

No. S171393

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DONTE LAMONT MCDANIEL,

Defendant and Appellant.

Los Angeles Superior Ct.
No. TA074274

APPELLANT'S OPENING BRIEF

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

HONORABLE ROBERT J. PERRY, JUDGE

MICHAEL J. HERSEK
State Public Defender
PETER R. SILTEN
Supervising Deputy State Public Defender
State Bar No. 62784
ELIAS BATCHELDER
Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
silten@ospd.ca.gov

Attorneys for Appellant

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No. S171393

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DONTE LAMONT MCDANIEL,

Defendant and Appellant.

Los Angeles
Superior Ct. No.
TA074274

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)¹ This appeal is taken from a judgment which finally disposes of all of the issues between the parties.

STATEMENT OF THE CASE

On March 26, 2008, an amended information was filed in the Los Angeles County Superior Court charging appellant with Count 1, a violation of former section 12021, subdivision(a)(1), possession of a firearm by a felon; Count 2, a violation of section 187, subdivision (a), (first degree murder of Annette Anderson); Count 3, a violation of section 187,

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

subdivision (a), (first degree murder of George Brooks), Count 4, violation of sections 187, subdivision (a), and 664, (attempted murder of Debra Johnson), and Count 5, a violation of sections 187, subdivision (a), and 664 (attempted murder of Janice Williams). (3 CT 568-579.)²

As to Counts 2 and 3, the information further alleged the special circumstance of multiple murder (§ 190.2, subd. (a)(3)). As to Counts 2 through 5, the information made further allegations of intentional discharge and use of a firearm under sections 12022.53, subdivisions (b) & (c), intentional discharge resulting in great bodily injury and death under section 122022.53, subdivisions (d) & (e)(1), commission of the offense for the benefit of, at the direction of, and in association with a criminal street gang under section 186.22, subdivisions (b)(1), and allegations that the crimes qualified as serious felonies under section 1192.7, subdivision (c). (3 CT 571-574.)

On April 2, 2008, appellant was deemed arraigned by agreement of defense counsel. (3A RT 443.) Without input from appellant or defense counsel, the court entered a plea of not guilty on appellant's behalf. (3A RT 443.)

On April 7, 2008, voir dire commenced. (3 CT 700-701.) Jury selection was completed on April 8, 2008. (2 CT 711-712.) Opening statements began the same day. (3 CT 711-712.)

On April 11, 2008, the People rested and the defense case began. (9 CT 2192-2194.) The defense rested the same day. (8 RT 1811.)

² “CT” refers to the clerk’s transcript on appeal; and “RT” refers to the reporter’s transcript on appeal.

On April 14, 2008, the prosecution and defense closing arguments were held and jury deliberations began. (9 CT 2213-2214.)

On April 16, 2008, the jury returned its verdicts: guilty on the firearm possession count, guilty on two counts of first degree murder, guilty on two counts of attempted murder, and a finding of true on the special circumstance of multiple murder, the criminal street gang enhancement, and all weapons allegations. (9 CT 2238-2242 [verdict forms], 2252-2253 [minute order].)

On April 16, 2008, the first penalty phase trial commenced. (9 CT 2253; 10 RT 2047-2052; 2052-2065.) Following the presentation of evidence by both the prosecution and the defense, the jury commenced deliberations on April 24, 2008. (15 RT 3036.) On April 29, 2008, the jury announced that it was deadlocked and a mistrial was declared. (16 RT 3043-3047; 9 CT 2292.)

The second penalty phase trial commenced on December 4, 2008, with the selection of a new penalty phase jury, which was sworn the next day. (9 CT 2359-2260, 2378-2379.) The prosecution rested its case on December 10, 2008 (9 CT 2386-2387, 2389-92, 2397-2398), and the defense rested on December 16, 2008 (9 CT 2400-2405).

Jury deliberations began on December 17, 2008. (9 CT 2411-2412.) After deliberating over the course of four days, the jury delivered its verdict of death on December 22, 2008. (9 CT 2427-2428, 2434-2436, 2469-2470, 2473.)

On March 20, 2009, the trial court denied a motion for a new trial and the automatic motion to modify the verdict to life without the possibility of parole and issued its sentence. (10 RT 2547–2552 [judgment], 2576-2587 [minute order].) Appellant was sentenced to death

on Counts 2 and 3 (first degree murder of Brooks and Anderson), with consecutive 25 year to life sentences for the firearm enhancements. (10 RT 2585-2586.) Appellant was sentenced to additional life terms with consecutive 25 to life firearm enhancements (but stayed) on counts 4 and 5 (attempted murder of Williams and Johnson), and sentenced to two years on Count 1 (unlawful possession of a firearm). (10 RT 2585-2586.) Pursuant to the gang allegation, section 186.22, appellant was deemed ineligible for parole for a minimum of 15 years on all counts. (10 RT 2585-2586.) The court imposed restitution and fines in the amount of \$200 and \$7,000, respectively. (10 RT 2551.)

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STATEMENT OF FACTS

A. The Guilt Phase

George Brooks (a.k.a. “G-Rail”), Derrick Dillard (a.k.a. “Del-Winkie”) and Prentice Mills (a.k.a. “Little Man”), were members of the Bounty Hunter Bloods (hereinafter “Bounty Hunters”), a large gang which operated predominately in and around Nickerson Gardens, the largest housing project west of the Mississippi. (5 RT 1123, 1134; 8 RT 1744, 1759, 1764, 1769.) The Bounty Hunters had approximately 600 members registered in law enforcement databases in 2004. (8 RT 1743.) Aside from various cliques within the Bounty Hunters gang, it had no organized structure other than the existence of “O.G.” members who had been around longer. (8 RT 1750.) Other members of the Bounty Hunters included appellant, his co-defendant Kai Harris, and William Carey (a.k.a. “Billy Pooh”). (5 RT 1106-1107; 8 RT 1759.)

Brooks was Dillard’s cousin, with whom he had grown up. (5 RT 1125.) According to law enforcement witnesses, Brooks was not a “leader” in the Bounty Hunters (5 RT 1767), but had attained a “mid-level” status (21 RT 4124). According to prosecution gang expert Kenneth Smith, Brooks was feared in the community because he was “known to shoot at people” and to rob people. (5 RT 1767.) Brooks had been in and out of prison all his life. (7 RT 1497.) He had been sentenced to prison for seven years for a robbery and then convicted of manslaughter for killing a fellow prisoner. (7 RT 1497.) In 2002, Brooks was tried for the murder of an individual who had purportedly shot one of Brooks’s brothers. (7 RT 1496.) Brooks was not convicted. (5 RT 1767.)

Dillard told police that he knew Brooks to be a person who was normally armed. (5 RT 1131.) Dillard did not personally see a weapon on

Brooks the day he was murdered, but he explained that Brooks “didn’t keep me in on all his business; if he had weapons or when he had weapons on him or when he didn’t have weapons on him.” (5 RT 1123, 1131.)

Brooks’s sister testified that she was “sure” that Brooks carried guns “at times” but he never told her that he did. (7 RT 1496.)

Kanisha Garner, George Brooks’s sister, testified that a few weeks before Brooks was killed, he told her that Carey “might be looking for him” for some drugs that he [Brooks] “ended up having.” (7 RT 1489.)

According to Garner, Brooks told her that Carey had given him some drugs and he was supposed to pay Carey back. (7 RT 1489-1490.)

During the transaction in which Brooks received close to four ounces of cocaine from Carey, there was a shooting and Brooks left with the drugs. (7 RT 1490-1491.) Garner spoke with Brooks the following morning. (7 RT 1491.) Garner was insistent that Brooks did not tell her he “snatch[ed]” the drugs, but that Carey “gave it to him. He was supposed to reimburse him with the money for the drugs after he sold them.” (7 RT 1493.)

Dillard had been spending a lot of time with Brooks in the days before Brooks was killed, and knew that Brooks had been staying at the apartment of victim Annette Anderson, also known by the nickname “Nobe.” (5 RT 1101-1102, 1127.) On the night Brooks was killed, Dillard snorted cocaine with Brooks and Mills at Anderson’s apartment. (5 RT 1126; 6 RT 1219.) They had been using cocaine periodically throughout the day. (5 RT 1126.) An hour or two before the shootings took place (5 RT 1133), Dillard, Brooks, and Mills left Anderson’s apartment to visit Harris. (5 RT 1110, 1126).

Dillard claimed that he had “no knowledge” of what he was doing at Harris’s apartment, and that he was simply accompanying Brooks. (5 RT

1104.) Dillard, Brooks and Harris were in Harris's living room; Dillard sat on the couch while Brooks and Harris had a five to ten minute "business discussion." (5 RT 1133-1134.) Dillard claimed that he could not hear what Brooks and Harris were discussing. (5 RT 1104.) When Dillard and Brooks left Harris's apartment they saw Angel Hill, Harris's girlfriend, Kathryn "Cat" Washington, and "Dee-Dee," all friends of Brooks. (5 RT 1133, 1135.) Brooks invited Dee-Dee, Hill, and Washington to come over and join the party at Anderson's apartment. (5 RT 1140.)

As Brooks, Dillard and the three women proceeded to Anderson's apartment, they encountered appellant. (5 RT 1106.) Mills was also present. (5 RT 1139.) Appellant asked Brooks "where have you been?," and said that "Billy Pooh [was] looking for him." (5 RT 1107.) Brooks responded that he had "been at home. Let's go down here to Nobe's house." (5 RT 1140.) According to Dillard, appellant sounded like he was "just inquiring" and it was "nothing rough" nor did it seem like appellant was "getting at him [Brooks]"; it was not a hostile or a tense conversation. (5 RT 1139-1140.)

Dillard, Brooks and Mills went to Anderson's apartment. Once there, they went into the bedroom and snorted cocaine. (5 RT 1141.) Anderson, Deborah Johnson, and Janice Williams were present in the apartment, but none were with the three men in the bedroom. (5 RT 1109-1110.)

In the early morning hours of April 6, 2004, Shirley Richardson was in the apartment with Hill, Harris, and a friend of Harris's whom she knew as "R Kelly," whom she identified at trial as appellant. (6 RT 1356-1357.) Richardson, Harris, and Hill were all getting high on PCP, methamphetamine, cocaine, and marijuana. (6 RT 1358.) Appellant

arrived later, wearing a black leather jacket, and was armed with a three-foot-long rifle. (6 RT 1358-1360.) Appellant was urging Harris to leave with him. (6 RT 1359.) Richardson never saw appellant with a handgun, though she may have told the police that she did. (6 RT 1360.) Harris also had a weapon, a Desert Eagle handgun, which she had seen before. (6 RT 1360-1361.) Appellant left, and Harris left about 20 to 25 minutes after appellant had left. (6 RT 1361-1362.) Minutes later she heard gunshots.

Dollie Sims testified she returned from work at around 12:30 a.m. on the night of the shootings and saw Harris (her cousin), Hill, Richardson and Washington. (7 RT 1416, 1419.) They were in a closed bedroom, drinking and doing drugs. (7 RT 1416.) Sims fell asleep approximately 30 minutes later, but was awakened by someone banging on her back door and asking for Harris. (7 RT 1418.) Sims had seen appellant only one time previously, and did not see him clearly, but claimed to recognize him by the size of his nose. (7 RT 1421, 1449.) Sims overheard appellant tell Harris that “we got to go handle this” and “this nigga just, you know, messed me over. And he got me twisted.” (7 RT 1419-1420.) Appellant also stated that someone had been robbing the spots where he “hustled” and he wanted to deal with the situation and wanted Harris to go with him. (7 RT 1420-1421.) Both men left, and Sims then noticed that everyone else had also gone, leaving her alone with Richardson’s baby. (7 RT 1421-1422.) Sims heard gunshots about 15 minutes later. (7 RT 1423.)

Approximately 10 minutes after she heard the gunshots, Richardson, Washington, and Hill returned to Sims’s house. (7 RT 1423.) Harris returned about five minutes after that, and appellant arrived shortly after Harris. (7 RT 1424.) She heard appellant discussing with Harris the possibility of buying tickets to Atlanta. (7 RT 1426.) After appellant

inquired, Harris told appellant that Richardson was “cool” and that everything “be cool.” (7 RT 1429.) Eventually, appellant left Sims’s house. (7 RT 1429.) Harris told Sims and the other people in the house that he dropped his gun in the alley running back to the house, but then picked it up. (7 RT 1429-1430.) Sims ultimately fell asleep and woke up to find Harris still in her house. (7 RT 1431.)

Elois Garner had known Anderson for over 20 years. (5 RT 1154.) She also knew victims Johnson, Williams, and Brooks, and had children with Williams’s brother. (5 RT 1155.) She had seen appellant in the neighborhood in the year preceding the crime and had seen Harris off and on in the area as well. (5 RT 1156-1157.) When first interviewed, Garner did not tell the police anything about appellant or Harris being involved in the shootings. (5 RT 1172.)

On the night of the shootings, Garner was walking in the vicinity of Anderson’s apartment. She was drinking Olde English, which she had been drinking since early in the morning. (5 RT 1154-1155, 1160, 1175.) She was approached by appellant and a person she knew by the name of Taco.³ Appellant put a gun to her head, and ordered her to knock on the back door of Anderson’s apartment. (5 RT 1156-1157, 1159; see also Peo. Exh. 3 [photograph of the back door of Anderson’s apartment].) Both appellant and Taco were wearing black. (5 RT 1163.)

Garner knocked on the door, but did not say anything. (5 RT 1162.) No one opened the door, and she ran away. She did not see or hear anyone inside the apartment. (5 RT 1162. 1178-1179.) About five minutes later,

³ On May 26, 2004, Garner was shown a photographic lineup by the police. She selected from that lineup a photograph of the person she knew as Taco. (5 RT 1169-1170; Peo. Exh. 6.)

Garner, who was speaking with a friend, heard two gunshots, followed by two more. (5 RT 1163, 1183.) Garner was standing outside in a parking lot at the time, near an apartment that was two apartment unit buildings away from Anderson's apartment. (5 RT 1163; see also Def. Exh. E.) She turned and saw two men, both dressed in black, running away from the apartment towards a gym in the complex. (5 RT 1163, 1165.) One of the men had braids with different colored rubber bands in it, similar to those she had seen on Taco. (5 RT 1164.)

According to Dillard, he, Brooks and Mills were sitting in the bedroom of the apartment when Anderson called out that someone was at the door for Brooks. (5 RT 1111.) Dillard heard the back door click and open, followed by screams and gunshots. (5 RT 1111.) He hid in the bedroom for approximately 10 minutes along with Mills. (5 RT 1112.) Dillard and Mills both exited the room, and Dillard called 9-1-1. (5 RT 1113.) Mills exited out the front door of the apartment. (5 RT 1115.) Dillard was outside when the police and paramedics arrived, but did not speak to the police that night. (5 RT 1116.)

Williams testified that she was in Anderson's apartment with Brooks and Anderson, but was unaware that Johnson was present. (6 RT 1199.) She did not talk to Johnson and thought that Johnson was still in jail. (6 RT 1217.) Williams had many drug cases, all of which involved the use of cocaine. (6 RT 1215.) She also had an active warrant. (6 RT 1215.) Williams denied any cocaine use that evening, but testified that she had been drinking. (6 RT 1214-1215.) She did not see Anderson or Brooks doing cocaine or any coke pipes in the apartment. (6 RT 1219-1220.)

Williams initially testified that she was awake immediately preceding the shooting when there was a knock at the door. (6 RT 1201.)

When confronted with her testimony at the preliminary hearing that she had “nodded off” immediately before the shooting, she stated she did not recall this testimony. (6 RT 1227.) She then admitted that “I be in and out . . . I’ve been going in and out.” (6 RT 1228.) She also stated that it “could have been” that she testified that she had not been asleep more than five or ten minutes when someone knocked on the door. (6 RT 1228.) She had her head down on the table at the time. (6 RT 1212.)

Prior to someone knocking on the door, Williams heard a whistle, but no voices. (6 RT 1205.) Then someone knocked at the back door, while Anderson was in the bathroom. (6 RT 1200.) Williams asked who was there. After Garner identified herself, Williams told Anderson to answer the door. Williams said she was not letting Garner in because she had been in the apartment earlier that evening. (6 RT 1200, 1205-1206.) After Anderson opened the front door, appellant entered. (6 RT 1201.) He was armed and shooting. (6 RT 1207.) Williams was immediately shot and fell on the floor and lay there. (6 RT 1202-1203.) The next thing she remembered was an ambulance and firemen. (6 RT 1203.) She had been shot in the mouth and neck, as well as in the arms and legs. (6 RT 1203.)

Johnson initially told the police that she did not see the shooter because she was asleep when she was shot. (8 RT 1669.) Prior to trial, Johnson died of acute cocaine intoxication and an asthma attack. (8 RT 1669.) Her preliminary hearing testimony was admitted at trial and read to the jury. (8 RT 1682-1739.)

During her testimony at the preliminary hearing, Johnson identified appellant as the person who shot her. (8 RT 1688-1689.) She testified that, though she was asleep when the shooting began, she woke up afterwards.

(8 RT 1718.) She further explained that she did not initially identify appellant because she was afraid. (8 RT 1721-1722.)

She knew appellant's name at the time she first identified him to the police. (8 RT 1723.) However, she identified him not with a name but with the description "shorter black boy." (8 RT 1723.) She indicated that the person who shot her was shorter than the other shooter. (8 RT 1725.) However, she also testified that she only saw one person enter the apartment. (8 RT 1726.) Johnson attempted to clarify these seemingly contradictory assertions by explaining that she was told by Janice Williams the same day she went to the hospital that two men were involved. (8 RT 1728.) Allegedly, Williams talked to Johnson about the perpetrators en route to the hospital. (8 RT 1732-1733.) Johnson received \$3,219 in witness protection funds. (8 RT 1669-1670.)

Mysesha Hall, who lived three doors down from Anderson's apartment, was awake at around 3:00 a.m. on the night of the shootings. (6 RT 1335-1336.) She was smoking cigarettes when she heard a couple of single shots, followed by several more. (6 RT 1336-1337.)

When she heard the first shots, she looked out her window towards Anderson's apartment. Shortly thereafter, she saw a short man dressed in white run out of the back door of Anderson's apartment. (6 RT 1337-1338.) She then heard several more shots. (6 RT 1337.) She then saw two tall men wearing dark clothing run out of the back door of Anderson's apartment. (6 RT 1338-1339.)

Angel Hill was Kai Harris's girlfriend at the time of the shootings. (6 RT 1231.) She was affiliated with the Bounty Hunters. (6 RT 1234.) Police first contacted and detained Hill as a suspect in a carjacking, along with co-defendant Kai Harris. (8 RT 1646-1649, 1653.) She was never

prosecuted for this crime. (8 RT 1648.) When she was initially detained, investigating homicide detectives informed her that they could prove she was guilty of murder because she had provided assistance to Harris. (8 RT 1655-1657.) Hill testified to facts inculpatng appellant.

Around the time of the shootings, Hill did “hard-core drugs” and used them “everyday all day,” which made it difficult for her to recall various details. (6 RT 1244.) On the night of the crime in particular, Hill was using crystal meth, PCP, cocaine, marijuana, and liquor of some kind. (6 RT 1270.)

Hill testified that at the time of the shootings, she was one parking lot down from Anderson’s apartment. She was with her friends Washington and Dee-Dee. She heard the shots and ran back to the car with her friends. (6 RT 1235.) She then drove to Anderson’s apartment to pick up her two friends that were supposed to have been at Anderson’s apartment. The two friends were Dillard and someone she could not recall. (6 RT 1236.)

Hill went to the back door of Anderson’s apartment, which was cracked open. (6 RT 1237.) She did not, however, pick up Dillard because no one came to the door. (6 RT 1236-1237.) Hill then returned to Sims’s apartment, where Harris was staying. (6 RT 1237.) Harris and appellant, whom she knew as “R Kelly” were present. (6 RT 1237-1238, 1246.)

According to Hill, a woman in a white car picked up Harris, Hill, and appellant from Sims’s residence and took them to another house. (6 RT 1240.) That woman was appellant’s girlfriend, Tiffany Hawes.⁴

⁴ Hawes testified that she had received a call from appellant and picked up appellant, Hill and Harris and took them to her apartment. (7 RT 1455, 1457, 1460-1461.)

Hill stayed in the bathroom of this house for about two or three hours because she was not feeling well. (6 RT 1241.) It was daylight when she left the bathroom. (6 RT 1242.) However, prior to entering the bathroom, she heard a conversation between Harris and appellant. (6 RT 1248.)

Initially, Hill testified that she did not remember anyone admitting anything about the crime. (6 RT 1242.) However, when confronted with prior statements to the investigating detective, Hill recalled that appellant told Harris that he was disappointed with Harris, and that appellant was bragging about what had happened in Anderson's apartment and making it seem like what he did was a big joke, noting that the gun made Brooks's face explode. (6 RT 1245, 1247-1248.) This conversation occurred when they were watching news coverage of the shooting. (6 RT 1252.) Hawes, who was present, denied that appellant said anything while they watched the news coverage. (7 RT 1461.)

During this conversation, Carey arrived at the house. (6 RT 1254.) Appellant had called Carey and asked him to come over. (6 RT 1255.) Appellant bragged to Carey about the crime while the news coverage was playing. (6 RT 1255-1256.) After Hill left the bathroom, she returned with Harris to Sims's apartment. (6 RT 1256.) Later, after his arrest, Harris wrote to Hill to encourage her to create a false alibi for him, and she wrote back she would do anything for him. (6 RT 1257, 1264-1265.) Hill initially presented this false alibi to police investigating the case. (8 RT 1651.)

Five days after the shootings, Deputy Sheriff Marcus Turner pulled over a blue Toyota with no license plates. (7 RT 1503.) After the car came to a stop, the passenger of the vehicle, appellant, opened the door and began to exit; he was ordered back in before leaving the well of the car. (7 RT

1505, 1511.) Turner began to pull appellant from the vehicle, at which time he saw a bulge in appellant's front pants pocket that resembled a semiautomatic weapon. (7 RT 1506-1507.) Turner retrieved the weapon, a Ruger 9 millimeter, and also found additional ammunition. (7 RT 1507-1508.) The Ruger was later test fired and compared against cartridges recovered from the scene of the instant crime. (7 RT 1560-1563.) A firearms examiner found that 10 of the cartridges recovered from the scene matched the 9 millimeter Ruger. (9 RT 1563.)

Certain bullets recovered from the crime scene by the coroner were excluded as being fired from the Ruger. (7 RT 1565.) And six cartridge cases were matched to another gun, a .357 Magnum Desert Eagle. (7 RT 1565-1568.)

