

a. This Court's Holding in People v. Ochoa

In Ochoa, this Court rejected a challenge to CALJIC No. 8.87. Mr. Ochoa asserted that Apprendi required his jury to find beyond a reasonable doubt that the evidence established the

attempted, threatened, or actual use of force or violence in order to find an aggravating factor under Penal Code section 190.3(b). This Court disagreed. Justice Brown's opinion states in pertinent part:

> "In Apprendi, the United States Supreme Court decided which sentencing bases must be determined (1) beyond a reasonable doubt (2) by a jury. Apprendi itself excluded from its scope state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. **The Apprendi court cited as an example the sentencing scheme described in Walton v. Arizona, whose holding compels rejection of defendant's instant claim.** Arizona law provided that convicted first degree murderers were subject to a hearing in which the trial court decided whether to sentence the defendant to death or life imprisonment. **A finding of first degree murder in Arizona was thus the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California;** both events narrowed the possible range of sentences to death or life imprisonment. Walton held there was no constitutional right to a jury determination that death was the appropriate penalty. As the Apprendi court explained, a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. **In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further Apprendi bar to a death sentence . . . As we observed in People v. Anderson, once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death. Therefore, a penalty determination of death does not result in a sentence that exceeds the statutory maximum prescribed for**

> **the offense of first degree murder with a special circumstance.** . . . Accordingly, Apprendi does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (26 Cal.4th at 453-454, emphases added.)

b. The United States Supreme Court's Decision in Ring v. Arizona

This Court explicitly ruled in Ochoa that a finding of first degree murder in Arizona was "the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California." However, in Ring, the High Court invalidated Arizona's death penalty scheme and, in so doing, rejected the very same analysis set forth by Justice Brown in Ochoa.

Initially, the Court described Arizona's statutory frame work. In Arizona, following a jury adjudication of a defendant's guilt of first degree murder, the trial judge, sitting alone, determines whether or not to impose the death penalty. The judge determines the presence or absence of enumerated "aggravating circumstances" and any "mitigating circumstances." The judge may sentence the defendant to death only if there is at least one aggravating circumstance and "there are no mitigating circumstances sufficiently substantial to call for leniency." (122 S.Ct. at 2433-2435.)

The Court recalled that it had discussed Arizona's death penalty scheme in Apprendi, and that Justice O'Conner, in her dissent in that case, had interpreted that scheme as follows:

> "A defendant convicted of first degree murder in Arizona cannot receive a death sentence unless a judge makes a factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." (122 S.Ct. at 2436.)

The Ring Court further explained that after Apprendi was decided, the Arizona Supreme Court had approved Justice O'Conner's formulation, and ruled that Ring's death sentence, "required the judge's factual findings." (Id.) Based solely on the jury's verdict finding Ring guilty of first degree felony murder, the maximum sentence he could have received was life imprisonment, because after that jury finding, **an additional factual finding that at least one aggravating factor existed was still required before Ring could be sentenced to death. (122 S.Ct. at 2427.)**

The Court acknowledged that it had previously upheld Arizona's death penalty scheme in Walton v. Arizona (1990) 497 U.S. 639, on the grounds that the aggravating factors were not "elements of the offense," but rather "sentencing considerations" guiding the choice between life and death. (122 S.Ct. at 2437, citing Walton, 497 U.S. at 648.) However, the Court also pointed out that in his dissent in Walton, Justice Stevens had urged that:

> "[T]he Sixth Amendment requires a jury determination of facts that must be established before the death penalty may be imposed. Aggravators operate as statutory elements of capital murder under Arizona law . . . because in their absence, the death sentence is unavailable."(122 S.Ct. at 2438.)

The Court also discussed its prior holding in Jones v. United States (1999) 526 U.S. 227 as follows:

> "Jones endeavored to distinguish certain capital sentencing decisions, including Walton. Advancing a careful reading of Walton's rationale, the Jones Court said Walton characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and lesser penalty, not as a process of raising the ceiling of the sentencing range available." (122 S.Ct. at 2439."