Dr. Jeffrey Gudstadt, the deputy medical examiner who conducted the Anderson autopsy, testified that Anderson suffered three gunshot wounds, a fatal wound to the cheek, a fatal wound to the chest, and a wound to the left forearm. (7 RT 1388-1389, 1397, 1400.) Medium caliber bullets were recovered from the chest wound and the head wound. (7 RT 1393-1394, 1399.) The bullet recovered from Anderson's back did not match the gun found in possession of appellant. (7 RT 1576-1577.) Cocaine and alcohol and corresponding metabolites were found in Anderson's blood. (7 RT 1410-1411.)

Dr. Irwin Golden, the deputy medical examiner who conducted the autopsy of Brooks, identified seven wounds, including several to the face and body. (7 RT 1515 1518-1525.) The toxicology report on Brooks indicated the presence of marijuana, alcohol, cocaine, and associated metabolites. (7 RT 1535-36.)

Coroner investigator Denise Bertone found a wire commonly used for crack pipes near Anderson's hand on the floor and a razor blade on the kitchen counter. (7 RT 1547.) Bertone found a glass vial with a crystalline substance and a plastic bag with a tan, rock-like substance in Brooks's pocket. (7 RT 1547-1548.) A crack pipe was also found on the floor. (7 RT 1604.)

B. The Penalty Phase⁵

1. The Prosecution Case

a. The Shooting of Ronnie Chapman

Jeanette Geter testified that on April 21, 2002, some time between 2:00 and 3:00 p.m., she was inside her "granny's" apartment in the Nickerson Gardens; her cousin, Ronnie Chapman, was in the apartment's backyard. At that time, Geter observed two men approaching Chapman. Geter saw a gun and "was in the window screaming, telling my cousin to run or something because they was coming." (19 RT 3648.) Chapman was shot "on his side." (19 RT 3646.) Geter identified appellant as the person who shot Chapman. (19 RT 3648.)

Manuel Moreno, a police officer for the City of Los Angeles, along with his partner Officer Coughlin, went to the Nickerson Gardens and made contact with Chapman. (20 RT 3803.) Chapman had been shot in the upper

⁵ The jury that heard the penalty phase evidence was not the same jury that sat at the guilt phase, as that jury deadlocked at the first penalty phase trial and a mistrial was declared as to penalty. At the second penalty trial, the prosecution presented evidence concerning the capital charges as circumstances of the offense. (Pen. Code, § 190.3, subd. (a); see 19 RT 3537-21 RT 4110.) Much of that evidence was a repetition of the evidence presented the first time around at the guilt phase in this case. As such, appellant will not repeat that evidence here.

stomach area. (20 RT 3804.) Moreno spoke to Jeanette Geter, who said that she had witnessed the shooting. Geter identified appellant as the shooter. (20 RT 3805.) Moreno testified that about a minute before he had received the radio call about the shooting he had seen appellant running. According to Moreno, appellant “stopped and acknowledged our presence. That’s when I recognized him.” (20 RT 3806.) Appellant was wearing a “real royal blue silk shirt.” (20 RT 3807.)

Approximately three weeks after Chapman was shot, Moreno received a call to go to 1622 East 109th Street to provide backup for a traffic stop. Appellant was being detained at that address by Officers Michael Owens and Scott Burkett for a traffic violation. (20 RT 3813.) According to Owens, appellant stopped at 1622 East 109th Street and walked to the front gate. (*Ibid.*) Moreno conducted a search of the residence at 1622 East 109th Street and found in the back bedroom the shirt appellant was wearing the day Chapman was shot. (20 RT 3807-3808.)

b. The Robbery of Javier Guerrero

Javier Guerrero testified that on April 6, 1995, a little after midnight, his car broke down on the 105 Freeway. He was given a ride to a pay phone at 112th Street and Central Avenue in Los Angeles. (20 RT 3763.) While he was in the process of calling his family, three men approached him; one of the men had a gun and placed it against Guerrero’s forehead. Another man poked Guerrero in the stomach with a hard object; he did not see what it was. (20 RT 3764-3765.) One of the men said, “Give me the money.” (20 RT 3764.) Guerrero said that all three of the men demanded his money. He told them, “I don’t have the money. I don’t have the money.” (20 RT 3765.) The men searched his person and took his watch, which Guerrero valued at \$300. They also took some papers, which they threw to the

ground. The whole incident took between three and five minutes. After the men took his watch, they started to run. The police arrived as Guerrero was picking up his things. (20 RT 3766.) He told them that he had been robbed. (*Ibid.*) Later that same evening, the police took Guerrero to several in-the-field showups to see if he could identify any of the three men who had robbed him.⁶ At either the second or third showup he identified a suspect. (20 RT 3767-3769.) He did not see that person in the courtroom. (20 RT 3770.)

Around midnight on April 6, 1995, Los Angeles County police officer Marlin Hill and his partner, Officer Bojorquez, were on patrol. At that time, Hill observed a Hispanic male kneeling by a pay phone surrounded by three young black men. The three men saw Hill's patrol car and started to run. Hill pursued the men and apprehended one of the three, who he identified as appellant. (20 RT 3776.)

c. Threatening a School Official

On February 29, 1996, Thomas Tolliver was working as a Campus Security Assistant Aide for the Los Angeles Unified School District. He was providing security at Markam Middle School. (20 RT 3784.) At around noon on that day, Tolliver, who was wearing a yellow jacket that identified him as a security officer, and another security officer who was not in uniform, encountered appellant and two other individuals walking through the school campus. Tolliver told appellant that he had no business being on campus and told him to leave. (20 RT 3785-3797.) Appellant asked Tolliver if he was strapped, meaning do you have a gun. Tolliver

⁶ The officer who took Hill to the field identifications believed that Guerrero “was shown three separate individuals on two different occasions.” (20 RT 3781.)

again told appellant to leave. As Tolliver raised his radio up to his face to call school police, appellant moved in closer to him and said “I’m going to come back and shoot your mother fucking ass.” (20 RT 3788.) As Tolliver was talking to the police, the three individuals ran away. (20 RT 3789.) Tolliver never saw appellant on the school campus again. (20 RT 3791.)

d. Possession of an Assault Weapon

On January 18, 2002, at approximately 5:30 p.m., Officer Manuel Moren was on patrol in a marked police vehicle with his partner Officer Coughlin. (20 RT 3797.) At that time, he observed appellant walking between two buildings inside Nickerson Gardens. He stopped his patrol car and Coughlin got out. According to Moreno, appellant looked in their direction and started running. (20 RT 3798.) Moreno and Coughlin gave chase; Coughlin ordered appellant to stop. (20 RT 3799.) Moreno noticed that appellant had a “pretty good sized handgun in his left hand.” (*Ibid.*) They lost sight of appellant and heard a door slam. They tried to figure out where he went and narrowed it down to two units. (20 RT 3799-3800.) Inside one of the two units they found appellant, and near appellant inside a stove top the gun they had previously seen in his possession. The gun was an unloaded Tec 9 handgun. (20 RT 3800.)

On January 18, 2002, Los Angeles Police Officer Erik Shear saw appellant running between some buildings around 112th and Parmelee. It appeared that he had a limp. “It appeared that his leg was straight and he wasn’t bending his knee much when he was running, like he normally would.” (20 RT 3821.) Appellant was wearing long, baggy black shorts and a white t-shirt. (20 RT 3814-3816.) Shear lost sight of appellant but received a call from another police unit that he had run into one of the apartment units. Shear went to that unit, took appellant into custody and

searched the unit. (20 RT 3817.) In an upstairs bedroom under the bed Shear found an Uzi assault rifle. (20 RT 3817-3818.) Shear noticed a black thread stuck in a rotating hinge on the rifle. (20 RT 3818-3819.) Hidden in the stove was a Tec 9 assault gun. (20 RT 3822.) Shear also found two types of ammunition, 7.62 x 39 ammunition and .223 caliber ammunition. (20 RT 3823.) The 7.62 x 39 ammunition was in two rifle magazines that had been taped together, back to back. (*Ibid.*)

Documentary evidence was presented that on June 27, 2002, appellant was convicted of possession of an assault weapon, a violation of Penal Code section 12280, subdivision (b). (20 RT 3828-3829.)

e. Firearm Possession

On December 8, 2001, Officer Shear had another encounter with appellant. On that date, Shear and his partner, Officer Bodell, saw appellant and tried to detain him. Appellant attempted to flee and Shear gave chase. Shear caught him by his jacket but the jacket came off and appellant got away. At that time, Shear noticed a large stainless steel handgun in appellant's waistband. Appellant fled inside an apartment. Shear saw appellant looking out of the apartment's second story window. When appellant saw Shear he slammed the window shut. Shear and another police officer secured the apartment, obtained consent to search the apartment from one of the tenants, and asked everyone inside the apartment to come outside. Appellant came out of the apartment wearing a different sweatshirt. (20 RT 3831.) Shear detained and handcuffed appellant. Once everyone was out of the apartment, a search was conducted. Inside the upstairs bedroom where appellant had been seen earlier a .357 caliber handgun containing five hollow point bullets was found in a laundry basket under some clothes. (20 RT 3832.)

f. Killing of Akkeli Holley

On July 4, 2003, Akkeli Holley, a reputed high-ranking gang leader, was murdered. The prosecution called Kathryn Washington as its only alleged eyewitness to the crime. After she testified that she did not witness the shooting of Akkeli Holley (19 RT 3726), the prosecution played portions of a taped interview she had with Los Angeles Police Detective Mark Hahn to see whether they would refresh her recollection (see 20 RT 3854, 3856). The interview was taped some time after the April 6, 2004, shootings in the instant case. (See CT Supplemental III, at pp. 188-204 [transcripts of taped interview].)

In her taped interview, Washington said that on July 4 she saw “two boys,” one of whom she knew as R-Kelly, involved in a shoot-out with Holley. She was at her friend Kawana’s house when she heard shooting. (CT Supplemental III, at pp. 190-191.) She saw a person by the name of Roebell running and shooting at the two boys; they were shooting back. Roebell ran to his friend Rene’s house. (*Id.* at pp. 199-200.) At that time, Holley drove into a nearby parking lot. R-Kelly and the other guy approached the driver’s side of Holley’s car. Holley “jumped” to the passenger seat. Washington said that shots were fired into Holley’s car. (*Id.* at pp. 193, 200.) Though both R-Kelly and the other man were armed, she could not say who did the shooting. (*Id.* at pp. 201, 203.)

On cross-examination, Washington denied telling Detective Hahn that before Holley was murdered she was at the beach with a number of other guys and girls from Nickerson Gardens, and witnessed Holley and Billy Pooh (a.k.a. William Carey) arguing over money. (20 RT 3862-3863.) She said that around the time Holley was shot and on the day he was shot she was using a number of drugs on a daily basis, including PCP, cocaine,

marijuana, alcohol, and methamphetamine. (20 RT 3865.) She said that these drugs would cause her to hallucinate and make her see things that were not there. “I was on drugs. Anybody that’s on drugs ain’t in their right state of mind.” (20 RT 3864-3865.)

Detective Hahn testified that when he interviewed Washington about the Holley shooting, she appeared to be sober and not under the influence of any drugs. (21 RT 3983.) During that interview, Washington told him that prior to Holley’s murder, she went to a party at the beach and witnessed Holley and Billy Pooh arguing over money. (21 RT 4019, 4021-4022.) Washington described Holley and Pooh as “gang-bangers, they hustlers.” (21 RT 4022.)

Deputy Medical Examiner Solomon Riley performed the autopsy on the body of Akkeli Holley on July 11, 2003. (20 RT 3870.) He testified that Holley died as a result of having sustained three gunshot wounds. (20 RT 3871.) One wound was very close to the top of the head and exited on the forehead on the left side of the head. (20RT 3873.) Another entry wound was just above the left nipple. There was no exit wound associated with this entry wound; the bullet lodged on the left side of the back beneath the shoulder blade. (20 RT 3875-3876.) Riley recovered the bullet and placed it into evidence at the forensic center. (20 RT 3877.) The third entry wound was to the left side of the chest region. It went through both lungs and the aorta. (20 RT 3878-3879.)

Focusing in on the unreliability of Washington’s account of the Holley shooting because of her admitted daily use of PCP, cocaine, marijuana, alcohol, and methamphetamine, the defense called Dr. Ronald Markman, a psychiatrist and an expert on the effects of drugs. (22 RT 4175.) Dr. Markman testified that he has seen many hundreds of people

who were under the influence of drugs. He has testified as an expert on behalf of the prosecution, the defense and as an independent expert for the court. (22 RT 4176.)

He described the drug PCP as follows:

It basically was initially tested years ago as an anaesthetic, but it ultimately was found to have significant side effects, one of them making people crazy, hallucinogenic, hearing, seeing things that weren't there, misinterpreting events in the immediate environment, for that matter.

(22 RT 4177.)

He testified that cocaine is a stimulant. “[I]t produces side effects of paranoid thinking . . . [and] can produce visual hallucinations, meaning seeing things that aren't there.” (22 RT 4177-4178.)

Dr. Markman testified that alcohol is an intoxicant that can influence perception. Dr. Markman said that it can produce “what's called alcoholic hallucinosis where you again see or hear things that aren't there.” (22 RT 4179.)

He said that marijuana is another intoxicant that can produce some of the same signs and symptoms that alcohol does. (22 RT 4179.) Marijuana can affect the perceptions persons have of the things around them. (22 RT 4180.)

Regarding methamphetamine, Dr. Markman testified that methamphetamine is also a stimulant. It “does most of the things that cocaine does, produces excessive or increased heart rate, increased blood pressure, dilated pupils.” (22 RT 4181.)

Dr. Markman said that intoxicating drugs are additive to each other. “They enhance each other's effects.” (22 RT 4180.)

Dr. Markman was asked “assuming somebody was using a combination of PCP, alcohol, marijuana, cocaine and meth, could a combination of these drugs affect their perceptions of what was going on around them?” (22 RT 4182.) He answered: “One of those drugs could. A combination could . . . create nervous system chaos, basically.” He was asked whether someone who had taken a combination of these drugs “would misperceive what’s happening in their environment under the influence of those drugs?” Dr. Markman answered, “Absolutely.” (22 RT 4182.)

Dr. Markman said that people under the influence of PCP, cocaine, methamphetamine and alcohol can hear or see things that are not there. (22 RT 4182-4183.) The use of these drugs can produce false memories. “If you misinterpret what you are seeing, saying you misidentify someone, you lay down that memory, then you are going to come back with that information later on.” (22 RT 4183.)

g. January 24, 2003, Battery on a Peace Officer

On January 24, 2003, around midnight, Los Angeles Police Officer Gerardo Davilla responded to a call of shots being fired on other officers at 1443 East 111th Place, an apartment in a four unit building. (20 RT 3902-3903.) Davilla and other officers secured the area, setting up a perimeter. At that time, appellant walked up and sat on the hood of a nearby vehicle. (20 RT 3904-3905.) Davilla motioned for appellant to leave. Appellant said something that Davilla was unable to hear. Davilla raised his voice and again ordered appellant to leave. Appellant looked in Davilla’s direction and said, ““Fuck that shit.”” (20 RT 3905.) Davilla and two other officers walked towards appellant. Appellant again ignored Davilla’s orders that he leave the area. Davilla then approached appellant and, using a firm grip,

grabbed him and escorted him away from the secured area. Davilla released appellant and told him to leave the area or he would be arrested. (20 RT 3906-3907.) At that point, appellant said, ““Fuck you, bitch. You ain’t shit without the badge and the gun.”” (20 RT 3907.) Appellant then assumed a combative position, raised his fists and walked towards Davilla. Davilla pushed appellant backwards. Appellant threw a glancing blow to the top of Davilla’s head. Davilla hit appellant in the face, and the two fell to the ground. (*Ibid.*) The other two officers came to Davilla’s assistance; one hit appellant with a baton twice on his legs. They eventually turned appellant over and handcuffed him. (20 RT 3908.) Once at the jail dispensary, appellant was treated for an injury to his left eye and one of his shins. (20 RT 3911.)

Joshua Smith was talking to appellant when they were approached by several police officers who told them to leave the area. The police were there because a crime had occurred nearby. The police had taped off the area where the crime had occurred, but, according to Smith, he and appellant “was nowhere near that area. Nowhere.” (22 RT 4152.) A large Hispanic police officer approached appellant, who was sitting on the hood of a car. The officer said something to appellant and then “swung at him.” (22 RT 4144-4146.) Another officer joined the first officer and the two tried to restrain appellant. A third officer grabbed Smith by his wave cap and pulled it down over his face, telling him “Don’t look over there. Get out of here. Don’t look over there.” (22 RT 4146.) Smith could not really see what was happening because “the cop that was right there was blocking – trying to block my view.” (*Ibid.*) Smith complained to that officer that what they were doing to appellant “was police brutality.” Smith did not hear appellant yell or say anything to the officer who hit him. Nor did he

see appellant challenge this officer to a fight. (22 RT 4148.) Smith said that there were some Hispanics in the same general vicinity who were not asked to leave the area. (22 RT 4147.)

h. June 21, 2006, Battery on Peace Officer

On June 21, 2006, Sheriff's Deputy David Jimenez was working in the Compton Courthouse lockup. On that date, appellant was being housed in a cell in the D lockup area. (20 RT 3919.) Appellant was using one of the phones in the cell, and Jimenez asked him to get off of the phone. Appellant looked at Jimenez, rolled his eyes, and kept talking on the phone. Jimenez went to move some other inmates. When he returned, he again asked appellant to get off of the phone. Appellant complied. Jimenez had appellant step out of the cell. Appellant was upset and wanted to know why he was being moved. Jimenez told him that he need to put other inmates in the cell. Jimenez told him that he was being moved to an adjoining cell. Appellant backed up and assumed a fighting stance. As Jimenez reached up to his microphone to request backup from other deputies, appellant attempted to hit him with his right hand; appellant's left hand was handcuffed to a waist chain. (20 RT 3922-3923.) Jimenez hit appellant twice in the face, causing appellant to back up. As appellant came at him for a second time, Jimenez sprayed appellant twice in the face with OC spray. (20 RT 3920-3921.) Appellant retreated back into the cell and crouched down. He was then handcuffed. Appellant suffered bruising and swelling to his face; Jimenez fractured his hand. (20 RT 3923.)

i. Possession of a Weapon in the County Jail

On June 7, 2004, Deputy Sheriff Herson Albizures was working at the Men's Central Jail. On that date, around 1:00 in the morning, Albizures, along with two other deputies and a supervising sergeant,

conducted a search of appellant's jail cell. At that time, appellant was sharing the cell with two other inmates, inmate Pitman and inmate Childs. (21 RT 3943-3945, 3958.) Appellant and his two cellmates were removed from their cell and placed inside another cell while their cell was being searched. (21 RT 3947.) The search of appellant's cell revealed several jail-made weapons or shanks that were concealed from plain view. (21 RT 3948.) Two shanks were found under inmate Pitman's mattress. (21 RT 3949.) And a single shank made from a broken broom handle that was approximately 11 inches long and had a sharpened point at one end and a cloth handle at the other was found embedded in a mattress that had appellant's property on top of it. (21 RT 3949-3951, 3964-3965.) However, just prior to the search of appellant's cell, Albizures observed inmate Pittman lying on top of appellant's bunk. (21 RT 3965-3966.) Albizures did not know how long appellant had been assigned to that particular cell. And he acknowledged that appellant's cell was a transition cell, meaning that inmates were being shuttled in and out of that cell all of the time. (21 RT 3968.)

j. Throwing Feces at Another Inmate

On November 21, 2006, around 8:35 p.m., Deputy Sheriff Gregory Boling was working in the Men's Central Jail. At that time, he was escorting an inmate by the name of Michael Black from the law library back to Black's cell. (21 RT 3970-3971.) As they passed a cell occupied by appellant and another inmate (inmate Garcia), appellant and Garcia threw several small cartons filled with excrement at Black, hitting Black in the chest and face. (21 RT 3972-3973.) Boling saw appellant throw two or three cartons before Boling sprayed appellant and Garcia with OC spray. (21 RT 3972.)

k. Victim Impact

Curtis Wilson, Sr., is the brother of victim Annette (Nobe) Anderson. (21 RT 4065.) Wilson has four brothers, Anderson was his only sister. (21 RT 4066.) He described her as the “backbone of the family”; she kept the family together. She lived in Nickerson Gardens pretty much her whole life. She was a role model for other members of the family. She was always smiling and had a lot of friends. She was an excellent student and real smart. (21 RT 4068-4070.) Wilson said that even though he grew up without a father in the home, he did not get involved in crime or gangs. He moved out of the neighborhood, went to school and got a job. (21 RT 4069.) Though he no longer lived in Nickerson Gardens, Wilson would take his kids to see his sister at least two or three times each week. The last time he saw his sister was the day before she was killed. He received a phone call from her daughter, Neisha Sanford, that she had been shot. Sanford was upset and crying. Learning of his sister’s death made Wilson feel angry and full of revenge. (21 RT 4071-4072.) He got into his car and raced to his sister’s apartment. When he got there, the police would not let him into her apartment. He wanted to know if she was still alive. (21 RT 4072-4073.) About an hour or two after he got there, he was told that his sister was dead. (21 RT 4073.) The next time he saw his sister’s face was when she was laying in her casket. Wilson said that seeing her “Just tore me up.” (21 RT 4074.) About a month after she had been killed, Wilson and his brothers went to his sister’s apartment to remove her belongings. There “was a lot of blood all over the floor and stuff.” (21 RT 4075.) Wilson said that their mother took her daughter’s death “real hard.” She could not believe that she was dead. She said that she was getting phone calls from her. Wilson said that his mother was “hallucinating and stuff.”

(21 RT 4076.) Wilson also had a difficult time accepting his sister's death; the pain is still there. (21 RT 4076-4077.) His daughter, who was 10 at the time, also took her aunt's death real hard. (21 RT 4077.)

Delance Evans, Anderson's grandson, testified about the close relationship he had with his grandmother, Annette Anderson. He would see her everyday after school, and would stay at her house until his mother got off from work. He was 12 or 13 when she was killed. Her death has left him feeling "sad all the time." (21 RT 4084-4087.)

Neisha Sanford, Annette Anderson's daughter, testified about her relationship and that of her children with her mother. (21 RT 4091-4092.) She described how she first learned about her mother's death, and her visit to the crime scene. (21 RT 4102-4104.) Sanford said that her mother was the core of the family; she was a generous person and had a kind heart. (21 RT 4096.) Sanford testified about her mother's long battle with cancer and how it gave rise to her problem with illicit drugs and alcohol. (21 RT 4094-4095.) Sanford identified a number of photographs of her mother with family members and friends. (21 RT 4092-4093, 4096-4102.) When asked how her mother's death has affected her, Sanford said, "I don't have a life anymore. My life ended four years ago. Him taking my mother's life, that was the last of my life." (21 RT 4108-4109.)

2. Defense Case

Larry McDaniel is appellant's father. Larry was living with another woman when he got involved with appellant's mother and had two children: appellant and his brother, Tyron. Larry never lived with appellant's mother and was not present when appellant was born. (22 RT 4265-4267, 4270.) Both Larry and appellant's mother were drinking alcohol when she was pregnant with appellant; appellant's mother drank E & J Brandy. (22 RT

4268, 4273.) Larry started using cocaine shortly after appellant was born. (22 RT 4268.) He suffers from chronic pancreatitis as a result of his drinking and drug use. (22 RT 4277.)

Larry said that he was not around much when appellant and Tyron were young. Larry joined a motorcycle club and did a lot of traveling. Larry moved to Sacramento when appellant was about two or three and did not return to Los Angeles until appellant was approximately 11 or 12 years old. Larry said that he regretted that he was not there for appellant. When he returned appellant had “matured,” meaning that he had already joined a gang. Larry said that if you did not join a gang, you had problems. He described Nickerson Gardens a a place that people go to die. (22 RT 4271, 4273.)

Larry said that he had a twin brother who was one of the original Bounty Hunters. He was killed in a gang related incident. Larry never joined the Bounty Hunters. He became a biker instead. (22 RT 4272.)

Larry said that appellant’s mother was working nights for the post office. (22 RT 4274.)

Larry knew both Timothy and Donald Batiste, appellant’s uncles. Both were Bounty Hunters. Larry said that he knew that they were the ones looking after appellant. Appellant loved Timothy. Larry saw appellant after Timothy had been killed. Appellant had changed. He was angry about it. (22 RT 4276.)

Larry said that he loves appellant and asked the jury to spare his life. (22 RT 4278.)

Geraldine Batiste is appellant’s mother. Appellant’s father, Larry McDaniel, lived across the street with another woman. (22 RT 4280-4281.)

Geraldine was drinking when she was pregnant with appellant. She did not know that drinking while being pregnant could be harmful to her child. (22 RT 4282.) Geraldine testified that Larry hit her once causing a “big hole” in her jaw. She did not call the police. (22 RT 4284.) She had previously testified that both appellant and Tyron were present when this happened. (22 RT 4284, 4285, 4286-4287.)

Geraldine worked pretty much every day from about 3:15 p.m. to sometimes 4:00 a.m. Before he was murdered, Geraldine’s brother, Timothy, was there to help take care of appellant and the family. (22 RT 4288-4289.) He sold “drugs and stuff to get money” for food, “and to buy the kids clothes and stuff.” (22 RT 4290.) Timothy was a father figure for appellant and appellant looked up to him. Timothy was killed when appellant was about 12. (22 RT 4291.) Timothy’s death affected appellant. “He started being angry and hostile, he really got involved with the gangs and stuff.” (22 RT 4306.) Also, after Timothy was killed, appellant helped provide money for the family. Geraldine did not know where the money came from. (22 RT 4281.)

Living in Nickerson Gardens was hard. It was a bad environment; no place to raise children. There were many shootings and much drug dealing. Kids were forced to join gangs when they were eight or nine years old. “Most of the kids in their area were in the gang. And the ones that wasn’t in there, they would beat them up and make them join the gangs.” (22 RT 4301.) Appellant was probably involved in a gang when he was nine. (22 RT 4302.) When appellant was about 15, he got shot in the leg and now walks with a limp. (22 RT 4298-4299.)

Geraldine said that you had to be strong to survive, and that she taught appellant to be strong. (22 RT 4289, 4300-4301.) She would

discipline him “with the belt” from time to time. She did this to make him strong so that he could protect and defend himself. (22 RT 4300.)

When appellant was very young, the family moved around a lot and they lived with relatives to survive. (22 RT 4296-4297.) At one point, when appellant was about seven or eight, they moved to “skid row.” (22 RT 4292-4293.) Geraldine started using cocaine around that time. Appellant did not like living on skid row “because they didn’t want to be around the drugs and the killings and they kept seeing the older people that was staying there, they was passing away. So they would see dead bodies being moved out.” (22 RT 4295.)

Geraldine said that appellant’s early life was unstable because the family moved to so many places. He had learning problems in school. He was diagnosed as being “learning disabled.” He was placed in “resource classes.” (22 RT 4297.)

Geraldine testified that appellant has three children. He has a son named Donte, Jr., and two daughters named Kanaya and Tamaya. (22 RT 302.) Before appellant was incarcerated, he helped care for his daughters; his son was born around the time of his arrest. (22 RT 4303.)

Geraldine made the following plea to the jury to spare appellant’s life:

I don’t know if my son did what he’s charged with. If he did, it is wrong. He should be punished. But it’s not right to take anyone’s life. But I just want him to be able to see his kids and I want them to be able to see their dad.

(22 RT 4308.)

Tameka Simmons is the mother of two of appellant’s children, Tamaya and Donte McDaniel, Jr. (23 RT 4340.) She said that appellant maintains a close relationship with Tamaya and Donte. He writes to them,

sending them holiday and “I love you” cards, and talks to them on the phone. (23 RT 4340-4341.)

He was with Tameka in the hospital when she gave birth to Tamaya. He provided for Tameka’s needs. He was also present when Donte was born. (23 RT 4347.) He never mistreated Tameka or his children. (23 RT 4341.)

Tameka now lives in Mississippi and is married. She moved away from Los Angeles to escape the violence and to provide a better environment for herself and her children. (23 RT 4339, 4343.)

Tameka asked the jury to spare appellant’s life. (23 RT 4343-4346.)

Kamika Benjamin is appellant’s cousin. She is six years older than appellant. Appellant’s mother is Kamika’s mother’s older sister. (22 RT 4207.) Kamika lived in the Nickerson Gardens Housing project until she was about 16. She played with appellant when he was a young child. He was a fun child. She knows appellant’s three children, Kanaya, Donte and Tamaya. She described appellant’s relationship with his children, saying that he is a good dad who loves his kids. Appellant tries to stay in contact with his children. He calls them and sends them cards. (22 RT 4208-4210, 4211.)

Kamika said that moving out of the Nickerson Gardens when she was 16 was “the best thing that could have happened to me and my brothers and sisters.” (22 RT 4211.) She described what it was like to live in the Nickerson Gardens:

Very tough. Hard environment to live in. You have to basically protect yourself, defend yourself. Always getting down. Gunshots, worrying about bullets coming in. Worrying about people harming you for just being with the wrong crowd, trying to fit in with the crowd wondering when

people are going to try to appreciate why you do things that you didn't want to do. ¶ Getting in a situation where you have to worry about if you were going to be caught up with older guys, gangsters. Like they call them O.G., where they are pressuring you to interact with them sexually. It was a lot of different things that went on in that environment that made me very, very scared and worried.

(22 RT 4212.)

Kamika said that there was pressure on the boys to “get in with a group of individuals that had power.” (22 RT 4213.) She explained what she meant by that as follows:

What I mean by power is where other people feared them. Or you want to get together with someone who you feel could protect you outside – I call it the street gang, you know. ¶ Otherwise you were going up against people jumping you, assaulting you, trapping you, setting you up, calling you a snitch, or just a lot of different things could happen if you didn't get into that type of environment. ¶ And you have to understand that the projects is nothing but negativity. If you stay in it, mentally, you get immuned [*sic*] to it. You have to get out. If you don't get out, you are bound to be either killed or locked away for a very long time.

(22 RT 4213.)

Kamika said that appellant had an uncle named Timothy. Timothy was an important person in appellant's life. He was like a father to him, a big brother. (22 RT 4214-4215.) He was appellant's most important role model. He was a member of the Bounty Hunters. (22 RT 4216.) Timothy was set up and killed by members of the Hacienda Blood gang. After Timothy was murdered, she saw a change in appellant. “The pain. The hurt. The support. The male figure in his life. The person he can talk to when he couldn't talk to anyone else.” (22 RT 4215-4216.) Timothy made his living “hustling in the streets.” (22 RT 4216.)

One of appellant's other role models was Timothy's brother, Ronald. Ronald has been locked away for most of his life. Timothy had another brother, Donald. Donald was a crack addict. (22 RT 4217.)

Kamika expressed her love for appellant and said that she does not want him to be put to death. She told appellant's jury that:

[G]rowing up in the projects as a young adult, especially a male, is a hard task. When you stay in it, you are bound to get caught up. ¶ And when I say caught up, that means either you are gonna die or you're going to go to jail for a very long time. ¶ And because he couldn't get out of the projects, he's caught in a situation that has now put him here. But his life is something that I can't deal with being taken away. And his nephews, his cousins, his kids, my grandmother, my auntie, my uncle, oh, just so many people, it hurts. ¶ Just please don't take his life away.

(22 RT 4219.)

Jason Benjamin is one of appellant's cousins. He and appellant are close in age. Growing up, they would spend time together. He and his family left Nickerson Gardens when he was 11 or 12 years old. (22 RT 4226-4227.) He said that getting away from the Nickerson Gardens "was a very good thing." (22 RT 4228.) He explained that if he had not left, "I might have got killed or might have ended up . . . in jail or who knows. I probably wouldn't have turned out so good." (*Ibid.*)

He described what it was like growing up in Nickerson Gardens with all of the daily violence. He described an incident when he was three or four where a boy younger than himself was shot in the head by the boy's mother's boyfriend. Appellant and appellant's brother Tyron also witnessed the shooting. (22 RT 4229.) Jason said that one of his sister's boyfriends was also murdered. (22 RT 4230.) The building appellant lived in was

infested with drug dealers, with many crack addicts going in and out of the building. The police would often raid the building. (22 RT 4231.)

Jason described appellant's relationship with Timothy as being close and how his death affected appellant. "It hurt him bad because, you know – not just when he lost him, but when we lost him, too, you know, he took it the hardest out of the little kids, you know, because out of us three, because he was the oldest, like I said, he understood more than me and Tyron. So it hurt him bad, you know. He really tripped out." (22 RT 4233.)

Appellant's demeanor changed after that. "He was forced to grow up faster than . . . he chose to. It was hard in there." (22 RT 4233.) Appellant had no one to guide him; he was left on his own because his mother was working all of the time. (22 RT 4234.)

Jason said that appellant had two other uncles, Ronald and Donald. Ronald was locked up for most of the time, and Donald was a crack addict. (22 RT 4234-4235.)

Jason appealed to the jury to spare appellant's life. (22 RT 4235-4236.)

Danyelle Jones grew up in and around Nickerson Gardens. She lived there from 1998 to 2004. Her family and appellant's were close. She has been in and out of jail a lot and is now in state prison. (22 RT 4155.) She is seven years younger than appellant. She described him as a good friend. (22 RT 4156.) When she first went to prison she thought of committing suicide. She wrote to appellant saying that she was ready to give up on life. Appellant contacted the people in charge of the mental health unit in the prison where she was being held to get her help. He also wrote to her and explained to her the value of life. She was put on suicide watch and given the help she needed in prison. She credits appellant with helping save her

life. (22 RT 4163.) Since that time, she has taken some college courses and participated in programs to help others. She has helped with Scared Straight and has been a mentor for SAP (Substance Abuse Program). She said that appellant is her friend and she would be devastated if he were to be put to death. She made the following appeal to the jury to spare appellant's life:

I know him personally. And he's really a good person. He helped me from not committing suicide and he's like a good friend. If you really get to know him, he's very smart. He's outgoing. And I think he deserves a chance to live.

(22 RT 4164.)

Father Gregory Boyle is a Jesuit priest who is the founder and executive director of Homeboy Industries, which is the largest gang intervention program in the country. (22 RT 4239.) He has qualified many times as a gang expert. (22 RT 4240.)

Father Boyle was asked "why does a kid join a gang?" He replied that:

[K]ids gravitate toward a gang when they have encountered their life as a misery and misery loves company. And so kids – though the prevailing culture myth is that kids are seeking something when they join a gang, when in fact they're fleeing something always. They're fleeing trauma. They're fleeing negative. They're fleeing sexual, emotional, physical abuse.

(22 RT 4241.)

Father Boyle said that:

[A] damaged kid is nine times out of ten or ten times out of ten going to find himself or herself in a gang. Damaged kids cause damage. It's the way it all works.

(22 RT 4242.)

Father Boyle said that while people have choices regarding whether to join a gang, it is important “to examine with some compassion the degree of difficulty there is in being free enough to choose.” (22 RT 4242.) Father Boyle was asked the following:

A situation where there is no father in the home, a young kid, a ten-year-old kid is being raised by a mother who is . . . has to work constantly, menial work constantly, his uncle is a drug dealer and he is a role model and a person looked up to. This uncle was murdered at some point during the years of what might be called formative years . . . ten, eleven years old. ¶ Let’s say the mother used drugs during her pregnancy she would – she drank and there’s [evidence] of fetal alcohol damage. And then at . . . different points while this kid is very young, she’s living on skid row, kicked around from place to place surrounded by . . . violence, drugs and chaos, and this boy himself was shot at the age of fifteen. ¶ Would you consider that in the equation talking about the degrees of difficulty?

(22 RT 4243-4244.) Father Boyle answered:

If you compound the misery, you multiply the outcome to be of equal misery. Gangs are places kids go when they encounter in their life misery, and you can present layer upon layer upon layer of damage and trauma and difficulty. ¶ Then again, that shades one’s ability to choose well. And again, it just makes it more difficult, whatever that means in a society to make that, makes it more difficult. It’s difficulty is a fact in that it intensifies and diminishes a person’s ability to navigate adolescence or one’s life if you compound the misery.

(22 RT 4244-4245.)

Father Boyle concluded by saying:

I think there are common denominators in all gang members, it’s the inability to imagine the future, born of traumas that are deep and pervasive enough that you want to flee what ought to be containing you and does not. And that’s

the common denominator. ¶ And more to the point, you are not going to find a hopeful kid who will gravitate towards a gang no matter what the lure you think it holds. The outsider view thinks that that is how it works, join the gang and see the world. And that's the myth. But that's born of a less sophisticated sense of what gang members or the profile of a gang member actually is. ¶ So if you maximize the misery, you are going to increase the chance that a young person is going to join a gang.

(22 RT 4248.)

On cross-examination, Father Boyle testified that he did not know why appellant joined a gang. He had not spoken to him. Father Boyle said that he was testifying not as a character witness but as a gang expert who can “speak more generally why kids join gangs.” (22 RT 4249-4250.) He was not being paid for his testimony, and he was opposed to the death penalty. (22 RT 4249-4250, 4255.)

Dr. Fred Bookstein, Ph.D., is a professor of statistics at the University of Washington in Seattle, a professor of psychiatry and behavioral sciences, also at the University of Washington, and a guest professor of anthropology at the University of Vienna in Austria. (23 RT 4353-4354.) He has written or collaborated in writing many papers and five books. He teaches morphometrics, which is a field of statistics specializing in the measurement of the shape of things that occur in biology, both in Seattle and Vienna. (23 RT 4355.) He is the scientific director of the research unit of the Department of Psychiatry at the University of Washington which includes the fetal alcohol and drug research unit. (23 RT 4354.) The fetal alcohol and drug research unit studies babies, children and adults who have been exposed to various kinds of chemicals during the time they were carried. “We do studies on the distribution of this

information to parents, to the school system, to the state, to the legal system.” (23 RT 4355.)

Dr. Bookstein testified that he found signs of brain damage in appellant’s brain caused by prenatal exposure to alcohol. (23 RT 4364-4365, 4394-4396, 4400.)

In my opinion, to an overwhelming probability, Mr. Mc Daniel’s brain image shows one of the typical signs of damage caused by prenatal exposure to the alcohol that I am told he was exposed to.

(23 RT 4365.) “And that damage very much increases the orders of behavior associated with criminality.” (23 RT 4411.)

According to Dr. Bookstein, “Fetal alcohol people have a great deal of difficulty choosing between competing norms. This is part of the psychological findings and also real life findings.” (23 RT 4419.) “[P]eople with [appellant’s] brain damage typically have problems with moral decisions.” (23 RT 4421.)

Dr. Bookstein testified that the damage associated with Fetal Alcohol Syndrome can be aggravated by “a low percentage of life in a stable home, being a victim of physical abuse, being in a poor quality home, living with people abusing alcohol or drugs, not having basic needs met.” (23 RT 4430.)

Nancy Cowardin has a Ph.D. in educational psychology, and special education. She runs a program called Educational Diagnostics. (23 RT 4436.) She has had a long career in education, as a teacher, college professor, and grants director. (23 RT 4437.) She has testified as an expert witness and has worked with the courts. (23 RT 4437.)

She defined a learning disability as follows:

A learning disability is a specific learning handicap the schools identify when a child has intellect competence but he can't learn specific material. It can be confined to one subject matter or it could be a learning process such as auditory processing, visual processing, something like this. But it impedes learning. ¶ And the definition really is, it's a life-long learning difference that acquires [*sic*] accommodation. So that in schools these individuals go into special education classes where we can give them specialized services, design material to their specific needs.

(23 RT 4438.)

She did an assessment of appellant in 2005. He was 26 at the time. She spent about five hours with him giving him a battery of tests to look at his educational skills, his underlying learning processes and to get a full picture of his skill profile. (23 RT 4438, 4440.) She also reviewed his school records. (23 RT 4441.) She said that appellant has a verbal I.Q. of 73 and a non-verbal I.Q. of 100. The average is an I.Q. score of 84. (23 RT 4448, 4452.) These scores indicate that appellant has "good skills in one area and very weak skills in another and that lopsidedness is what accounts for his learning disability." (*Ibid.*) Appellant's information processing scored at the six-year-old level. (23 RT 4453.)

According to Cowardin, appellant's school records indicate that his learning disabilities preceded his behavioral problems.

[I]f we look at what the teachers are saying in first grade, that he's missing basic skills. That he's weak in reading. ¶ The second grade they are recommending him for retention, which apparently doesn't happen. ¶ The behavioral problems that are noted are after those two years, so in this case it does appear that the learning issues preceded the behavioral problems, and by the way, very typical. When kids can't do it, they don't want to be there.

(23 RT 4455.)

ARGUMENT

I.

THE PROSECUTOR VIOLATED *BATSON* AND *WHEELER* IN HIS PEREMPTORY CHALLENGE OF PROSPECTIVE JUROR NO. 28

A. Introduction

Appellant is a black man. During jury selection, and over repeated defense objection, the prosecutor used 5 of his first 12 peremptory challenges to exclude other blacks from appellant's jury, including Prospective Jurors Nos. 28 and 46. After hearing the prosecutor's various reasons for why he excused all five jurors, the court found the prosecutor's reasons for why he excused No. 46 to be lacking and gave the defense the option of a mistrial or the reseating of that juror. The defense chose the latter and Prospective Juror No. 46 was ordered reseated. The issue here is the trial court's erroneous denial of appellant's *Batson/Wheeler* motion⁷ with respect to Prospective Juror No. 28.

This much is clear: the prosecutor engaged in discrimination during the process of jury selection and engaged in pretextual justification in order to shield his misconduct from the court. (See 5 RT 1085-1086 [trial court's finding of *Batson/Wheeler* error and reseating of African-American Prospective Juror No. 46].)⁸ The question for this Court is whether, minutes

⁷ *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

⁸ Apparently unchastened, the prosecutor here committed *Batson/Wheeler* error several months later in co-defendant Kai Harris's capital trial, resulting in the trial court having to declare a mistrial. A new jury was empaneled and Harris was sentenced to death. His automatic appeal is pending before this Court in *People v. Harris*, No. S178239. In a
(continued...)

prior to the prosecutor’s discriminatory act and pretextual justification, the prosecution had already violated the fundamental prohibition of race-based jury selection in excusing Prospective Juror No. 28.

The alleged “primary” basis for the excusal of Prospective Juror No. 28 – an eminently qualified ex-military man who believed that the death penalty was applied “too seldom” (5 CT 1210, 1216) – was his answer regarding the relative severity of LWOP and death. (5 RT 1078-1079.) Both the trial court and the prosecution separately noted that his response was a very common one (4 RT 857, 942), and the prosecutor even conceded this point when justifying Prospective Juror No. 28’s excusal. (5 RT 1078-1079.)

Though the prosecutor attempted to ground his excusal of Prospective Juror No. 28 on the principle that “I don’t think that [a belief that LWOP is more severe] is a good instinct to have on a death penalty jury,” he nonetheless seated no less than *four* non-black jurors who had similarly answered that they believed that LWOP was a more severe punishment.⁹ And the jury actually selected by the prosecutor hardly reflected a strategy of seeking jurors who stated that death was more severe:

⁸(...continued)

separate motion, pursuant to Evidence Code sections 452, subdivision (d), and 459, subdivision (a), and California Rules of Court, rule 8.252, appellant requests that this Court take judicial notice of the *Batson/Wheeler* proceedings in *People v. Harris*, No. S178239 [Los Angeles County Superior Court Case No. TA74314] at 10 CT 2743-2744, 2754-2755, and 11 RT 1959-2172.

⁹ 4 CT 770, 890, 914, 926 [Questionnaire’s of Seated Juror No. 4, Seated Alternate No. 2 Seated Alternate No. 4 and Seated Alternate No. 5].

of the eighteen jurors and alternates seated by the prosecutor, fewer than half stated on their questionnaires that the death penalty was more severe.¹⁰

Comparative analysis conclusively demonstrates that the prosecution treated Prospective Juror No. 28 differently than other jurors who had answered that LWOP was more severe. Where the “main concern[.]” of the prosecutor fails comparative juror analysis, that is the end of the matter: alternative justifications need not be considered. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 485 [refusing to address demeanor-based justification where “main concern” regarding potential scheduling conflict failed comparative analysis].) Yet moving past the prosecutor’s “primary” concern only further undermines his justifications. Because the taint of discrimination irretrievably infected jury selection in appellant’s case, his conviction and death sentence must be reversed.

B. Relevant Facts

1. Prospective Juror No. 28

According to his questionnaire, prospective Juror No. 28 was a 73-year-old African-American male, who had been a “lead man” electrician for Bowen Aircraft prior to retirement after 39 years of service. (5 CT 1209.) He owned his own home. (5 CT 1209.) For his education level he listed “12 years.” (5 CT 1209.) He had served in the military and attained the rank of private second class. (5 CT 1210.) He had served on at least one criminal jury that had reached a verdict. (5 CT 1210.) He felt that the

¹⁰ 4 CT 794 [Seated Juror No. 6]; 4 CT 806 [Seated Juror No. 7]; 4 CT 830 [Seated Juror No. 9]; 4 CT 842 [Seated Juror No. 10]; 4 CT 854 [Seated Juror No. 11]; 4 CT 866 [Seated Juror No. 12]; 4 CT 902 [Seated Alternate No. 3]; 9 CT 938 [Seated Alternate No. 6].

“crime situation” in Los Angeles was “bad.” (5 CT 1210.) He felt that police officers did sometimes lie, but he did not know how frequently. (5 CT 1211.) He was a religious man, but he did not feel these principles would affect his ability to serve. (5 CT 1212.) He described himself as a “follower” more than a leader. (5 CT 1212.) There were gangs in his area, but he did not feel like he had had good or bad experiences with them. (5 CT 1213.)