However, the Court also noted Justice Kennedy's dissent in Jones, which questioned the majority's characterization of Walton. The aggravating factors at issue in Walton, Justice Kennedy suggested, were not merely circumstances for consideration by the trial judge in exercising sentencing discretion within a statutory range of penalties. Rather:

> "Under the relevant Arizona statute Walton could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment." (122 S.Ct. at 2439.)

Justice Kennedy had concluded in Jones that the majority's opinion cast doubt on the continuing validity of Walton, noting that:

> "If it is constitutionally impermissible to allow a judge's finding to increase a maximum punishment for car jacking by ten years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death. In fact, Walton would appear to have been a better

> candidate for the Court's new approach than is the instant case." (122 S.Ct. at 2439.)

The Court then turned to its decision in Apprendi, in which it had stated that Walton was not inconsistent with its conclusions there. According to the Apprendi Court the key distinction that saved Arizona's death penalty scheme was precisely that advanced by the Deputy Attorney General in the instant case: A conviction of first degree murder in Arizona, reasoned the Apprendi court, carried a maximum sentence, so the judge's subsequent findings concerning the presence of aggravators could not expose a defendant to a greater sentence than that statutorily permitted by the jury's guilty verdict as to first degree murder. (122 S.Ct. at 2439-2440.)

However, as the Court noted in Ring, the Apprendi dissenters had called the majority's distinction of Walton "baffling." The Court noted particularly Justice O'Conner's dissent in Apprendi and stated:

> "The Court [in Apprendi] claimed that the jury makes all of the findings necessary to expose the defendant to a death sentence. That, the dissent said, was demonstrably untrue, for **a defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment and not the death penalty.** Walton, the Apprendi dissenters insisted, if properly followed, would have required the Court to uphold Apprendi's sentence. If a state can remove from the jury a factual determination that makes the difference between life and death, as Walton holds that

> it can, it is inconceivable why a state cannot do the same with respect to a factual determination that results in only a ten-year increase in the maximum sentence to which a defendant is exposed." (122 S.Ct. at 2440, emphases added.)

Arizona had argued in Ring, as does Justice Brown in Ochoa, that, once the defendant is convicted of first-degree murder, for which the state's law specifies life imprisonment or death as sentencing options, then a death sentence is necessarily within the range of punishment authorized by the jury's verdict. (122 S.Ct. at 2440.)

However, the Ring Court squarely rejected this argument:

> "This argument overlooks Apprendi's instruction that the relevant inquiry is one not of form, but of effect. **In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment then that authorized by the jury's guilty verdict. The Arizona first degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.** If Arizona prevailed on [this] argument, Apprendi would be reduced to a meaningless and formalistic rule of statutory drafting." (Id., emphases added.)

c. Ring's Application to California's Statutory Scheme

i. Imposition of the Death Penalty After a Penalty Phase Determination Pursuant to Penal Code Section 190.3 That Aggravating Factors Outweigh Mitigating Factors Increases the Maximum Sentence Permissible Under the Jury's Guilt Phase Verdict and Finding of Special Circumstance(s)

California's death penalty scheme violates Ring by requiring factual findings above and beyond those made during the guilt

phase before the death penalty may be imposed. Ring requires that each of those factual determinations must be made unanimously beyond a reasonable doubt by a jury. However California's death penalty law as interpreted by this Court fails to comply with this basic Due Process requirement. Indeed there is no such requirement even where the aggravating factors are purely factual rather than "normative" (e.g. whether or not the defendant used force or violence or threatened to do so or whether he has any prior felony convictions. (Penal Code §§190.3, subdivisions (b) and (c)).) Individual California jurors are free to decide for themselves which aggravating facts to weigh, and what standard of proof they wish to use since, according to this Court:

> "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, that they outweigh mitigating factors, or that death is the appropriate sentence." (People v. Fairbank (1997) 16 Cal.4th 1223, at 1255.)

This Court's decision in Ochoa echoes Fairbank on this point.

However, after Ring, Fairbank and Ochoa are no longer good law. California's death penalty simply does not meet the federal constitutional requirements imposed by the United States Supreme Court.