His responses to the death penalty-related questions were largely unremarkable and occasionally demonstrated that he would be favorable to the prosecution.

As noted above, Prospective Juror No. 28 stated without elaboration that he believed that an LWOP sentence was more severe than death. (5 CT 1214.) He had “no feeling” about the death penalty. (5 CT 1214.) He answered that he was not so strongly opposed to the death penalty that he would automatically vote for life and that he was not so strongly in favor that he would automatically vote for death. (5 CT 1215.) Likewise, he indicated that he was not so strongly opposed to the death penalty that he would vote against death regardless of aggravating or mitigating circumstances. (5 CT 1215.) Similarly, he responded that he would not always vote for life or death regardless of the aggravating or mitigating evidence. (5 CT 1215.) His views on the death penalty were not based on religion and he did not belong to any group that supported the elimination of the death penalty. (5 CT 1215.)

In response to the final death qualification question, “Regardless of your views on the death penalty, would you be able to vote for death for the defendant if you believed, after hearing all the evidence, that the death penalty was appropriate,” he answered “No.” (5 CT 1215-1216.) However,

he clarified in court-led voir dire on death qualification that he was a “Category 4” juror who could vote for either LWOP or death.¹¹ (4 RT 878.) The prosecution never questioned Prospective Juror No. 28 regarding his death qualification answers, and even when the trial court pointed out during the *Batson/Wheeler* hearing his isolated and contradictory questionnaire response that he could not impose death (5 RT 1080), the prosecution never adopted this as any part of its justification for excusing this juror.

Prospective Juror No. 28 indicated that his feelings on the death penalty would not impair his ability to be a fair juror and that the death penalty was imposed “too seldom” in California. (5 CT 1216.) He separately indicated that he did not want to serve on the jury because it would be “too long.” (5 CT 1216.)

As noted above, during court-led voir dire, he affirmed that he was a “Category 4” juror (i.e. a juror who could impose life or death). (4 RT 878.) His only statement¹² in attorney-led voir dire was to affirm that he

¹¹ During the death qualification process, the trial court described four categories of jurors. (4 RT 860-863.) According to the trial court, a “Category 4” juror was a juror “who says, yeah, I know myself. . . . and I am comfortable with the fact that I can go either way. I can go for life without parole, if I was persuaded. I could go with death if I thought it was the right decision. I can follow the court’s instructions. I can weigh and consider the good evidence and the bad evidence. I would want to hear the good. I would want to hear the bad. I would want to look at it all. And I could make the decision.” (4 RT 863.)

¹² A prospective juror, likely Prospective Juror No. 17, was misidentified in some of the voir dire transcripts as Prospective Juror No. 28. The Attorney General has stipulated to the fact that the citations on 4 RT 913-914, 948-949, 983, and 986 do not actually refer to Prospective
(continued...)

could give equal weight to prior testimony read into the record. (5 RT 1057.)

2. Procedural History

The prosecution used three of its first eight strikes to excuse African-American jurors. (5 RT 1070 [strike of Prospective Juror No. 7]; 5 RT 1071 [strike of Prospective Juror No. 13]; 5 RT 1072 [strike of Prospective Juror No. 28]; see also 4 CT 1004-1015 [questionnaire of Prospective Juror No. 7]; 5 CT 1076-1087 [questionnaire of Prospective Juror No. 13]; 5 CT 1208-1219 [questionnaire of Prospective Juror No. 28].)

The prosecutor's third peremptory of Prospective Juror No. 28 led to a *Batson/Wheeler* challenge by defense counsel, who noted that the juror "seemed fairly strong on the death penalty" and there was "nothing obvious in his questionnaire." (5 RT 1072.) The trial court denied the motion stating, "I am not going to find a prima facie case. There are a lot of African Americans on this panel. There are a number that are seated in the box as we speak." (5 RT 1072-1073.) The court indicated it would be "mindful" going forward. (5 RT 1073.)

After the prosecutor used his 11th and 12th peremptory challenges on two additional African-American jurors (5 RT 1073 [Prospective Juror No. 40]; 5 RT 1074-1075 [Prospective Juror No. 46] see also 6 CT 1341-1352; 4 CT 752-763 [questionnaires of Prospective Jurors No. 40 and 46, respectively]), defense counsel renewed his *Batson/Wheeler* objection.

¹²(...continued)
Juror No. 28 and appellant has separately requested that this Court correct the record in this regard.

(5 RT 1075.)¹³ The trial court found a prima facie case and requested a response from the prosecutor. (5 RT 1075.)

The prosecutor provided as a “preface” to his explanations that the victims and many prosecution witnesses were African-American and, as such, he lacked any motivation to excuse black jurors. (5 RT 1076-1077.) He further explained that he used a “letter grading system” that was “blind of any racial category” and that the jurors he excused were all jurors that he “deem[ed] to be F’s and D’s.” (5 RT 1077.)

With respect to Prospective Juror No. 28, the prosecutor provided three bases for his excusal. The prosecutor alleged that his first and “primary problem” with this juror “was that he, along with many others, in fact – but he indicated that life without parole is a more severe sentence, which I don’t think is a good instinct to have on a death penalty jury.” (5 RT 1078-1079.)

The prosecutor also noted that the juror indicated that “he did not want to serve on the jury because he felt like the trial would be too long.” (5 RT 1079.) He explained that he tried “not to have jurors on death penalty cases that don’t want to be here and don’t want to take the time in particular to be here” and a “juror that is in a rush is not a juror I want to have.” (5 RT 1079.)

Finally, the prosecutor indicated that he was trying “to have a jury with as much formal education as possible. And this juror I think just completed the twelfth grade. So those are the reasons I dismissed that juror.” (5 RT 1079.)

¹³ Defense counsel later made clear that his objections were based on both state and federal Constitutions under *Batson* and *Wheeler*. (5 RT 1083.)

Defense counsel, who had not responded to the prosecutor's prior justifications for excusal of Prospective Jurors Nos. 7 and 13, interjected that:

There were many jurors – those particular reasons – the education, LWOP is more severe, the uncomfortable – you know, the time issue with regard to the jury, there are a lot of people on this panel that have reflected – and you corrected them in your opening remarks, and they all backed off of any problem in that regard. ¶ As far as education goes, I haven't gone through it particularly, but there are lots of jurors –

(5 RT 1079-1080.)

The court then interrupted to relate that Prospective Juror No. 28 had given one response to the questionnaire indicating that he would not be able to vote for death. (5 RT 1080.) The prosecutor did not adopt this as a basis for his excusal or reference this fact in any way. However, defense counsel explained that Prospective Juror No. 28 had clarified during court-led voir dire that this answer was simply a mistake. (5 RT 1080; see also 4 RT 878 [Prospective Juror No. 28's answer to court-led voir dire indicating that he was a "Category 4" juror].)

The court indicated that it could not recall one way or the other whether Prospective Juror No. 28 had corrected a mistake in his voir dire, and moved on to soliciting justifications for the dismissal of other prospective jurors. (5 RT 1080.)

With respect to Prospective Juror No. 46, the prosecutor stated that his questionnaire was "troubling" because (a) he said "that life without parole and the death penalty are essentially the same because life in prison is not a life"; (b) he "did not believe that the death penalty was a deterrent" and though it was mostly for retribution or revenge; and (c) the juror listened to the radio station KPFK, a public radio station in the Los Angeles

area, which the prosecutor listened to but which he believed was “very liberal politically” and which he alleged served as a forum for “anti-death penalty advocates.” (5 RT 1082.) Defense counsel responded that he himself, as well as many other “conservative jurors” listed to KPFK and other public radio stations. (5 RT 1082.)

The trial court responded that it had been reading an article regarding the *Batson/Wheeler* doctrine recently, and that it found dealing with objections based on this doctrine to be a “difficult undertaking” and the “most annoying aspect of juror selection.” (5 RT 1084.) The court stated initially that it held the prosecutor in high regard and found him to be “an utmost professional” and that he “never thought he was trying to do anything underhanded.” (4 RT 1084.) Then, declaring that “peremptory challenges should have some flexibility in the way the judge looks at them,” the trial court stated that “I am accepting of the articulated reasons that have been advanced here.” (5 RT 1084-1085.)

Immediately after this ruling, the court then inquired of defense counsel:

I suppose the defense is arguing that we should – that this court should not allow 46 to be excused or are you arguing that this – that Mr. Dhanidina is making false representations to the court and that this panel should be dismissed and we should start all over again?

(5 RT 1085.)

Defense counsel responded: “I am not asking that the panel be dismissed and start all over. I am just asking that Juror No. 46 not be excused.” (5 RT 1085.) The trial court then reversed course and granted the *Batson/Wheeler* motion with respect to Prospective Juror No 46, noting

that the juror's choice of radio station was "not a valid reason." (5 RT 1085.)

The prosecutor responded that the radio station was only one of the three bases for his excusal, and then attempted to provide further reasons, noting that the juror volunteered at a non-profit. (5 RT 1085). The prosecution noted that the non-profit was called "Urban Possibilities" and that "throughout the questionnaire" there were a "number of race neutral reasons." (5 RT 1085-1086.) The prosecutor also requested an opportunity to brief the issue, or consult his supervisors to discuss this "highly unusual" situation. (5 RT 1086.) The trial court responded that it did not "like the *Wheeler* law" and that it was "trying to apply it the best I can." (5 RT 1086.) Noting that Prospective Juror No. 46 "seemed like an acceptable juror," the trial court denied the prosecution's request for additional time and reseated the juror. (5 RT 1086.)

After the first penalty phase trial ended in a mistrial, the prosecutor filed a motion for reconsideration of the trial court's *Batson/Wheeler* ruling. (9 CT 2302-2313.) A hearing was held on the motion on July 16, 2008. (16 RT 3055-3061; see also 9 CT 2315-2316 [minute order].)

During the hearing the trial court first indicated that it was "disappointed" that the hearing was being held on the record, but felt that it was compelled to do so because it was a capital case. (16 RT 3055.) Defense counsel voiced a desire to avoid any involvement in the motion, and indicated that he had talked with the prosecutor prior to the hearing and had agreed to "submit it to the court." (17 RT 3055-3056.) The trial court stated its concern that the motion had "nothing to do with this trial" and that it was about the "prosecutor's perception of his record as a prosecutor." (17 RT 3056.) The trial court then indicated that it had great respect for the

prosecutor and indicated that it would “write in support” of his appointment to the bench “at the appropriate time.”¹⁴ (16 RT 3057.)

The trial court indicated that the prosecutor was “wrong on the law” by arguing that a trial court is “limited to a determination regarding the honesty of the prosecuting attorney in providing race-neutral reasons for dismissal of a juror and not a determination of the validity of those reasons to prove actual bias.” (16 RT 3057-3058.) Ultimately, the trial court denied the motion, concluding that the reason the prosecutor provided for striking the “5th black juror in a pool of twelve potential black jurors was inadequate under the law” and that “I didn’t think they [the reasons] were valid under the circumstances because I think there were other jurors who said similar statements as this juror.” (16 RT 3060-3061.)

C. Applicable Legal Principles

Both state and federal Constitutions prohibit race-based peremptory challenges. (*People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky, supra*, 476 U.S. at p. 97.) *Batson/Wheeler* violations are analyzed under the familiar three-step process:

[O]nce 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.

¹⁴ The prosecutor was later appointed to the Los Angeles County Superior Court. (Office of Edmund G. Brown, Jr., *Governor Brown Appoints Eight To Los Angeles County Superior Court*, (May 18, 2012.) available at <<http://gov.ca.gov/news.php?id=17552>>.)

(*Purkett v. Elem* (1995) 514 U.S. 765, 767; see also *People v. Lenix* (2008) 44 Cal.4th 602, 612–613.)

The final step of the process imposes special obligations on the trial court to carefully evaluate the prosecutor’s explanation for the peremptory challenge. “As the *Batson* court observed, ‘In deciding if the defendant has carried his burden of persuasion, a court must undertake ‘a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’ [Citation].” (*People v. Lenix, supra*, 44 Cal.4th at p. 621.)

Although this Court has acknowledged the necessity of relying “on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination” (*People v. Wheeler, supra*, 22 Cal.3d at p. 282), this Court has also dictated that a trial judge make “a sincere and reasoned attempt to evaluate the prosecutor’s explanation in light of the circumstances” (*People v. Hall* (1983) 35 Cal.3d 161, 167-168), and has demanded that “every questioned peremptory challenge [] be justified” (*People v. Fuentes* (1991) 54 Cal.3d 707, 715.) In analyzing the validity of the prosecutor’s explanations for the use of his challenges, the reviewing court must consider “all of the relevant facts.” (*Batson v. Kentucky, supra*, 476 U.S. at pp. 96-97.) A trial court must also “clearly express its findings.” (*People v. Silva* (2001) 25 Cal.4th 345, 385.)

“If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.” (*Miller–El v. Dretke* (2005) 545 U.S. 231, 241.) This form of “comparative juror analysis [is] a centerpiece of the *Batson* analysis,” even when conducted for the first time at the appellate level. (*Boyd v. Newland* (9th

Cir. 2006) 467 F.3d 1139, 1150.) Comparative juror analysis “*must be considered in the trial court* and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.” (*People v. Lenix, supra*, 44 Cal.4th at p. 622, italics added.) “A court need not find all nonracial reasons pretextual in order to find racial discrimination.” (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360.)

“Ordinarily, [appellate courts] apply a deferential standard of review to the trial court’s denial of a defendant’s *Batson/Wheeler* motion, considering only whether the ruling is supported by substantial evidence.” (*People v. Salcido* (2008) 44 Cal.4th 93, 136.)

1. Appellant Preserved His Claim of Error with Respect to the Excusal of Prospective Juror No. 28

Appellant pauses to address a potential distraction from the merits of his claim, defense counsel’s statement to the trial court that he was “not asking that the panel be dismissed” and that he was “just asking that Juror No. 46 not be excused.” (5 RT 1085.) Read out of context, it could be argued that defense counsel was perfectly happy with the discriminatory excusal of Prospective Juror No. 28 and wished nothing be done about it. However, nothing about the legal or factual context of the statement regarding Prospective Juror No. 46 suggests waiver or forfeiture of appellant’s remedies with regard to Prospective Juror No. 28.

Defense counsel did everything required to preserve his claim of error for the exclusion of Prospective Juror No. 28. He separately objected to the exclusion of this juror. (5 RT 1072.) And, when a prima facie was found and the prosecutor provided justifications for the excusal of Juror No. 28, defense counsel argued that those justifications were pretextual because they were shared by many other prospective jurors. (5 RT 1079-1080.) The

trial court, at least implicitly, denied defense counsel's motion with respect to Prospective Juror No. 28 when it stated, "I am accepting of the articulated reasons that have been advanced here." (5 RT 1085.) Although the trial court then reconsidered this ruling with respect to Prospective Juror No. 46, it made no indication that it was reconsidering its initial ruling with respect to any other juror.

When the trial court indicated it was reconsidering the denial of the *Batson-Wheeler* motion with respect to Prospective Juror No. 46, defense counsel did state that he did not wish for a mistrial and that "I am just asking that Juror Number 46 not be excused." (5 RT 1085.) However, this statement can only be understood as a waiver of appellant's right to a mistrial with respect to the exclusion of Prospective Juror No. 46, without application to the excusal of Prospective Juror No. 28. After all, the trial court never found the excusal of Prospective Juror No. 28 improper to begin with.

As this Court has recently reaffirmed, the default remedy for a *Wheeler* violation is quashing the entire venire and restarting the jury selection process. (*People v. Mata* (2013) 57 Cal.4th 178, 186.) However, the trial court "may proceed with [] alternative orders" though "only with the assent of the complaining party [that] safeguards the injured party's interest in an appropriate remedy to the improper discharge of a potential juror based on group bias." (*Id.* at p. 185.) By expressly or "impliedly consenting to the alternative remedy, the complaining party waives the right to the default remedy of quashing the jury venire." (*Id.* at p. 186, italics added; see also *id.* at p. 188.)

However, *Mata* did not address the "problem that arises when, as perhaps more commonly occurs, a *Batson/Wheeler* motion is granted only

after a pattern of discriminatory excusals has emerged. In this latter situation, several prospective jurors presumably will already have been wrongly dismissed.” (*People v. Mata, supra*, 57 Cal.4th at p. 190, (conc. opn. of Baxter, J.)) If these jurors “cannot be recalled . . . the representative nature of the venire has been irreparably distorted, and the status quo ante cannot be restored.” (*Ibid.*) A mistrial is then necessary. (*Ibid.*)

Here, defense counsel affirmatively approved of the alternative remedy proposed by the trial court as to Prospective Juror No. 46. (5 RT 1085 [requesting “that Juror Number 46 not be excused”].) However, neither the trial court nor defense counsel said anything about altering or limiting available remedies with respect to Prospective Juror No. 28. There was no occasion to say anything about Prospective Juror No. 28, as the trial court never found, or suggested that it might find, any *Batson/Wheeler* violation as to that juror. It would be anomalous to construe defense counsel’s statement as waiving a remedy for an error that had never been found.

Any other reading of the record makes little sense and would trample the important “safeguards [to] the injured party’s interest in an appropriate remedy to the improper discharge of a potential juror based on group bias.” (*People v. Mata, supra*, 57 Cal.4th 178 at p. 185.) A defendant is entitled to the “status quo ante” prior to the discriminatory acts of the prosecutor. (*Id.* at p. 190 (conc. opn. of Baxter, J.)) Although a defendant can achieve status quo ante by demanding a mistrial or by demanding that the improperly stricken juror(s) be reseated, the fact that he elects to reseat a juror should not be construed to mean that he waives his right to status quo ante. If in fact two or more jurors were improperly discriminated against,

reseating only *one* juror would not correct the prosecutor's unconstitutional actions. Indeed, it would be an improper remedy. (See *ibid.* [if multiple jurors are improperly stricken, the trial court must either recall all stricken jurors or declare a mistrial].)

Because Prospective Juror No. 28 was improperly excused, and because defense counsel clearly objected to his excusal, the issue is preserved.

2. This Court Should Give Great Weight to the Direct Evidence of Discrimination by the Prosecution in the Selection of Appellant's Jury and Should Not Defer to the Trial Court's Finding Regarding Prospective Juror No. 28 Where Nothing in the Record Shows it Took its Own Finding of Discrimination into Consideration

As noted above, the trial court granted appellant's *Batson/Wheeler* challenge with respect to Prospective Juror No. 46. (5 RT 1085-1086.) The prosecutor's intentional discrimination during the selection of appellant's jury renders this case fundamentally different from the many *Batson/Wheeler* cases previously reviewed by this Court. (See *People v. Muhammad* (2003) 108 Cal.App.4th 313, 322 [noting that although "[m]ost of the reported cases involving *Wheeler* challenges involve trial court decisions crediting a prosecutor's explanation," trial court's finding of discrimination and pretext is also due deference].)

Looking to the jurisprudence of Title VII from which the *Batson/Wheeler* doctrine is derived and borrows,¹⁵ the existence of "direct

¹⁵ *Batson v. Kentucky*, *supra*, 476 U.S. at p. 94, fn. 18; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338; *People v. Johnson* (2003) 30 Cal.4th 1302, 1314, overruled on other grounds by *Johnson v. California* (continued...)

evidence” of discriminatory motive by the relevant decision maker is highly relevant. (See *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480 [probative value of other acts of discrimination “especially high”]; *Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1128 [reversing summary judgment where state official laughed at racially offensive joke about “chinks” in the department, though comment related to individuals other than the plaintiff].)

If a prosecutor has been found to unjustly skew the process of jury selection through the use of racial stereotypes, it is hard to imagine why racial stereotypes would play *no* role in the exclusion of other jurors in the very same case. (See *People v. Mata, supra*, 57 Cal.4th at p. 190 (conc. opn. of Baxter, J.) [where a *Batson/Wheeler* motion is granted “only after a pattern of discriminatory excusals has emerged” several prospective jurors “*presumably* will already have been wrongly dismissed”] italics added.) Relatedly, the existence of a pretextual justification for the excusal of one juror lends great weight to the possibility that the prosecutor’s justifications for other jurors are also pretextual. Accordingly, at a minimum, this Court should review the prosecution’s justification for the excusal of Prospective Juror No. 28 extraordinarily skeptically. More specifically, however, the facts of this case mandate a different analytical approach.

As noted above, appellate courts “[o]rdinarily . . . apply a deferential standard of review to the trial court’s denial of a defendant’s *Wheeler/Batson* motion.” (*People v. Salcido, supra*, 44 Cal.4th at p.136.) However, this deference does not apply in all circumstances. (See, e.g. *id.*

¹⁵(...continued)
(2005) 545 U.S. 162.

at p. 137 [no deference where trial court may have applied wrong standard].) In this case, the trial court’s finding of discrimination – combined with its failure to explicitly take that finding into account in assessment of the excusal of other jurors – requires that this Court alter its ordinarily deferential assessment of appellant’s claimed *Batson/Wheeler* error.

This result is compelled for two independent reasons. First, no deference is due where a “trial court’s analysis reflects only that it examined each challenged strike individually” and that other “evidence of pretext was not confronted but rather was overlooked by the trial court in assessing the prosecutor’s credibility.” (*Harris v. Hardy* (7th Cir. 2012) 680 F.3d 942, 951 [no deference under AEDPA]; *United States v. Stephens* (7th Cir. 2008) 514 F.3d 703, 712 [“we cannot defer to a district court [*Batson*] decision that ignores material portions of the record without explanation”]; *McGahee v. Alab. Dept. Of Corrections* (11th Cir. 2009) 560 F.3d 1252, 1263 [no AEDPA deference when state trial court “omitted from step three of its analysis crucial facts”]; cf. *People v. Silva, supra*, 25 Cal.4th at pp. 375, 386 [when prosecutor’s stated reasons are unsupported or inherently implausible, trial court must do more than make “global finding” of sufficiency].)

Short of an outright admission of discrimination, it is difficult to conceive of more central evidence to *Batson*’s stage-three analysis than a finding that the prosecutor engaged in discrimination and pretextual justification in the very same case minutes after the challenged strike at issue. Yet, although the trial court accepted the prosecutor’s reasons regarding Prospective Juror No. 28 *before* it reversed course on Prospective Juror No. 46, (see 5 RT 1084-1085), the trial court said nothing whatsoever

about Prospective Juror No. 28 after it found that the prosecutor’s justifications for Prospective Juror No. 46 were pretextual. (*Ibid.*) In short, powerful evidence of pretext was “overlooked” by the trial court, and it therefore omitted “crucial” and/or “material” evidence relevant to the third-stage analysis. (*Harris v. Hardy*, *supra*, 680 F.3d at p. 951; *United States v. Stephens*, *supra*, 514 F.3d at p. 712; *McGahee v. Alab. Dept. Of Corrections*, *supra*, 560 F.3d at p. 1263.)

The failure to weigh the impact of discrimination against Prospective Juror No. 46 in considering the claim of discrimination against Prospective Juror No. 28 violates the command of the United States Supreme Court: that a court consider the strike of one juror for the bearing it might have upon the strike of another. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 478.) The record is devoid of evidence even hinting that the trial court took the discriminatory strike of Prospective Juror No. 46 into consideration in its denial of the *Batson/Wheeler* motion with respect to Prospective Juror No. 28.

The second reason that this Court should not defer to the trial court’s decision relates to the nature of the presumptions that apply to *Batson/Wheeler* analysis. As this Court has explained in *Salcido*, the deference due a finding of no discrimination is based in no small part upon the fact that “[a] prosecutor is presumed to employ peremptory challenges in a constitutional manner” (*People v. Salcido*, *supra*, 44 Cal.4th at pp. 136-137; cf. *People v. Muhammad*, *supra*, 108 Cal.App.4th at p. 322 [“the presumption is rebuttable; the trial judge implicitly found that it was rebutted in this case.”].) Where a prosecutor is found to have violated *Batson/Wheeler*, his or her justifications should no longer be clothed in a presumption of validity.

This Court has made this point explicitly. Although it defers to unexplained denials of *Batson* motions, it only does so:

[W]here nothing in the record is in conflict with the usual presumptions to be drawn, *i.e.*, *that all peremptory challenges have been exercised in a constitutional manner*, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge.

(*People v. Reynoso* (2003) 31 Cal.4th 903, 929, italics added; see also *People v. Mai* (2013) 57 Cal.4th 986, 1072 (conc. opn. of Liu, J.) [citing *Reynoso* as the origin of deference to unreasoned *Batson/Wheeler* denials].)

As a result of the prosecutor's unlawful attempt to excuse Prospective Juror No. 46, the usual presumptions do *not* apply in this case. The "record is in conflict with the usual presumptions to be drawn, *i.e.*, that all peremptory challenges have been exercised in a constitutional manner." (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.) As such, appellate deference, particularly to what are at best implicit findings of credibility (5 RT 1085), is wholly inappropriate. The trial court's summary acceptance of the prosecutor's justifications for striking Juror No. 28 must therefore be reviewed *de novo*.

3. The Impact of a Request for Comparative Analysis of the Relevant Juror in the Trial Court

As noted above, "comparative juror analysis [is] a centerpiece of the *Batson* analysis," even when conducted for the first time at the appellate level. (*Boyd v. Newland, supra*, 467 F.3d at p. 1150.) However, this is not

to say that placing comparative juror analysis at issue before the trial court has no impact on appellate analysis.

The United States Supreme Court has warned that “a retrospective comparison of jurors based on a cold appellate record may be very misleading *when alleged similarities were not raised at trial.*” (*Snyder v. Louisiana, supra*, 552 U.S. at p. 483, italics added.) “In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.” (*Ibid.*) However, when the shared characteristic *is* raised in the trial court, these concerns do not apply. (*Ibid.*)

Relying on the United State’s Supreme Court’s warnings in *Snyder*, this Court has noted the limitations of comparative juror analysis when first raised on appeal. (*People v. Lenix, supra*, 44 Cal.4th at p. 622 [“like the *Snyder* court, we are mindful that comparative juror analysis . . . has inherent limitations.”].) In *Lenix*, this Court provided a detailed explanation for why it believed comparative juror analysis raised for the first time on appeal could be an “exceptionally poor medium to overturn a trial court’s factual finding” regarding the prosecutor’s credibility. (*Id.* at pp. 622-624.)

However, this Court, like the high court in *Snyder*, noted that restrictions on appellate review involving comparative analysis were limited to cases in which no comparative analysis had been urged in the trial court: “Defendants *who wait until appeal* to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court’s ultimate finding of no discriminatory intent.” (*People v. Lenix, supra*, 44 Cal.4th at p. 624, italics added.) This is because comparative analysis is most persuasive when a prosecutor has had a chance to respond to defense counsel’s allegations of similarities. (*Ibid.*)

[comparative analysis “most effectively considered” in cases “where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard”] see also *id.* at p. 633 (conc. opn. of Baxter, J.) [when comparative analysis is requested in the trial court “the prosecution is afforded a fair opportunity both to state its reasons for challenging a prospective juror and to explain its failure to challenge any alleged similarly situated jurors. This minimizes the prospect of appellate speculation in the evaluation of a *Wheeler/Batson* claim.”].)

a. Comparative Analysis Was Requested in the Trial Court, but the Trial Court Provided No Comparative Analysis in its Decision with Respect to Prospective Juror No. 28

Defense counsel clearly urged the trial court to engage in comparative juror analysis. When discussing Prospective Juror No. 28, defense counsel argued that all of the “particular reasons” articulated by the prosecution were characteristics held by multiple jurors. (See 5 RT 1079-1080.) Defense counsel similarly urged comparative analysis with regard to Prospective Juror No. 46. (5 RT 1082 [requesting that the trial court to engage in comparative analysis with other “conservative jurors” on the panel in regard to their public radio listening habits].) And, at least retrospectively, the trial court provided evidence that it utilized some degree of comparative juror analysis in finding the peremptory challenge of Prospective Juror No. 46 to be racially motivated. (See 16 RT 3060-3061 [denying motion for reconsideration because “I didn’t think they [the reasons] were valid under the circumstances because I think there were other jurors who said similar statements as this juror”].)

Nothing in the record, however, indicates that the trial court engaged in any comparative analysis of the reasons offered by the prosecutor with respect to Prospective Juror No. 28. Instead, when discussing Prospective Juror No. 28, the trial court simply brought up a stray and obviously mistaken questionnaire response (5 RT 1080) – a reason that the prosecutor did not even rely upon. (Cf. *People v. Jones* (2011) 51 Cal.4th 346, 365 [“in judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given.”].)¹⁶ The trial court’s ruling, aside from noting its respect for the prosecutor who it would not accuse of “underhanded” acts, consisted of the solitary statement – later reversed with respect to Prospective Juror No. 46 – that “I am accepting the articulated reasons that have been advanced here.” (5 RT 1085.)

b. No Deference Is Owed to the Trial Court in Light of its Failure to Engage in the Requested Comparative Analysis When Accepting the Prosecutor’s Justification for the Exclusion of Prospective Juror No. 28

A trial court’s decision to deny a *Batson/Wheeler* motion is only entitled to deference if it engages in “a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) However, the fact that comparative juror analysis was urged upon the trial court – but never explicitly conducted in its ruling – provides a strong basis for finding the trial court’s ruling was an unreasoned denial and not entitled to deference. To begin with and as

¹⁶ The prosecutor was not hesitant to rely on potentially mistaken death qualification questionnaire responses. (5 RT 1077 [relying on potentially mistaken questionnaire responses of Prospective Juror No. 7].)

explained above, this Court and the United States Supreme Court have made quite clear that there is a significant difference between comparative analysis when raised at the trial court and when raised for the first time on appeal. After all, when the issue is raised at the trial level “the prosecutor can respond to the alleged similarities” and the trial court “*can evaluate those arguments* based on what it has seen and heard.” (*People v. Lenix, supra*, 44 Cal.4th at p. 622, italics added, see also *id.* at p. 633 (conc. opn. of Baxter, J.).)

In this case, the prosecutor was on notice of the comparative juror argument and had every opportunity to discuss or distinguish similarly situated jurors. As discussed in greater detail below, instead of differentiating similarly situated jurors, the prosecutor essentially admitted that his “primary” justification would fail comparative analysis. (5 RT 1078 [prosecutor’s concession that “many others” in addition to Prospective Juror No. 28 had initially indicated that LWOP was a more severe punishment].)

As a practical matter, the reason this Court has continued to provide deference to unexplained *Batson/Wheeler* denials is that, even absent explanation for a trial court’s decision:

No reason appears to conclude the court failed to consider all the factors bearing on the prosecutor’s credibility, including his demeanor, the inherent reasonableness or improbability of his proffered explanations, their plausible basis in accepted trial strategy, the court’s own observation of the relevant jurors’ voir dire, its experience as a trial lawyer and judge in the community, and the common practices of the prosecutor’s office and the individual prosecutor himself.

(*People v. Mai, supra*, 57 Cal.4th at p. 1054.)

In this case, there is every reason “to conclude the court failed to consider all the factors” relevant in a comparative analysis. (Cf. *ibid.*)

Comparative juror analysis requires courts to undertake a “careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were ‘similarly situated’” and then calculate any similarities’ effect on the prosecutor’s justifications. (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1389, fn. 4.) This process, done correctly, is time-consuming and requires thorough scrutiny. Importantly, when requested of the trial court, it is evidence that the “trial court *must consider* in making its determination.” (*People v. Johnson, supra*, 30 Cal.4th at p. 1323, italics added.)

Here, despite the longstanding rule that trial courts “must consider” comparative analysis (*People v. Johnson, supra*, 30 Cal.4th at p. 1323), there is no indication that the trial court compared Prospective Juror No. 28 to any other juror. In the heat of trial, and absent any indication in the record, it is simply not realistic to add to the long list of presumptions afforded the correctness of the trial court ruling that the court conducted the complex task of assembling a list of similarly situated jurors and then of weighing their comparative responses to those of the stricken jurors. (Cf. *People v. Lenix, supra*, 44 Cal.4th at p. 623 [noting the “fluid dynamic” of jury selection]; *Sifuentes v. Brazelton* (N.D. Cal. 2013) 4 F.Supp.3d 1181, 1222 [“jury selection is a dynamic, fast-paced process”].) Assuming from a silent record that a trial court conducted this lengthy and difficult process is particularly unrealistic where, as in this case, defense counsel did not himself present a detailed list of jurors to the trial court for purposes of the comparison. (See 5 RT 1079-1080.)

Finally, whatever the merit of deferring to the implicit connotations of a trial court *denial* of a *Batson/Wheeler* motion, the same “pile of presumptions” (*People v. Mai, supra*, 57 Cal.4th at p. 1062 (conc. opn. of

Liu, J.) should not work against a defendant when the trial court's *grants* such a motion as to one of the jurors at issue. For these reasons, the trial court's denial of appellant's *Batson/Wheeler* motion with respect to Prospective Juror No. 28 should not be afforded the "great deference" normally applied by this Court. (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.)

D. Due to the Substantial Evidence Suggestive of Discrimination and Pretext, this Court Should Find That the Prosecutor's Excusal of Prospective Juror No. 28 Was Impermissibly Motivated by Race

The single most important evidence of pretext in this case is the trial court's finding that the prosecutor engaged in discrimination and pretext with regard to another juror. (5 RT 1085; see *State v. McFadden* (Mo. 2007) 216 S.W.3d 673, 676-677 [despite absence of similarly situated jurors, overturning trial court's denial of *Batson* motion where the same prosecutor, in another case against the same defendant, had also violated *Batson*].) Except in the rare case involving a blatantly anti-prosecution juror, it is almost impossible to conceive that a prosecutor who allows race to motivate his jury selection choices does so only selectively. If race played a role in one peremptory, it is extremely likely that it played a role in another.

But other significant evidence supports a finding of discrimination against Prospective Juror No. 28. Appellant reviews each piece in turn.

1. The Failure to Meaningfully Question Prospective Juror No. 28 Is Evidence of Discrimination

In *Wheeler* itself, the Court explained that "desultory" questioning of minority prospective jurors provides some evidence of potential discrimination. (*People v. Wheeler, supra*, 22 Cal.3d at p. 281.) Failure to

inquire of the challenged juror regarding *any* of the allegedly negative qualities later used to justify exclusion is especially noteworthy. (*People v. Huggins* (2006) 38 Cal.4th 175, 235 [“failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual”].) Equally suspicious is a complete failure to question the challenged juror. (*People v. Lewis* (2008) 43 Cal.4th 415, 476 [failure to explore excused juror’s views at all during voir dire “troubling”].)

Here, the prosecutor only asked Prospective Juror No. 28 a single question, entirely unrelated to any of the alleged bases for his later excusal. (See 5 RT 1057.) The prosecutor likewise did not ask Prospective Juror No. 46 a single question. The failure to question Prospective Juror No. 28 regarding the alleged reasons for his excusal was particularly notable here, where the context surrounding each justification indicated that the prosecution “probably would have [questioned on this point] had [it] actually mattered.” (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246.)

a. That the Prosecutor Did Not Question Prospective Juror No. 28 Regarding the “Primary” Motivation for His Excusal Suggests That this Justification Was Merely Pretextual

The “primary” basis for excusal of Prospective Juror No. 28 was that he had answered in his questionnaire that LWOP was a more severe punishment than death. (5 RT 1078-1079.) The prosecutor claimed that he did not “think this is a good instinct to have on a death penalty jury.” (5 RT 1079.)

This fairly common questionnaire response was almost immediately addressed by the trial court in voir dire after the jurors filled out their

questionnaires. After first instructing the jury that life without parole is a less severe punishment, the trial court stated that “many of you in your responses said . . . I think life without parole is worse.” (4 RT 857.) The court instructed all of the jurors that they had to “put aside” that feeling and that the “law says life is less severe than death.” (*Ibid.*)

The trial court’s admonition seems to have had its intended effect. When the prosecutor began to question jurors soon thereafter, he indicated that “I notice on the questionnaires that the judge pointed out that a lot of people felt that a life sentence or a life without parole is more severe than the death penalty.” (4 RT 942.) When he asked for a show of hands as to who believed that was true, the prosecutor noted that “considerable fewer than I know filled [that response on] the questionnaires” had raised their hands. (*Ibid.*) The prosecutor then questioned on this topic one of the jurors who had raised her hand, followed by two other jurors. (4 RT 942-943.)

Conspicuously absent from this questioning was Prospective Juror No. 28 – and any of the four non-black jurors who had stated that LWOP was a more severe sentence and who were later seated by the prosecution. In short, it appears that these jurors all took the trial court’s admonition to heart and did not further contend that LWOP was more severe than death. None were later penalized for it by the prosecution – except for Prospective Juror No. 28. The prosecutor’s failure to question Prospective Juror No. 28 on this ground, after the trial court’s clarifying instruction, thus suggests that his later reference to this questionnaire response as the “primary” justification was simply pretext to discriminate.

b. The Failure to Question Prospective Juror No. 28 on His Time Concerns

The second reason proffered by the prosecutor for his excusal of Prospective Juror No. 28 was that he “indicated on his questionnaire that he does not want to serve on the jury because he felt like the trial would be too long.” (5 RT 1079.) Alleged solicitude for a juror’s concerns with the length of trial was the very subject addressed by the United States Supreme Court in *Snyder v. Louisiana*, *supra*, 552 U.S. 472, and found to be pretext. (*Id.* at p. 479.)

According to the prosecutor, he was worried about Prospective Juror No. 28’s time concern because “a juror in a rush is not a juror I want to have.” (5 RT 1079.) This explanation is on its face implausible. The idea that Prospective Juror No. 28 would vote to acquit on guilt or vote against death out of a sense impatient pique is unsupported and unsupportable. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 482 [even if true, juror’s hypothesized impatience “might have led him to agree [with verdict favoring prosecution] in order to speed the deliberations. Only if all or most of the other jurors had favored the lesser verdict would [the juror] have been in a position to shorten the trial by favoring [an undesirable] verdict.”].) Because the Supreme Court itself has viewed this justification with deep suspicion, so too should this Court.

As with the comparative severity of LWOP, there were many prospective jurors who expressed concern about the length of the trial. Indeed, an entire portion of the voir dire, in which Prospective Juror No. 28 did not participate, was dedicated to hardships. (3A RT 467-512.) Virtually all of the hardships pertained to the conflicts generated or exacerbated by the estimated length of the trial. (*Kesser v. Cambra*, *supra*, 465 F.3d at p.

362 [“[w]e cannot believe this was a sincere reason for striking [the juror], since many others who were not struck also expressed concerns about leaving their work for the weeks and perhaps months needed to complete Kesser’s trial. Such excuses were commonplace”].)

Although the prosecutor questioned a few of the prospective jurors’ concerns regarding possible conflicts (see, e.g., 4 RT 944 [Prospective Juror No. 5]; 4 RT 950-951 [Seated Juror No. 21]; 4 RT 964-965 [Seated Juror No. 5]), he failed to make any inquiry into the alleged time conflict for Prospective Juror No. 28. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 481 [relying in part on the fact that the prosecution “did not choose to question [the juror] more deeply” about his alleged conflict in schedule].) The prosecutor’s failure to question Prospective Juror No. 28 on this ground thus also supports a finding of pretext.

c. The Failure to Question Prospective Juror No. 28 Regarding His Education Level

The third reason proffered by the prosecutor to justify his exclusion of Prospective Juror No. 28 was that he was “trying, to the extent possible with the jurors available to me, to have a jury with as much formal education as possible.” (5 RT 1079.) Because the prosecutor surmised that “this juror I think just completed the 12th grade,” he argued that this characteristic supported his peremptory on race-neutral grounds.

As explained more fully below, educational level was an extraordinarily weak justification. Like with the prosecutor’s other justifications, there were very large numbers of prospective jurors, who, like Prospective Juror No. 28, did not attend college. Only five of the twelve seated jurors and none of the alternates had listed a college degree in

their questionnaires and several, like Prospective Juror No. 28, had only high school educations.¹⁷

Perhaps more glaringly, although claiming a desire to maximize educational levels on the jury, the prosecutor did not ask a single question of *any* of the jurors regarding their education. This despite the fact that many jurors listed the extremely ambiguous answer of “some” high school or college. (See, e.g. 4 CT 765 [Seated Juror No. 4 attended “some college courses”]; 4 CT 801 [Seated Juror No. 7 had attended “some high school”]; 4 CT 897 [Seated Alternate No. 3 attended “some college”]; 4 CT 921 [Seated Alternate No. 5 attended “some college”].) Although failure to question any of the jurors about their education thus belies a claim that a high school education was disqualifying, Prospective Juror No. 28 himself provides a compelling example of why the prosecutor “probably would have [questioned on this point] had [it] actually mattered.” (*Miller-El v. Dretke, supra*, 545 U.S. at p. 246.)

¹⁷ See 4 CT 729 [Seated Juror No. 1, M.S. degree]; 4 CT 741 [Seated Juror No. 2, B.M. and M.M. degrees]; 4 CT 753 [Seated Juror No. 3, high school]; 4 CT 765 [Seated Juror No. 4, some college]; 4 CT 777 [Seated Juror No. 5, 11th grade]; 4 CT 789 [Seated Juror No. 6, B.S. degree]; 4 CT 801 [Seated Juror No. 7, some high school]; 4 CT 813 [Seated Juror No. 8, 12th grade and trade school]; 4 CT 826 [Seated Juror No. 9, M.S. degree]; 4 CT 837 [Seated Juror No. 10, “12 years”]; 4 CT 849 [Seated Juror No. 11, pursuing graduate degree]; 4 CT 861 [Seated Juror No. 12, “14”]; 4 CT 873 [Alternate Juror No. 1, 2 years of college]; 4 CT 885 [Alternate Juror No. 2, AA degree]; 4 CT 897 [Alternate Juror No. 3, some college]; 4 CT 909 [Alternate Juror No. 4, high school graduate and 1 year of junior college]; 4 CT 921 [Alternate Juror No. 5, some college]; 4 CT 933 [Alternate Juror No. 6, college student with approximately 80 units].

Although only graduating high school, Prospective Juror No. 28's questionnaire hardly suggested that he lacked education and training. Prior to retirement, he was a "lead man" electrician for an aircraft company where he had work for nearly four decades. (9 CT 1209; see also Cal. Labor Code, §§ 108-108.5 [establishing rigorous certification procedures for California electricians].) Due to the very discrimination that the *Batson/Wheeler* doctrine was meant to combat, obtaining a college education was exceedingly rare for African-American men of Prospective Juror No. 28's generation. (See McDaniel et al., *The Black Gender Gap in Educational Attainment: Historical Trends and Racial Comparisons* (2011) 48 Demography 889, Appendix, figure 1 [between 1950 and 1960, only approximately 2-3% of African American men between 22 and 28 years old had completed college].) However, to obtain the technical training necessary to become an electrician working on aircraft, Prospective Juror No. 28 almost surely had to receive further formal education and training beyond a mere high school diploma.

Perhaps Prospective Juror No. 28 began to obtain this training in the military, where he attained the rank of private second class. (9 CT 1210.) But regardless of precisely where Prospective Juror No. 28 obtained the education necessary to work on aircraft, or the further training required to attain a supervisory role in doing so (9 CT 1209), the prosecutor evinced absolutely no interest. By claiming that Prospective Juror No. 28 was simply too uneducated to serve on his jury without any further inquiry, the prosecutor provided further evidence that his justifications were merely pretext.

2. The Prosecutor’s Inexplicably Extremely Negative Rating of Prospective Juror No. 28 Provides Further Evidence of Discrimination

In prefacing his justifications for excusal, the prosecutor said that he had labeled all of the black jurors, including the relatively noncontroversial Prospective Juror No. 28, as an “F” or a “D” on his grading system. (5 RT 1077.) As explained in the comparative analysis below, Prospective Juror No. 28’s allegedly negative traits were shared with numerous other seated jurors. Thus, not only the comparative analysis, but the extremely negative rating itself suggests that race played a role in the prosecutor’s rating system.

It is true enough that “[t]he justification need not support a challenge for cause, and even a ‘trivial’ reason, if genuine and neutral, will suffice. [citation].” (*People v. Lenix, supra*, 44 Cal.4th at p. 613.) But where a seemingly fair-minded juror is placed in a graded category out of step with the juror’s seemingly moderate questionnaire and/or voir dire responses, it is suspicious and strongly suggestive of racial motivation. (See *Crittenden v. Ayers, supra*, 624 F.3d at p. 953 [prosecutor’s extremely negative rating of black juror evidence of discrimination where it was out of proportion to juror’s views].)

3. Comparative Analysis Further Substantiates That the Excusal of Prospective Juror No. 28 Was Motivated by Race

The prosecutor’s “proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent.” (*Snyder v. Louisiana, supra*, 552 U.S. at p. 485.) Thus, when a prosecutor provides multiple reasons, “[a] court need not find all nonracial reasons pretextual in order to find racial discrimination.” (*Kesser v. Cambra, supra*, 465 F.3d at p. 360.)

In particular, where the prosecutor's stated "main concern[]" fails comparative juror analysis, additional analysis regarding other, subsidiary justifications is unnecessary. (*Snyder v. Louisiana, supra*, 552 U.S. at p. 485 [refusing to consider demeanor-based justification where "main concern" of prosecutor, a potential conflict in schedule, failed comparative analysis].)