Of course, as noted above, Justice Brown argues that California's penalty phase findings do not increase the maximum penalty to which a defendant may be sentenced, because once the

guilt phase jury has returned a guilty verdict for first degree murder and found at least one special circumstance, the defendant may be sentenced to death.

However, Ring forecloses that argument. As this Court noted in Ochoa, a finding of first degree murder in Arizona under the statutory scheme invalidated in Ring is the "functional equivalent" of first degree murder with one or more special circumstances in California. (26 Cal.4th at 454.) And Ring holds, the relevant inquiry is one not of form, but of effect. Just as when a defendant is convicted of first degree murder in Arizona, a jury verdict of guilt with a finding of one or more special circumstances in California "authorizes a maximum penalty of death only in a formal sense," because Penal Code section 190, which provides the penalty for first degree murder, specifically cross-references sections 190.1 through 190.5, and goes on to provide that the punishment for first degree murder (whether 25 years to life, life without possibility of parole or death) "shall be determined as in sections 190.1, 190.2, 190.3, 190.4, and 190.5."

Section 190.1 requires the jury to determine the truth of all special circumstances charged as enumerated in section 190.2. Section 190.2 provides that the penalty for first degree murder shall be death or life without possibility of parole **only** if one of the specifically enumerated special circumstances is found to be true under the procedures described in section 190.4.

Section 190.3 requires that if the defendant has been found

guilty of first degree murder, and if one or more special circumstances has been found true, the trier of fact shall determine whether the penalty shall be death or life without possibility of parole, and that in making that determination the trier of fact may impose the death penalty if the aggravating factors outweigh the mitigating factors. Accordingly, the jury in Defendant Booker's penalty phase trial was instructed that, "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 they warrant death instead of life without parole."

California's death penalty scheme is indistinguishable from the Arizona scheme invalidated in Ring on this crucial point. Arizona law provides that "in determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated . . . [under Arizona law] and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency." (Arizona Revised Statutes, section 13-703(E).)

Thus, as this Court acknowledged in Ochoa, California's death penalty scheme is the functional equivalent of Arizona's. This means that, in light of Ring, Justice Brown's argument that the guilty verdict and finding of a special circumstance are all

that are required in order to impose the death penalty, just like Arizona's virtually identical argument in Ring, must be rejected.

ii. California Penal Code Section 190.3 Requires Additional Factual Findings to be Made Before The Death Penalty May be Imposed

Justice Brown argued that "all necessary facts to support imposition of the death penalty have been determined by the jury - beyond a reasonable doubt - during the guilt phase. At the penalty phase, all that is left is a normative, moral evaluation of the offense and the offender based upon the considerations listed in Penal Code section 190.3. This argument might be interpreted as claiming that even if additional findings are required at the penalty phase, these are normative rather than "factual" in nature, and therefore Ring does not require that they be made unanimously by the jury beyond a reasonable doubt.

However, this position is untenable.

The additional findings required to impose the death penalty in California, just like those in Arizona, and whether they are called "factors" or "circumstances" are indeed factual. Therefore, California's death penalty scheme, just like Arizona's is fatally flawed and will not pass constitutional muster.

Arizona law provides:

> "In determining whether to impose a sentence of death or life imprisonment, the **trier of fact** shall take into account the **aggravating and mitigating circumstances** that have been proven. The **trier of fact** shall impose a sentence of death if the **trier of fact** finds one or more of the **aggravating**

> **circumstances** enumerated . . . [herein] and then determines that there are no **mitigating circumstances** sufficiently substantial to call for leniency."

Similarly, California Penal Code section 190.3 mandates that the **trier of fact:**

> "[S]hall impose a sentence of death if the **trier of fact** concludes that the **aggravating circumstances** outweigh the **mitigating circumstances.** If the **trier of fact** determines that the **mitigating circumstances** outweigh the **aggravating circumstances** the **trier of fact** shall impose [life without the possibility of parole]."

The Arizona statute, like Penal Code section 190.3, lists the specific circumstances which can be considered as aggravating or mitigating the offense. Many of these are very similar to special circumstances under California law, e.g. multiple murders (cf. 190.2(3) with Ariz. Rev. Stat. §13-703(F)(8)); previous homicides (cf. 190.2(2) with Ariz. Rev. Stat. §§13-703(F)(1)); peace officer victim (cf. §190.2(7) with Ariz. Rev. Stat. §13-703(F)(10)). Others, however, are equivalent to section 190.3 circumstances (e.g. cf. §190.3(c) (prior felony convictions) with Ariz. Rev. Stat. §13-703(F)(2) (prior conviction of a serious offense); cf. §190.3(a) (circumstances of the crime) with Ariz. rev. Stat. §13-703(F)(6) (offense committed in an especially heinous, cruel or depraved manner), and with Ariz. Rev. Stat. §13-703(F)(3) (in committing the offense the defendant knowingly created a grave risk of death to another persons or persons in addition to the persons murdered) and with Ariz. Rev. Stat. §13-703(F)(9) (victim was under 15 years of age or was 70 years of

age or older); cf. §190.3(i) (age of the defendant at the time of the crime) with Ariz. rev. Stat. §13-703(F(5) (same) and with Arz. Rev. Stat. §13-703(F)(9) (defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under 15 years of age or was 70 years of age or older); cf. §190.3(h) (defendant's capacity to appreciate criminality of his conduct or conform to requirements of law was impaired by mental decease or defect or intoxication) with Arz. Rev. Stat. §13-703(G)(1) (defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired); cf. §190.3(g) (whether defendant acted under extreme duress or substantial domination of another person) with Arz. Rev. Stat. §13-703(G)(2) (defendant under unusual and substantial distress); cf. §190.3(k) (any other circumstance extenuating the gravity of the crime) with Arz. Rev. Stat. §13-703(G) (any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense).

Thus, it is clear that California's death penalty scheme requires additional **factual** findings by the trier of **fact** in both California and Arizona. It simply does not matter whether or not we call these "facts" or "factors" or "circumstances". Just like a rose is a rose is a rose, a fact is a fact is a fact. If Arizona's law is unconstitutional because these factual findings

(or whatever we may chose to call them) do not have to be made beyond a reasonable doubt under state law, then California's law which similarly does not require the trier of fact to find the relevant facts true beyond a reasonable doubt is also necessarily unconstitutional.

It does not matter that the trier of fact in Arizona is a judge, whereas the fact finder in California is a jury. What is important here, under Ring, is the proof beyond a reasonable doubt standard. (See Justice Scalia's concurring opinion in Ring at 122 S.Ct. 2444-2445.) If the trier of fact (whether judge or jury) need not make the requisite factual findings utilizing the constitutionally required standard of proof, then those findings have no constitutional validity, and the law which permits this is also constitutionally invalid.

Since California's death penalty statutory scheme, like Arizona's fails to require this, it is constitutionally invalid.

It cannot be seriously argued that the jury in Defendant Booker's case was merely being asked to make purely normative rather than factual findings.

4. Conclusion

It follows that, under Apprendi and Ring, California's death penalty laws, as applied in Richard Booker's case, are unconstitutional.

The High Court's subsequent decisions in Blakely v. Washington (2004) 542 U.S. 296 and United States v. Booker (2005) 543 U.S. 220 invalidating Washington's sentencing laws and the

mandatory Federal Sentencing Guidelines, as well the granting of certiorari in Cunningham v. California, docket No. 05-6551 despite this Court's decision in People v. Black (2005) 35 Cal.4th 1238 upholding the constitutionality of California's non-capital sentencing laws under Apprendi, based on an analysis very similar to Justice Brown's in Ochoa, emphase the correctness of the above conclusion.