Review of the record demonstrates that numerous seated jurors (and for that matter, a large number of prospective jurors), had initially answered that LWOP was a more severe sentence. Because the prosecution's "primary" concern (5 RT 1078-1079) fails comparative analysis, this Court need not proceed beyond this reason. (*Snyder v. Louisiana, supra*, 552 U.S. at p. 485.) However, because comparative analysis of the prosecutor's other reasons provides further evidence of discrimination, appellant conducts a comparative juror analysis of each justification.

a. Comparative Juror Analysis Demonstrates That the Prosecutor's Reliance on Prospective Juror No. 28's Questionnaire Response That LWOP Was More Severe than the Death Penalty Was a Pretextual Justification

A questionnaire response that LWOP was more severe than death was extraordinarily common: no less than 33 prospective jurors explicitly stated that they felt that LWOP was more severe.¹⁸ An additional eight

¹⁸ 4 CT 770 [Prospective Juror No. 22]; 4 CT 818 [Prospective Juror No. 21]; 4 CT 890 [Prospective Juror No. 71]; 4 CT 914 [Prospective Juror No. 77]; 4 CT 926 [Prospective Juror No. 95]; 4 CT 951 [Prospective Juror No. 2]; 4 CT 998 [Prospective Juror No. 6]; 4 CT 1011 [Prospective Juror No. 7]; 5 CT 1166 [Prospective Juror No. 24]; 5 CT 1214 [Prospective Juror No. 28]; 5 CT 1311 [Prospective Juror No. 37]; 6 CT 1359

(continued...)

prospective jurors stated or suggested that the two were equivalent,¹⁹ a response the prosecutor also claimed justified exclusion. (5 RT 1081.) When juxtaposed against the assertion that a belief in the comparative severity of LWOP was the “primary” focus of a peremptory challenge, these numbers alone are stark evidence of pretext. (*Snyder v. Louisiana, supra*, 552 U.S. at p. 480 [relying on fact that challenged juror was one of more than fifty prospective jurors who had expressed scheduling concerns similar to challenged juror].)

The prosecutor seated four non-black jurors who had similarly answered that they believed that LWOP was a more severe punishment. (4 CT 770 [Seated Juror No. 4]; 4 CT 890 [Seated Alternate No. 2]; 4 CT 914 [Seated Alternate No. 4]; 4 CT 926 [Seated Alternate No. 5].) And the prosecutor also seated four non-black jurors who did not clearly indicate

¹⁸(...continued)

[Prospective Juror No. 41]; 6 CT 1371 [Prospective Juror No. 43]; 6 CT 1419 [Prospective Juror No. 48]; 6 CT 1431 [Prospective Juror No. 49]; 6 CT 1491 [Prospective Juror No. 56]; 6 CT 1563 [Prospective Juror No. 65]; 6 CT 1575 [Prospective Juror No. 66]; 6 CT 1587 [Prospective Juror No. 67]; 6 CT 1599 [Prospective Juror No. 69]; 6 CT 1623 [Prospective Juror No. 72]; 7 CT 1671 [Prospective Juror No. 78]; 7 CT 1683 [Prospective Juror No. 79];7 CT 1719 [Prospective Juror No. 82]; 7 CT 1731 [Prospective Juror No. 83]; 7 CT 1803 [Prospective Juror No. 89]; 7 CT 1815 [Prospective Juror No. 90]; 7 CT 1827 [Prospective Juror No. 91]; 7 CT 1863 [Prospective Juror No. 94]; 7 CT 1875 [Prospective Juror No. 96]; 8 CT 1935 [Prospective Juror No. 101]; 8 CT 1995 [Prospective Juror No. 107]; 8 CT 2019 [Prospective Juror No. 109].

¹⁹ See 4 CT 734 [Prospective Juror No. 1]; 4 CT 758 [Prospective Juror No. 46]; 4 CT 878 [Prospective Juror No. 68]; 4 CT 974 [Prospective Juror No. 4]; 4 CT 986 [Prospective Juror No. 5]; 7 CT 1647 [Prospective Juror No. 75]; 7 CT 1911 [Prospective Juror No. 99]; 8 CT 2139 [Prospective Juror No. 119].

that the death penalty was more severe. (4 CT 734 [Seated Juror No. 1 thought LWOP and death penalty “equally” severe]; 4 CT 746 [Seated Juror No. 2 had “no opinion” on severity without context]; 4 CT 782 [Seated Juror No. 5 responded that he “d[id]n’t know” which punishment was more severe]; 4 CT 878 [Seated Alternate No. 1 answered “both severe”].) Indeed, of the 12 jurors initially seated, only half stated that the death penalty was more severe. (4 CT 794 [Seated Juror No. 6]; 4 CT 806 [Seated Juror No. 7]; 4 CT 830 [Seated Juror No. 9]; 4 CT 842 [Seated Juror No. 10]; 4 CT 854 [Seated Juror No. 11]; 4 CT 866 [Seated Juror No. 12].) And only two of the six alternates stated that the death penalty was more severe. (4 CT 902 [Seated Alternate No. 3]; 9 CT 938 [Seated Alternate No. 6].)

These numbers make it extremely difficult to credit the prosecutor’s claim that a belief that LWOP is more severe than death was in fact the “primary” basis for excluding Prospective Juror No. 28 or his claim that such a belief was not a “good instinct to have” on a jury. (5 RT 1079.) As discussed above, both the prosecutor and the trial court separately noted that such questionnaire responses were extremely common. (4 RT 857, 942.) And in justifying the excusal, the prosecutor essentially conceded that Prospective Juror No. 28’s response regarding LWOP would fail comparative juror analysis. (5 RT 1078 [“many others” had initially indicated that LWOP was a more severe punishment].) Because the prosecutor’s “primary concern” does not survive comparative analysis, there is strong evidence of pretext and the inquiry should end here. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 485.)

**b. The Prosecutor's Subsidiary Justifications
Provide More Evidence of Pretext**

The prosecutor's second and third justifications for excusing Prospective Juror No. 28 – his questionnaire response indicating that the trial would be “too long,” and the fact that he only graduated from high school – also wither under comparative scrutiny.

The alleged concern about educational attainment is a particularly weak justification. As an initial matter, Prospective Juror No. 46 also had a high school education. (4 CT 753.) But when asked to justify his excusal of Prospective Juror No. 46, the prosecutor made no mention of a concern about his educational level. (4 RT 1081-1082, 1085.) That the prosecutor listed this factor for one juror, but not another, suggests his avowed concern about education was not a true selection criterion. In light of the finding that the excusal of Prospective Juror No. 46 was discriminatory, it seems the prosecutor merely cast about, black juror by black juror, for allegedly race-neutral reasons which he could apply.

The fact of the matter is, the sheer numbers indicate that low educational attainment could not have been be a disqualifying concern. Numerous prospective jurors (33 in total) had high school level educations

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or less.²⁰ This is to say nothing of the even larger number of jurors that had only vocational training or “some college.”

Despite the prosecutor’s claim that he was excusing jurors with a low educational attainment, the educational attainment of the juror pool generally was reflected in the educational level of the seated jury. Seated Juror No. 4 – who had also answered that LWOP was more severe (4 CT 770) – had barely progressed beyond high school. (4 CT 765 [juror attended “some college courses”].) Seated Juror No. 5 had not even graduated high school. (4 CT 777.) Seated Juror No. 12 answered for her education level “14,” which at least suggests the possibility that she finished schooling at age 14. (4 CT 861.)²¹ Several other non-black jurors had only marginally

²⁰ 4 CT 753 [Prospective Juror No. 46]; 4 CT 777 [Prospective Juror No. 50]; 4 CT 801 [Prospective Juror No. 42]; 4 CT 813 [Prospective Juror No. 21]; 4 CT 837 [Prospective Juror No. 18]; 4 CT 945 [Prospective Juror No. 2]; 5 CT 1053 [Prospective Juror No. 11]; 5 CT 1065 [Prospective Juror No. 12]; 5 CT 1089 [Prospective Juror No. 14]; 5 CT 1125 [Prospective Juror No. 17]; 5 CT 1149 [Prospective Juror No. 23]; 5 CT 1197 [Prospective Juror No. 27]; 5 CT 1209 [Prospective Juror No. 28]; 5 CT 1306 [Prospective Juror No. 37]; 6 CT 1342 [Prospective Juror No. 40]; 6 CT 1354 [Prospective Juror No. 41]; 6 CT 1366 [Prospective Juror No. 43]; 6 CT 1378 [Prospective Juror No. 44]; 6 CT 1390 [Prospective Juror No. 45]; 6 CT 1390 [Prospective Juror No. 54]; 6 CT 1534 [Prospective Juror No. 61]; 6 CT 1618 [Prospective Juror No. 72]; 7 CT 1678 [Prospective Juror No. 79]; 7 CT 1750 [Prospective Juror No. 85]; 7 CT 1798 [Prospective Juror No. 89]; 7 CT 1918 [Prospective Juror No. 100]; 8 CT 1954 [Prospective Juror No. 104]; 8 CT 1966 [Prospective Juror No. 105]; 8 CT 2026 [Prospective Juror No. 110]; 8 CT 2086 [Prospective Juror No. 115]; 8 CT 2110 [Prospective Juror No. 117]; 8 CT 2122 [Prospective Juror No. 118]; 8 CT 2134 [Prospective Juror No. 119].

²¹ Because Seated Juror No. 12 was raised in part in Guatemala (4 CT 861), it is unclear if she meant that she finished schooling at age 14, or was instead referring to a foreign grading system or additional post-12th
(continued...)

more advanced education than Prospective Juror No. 28. (See, e.g., 4 CT 897 [Seated Alternate No. 3 attended “some college”]; 4 CT 921 [Seated Alternate No. 5 attended “some college”]; 4 CT 885 [Seated Alternate No. 2 had AA degree]; 4 CT 897 [Seated Alternate No. 3 attended “some college”]; 4 CT 908 [Seated Alternate No. 4 “1 yr. of jr. college”]; 4 CT 921 [Seated Alternate No. 5 attended “some college”].) Some seated jurors had indeed graduated from a 4-year college or possessed an advanced degree. However, in light of the large number of jurors with lower educational levels (both black and non-black), it is difficult to accept Prospective Juror No. 28’s educational background was in fact the actual basis for his excusal.

An examination of the prosecutor’s justification regarding Prospective Juror No. 28’s concern for a lengthy trial fares no better. Over 50 prospective jurors expressed concern stemming from the length of the trial and/or related conflicts in schedule.²² (Cf. *Snyder v. Louisiana, supra*,

²¹(...continued)

grade education in the United States. She had obtained a legal secretary certificate. (*Ibid.*) In any event, the prosecutor did not question her about her education, suggesting he was unconcerned about any ambiguity.

²² See 4 CT 728, 736, 3A RT 474-475 [Prospective Juror No. 1 (aka Badge No. 6774)]; 4 CT 968, 3A RT 475-476 [Prospective Juror No. 4 (aka Badge No. 4585)]; 4 CT 1024 [Prospective Juror No. 8]; 4 CT 820 [Prospective Juror No. 21]; 5 CT 1148, 1159, 3A RT 477-479 [Prospective Juror No. 23 (aka Badge No. 9995)]; 5 CT 1216 [Prospective Juror No. 28]; 5 CT 1252 [Prospective Juror No. 31]; 5 CT 1301 [Prospective Juror No. 36]; 5 CT 1317, 1325, 1328, 3A RT 476-477 [Prospective Juror No. 38 (aka Badge No. 3200)]; 6 CT 1353, 1361, 1364, 3A RT 457 [Prospective Juror No. 41 (aka Badge No. 0066)]; 4 CT 776, 784, 787, 3A RT 495 [Prospective Juror No. 50 (aka Badge No. 1508)]; 6 CT 1445 [Prospective Juror No. 51]; 6 CT 1485, 1493, 3A RT 496 [Prospective Juror No. 56 (aka (continued...)]

552 U.S. at p. 480 [relying on fact that challenged juror “was 1 of more than 50 members of the venire who expressed concern that jury service or sequestration would interfere with work, school, family, or other obligations”]; *Kesser v. Cambra, supra*, 465 F.3d at p. 362 [rejecting justification relating to hardship where such concerns were “commonplace”].)

Unsurprisingly, multiple jurors seated by the prosecutor expressed concern related to the length and timing of the trial. (See, e.g., 4 CT 736 [Seated Juror No. 1 willing to serve “if I can get off at 3:00 p.m. on Wednesdays and Fridays to pick up my son at school”]; 4 CT 784, 787 [Seated Juror No. 5 did not wish to serve on jury due to work and financial obligations]; 4 CT 832 [Seated Juror No. 9 did not want to serve on the jury due to “Job & Family Responsibilities”].) Both Seated Juror No. 1 and Seated Juror No. 5 not only voiced concern regarding the length of trial, but

²²(...continued)

Badge No. 9010)]; 6 CT 1509 1520, 3A RT 461-462 [Prospective Juror No. 59 (aka Badge No. 3675)]; 6 CT 1529 [Prospective Juror No. 60]; 4 CT 832 [Prospective Juror No. 64]; 6 CT 1565 [Prospective Juror No. 65]; 6 CT 1613 [Prospective Juror No. 70]; 7 CT 1661 [Prospective Juror No. 76]; 7 CT 1721 [Prospective Juror No. 82]; 7 CT 1725, 3A RT 472-473 [Prospective Juror No. 83 (aka Badge No. 7250)]; 7 CT 1745 [Prospective Juror No. 84]; 7 CT 1769 [Prospective Juror No. 86]; 7 CT 1865 [Prospective Juror No. 94]; 7 CT 1877 [Prospective Juror No. 96]; 7 CT 1901 [Prospective Juror No. 98]; 8 CT 1985 [Prospective Juror No. 106]; 8 CT 2000 [Prospective Juror No. 107]; 8 CT 2117 [Prospective Juror No. 117]; 8 CT 2157, 3A RT 499 [Prospective Juror No. 121 (aka Badge No. 4328)]; 3A RT 479-480 [Badge No. 2241]; 3A RT 458 [Badge No. 4974]; 3A RT 458-460 [Badge No. 8781]; 3A RT 461 [Badge No. 1199]; 3A RT 470-471 [Badge No. 5761]; 3A RT 479-480 [Badge No. 2241]; 3A RT 492-493 [Badge No. 8750]; 3A RT 493-494, 503-504 [Badge No. 7505]; 3A RT 498 [Badge No. 2009]; 3A RT 501 [Badge No. 7513].

(unlike Prospective Juror No. 28) in fact attempted to be excused during the hardship portion of voir dire. (3A RT 474-475, 495.)

Comparative analysis of Seated Juror No. 5²³ is particularly striking. Seated Juror No. 5 wrote on his questionnaire that he did not wish to serve on the jury because he was a manager at a store and “need[ed] to work to make house payment.” (4 CT 784.) He separately noted on the end of his questionnaire that he “need[ed] to be at work” because he was the “leader there at my store” and that, because he was buying his first house and needed to move, “I can’t be here.” (4 CT 787.) Although Seated Juror No. 5 attempted to be excused during the hardship period of voir dire, his request was denied. (3A RT 495.)

The prosecutor later asked Seated Juror No. 5 about his concerns during attorney-led voir dire. (4 RT 964.) Seated Juror No. 5 reaffirmed that he did not want serve on the jury due to financial issues. (4 RT 964.) When asked whether this issue would impact how he looked at the evidence, he stated “I believe so.” (4 RT 964.) When asked how so, he responded “there’s lots of things going on in my personal life financial-wise that I need to take care of the family.” (4 RT 964.) When asked if he could set aside those feelings if instructed to do so, the juror stated “I guess I have to.” (4 RT 964.) When the prosecutor responded “you have to?,” the juror responded “it is the law.” (4 RT 964-965.)

A better case could not be made for a juror who was in a rush to get off the jury. In fact, Seated Juror No. 5 ultimately managed to get off the jury prior to deliberations. (9 RT 1834-1836.) Nonetheless, despite failing

²³ Seated Juror No. 5 was also referred to as Prospective Juror No. 50 and Prospective Juror No. 1508. (See 4 CT 776 [questionnaire listing both Prospective Juror No. and Juror Badge No.]

to graduate high school and expressing ambivalence about the relative severity of LWOP, this juror was seated by the prosecution. (4 CT 777, 782.) In contrast, there was no indication that Prospective Juror No. 28 was in a hurry to get off the jury. Thus, the prosecution's alleged concern that Prospective Juror No. 28 was a "juror that is in a rush" (5 RT 1079) is without basis and exudes pretext.

E. Conclusion

As Justice Liu has recently and forcefully argued, this Court provides extraordinary deference to trial court rulings denying *Batson/Wheeler* motions based on the "implicit" acceptance of a host of factors about which the record is absolutely silent and thus where a "reasoned" trial court decision is arguably absent. (See *People v. Mai*, *supra*, 57 Cal.4th at pp. 1058-1078 (conc. opn. of Liu, J.); *People v. Williams* (2013) 56 Cal.4th 630, 699-728 (dis. opn. of Liu, J.); see also *People v. Manibusan* (2013) 58 Cal.4th 40, 107-109 (conc. opn. of Liu, J.); *People v. Chism* (2014) 58 Cal.4th 1266, 1338 (conc. and dis. opn. of Liu, J.)) The danger in continuing to extend this extreme deference to new contexts is that it tends to "foster judicial rationalization of a prosecutor's strikes," which in turn threatens to "undermine public confidence in the fairness of our system of justice" (*People v. Mai*, *supra*, 57 Cal.4th at p. 1076 (conc. opn. of Liu, J.))

This Court should not sweep under the rug the troubling facts of this case by applying deference to the trial court's decision and moving along. The record establishes (1) that the prosecutor violated *Batson/Wheeler* and hid his misconduct from the trial court with pretextual justifications with respect to Prospective Juror No. 46; (2) failed to meaningfully question the challenged juror at issue (in the same way he had failed to question the

other, improperly stricken juror); and (3) ultimately provided as justifications characteristics extremely common in the pool and common to many of the seated jurors. Short of an admission of misconduct by the prosecutor, it is hard to imagine a more compelling case that discrimination infected the jury selection process.

Because the evidence supporting discrimination is so strong, the prosecution's excusal of Prospective Juror No. 28 violated appellant's state and federal constitutional rights and reversal of the entire judgment is required. (*Batson v. Kentucky, supra*, 476 U.S. at p. 97; *People v. Wheeler, supra*, 22 Cal.3d at p. 283 [infringement of right to a fair and impartial jury is "prejudicial per se"].)

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II.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT’S MOTION TO SUPPRESS, THEREBY VIOLATING HIS FOURTH AMENDMENT RIGHTS AND REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

A few days after the instant crime, appellant was a passenger in a car driven by his brother that was subject to a *Terry*²⁴ stop because the car lacked rear license plates. (See 2 CT 405-410 [police report]; 3 RT 238-239 [police officer testimony regarding reason for stop].) As a result of that stop, police recovered from appellant’s person a weapon later linked by ballistics analysis to the shootings in this case. (9 RT 1560-1563.)

At the time of the stop, the arresting officers had no suspicion that appellant himself had committed any wrongdoing; the focus of the stop was the driver for driving a car that lacked license plates. When appellant attempted to exercise his constitutional right to leave the detained vehicle, one of the arresting officers ordered him to remain inside the vehicle. (3 RT 244.)

As the United States Supreme Court has made clear, a passenger is seized for purposes of the Fourth Amendment when the driver is detained for purposes of a routine traffic violation. (*Brendlin v. California* (2007) 551 U.S. 249, 262.) And California courts have further held that when a passenger subject to a routine stop signals his “intention to leave the car by opening the door and beginning to step out but [is] compelled to remain to comply with [a] police command” law enforcement must put forward “a reasonable, articulable suspicion of [the passenger’s] criminal activity . . . to justify a detention.” (*People v. Gonzalez* (1992) 7 Cal.App.4th 381, 386.)

²⁴ *Terry v. Ohio* (1968) 392 U.S. 1.

No such reasonable suspicion was articulated here. As such, appellant's detention was unlawful and his motion to suppress the gun and ammunition found on his person as a result of that unlawful detention should have been granted.

Suppression of an instrumentality of a crime – here the alleged murder weapon – is a paradigmatic example of prejudicial error. Given the significant credibility issues with respect to the prosecution's witnesses who identified appellant as one of the two shooters, the erroneous admission of the weapon was necessarily prejudicial, denying appellant his rights under the state and federal Constitutions. (U.S. Const. 4th Amend.; Cal. Const, art. I § 13.)

A. Relevant Facts

On October 22, 2007, appellant filed a motion to suppress all evidence as a result of his illegal detention during a routine traffic stop, including the 9 millimeter semi-automatic weapon and ammunition recovered during that illegal detention. (2 CT 397-410 [motion and exhibits]; see also 2 CT 414 [opposition].) The defense motion argued that a seizure occurs whenever law enforcement violates a defendant's "freedom to walk away" and such seizures must be grounded in "suspicion that the person may be personally involved in some criminal activity." (2 CT 401 [citing *People v. Bower* (1979) 24 Cal.3d 638, 643 and *In re Tony C.* (1978) 21 Cal.3d 888, 895].) A hearing was held on January 17, 2008. (3 RT 236-261; 2 CT 465.) One of the two arresting officers, Deputy Sheriff Marcus Turner, testified as follows.

On April 11, 2004, at around 10:00 p.m., Deputy Turner conducted a routine traffic stop of a blue Toyota because it did not have a rear license plate. (3 RT 237-238.) The car did not respond immediately when Turner

activated his car's lights. Instead, the car continued to drive for about 10 seconds, but pulled over when the siren was turned on, about 500 feet from where it had been when the lights were first activated. (3 RT 241, 243, 254.)²⁵ After the vehicle pulled over onto the shoulder, appellant stepped out of the passenger side of the vehicle to leave, but one of the officers shouted an order for him to "get back in the car" and appellant complied. (3 RT 238, 244.) Turner testified that appellant jumped out "as if he was going to start running" and that appellant "tried to run." (3 RT 238, 243-244.) But Turner later clarified that appellant managed only to put his feet on the ground outside the vehicle and stand up and did not take a single step before being ordered to return. (3 RT 253-254.) Subsequently, the driver, appellant's brother, was removed from the vehicle and, lacking a driver's license, was detained for that reason. (3 RT 245-246.)

Ultimately, Turner and his partner approached appellant with guns drawn and ordered him out of the vehicle. (3 RT 242, 245-246.) Appellant put his hands up. (3 RT 242.) As Turner was about to pull appellant from the vehicle, he noticed a bulge in appellant's pants pocket underneath his shirt that looked like a gun, which Turner then retrieved. (3 RT 242-243, 257-258.) Turner did not recognize appellant from any prior encounter. (3 RT 255.)

²⁵ Contrary to suggestions posited in the questioning by defense counsel, appellant's brother's conduct did not constitute a "failure to yield" under the Vehicle Code, since he yielded once the siren sounded. (See Veh. Code, § 2800.1 [failure to yield violation requires that *both* lights and siren have been activated]; 3 RT 238 [car pulled over after lights and siren activated].)