California's death penalty statutory scheme, is unconstitutional, in light of the above discussed United States Supreme Court decisions since the jury is not required to find **unanimously and beyond a reasonable doubt** the existence of aggravating **facts** and/or that these aggravating **facts** outweigh the mitigating **facts**. As Justice Scalia put it in Ring:

> "I believe that the fundamental meaning of the jury - trial guarantee of the Sixth Amendment is that all **facts** essential to 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 found by the jury **beyond a reasonable doubt** . . . Accordingly, whether or not the states have been erroneously coerced into the adoption of 'aggravating factors,' wherever those factors exist they must be subject to the usual requirements of the common law and the requirement enshrined in our Constitution, in criminal cases. They must be found by the jury **beyond a reasonable doubt.**" (122 S.Ct. at 2444-2445.)

Consequently, Mr. Booker's death sentence must be reversed.

E. THE CALIFORNIA CAPITAL PUNISHMENT SCHEME IS UNCONSTITUTIONAL IN ALLOWING INDIVIDUAL DISTRICT ATTORNEYS UNBRIDLED DISCRETION TO DECIDE WHICH SPECIAL CIRCUMSTANCE MURDER CASES WILL BE PROSECUTED AS DEATH PENALTY OFFENSES

Under California law, individual prosecutors have unlimited discretion to decide whether a penalty phase trial will be conducted for purposes of determining if the death penalty will be imposed in any particular case. This Court has previousy held that such deligation of power is constiutional. (People v. Crittenden (1994) 9 Cal.4th 83, 152.)

However, as noted by Justice Broussard in his dissenting opinion in People v. Adcox (1988) 47 Cal.3d 207, granting individual prosecutors such unlimited discretion creates a substantial risk of county-by-county arbitrainess. (Id. at 275-276.) Under this statutory scheme, some offenders will be singled out for the death penalty by one county district attorney while other offenders possessing similar characteristics and committing similar crimes in other counties will escape the ultimate punishment.

The absence of **any** standards to guide prosecutorial discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status. To seek the death penalty on the basis of factors that are constitutionally impermissible necessarily violates the Eighth and Fourteenth Amendments. (Zant v. Stephens (1983) 462 U.S. 862, at 885.)

The arbitrary discretion permitted by the California capital

punishment scheme is contrary to the principled decision-making mandated by the Eighth and Fourteenth Amendments. (Furman v. Georgia, supra, 408 U.S. 238.)

The United States Supreme Court has recognized that when fundamental constitutional rights are at stake uniformity among the counties within a state is essential. (Bush v. Gore (2000) 531 U.S. 98.) When a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (Id., 531 U.S. at 109.) This principle must reasonably apply to the right to life as well as the right to vote.

In California, the 58 counties, through their respective prosecutors' offices, make their own rules, within the broad parameters of Penal Code sections 190.1 and 190.25, regarding who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion. So long as an alleged crime falls within the statutory criteria of Penal Code section 190.2 or 190.25, the prosecutor is free to pick and choose which defendants will face potential death and which will be exposed to only imprisonment. This can hardly be said to constitute the uniform treatment required by the Equal Protection Clause of the Fourteenth Amendment.

The death judgment herein is the end product of the unconstitutional system described above. Therefore, Defendant Booker's death sentence must be reversed.

F. THE CALIFORNIA DEATH PENALTY STATUTE AND DEATH SELECTION PROCESS VIOLATE THE FEDERAL AND STATE CONSTITUTIONS FOR A WIDE VARIETY OF OTHER REASONS

The California death penalty and death selection process also violate the United States and California Constitutions for a variety of reasons **in addition to** those already discussed in subsections A though E of this Argument.

Since these "generic" claims have been repeatedly rejected by this Court, and are being presented here primarily to preserve them for federal habeas corpus review, and since this Court has held that these claims will be deemed to be fairly presented so long as they are stated in a straight forward manner accompanied by a brief argument (i) identifying the claim in context, (ii) noting that this Court has previously rejected the claim, and (iii) asking this Court to reconsider its previous decisions (People v. Schmeck (2005) 37 Cal.4th 240, these claims are set forth below in summary fashion.

The failure to require the trial court to instruct the jury that the absence of a mitigating factor is not itself aggravating, regardless of whether or not the court or counsel for the parties made an improper contrary suggestion, violates the defendant's right to a fair penalty trial and penalty determination, as well as due process, under the Sixth, Eighth, and Fourteenth Amendments.