Following argument by counsel, the trial court denied appellant's motion to suppress, finding Turner's testimony credible and ruling that he had "every right to do what he did under the circumstances." (3 RT 261.)

At trial, testimony was adduced that the weapon that was recovered from appellant (7 RT 1507-1508) was the same weapon that ejected several of the cartridge casings recovered at the crime scene. (9 RT 1563.)

B. Applicable Law

Both the state and federal Constitutions protect all persons against "unreasonable searches and seizures." (U.S. Const. 4th Amend.; Cal. Const, art. I § 13.) For purposes of the Fourth Amendment, a seizure is generally "reasonable" only if based on some reason to believe that the individual has committed a crime. (*Dunaway v. New York* (1979) 442 U.S. 200, 213.)

A person has been seized within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave." (*United States v. Mendenhall* (1980) 446 U.S. 544, 554.) A person is seized for Fourth Amendment purposes when the officer's words would convey to a reasonable person that he or she is being ordered to stop, and the person complies with that order. (*California v. Hodari D.* (1991) 499 U.S. 621, 628, 629.) Apropos the present case, when the driver of a car is seized during an investigative stop, the passenger is seized as well. (*Brendlin v. California, supra*, 551 U.S. at p. 263.)

In *People v. Gonzalez, supra*, 7 Cal.App.4th 381 (*Gonzalez*), the Court of Appeal directly addressed the question of whether a police officer must have an articulable basis in order to detain a car passenger by ordering him to return to the vehicle. In *Gonzales*, two police officers saw a gold

Buick change lanes rapidly without signaling. The officers stopped the car and, as they approached the Buick, defendant, a passenger, started to get out of the car. One officer commanded him to get back inside the car. (*Id.* at p. 383.) The officer then approached the defendant and noticed certain symptoms which led to the defendant's arrest for being under the influence of heroin. The officer testified at the suppression hearing that he did not suspect the defendant of criminal activity but ordered him to remain in the car for officer-safety reasons. (*Ibid.*) The court concluded that the defendant had been detained because a reasonable person would feel he was not free to leave after receiving such an unequivocal verbal command. (*Id.* at p. 384.) Because the detention was not based on a reasonable suspicion of criminal activity, the court reversed the denial of the motion to suppress and the judgment, holding that "a reasonable, articulable suspicion of criminal activity is needed to justify a detention. [Citations.] Being a passenger in a car stopped for a quick, un signaled lane change is not sufficiently suspicious behavior to meet this standard." (*Id.* at p. 386.)²⁶

²⁶ Courts of several other jurisdictions also follow this rule. (See *Wilson v. State* (Fla. Dist. Ct. App. 1999) 734 So.2d 1107, 1113 [holding that an officer "should be able to identify objective circumstances" to support ordering a passenger to return to or remain in a vehicle during a traffic stop]; *People v. Dixon* (Colo. App. 2000) 21 P.3d 440, 445 [where there was no evidence that officer saw furtive gestures or sign of weapon at the time the order, the "officer in this case had no lawful basis to order defendant back to the car"]; *Walls v. State* (Ind. Ct. App. 1999) 714 N.E.2d 1266, 1268 [rejecting "the notion that for purposes of taking 'command of the situation' or maintaining a 'tactical advantage' a police officer may routinely order the passenger of a car to remain at the scene of a traffic stop"]; *Castle v. State* (Alaska Ct. App. 2000) 999 P.2d 169, 173-175 [where record "does not support the State's assertion" that ordering passenger to return to vehicle was necessary for officer safety, suppression granted]; *State v.*

(continued...)

Gonzalez's holding that a reasonable suspicion of criminal activity is always required to justify a detention was later criticized by the courts in

²⁶(...continued)

Mendez (1999) 137 Wash. 2d 208, 223 [under state law, seizure of passenger “occurred when [the officer] first uttered the command for him to get back into the car. As soon as [the officer] gave the command, [the passenger] was no longer free to leave; he was seized” requiring reasonable suspicion]; *State v. Mastin* (Or. Ct. App. 2005) 203 Or.App. 366, 371 [order to passenger to “get back in the vehicle” during routine traffic stop was illegal detention under state law]; see also *Dennis v. State* (1997) 345 Md. 649, 693 A.2d 1150 (1997) [“unexplained belief that detaining [passenger] was safer for the officer than letting [passenger] leave the scene” insufficient to authorize detention]; *People v. Harrison* (1982) 57 N.Y.2d 470, 476 [“Neither is there any merit to the argument that prohibiting the occupants from leaving the automobile is such a minor intrusion on their rights that the police may do so absent reasonable suspicion.”].)

Several additional states go further than federal requirements under their state statutory or constitutional guarantees, and deny officers the right to control the movement of a passenger in any way (i.e., in or out of a car) absent some degree of articulable suspicion or threat to officer-safety. (See *State v. Sprague* (2003) 175 Vt. 123, 130 [an officer cannot order a driver out of his/her vehicle without providing “an objective circumstance that would cause a reasonable officer to believe it was necessary to protect the officer’s, or another’s safety or to investigate a suspected crime.”]; *State v. Mendez, supra*, 137 Wash.2d at p. 220 [“An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle]; *Commonwealth v. Gonsalves* (1999) 429 Mass. 658, 663 [“a police officer, in a routine traffic stop, must have a reasonable belief that the officer's safety, or the safety of others, is in danger”]; *State v. Smith* (1994) 134 N.J. 599, 637 A.2d 158, 166 [concluding that under Article I, Paragraph 7 of the New Jersey Constitution, an officer must have “some quantum of individualized suspicion” before asking a passenger to step out of a vehicle]; *State v. Kim* (1985) 68 Haw. 286, 711 P.2d 1291, 1294 (holding that “under article I, section 7 of the Hawaii Constitution, a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop.”)

People v. Castellon (1999) 76 Cal.App.4th 1369 (*Castellon*) and *People v. Vibanco* (2007) 151 Cal.App.4th 1 (*Vibanco*). However, both *Castellon* and *Vibanco* concluded (or at the very least assumed) that *Gonzalez* was correctly decided on the facts in that case, facts which are very similar to those present in appellant's case.²⁷

In *Castellon*, an officer stopped a car upon probable cause that a Vehicle Code violation had occurred. (*Castellon, supra*, 76 Cal.App.4th at p. 1373.) As the officer got out of his patrol car the defendant, a passenger, started to get out of the car. (*Ibid.*) The officer told the defendant not to get out of the car, but the defendant ignored him, got out of the car and stopped about three feet away, apparently in response to the officer's order and approach. (*Ibid.*) The court ultimately held that the passenger had been seized because he had "submitted to [the officer's] authority." (*Id.* at p. 1374.)

The *Castellon* court suggested that the United States Supreme Court's decision in *Maryland v. Wilson* (1997) 519 U.S. 408, which gives officers unilateral authority to order a passenger *out* of a car for safety reasons, should similarly allow officers the authority to detain passengers

²⁷ Although there is an acknowledged split of state authority on this issue, cases allowing arbitrary detention of passengers in stopped vehicles have frequently been the subject of vigorous disagreement. (See *People v. Gonzalez* (1998) 184 Ill.2d 402, 418, disapproved on other grounds by *People v. Sorenson* (2001) 196 Ill.2d 425 [police may detain passengers who attempt to leave traffic stop without suspicion of crime or threat to officer safety]; but see *id.* at 425-428 (dis. opn. of Heiple, J.); *State v. Webster* (1991) 170 Ariz. 372, 374 [accord]; but see *id.* at 374-375 (dis. opn. of Livermore, C.J.); *State v. Shearin* (N.C. Ct. App. 2005) 170 N.C.App. 222, 230 [accord]; but see *id.* at 235-245 (conc. opn. of Wynn, J.) [officer must have reasonable suspicion of crime or articulable basis for threat to officer safety].)

by confining them *within* a vehicle for the duration of a traffic stop. (See *Castellon, supra*, 76 Cal.App.4th at pp. 1374-1375 [indicating that “whether the passenger is ordered to stay in the car or got out of the vehicle is a distinction without a difference.”].) However, the *Castellon* court ultimately concluded that “*Gonzalez* may have been right on its facts, and we need not decide that case.” (*Id.* at p. 1376.) The court noted that in the case before it, the officer had every reason to take the safety precaution of ordering the passenger to remain inside the car: the passenger was a known gang member whom he recognized from prior contact investigating violent crimes and whose exit from the vehicle caused him to fear for his safety. (*Id.* at pp. 1372, 1375-1377.)

In *Vibanco, supra*, 151 Cal.App.4th 1, the court also criticized *Gonzales* on similar grounds, noting that it was decided before *Maryland v. Wilson, supra*, 519 U.S. 408, and *People v. Saunders* (2006) 38 Cal.4th 1129, 1136 [adopting the rule in *Wilson*], and *Castellon, supra*. (*Vibanco, supra*, 151 Cal.App.4th at p. 12.) Ultimately, *Vibanco* found *Gonzales* to be “factually distinguishable.” (*Ibid.*) It concluded that “current law supports the conclusion that police officers conducting a traffic stop may, “for purposes of officer safety, order the occupants . . . to stay in the car.” (*Id.* at pp. 12-13; see also *id.* at p. 11 [*Wilson* can “reasonably be interpreted” to allow officers to order a passenger “to remain in the car during a lawful traffic stop *if the officers deem it necessary for officer safety*”], italics added.) The *Vibanco* decision concluded its analysis by distinguishing *Gonzalez* and resting its holding on facts of the case supporting the officer-safety rationale:

One person in the backseat was reaching for something in the waistband area underneath her clothing. Another person was

simultaneously getting out of the car. The third passenger was remaining in the front seat. . . . *Under these circumstances*, the officer was justified in attempting to keep all of the passengers within sight for officer safety reasons.

(*Vibanco, supra*, 151 Cal.App.4th at p. 13, italics added.)

In short, although California cases have criticized the unqualified language in *Gonzalez* indicating that reasonable suspicion of criminal activity is always required (*Gonzalez, supra*, 7 Cal.App.4th at p. 386) no California case has directly contradicted the holding that law enforcement must articulate *some* basis for detaining a passenger. *Vibanco* and *Castellon* thus must be construed under their specific facts: requiring the prosecution to adduce facts reasonably necessitating detention of the passenger for safety reasons. (*Vibanco, supra*, 151 Cal.App.4th at p. 13; *Castellon, supra*, 76 Cal.App.4th at p. 1376.) Because no such evidence was produced at the hearing, the trial court's decision must be reversed.

C. Because the Prosecution Presented No Articulate Basis for Appellant's Detention, His Rights under the Fourth Amendment Were Violated

Under *Gonzalez*, *Castellon*, and *Vibanco*, appellant was undeniably seized when he was ordered back into the vehicle absent any showing of a need to do so. Appellant clearly meets the standard articulated in *Gonzalez*: there was no reasonable suspicion underlying the order for him to remain in the vehicle. (See *Gonzales, supra*, 7 Cal.App.4th at p. 385 [“articulate suspicion of criminal activity is needed”]; accord, *Walls v. State, supra*, 714 N.E.2d 1266, 1268 [officer's questioning “why a person who was merely a passenger in a car would walk away from the scene after the car was stopped by police” is “not enough”].)

But appellant's motion should have succeeded even under the narrower reading of *Gonzalez* adopted by *Castellon* and *Vibanco*, which both relied upon case-specific facts which provided articulable officer-safety justifications. (*Vibanco*, 151 Cal.App.4th at p. 13; *Castellon, supra*, 76 Cal.App.4th at p. 1376.) As a threshold matter, because no alleged safety justification was presented by the People in the trial court, it is forfeited as a legal basis for appellant's detention on appeal. This Court has long held that if the People have theories to support a contention that evidence should not be excluded as the product of illegal police conduct, "the proper place to argue those theories [is] on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal." (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640; see also *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1242 [declining to address prosecution's new Fourth Amendment justification on appeal].)

The People here did not even elicit conclusory officer testimony that the detention was motivated by unspecified concerns for officer safety. (Cf. *Gonzalez, supra*, 7 Cal.App.4th at p. 385 [although the "justification urged is officer safety" given lack of record substantiating safety concerns "to rule in respondent's favor would be to authorize the police detention of an individual with no articulable justification."].) To the contrary, and as discussed in more detail below, the motivation for appellant's detention was not officer safety but a desire to keep appellant from leaving the scene.

Regardless of the People's forfeiture of an officer-safety justification, at the time appellant was ordered back into the vehicle, there was no showing of any threat to officer safety. Although the driver of the vehicle took approximately 10 seconds to pull over (3 RT 241, 254), this is

well within the normal range for a driver surprised by (or perhaps ignorant of) the activation of emergency vehicle lights which may or may not be directed at his vehicle. It may “take drivers different amounts of time, especially at night, to identify the lights of the car behind them . . . [and] [i]t may also take some time for the driver to recognize that the officer intends for him to stop and safely turn onto the shoulder.” (*United States v. Jenson* (5th Cir. 2006) 462 F.3d 399, 405 [“modest” delay of up to one minute to pull over, even when coupled with “nervous behavior” does not amount to reasonable suspicion]; *United States v. Ortiz* (N.D. Cal. 2014) 54 F.Supp. 3d 1081, 1090, fn. 4 [fact that defendant pulled over within 10 to 15 seconds after activation of patrol car lights insufficient to establish reasonable suspicion].)

Unlike in *Castellon*, there was no showing in the present case that Officer Turner (1) was “a lone officer” facing multiple detainees, (2) expressed any basis for concern for his safety or the safety of his partner, or (3) recognized appellant as a gang member who he had encountered while investigating violent crimes. (Cf. *Castellon, supra*, 76 Cal.App.4th at pp. 1372, 1375.) Similarly, unlike in *Vibanco*, the arresting officers in this case were not outnumbered by the detainees, nor, more importantly, was anyone reaching for their waistband or making other threatening movements or furtive gestures. (3 RT 256-257 [arresting officer denied seeing any furtive motions in the car]; cf. *Vibanco, supra*, 151 Cal.App.4th at p. 13.)

Indeed, Deputy Turner’s repeatedly stated impression was not that appellant was a safety risk, but that he intended leave the scene of the detention (i.e., “run.”). (3 RT 243, 253; see also 3 RT 260 [prosecution argument that appellant “got out of the car without anyone asking him to do so. That left the officer with the impression he was attempting to flee”].)

Of course, the officer’s “impression” had limited factual basis, given that appellant did nothing more than try to exit the car. (3 RT 253-254; see also 3 RT 259 [testimony of Deputy Turner admitting that it was not unusual for passengers in traffic stops to exit vehicles]; see also *People v. Aldridge* (1984) 35 Cal.3d 473, 479 [“a mere subjective speculation as to the men’s purported motives [in alleged attempt to depart from police presence], . . . carries no weight”].) Yet the impression, and the prosecution argument based upon it, is nonetheless instructive in demonstrating that the officer *perceived no inherent threat* from the manner of appellant’s exit from the vehicle. Instead, the officer was concerned not with safety but with detaining appellant at the scene. This he could not do without any articulated basis.

D. No California Court Has Adopted a Blanket Standard Allowing All Passengers to Be Detained Without a Particularized Showing of Reasonable Suspicion of Illegal Activity or Concrete Evidence of a Need to Protect Officer Safety and this Court Should Not Do So Now

Absent any particularized showing that appellant was engaged in criminal activity, or that officer safety was somehow implicated, respondent may urge this Court to forge a rule allowing officers complete authority to detain automobile passengers who wish to leave when making routine traffic stops, without providing any articulated justification. As noted above, California courts have either rejected (see *Gonzales, supra*, 7 Cal.App.4th at p. 385), or stopped short of such a ruling (see *Vibanco, supra*, 151 Cal. App. 4th at pp. 12-13; *Castellon, supra*, 76 Cal.App.4th at p. 1376).²⁸ This Court should similarly reject any attempt to provide such

²⁸ This Court has adopted the rule in *Marlyand v. Wilson, supra*, 519 (continued...)

carte blanche authority, with such great potential for abuse, to law enforcement.

Opinions granting such authority do exist. (See, e.g., *People v. Gonzalez*, *supra*, 184 Ill.2d at p. 418; but see *id.* at pp. 425-428 (dis. opn. of Heiple, J.); *State v. Webster*, *supra*, 170 Ariz. at p. 374; but see *id.* at pp. 374–375 (dis. opn. of Livermore, C.J.); *State v. Shearin*, *supra*, 170 N.C.App. at p. 230; but see *id.* at pp. 235-245 (conc. opn. of Wynn, J).) However, these opinions contravene what this Court has declared is the very foundation of Fourth Amendment detention analysis: “Under *Terry* the touchstone of reasonableness for search or seizure without probable cause is the presence of ‘specific and articulable facts’ that reasonably warrant the intrusion on personal liberty and privacy. [Citation.]” (*People v. Glaser* (1995) 11 Cal.4th 354, 374.) Absent an articulable basis for restraining the liberty of passengers, attempts to justify the Fourth Amendment seizure as “reasonable” lack theoretical basis.

Granting complete control over passengers does not merely contradict the doctrinal underpinnings of the Fourth Amendment. Decisions allowing such power are all based on the same flawed premise. Virtually every decision upholding the authority to forcibly detain passengers without any articulable basis finds that such detention is a “minimal intrusion” of these individuals’ liberty interests outweighed by the

²⁸(...continued)

U.S. 408. (See, e.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 892-893 [exit order is authorized as well as “a brief continuation of detention for officer safety”]; *People v. Saunders* (2006) 38 Cal.4th 1129, 1134.) It has not directly addressed whether an order to remain in the car constitutes a seizure that must be justified by reasonable suspicion of criminal activity or a threat to officer safety.

unspecified concerns for officer safety. (See, e.g., *People v. Gonzalez, supra*, 184 Ill.2d at p. 418.)

The flaw in such logic begins with these cases' uncritical analogy to the United Supreme Court's decision in *Maryland v. Wilson, supra*, 519 U.S. 408, which found that an order to *exit* the vehicle was not overly intrusive. For example, as reasoned in *dicta* by the *Castellon* court:

[T]he inconvenience and intrusion are certainly *less* when the passenger is simply ordered to remain seated in the car than when he or she is ordered out of the vehicle. If the minimal additional intrusion on the personal liberty of the passenger ordered out of the vehicle cannot trump the safety of the officer, then surely the slight inconvenience of ordering the passenger to remain seated can be justified by an officer's concerns.

(*Castellon, supra*, 76 Cal.App.4th at p. 1375, italics in original)

The *Castellon* court's conclusion that an order to remain confined in a vehicle is "certainly less" intrusive than an order to exit, provides no citation or explanation. Quite simply, it is wrong.

As an initial matter, the United States Supreme Court expressly left open the issue presented here: whether law enforcement may forcibly detain a passenger in a confined space as opposed to simply temporarily ordering him out of the car. (*Maryland v. Wilson, supra*, 519 U.S. at p. 415, fn. 3.) More importantly, as the high court has recently reaffirmed, the officer-safety rationale of *Wilson* only allows "negligibly burdensome precautions" during routine traffic stops. (*Rodriguez v. United States* (2015) 135 S.Ct. 1609, 1616.) Forcing a passenger who wishes to leave to remain with a driver who has committed a traffic violation cannot be equated with the "slight inconvenience" countenanced in *Maryland v. Wilson*.

The entire basis for the Supreme Court’s determination that ordering passengers out of a car was a “minimal” intrusion was that “the passengers are already stopped by virtue of the stop of the vehicle. *The only change* in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car.” (*Maryland v. Wilson, supra*, 519 U.S. at p. 414, italics added.) In other words, the police directive in *Wilson* merely moved the passengers a few feet from the location they would have already occupied by *voluntarily* staying in the vehicle of the lawfully detained driver.

The same cannot be said of those passengers, such as appellant, who indicate a desire to leave the location of the driver’s detention. Their freedom of movement is not “minimally” curtailed. From the entire world of places they would rather be, a rule authorizing unsubstantiated passenger detention limits them to the confines of one vehicle (or anywhere else the officer decides, *see Castellon, supra*, 76 Cal. App. at 1373 [passenger detained outside of vehicle]) for the duration of the stop. This is no small interference. Indeed, it contravenes the very source of authority for investigative detentions, *Terry v. Ohio, supra*, 392 U.S. 1, which defines unlawful detention as restricting an individual’s “freedom to walk away.” (*Id.* at p. 17.)

As Justice Kennedy noted in his dissent in *Wilson*, “[t]raffic stops, even for minor violations, can take upwards of 30 minutes.” (*Maryland v. Wilson, supra*, 519 U.S. at p. 422 (dis. opn., Kennedy, J.)) And such estimations do not even begin to take into account the time taken by the numerous traffic stops – particularly prevalent in minority communities – in which drivers have probation search conditions, outstanding fines, or warrants completely unrelated to their passengers which will serve to

extend the length of any traffic stop. (See Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops* (1997) 87 J.Crim.L. & Criminology 544, 582, fn. 72 [noting that almost one in three Black men between 20 and 29 is under criminal justice supervision].) In such cases, passengers may find the prospect of such potential delay an extraordinary inconvenience and want to leave.

The Court of Appeal in *Gonzales* honed in on precisely this distinction: “This is not a case of a passenger whose presence is the natural result of his or her decision *to accept the delay* occasioned by the lawful stop of the vehicle in which he or she is traveling.” (*Gonzalez, supra*, 7 Cal.App.4th at p. 386, italics added; see also *State v. Shearin, supra*, 170 N.C.App. at 243 (conc. opn. of Wynn, J.) [“while it is true that when a vehicle is stopped, passengers are by definition also stopped, it does not flow from that that the detention of passengers in the vehicle potentially for the duration of the traffic stop is a ‘minimal intrusion’”].)

In fact, this Court has clearly stated that passengers are legally free to leave the scene of the driver’s lawful detention and are *not* to be subject to the same constraint on movement as drivers subject to traffic stops. (*People v. Brendlin* (2006) 38 Cal.4th 1107, 1117, overruled by *Brendlin v. California, supra*, 551 U.S. 249 [absent further direction from the officer or show of authority, passenger “is free to ignore the police presence and go about his or her business.”]²⁹)

²⁹ This Court’s decision that passengers have no basis to challenge suspicionless traffic stops was overruled by the United States Supreme Court in *Brendlin v. California, supra*, 551 U.S. 249. But its recitation of the law that passenger’s are “free to walk away” merely reiterates prior statements of Fourth Amendment law. (*People v. Bower* (1979) 24 Cal.3d (continued...))