Similarly, the failure to instruct the jury that a single mitigating factor, standing alone, may be sufficient to outweigh all other aggravating factors violates the defendant's right to a

fair penalty trial, penalty determination, and due process under the Sixth, Eighth, and Fourteenth Amendments.

The failure to require the jury to unanimously agree as to specific aggravating factors, rather than only the appropriate penalty, also violates the above enumerated federal constitutional provisions.

California's death penalty law is also unconstitutional in that it fails to require the jury to be instructed on the burdens and standards of proof concerning aggravating and mitigating evidence.

Moreover, the failure to impose upon the prosecution the burden of persuasion with respect to the imposition of the death penalty violated Defendant Booker's constitutional rights.

California's death penalty law is additionally unconstitutional because it fails to require the jury to make specific findings specifying the particular aggravating and mitigating factors relied upon in reaching a death verdict.

Moreover, the failure of this Court to undertake inter-case proportionality review in death penalty cases denies condemned defendants any meaningful appellate review as to their Eighth Amendment cruel and unusual punishment claims.

Beyond this, the death penalty statutory sentencing factors embodied in Penal Code section 190.3 fail to adequately channel or limit the sentencer's discretion in choosing to impose death over life without the possibility of parole.

The failure of this Court to require comparative review

under the Sixth, Eighth, and Fourteenth Amendments so as to prevent the wanton and capricious imposition of the death penalty renders California's death penalty scheme - as applied - unconstitutional.

These and various other challenges to California's death penalty scheme are discussed in some detail in both the Appellant's Opening Brief and this Court's opinion in People v. Stanley (see and Cf. Stanley AOB, Vol. III, at pages 326 et seq., and People v. Stanley (2006) 39 Cal.4th 913, 962-968 rejecting each of these arguments and citing this Court's previous decisions also rejecting these same or similar claims.)

Defendant Booker hereby incorporates that discussion by reference as though fully set forth herein).[11]

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[11] See footnote 10 ante. Since this Court has so recently considered (or perhaps more accurately declined to reconsider) these arguments in Stanley, supra, and in view of this Court's holding in Schmeck, supra, Defendant Booker sees no need to reiterate these same arguments in full here. However, Defendant Booker, in an abundance of caution, is filing concurrently herewith an appropriate Request for Judicial Notice to ensure that the **federal** courts will deem these claims fully and fairly presented in any future habeas corpus actions. Should this Court be inclined to reconsider any of these claims, Defendant requests that he be permitted to file an appropriate supplemental brief.

G. THE EXTRAORDINARY DELAY BETWEEN SENTENCE AND EXECUTION, THE RESULTING EXTENSIVE SUFFERING OF THE INMATE, INTERNATIONALLY RECOGNIZED AS "THE DEATH ROW PENOMENON," LARGELY THE RESULT OF INADEQUATE RESOURCES PROVIDED BY THE STATE TO REVIEW DEATH VERDICTS AND THE COMPLEXITY OF REVIEW MANDATED BY PAST ABUSES, IS UNCONSTITUTIONAL BECAUSE DEATH THEREAFTER SERVES NO LEGITIMATE PHENOLOGICAL ENDS AND IS A VIOLATION OF THE NORMS OF A CIVILIZED SOCIETY AND THUS OF THE EIGHTH AND FOURTEENTH AMENDMENTS

More than a decade ago in Lackey v. Texas (1995) 514 U.S. 1045, Justices Stevens and Breyer concluded that the argument that execution of a prisoner who had already spent many years on death row would violate the Eighth Amendment's prohibition against cruel and unusual punishment, though novel. . . " was "not without foundation." (Accord Ceja v. Stewart (9th Cir. 1998) 134 F.3d 1368, 1369, Fletcher J. dissenting.)

The "death row phenomenon" is the term used to describe the cumulative circumstances - including the physical conditions, as well as emotional and mental anguish that a death row inmake necessarily faces - over a period of years as part of his daily existence. This aspect of the sentence of death is recognized internationally as the equivalent of torture and inhuman and degrading punishment. (Soering v. United Kingdom (1989) 161 European Court of Human Rights (Series A) at 34.)

In Pratt and Morgan v. Attorney General for Jamaica (Privy Council 1993) 3 S.L.R. 1995, the Privy Council of the British House of Lords, England's highest court, unanimously held that to execute inmates who had been on death row for 14 years and who had been read execution warrants on several occasions would

constitute "torture or . . . inhuman or degrading punishment" in violation of the Jamaican Constitution, a document deeply rooted in the English common law tradition. The Privy Council explained:

> "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanities; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time." (Slip opinion at page 16.)

Although the decision did not involve an interpretation of the Cruel and Unusual Punishment Clause of the English Bill of Rights - the source of the Eighth Amendment to the United States Constitution - the Privy Council did survey English common law and conclude that extended imprisonment on death row and repeated setting of execution dates were not practices condoned historically at common law. This conclusion strongly suggests that the Cruel and Unusual Punishment Clause prohibits the execution of an inmate who has been under a sentence of death for a protracted period of time.

In Soering, supra, the European Court of Human Rights held that Great Britain's extradition of a German national to the State of Virginia, where capital murder charges were pending against him, would violate the European Convention's prohibition against inhuman or degrading treatment or punishment. The Court held that the protracted delays in carrying out death sentences in Virginia, which at that time averaged 6-8 years, constituted

inhuman and degrading punishment in violation of Article 3 of the Human Rights Convention Charter.

In California, the average stay on death row is much longer in light of the length of time it takes obtain counsel on appeal, and then pursue the automatic appeal as well as arguably meritorious habeas corpus claims in both state and federal court. Thus, the "length of stay" considerations in Soering are even greater as applied to the death penalty as currently administered in this state.

Furthermore, the conditions on San Quentin's death row and the anguish and mounting tension of living in the ever present shadow of death have been recognized by the Ninth Circuit Court of Appeals as so cruel and inhuman as to require a special court appointed monitor for over a decade. (Thompson v. Enomoto (9th Cir. 1990) 915 F.2d 1383.)

Defendant-Appellant Booker respectfully submits that no human being, regardless of what crimes he may have committed, should be subjected to this continuing torture, and that this is yet one more reason for declaring California's death penalty law unconstitutional.

CONCLUSION

The judgments must be reversed.

Dated: November 30, 2006

Respectfully submitted,

By _____
JONATHAN P. MILBERG

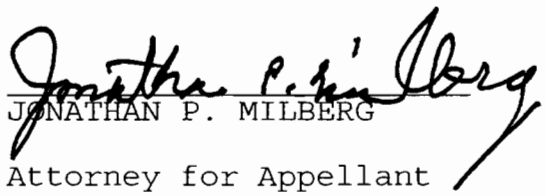
Attorney for Defendant and Appellant RICHARD LONNIE BOOKER

CERTIFICATE REGARDING LENGTH OF APPELLANT'S OPENING BRIEF

I hereby certify, pursuant to Rule 36, subdivision (b), that the text of this Appellant's Opening Brief contains 52364 words, and does not exceed 280 pages.

Dated: Nov. 30, 2006

Respectfully submitted,



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Attorney for Appellant

PROOF OF SERVICE BY MAIL

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of Los Angeles, that I am over the age of 18 years and not a party to the within cause; that my business address is 300 N. Lake Ave., Suite 320, Pasadena, CA 91101.

On December 5, 2006, I served the attached

APPELLANT'S OPENING BRIEF

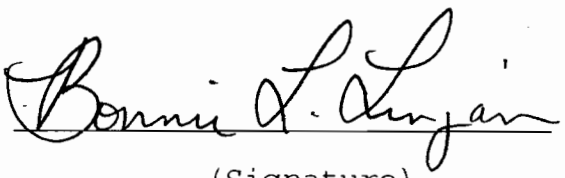
in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

PLEASE SEE ATTACHED MAILING LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at Pasadena, California, on December 5, 2006.

Bonnie L. Lingan

(Typed Name)



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