This is precisely the situation present in this case. Here, the officer provided precisely the show of authority discussed by this Court in *Brendlin* – shouting at the passenger to remain in the car when he attempted to leave. (3 RT 244.) In so doing, the officer ignored appellant’s right to “walk away.” (*People v. Bower* (1979) 24 Cal.3d 638, 643 [the Fourth Amendment guarantees the “freedom to walk away”]; *Wilson v. State, supra*, 734 So.2d at p. 1112 [“A wholly innocent passenger should have the right to choose whether to continue on with his business or return to the vehicle and remain by his driver-companion’s side.”]; *Terry v. Ohio, supra*, 392 U.S. at p. 17 [Fourth Amendment seizures are restrictions on an individual’s “freedom to walk away”].) Like appellant, most reasonable passengers will comply with an officer’s orders, regardless of whether the officer lacks constitutional authority to detain him. But when the authority to detain is thereby abused, the exclusionary rule should apply.

Mandatory and unsubstantiated detention of all passengers during the tens of thousands of traffic stops effectuated each year would have extraordinarily burdensome consequences on the citizens of this state. Imagine a bus driver pulled over for running a red light. If unjustified detention of all passengers is permitted simply because of unspecified safety concerns, everyone on the bus could be forced to remain seated for the entirety of the police intervention. Dozens, even scores of people wholly unrelated to the driver’s illegal conduct could be forced to remain on the bus for no reason at all other than the theoretical possibility that one of them might pose a safety risk. (Cf. *Florida v. Bostick* (1991) 501 U.S. 429,

²⁹(...continued)
638, 643 [the Fourth Amendment guarantees the “freedom to walk away”].)

434 [conceding that a bus passenger would be seized when police “convey a message that compliance with their requests is required”].)

Bus passengers are but one example – a rule providing for unsubstantiated detention of all passengers in traffic stops will affect a large number of cases. (*Maryland v. Wilson*, *supra*, 519 U.S. at p. 415 (dis. opn. of Stevens, J.) [noting that the ruling will impact “literally millions of other cases”]; see also *People v. Gonzalez*, *supra*, 184 Ill.2d at pp. 425-426 (dis. opn. of Heiple, J.) [“the majority trivializes the liberty interest at stake in this case. . . . Allowing police officers to arbitrarily detain passengers in vehicles stopped for traffic violations without any reason to believe the passenger has committed a crime or threatens the safety of the police officer ensures that this encounter will be annoying, frightening, and perhaps a humiliating experience. The thousands upon thousands of petty indignities legitimized by the majority opinion will have a substantial impact on the liberty and freedom of the citizens of this state”].)

Undoubtedly, in the millions of passenger detentions that such a rule would allow, a significant concern would be the potential for discriminatory abuse of an arbitrary power to detain. This concern was clearly articulated by the dissent in *Maryland v. Wilson*. (See *Maryland v. Wilson*, *supra*, 519 U.S. 408, 423 (dis. opn. of Kennedy, J.) [“When *Whren* [*v. United States*, 517 U.S. 806] is coupled with today’s holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police”].) The majority in *Maryland v. Wilson* mitigated these risks by limiting its holding to the minor intrusion of allowing passengers to be temporarily ordered out of the vehicle. (*Id.* at p. 415, fn. 3.) Decisions granting power to detain passengers at will, even if they do not wish to remain with the driver, obviously have no such limitation.

By its very nature, expanding police power to engage in suspicionless detentions of passengers discriminates against travelers who are poor and cannot afford their own vehicle. More specifically, if history teaches anything, it is that certain categories of poorer occupants will be targeted. (*United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1135, fn. 24 [“A significant body of research shows that race is routinely and improperly used as a proxy for criminality, and is often the defining factor in police officer’s decisions to arrest, stop or frisk potential suspects”]; see generally, Abramovsky and Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared* (2000) 63 Alb.L.Rev. 725; Harris, *supra*, 87 J.Crim.L. & Criminology at pp. 559-71; Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment* (1999) 74 N.Y.U. L. Rev. 956, fns. 1–3; Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment* (1997) 1997 Sup.Ct.Rev. 271.) As this substantial scholarship indicates, if this Court allows police authority to arbitrarily detain all passengers during traffic stops, there is little question that minority passengers will bear the disproportionate brunt of the allegedly “minimal intrusion.”

E. Unspecified Safety Concerns of Police Officers Do Not Validate Suspicionless Detention of Passengers in a Vehicle

As detailed above, detention of passengers in a vehicle is a substantial interference with their liberty. On the other side of the ledger, of course, is concern regarding the safety of officers conducting *Terry* stops, who may prefer unilateral control of all passengers at the scene.

Officers *always* face the risk of danger in on-the-street encounters. However, absent “minimal” intrusion articulated in *Maryland v. Wilson*, officer safety does not serve as a trump card with which law enforcement can discard the requirement of articulable suspicion. For instance, despite “the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters.” (*Maryland v. Buie* (1990) 494 U.S. 325, 334, fn. 2.)

In other words, while the concern for officer safety “may justify the ‘minimal’ additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify [] considerably greater intrusion” of other forms of restriction on liberty. (*Knowles v. Iowa* (1998) 525 U.S. 113, 117 [rejecting theory of “search incident to citation” where the “threat to officer safety from issuing a traffic citation, . . . is a good deal less than in the case of a custodial arrest”].)³⁰ It is hard to understand why safety concerns

³⁰ The Court in *Wilson* justified its safety concerns by citing the large number of officers assaulted and killed during traffic pursuits and stops. (*Maryland v. Wilson, supra*, 519 U.S. at p. 413 [citing FBI Uniform Crime Reports]; see also Schmidlin III, *Are New Jersey Cops Worth Less?* (1998) 29 Rutgers L.J. 1047, 1051 [complaining that New Jersey’s failure to adopt the *Maryland v. Wilson* rule placed New Jersey officers at risk].) However, nothing in the Uniform Crime Reports since that decision suggests that officers from the many jurisdictions that have declined to adopt the rule on state law grounds, see *supra*, fn. 16, have suffered an increase in officer injuries or fatalities. (See, e.g., FBI, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 2013, Tables 1, 74 available at <<http://www.fbi.gov/about-us/cjis/ucr/leoka/2013>> [as of July 30, 2015] [New Jersey has rate of officer fatalities and injury proportionally low to its rank in population].) There is no reason other than ipse dixit to assume that forcibly detaining car passengers will make law

(continued...)

would not justify frisking lawbreaking drivers but would justify forcibly detaining innocent passengers pursuant to the issuance of a simple traffic ticket.

In fact, an officer-safety rationale would make an inexplicable distinction between *Terry* stops of individuals who were driving and those who were simply walking or standing. Were appellant and his brother not driving but instead *walking* down the street and appellant's brother was detained for an infraction in which appellant played no role, appellant would unquestionably be free to leave the scene and any detention of appellant would have to be supported by reasonable suspicion. Courts authorizing detention of innocent passengers pursuant to a traffic stop of the driver have had little explanation for this contradiction other than to reiterate that the detention occurred during a traffic stop. (See *People v. Gonzalez*, *supra*, 184 Ill.2d at p. 417 [rejecting the argument that the passenger should be due "the same consideration as any citizen simply walking down the street of his community" on the grounds that he was stopped in a vehicle].)

Similarly, there is no meaningful distinction between a passenger and the driver of another car which is following a vehicle detained in a traffic stop. Clearly, if appellant had been in his own vehicle following his brother's vehicle, the fact that his brother's car lacked a rear license plate would provide no basis for detaining appellant. In such a hypothetical, if

³⁰(...continued)
enforcement any safer. (Cf. *Maryland v. Wilson*, *supra*, 519 U.S. at p. 414 ["Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment"].)

appellant had decided to drive away and not linger at the scene of his brother's traffic stop, officers would have been required to formulate reasonable suspicion in order to detain him.

In sum, decisions granting unilateral authority to police to detain all passengers inside the driver's vehicle find little support in a Fourth Amendment doctrine grounded in articulable suspicion. Such decisions violate the general principle that suspects are "free to walk away" when approached by law enforcement. (*People v. Perrusquia* (2007) 150 Cal.App.4th 228, 236 ["Frequently, we are reminded by the prosecution that when approached by the police, suspects are free to walk away"].) And they also contravene this Court's statement that passengers, in particular, are free to leave when police detain the driver. (*Brendlin, supra*, 38 Cal.4th at p. 1117.) Perhaps most importantly for the purposes of the innocent citizens whom the Fourth Amendment is meant to protect, such a rule would lend itself to arbitrary detention and abuse. This Court should not adopt a rule allowing the suspicionless detention of passengers who wish to leave the scene of a driver's detention.

F. Appellant Was Prejudiced by the Admission of the Illegally Seized Firearm

A criminal conviction cannot be affirmed unless federal constitutional errors leading to the conviction are harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Thus, an error in admitting evidence seized in violation of the Fourth Amendment must be judged by the *Chapman* standard. (*People v. Ratliff* (1986) 41 Cal.3d 675, 688.)

Admission of a weapon linked to the charged crime is a classic example of prejudicial evidence resulting from an unlawful search. (6

LaFave, Search & Seizure (5th ed. 2012) § 11.7(f), p. 601 [“it has often been held that the error was not harmless where the improperly admitted evidence was . . . weapons”].)

The question in such a case is not:

[W]hether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was “harmless” in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner’s guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result.

(*Bumper v. North Carolina* (1968) 391 U.S. 543, 553 (conc. opn. of Harlan, J.); see also *id.* at p. 550 [unlawful seizure of .22 caliber rifle allegedly used in the commission of rape was “plainly damaging” to the defendant and mandated reversal].)

Perhaps self-evidently, “illegally obtained and improperly admitted evidence is most likely to be highly relevant and thus prejudicial if it is an instrument of the crime” (La Fave, *supra*, 6 Search & Seizure § 11.7(f) see also *id.* at fn. 252 & 257 [collecting numerous cases in which admission of unlawfully seized weapons constituted prejudicial error].) Like many of these cases, although other evidence existed supporting the prosecution theory that appellant was one of the shooters, it can hardly be said that improper admission of the gun “could not have affected the result.” (*Bumper v. North Carolina, supra*, 391 U.S. at p. 553 (conc. opn. of Harlan, J.).)

As a starting point, there were at least two additional gang members who admitted to being present at the scene of the crime: Derrick Dillard and Prentice Mills. (5 RT 1126; 6 RT 1219.) In addition, one of the more

credible witnesses, neighbor Myesha Hall, testified that an unidentified individual exited the back door of the apartment shortly after the first shots were fired but prior to two additional men fleeing through the back door. (6 RT 1337-1338.) This testimony either contradicted the testimony of Dillard that he and Mills remained in the bedroom for the duration of the attack, or suggested that a third perpetrator was present.

Although the two surviving victims, Johnson and Williams, identified appellant as the shooter, their testimony was subject to significant impeachment. (See generally, 9 RT 1900-1910 [defense closing argument questioning surviving victims' credibility].) Both were heavy drug abusers and Williams had numerous drug-related convictions. (8 RT 1679; 6 RT 1215; see also 8 RT 1785 [stipulation that drugs were found in Williams's blood after hospitalization].) Multiple witnesses, including the victims, indicated that the apartment was dimly lit (5 RT 1143, 1145; 6 RT 1223), thus limiting these witnesses' ability to make an accurate identification. (See also 9 RT 1899 [defense argument noting that room was dimly lit].) Johnson had been given thousands of dollars in witness protection funds and thus had an incentive to name appellant even in the absence of a clear opportunity to identify him. (8 RT 1669-1670.)

Perhaps most importantly, there was evidence that both surviving victims were *asleep* at the drug party in Anderson's house immediately prior to being shot and thus would not have had any meaningful opportunity to observe and credibly identify anyone. (See, e.g., 6 RT 1228; 8 RT 1669.) Williams had such a poor understanding of her surroundings that she did not even realize that Johnson was in the same small apartment. (6 RT 1217.)

Although Johnson knew appellant and his name at the time of the crime, she initially identified him only as the “shorter black boy” to police. (8 RT 1723.) When challenged about this implicit reference to a second, taller shooter, Johnson concocted a story that Williams had spoken with her at the scene of the crime about a second shooter, though Johnson had been shot in the mouth and fell unconscious at the scene. (8 RT 1725-1728, 1732-1733; see also 9 RT 1906-1907 [defense argument questioning Johnson’s identification of 6’2” appellant as the “shorter black boy” who shot her].) Moreover, the physical evidence also called into question Johnson’s identification of appellant as the shooter. As noted by defense counsel, the only shell casings found in the living room where Johnson was shot matched the gun attributed to the co-defendant, not the weapon attributed by the prosecution to appellant. (9 RT 1910 [closing argument].) Outside the presence of the jury, the prosecution even conceded that “Johnson was asleep when the shooting began, [and] was in no position to testify about who came and went.” (18 RT 3452.)

The final witness that placed appellant at the scene of the crime was Elois Garner. However, Garner was perhaps the least credible of all of the prosecution’s witnesses. (See generally, 9 RT 1900-1903 [defense closing argument discussing Garner’s testimony].) She provided a dubious story that appellant had forced her to knock on the back door of the apartment, but made very clear that she did not say anything, rendering the alleged tactic utterly pointless. (5 RT 1160, 1162, 1178-1179.) She testified that, after this alleged experience, she was talking to a friend in a distant parking lot, five minutes later, when she heard shots. (5 RT 1163, 1183.) Although this corroborated the original version of events she provided to police which did not implicate appellant (5 RT 1172), this version was physically

impossible given other testimony and physical evidence indicating that Anderson was shot immediately upon opening the back door (see 9 RT 1903 [closing argument]).

Despite the many inconsistencies and credibility questions concerning the prosecution witnesses, appellant's trial counsel did not ultimately contest identity. Instead, no doubt in light of the fact that appellant was found in possession of a weapon linked to the murder, trial counsel conceded second degree murder and disputed only premeditation and deliberation. (9 RT 1927-1928.) When unconstitutionally admitted evidence has such a profound impact on the dynamics of a trial, there is little question that it is prejudicial. (See, e.g. *Cuervo v. State* (Fla. 2007) 967 So.2d 155, 167 [although victim identified defendant and defendant merely challenged "the element of premeditation for attempted first-degree murder, the defense might have pursued a different theory of defense had the trial court granted its motion to suppress his confession"].) Because it is virtually impossible to conceive that admission of the weapon linked to the crime did not have an impact on the trial, appellant's conviction must be reversed.

With respect to penalty, the harm is similarly quite clear. The prosecution strongly emphasized the fact that appellant was arrested soon after the crime with the weapon and ammunition at issue. (24 RT 4542-4543.) Holding the weapon forth to the jury, the prosecution told them:

[I]t makes you want to vomit to hold a gun like this.

Not him. Not him. Because after he fired those ten shots from this gun into those people, what did he do?

He reloaded. He reloaded.

What does that mean about his intent?

He didn't commit this horrible crime and think, oh my god, I can't believe what just happened and distance himself from the gun, no. This is a perfectly good gun. Do you know how many people you can kill with this?

Why get rid of it? He kept it and reloaded with not one, but two magazines. Twenty more rounds of ammunition. And one in the chamber.

There's more people to kill. This is a perfectly good gun. Why get rid of this?

(24 RT 4543.)

Indeed, the prosecutor urged the jury to consider the fact of appellant's possession of a weapon as evidence that appellant could never reform: "for those of you tempted to agree with the defense that all of a sudden, magically we're going to wave our hands and McDaniel is going to turn into a different person, well, [the fact that he was found with a weapon] is your indication." (24 RT 4542.)

"In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." [Citation]." (*People v. Von Villas* (1992) 11 Cal.App. 4th 175, 249.) With regard to penalty phase, all signs point to the fact that this was a close case.

Appellant's jury deliberated for nearly 20 hours over the course of four days. (9 CT 2411-2412, 2427-2428, 2434-2436, 2473; see *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [length of jury deliberations indicates that the case was close]; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855 [same]; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1140-1141 [three days of deliberations]; *Dallago v. United States* (D.C. Cir. 1969) 427 F.2d 546, 559 [close case where jury deliberated for five days before returning its verdict]; *United States v. Brodwin* (S.D.N.Y. 2003) 292

F.Supp.2d 484, 497 [“the jury found this a close case, as reflected by their five and a half days of deliberations before returning their verdict”];³¹ see also *Fry v. Pliler* (2007) 551 U.S. 112, 123 (dis. opn. of Breyer, J.) [“according to data compiled by the National Center for State Courts, the average length of jury deliberations for a capital murder trial in California is 12 hours”].) This lengthy deliberation was on top of a prior extended process of deliberation during the first penalty phase which ended in a hung jury. (See 9 CT 2283-2293; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 [fact that defendant tried twice a “strong indication” that case was close]; *People v. Sturm* (2005) 37 Cal.4th 1218, 1243 [court looks “very closely at the question of prejudice” where death penalty imposed on penalty phase retrial].) Another indication that the instant case was a close case is the jury’s request for readback and further instruction. (See 9 CT 2415 [jury request for further instruction]; 2419 [same]; 2430 [request for readback of testimony of Derrick Dillard and further instruction regarding “uncharged criminal acts”]; see, e.g., *People v. Williams* (1971) 22 Cal.App.3d 34, 39-40 [close case when jurors requested readback of critical testimony]; cf. *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions and requests to have testimony reread are indications the deliberations were close].)

³¹ As stated by Witkin and Epstein, The rule is occasionally declared that, in a “close case,” i.e., one in which the evidence is ‘evenly balanced’ or ‘sharply conflicting,’ a lesser showing of error will justify reversal than where the evidence strongly preponderates against the defendant.

(6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 45, pp. 506-507.)

In sum, it cannot be said that the improper introduction of the gun and ammunition evidence was harmless beyond a reasonable doubt. Therefore, reversal of appellant's conviction and sentence of death is required.

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III.

THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE THAT WAS THE BASIS FOR OTHERWISE IRRELEVANT AND PREJUDICIAL GANG TESTIMONY

Pursuant to a prosecution motion and over defense objection, the trial court admitted hearsay statements made by victim George Brooks to his sister, Kanisha Garner, prior to his death. (3A RT 482-483.) According to Garner, Brooks told her that he had been given drugs to sell on commission from William Carey, a.k.a. Billy Pooh, a senior member of the Bounty Hunters, and left with the drugs in the middle of an unrelated firefight. (7 RT 1489-1493.)

Based on Garner's hearsay testimony, the prosecution urged the jurors to *disbelieve* the version of events provided by Brooks to Garner, and invited the jury to imagine a different factual scenario: Brooks obtained the drugs through a theft from Carey for which he was later murdered.

While the portion of Brooks's statement to Garner that he was selling illicit drugs was admissible as a statement against penal interest (see Evid. Code, § 1230),³² the later portion of his statement as to how he

³² Evidence Code section 1230 reads as follows:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

obtained the drugs and from whom should have been excluded as a collateral statement as it had none of the hallmarks of trustworthiness associated with the hearsay exception for declarations against interest.

Brooks's inadmissible hearsay statement at issue here was among the very few pieces of evidence tying the killings in this case to alleged gang conduct. Indeed, as the prosecution acknowledged, it was "the very foundation for proof of motive." (3 CT 585.) Absent the inadmissible portions of Brooks's statement to Garner, the prosecution's entire gang-retaliation theory, and the associated gang enhancement, would have been seriously undermined. The erroneous admission of the inadmissible and unreliable hearsay evidence, in addition to being error under the Evidence Code, also violated appellant's rights under the state and federal Constitutions to a fair and reliable capital sentencing hearing and due process. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; cf. *Michigan v. Bryant* (2011) 562 U.S. 344, 371, fn. 13. ["[E]rroneous evidentiary rulings can . . . rise to the level of a due process violation. [Citation]".]) By providing the vehicle for the introduction of extraordinarily prejudicial (but otherwise largely irrelevant) gang evidence, the trial court's error prejudiced appellant at both guilt and penalty phases and reversal of the entire judgment is required.

A. Relevant Facts

On March 28, 2008, the prosecution filed a motion in limine seeking to introduce hearsay statements Brooks made to his sister, Kanisha Garner, under Evidence Code section 1230. (3 CT 581-594.) The prosecution's motion summarized the testimony that Garner would provide by relating the testimony she had previously provided in the trial of appellant's co-defendant, Kai Harris:

According to Ms. Garner, her brother had recently been released from prison and was in need of money. Mr. Brooks [*sic*] friend Billy Pooh, a member of the Bounty Hunter Bloods criminal street gang, had offered to give him some drugs to sell as a means of earning some money. George Brooks told his sister “an incident happened at the house – at one of Billy Pooh’s house[’s], on 109th, and the house was shot up. Billy Pooh left drugs in the house, and he [George Brooks] took the drugs and left.” Ms. Garner testified that she told her brother he shouldn’t be dealing with Billy Pooh at all, “because of Donte’s status in the projects.”

(3 CT 582.)

Like Garner’s later testimony at appellant’s trial, it was abundantly clear from the prosecution’s own motion that Brooks was not required to pay for the drugs up front: Carey offered to “give” Brooks drugs as a means to “earn money.” (3 CT 582; see also 7 RT 1493 [Garner’s testimony that Brooks did not tell her he “snatch[ed]” the drugs, but that Carey “gave it to him. He was supposed to reimburse him with the money for the drugs after he sold them”].)

Nonetheless, the prosecution’s motion insisted – despite Garner’s recitation of the facts – that Brooks’s statement indicated that Brooks had “robbed” Carey. (3 CT 582-585.) As such, the prosecution claimed that the hearsay regarding from whom and how Brooks obtained the drugs was admissible both as against his penal and social interests. (*Ibid.*)

The statement was allegedly against Brooks’s penal interest because the admission “that he had robbed Billy Pooh of a large amount of drugs is a confession of a serious crime.” (3 CT 584.) And it was against Brooks’s social interest because “stealing [Carey’s] entire drug supply[] put George Brooks at risk, not only with Billy Pooh, but also with his confidante Donte McDaniel, and perhaps the Bounty Hunters gang as a whole.” (3 CT 585.)

At a subsequent hearing, the trial court granted the motion to admit the evidence under Evidence Code section 1230 over defense objection. (3A RT 483.) Garner later testified regarding the hearsay detailed above. (7 RT 1489-1493.)

Based almost solely on Garner’s testimony, the prosecution’s theory of the case was that Brooks was killed by appellant and co-defendant Harris because he had stolen drugs from Carey. (5 RT 1099-13 [opening argument]; 9 RT 1847 [closing argument].) Because Carey, appellant, and Harris were members of the Bounty Hunters, the prosecution argued that the killing was made for the benefit of, at the direction of, and in association with a criminal street gang under Penal Code section 186.22 subdivision (b)(1). (9 RT 1863-1865 [prosecution closing argument]; see also 9 CT 2239-2242 [verdict forms finding gang enhancements true with respect to murder of Brooks and Annette Anderson and attempted murders of Janice Williams and Debra Johnson].)

B. Applicable Legal Principles

To satisfy the requirements of Evidence Code section 1230, a declaration must be (1) distinctly against the declarant’s penal interest and (2) must be clothed with “indicia of reliability.” (*People v. Duarte* (2000) 24 Cal.4th 603, 614.) Because of concerns that declarations against penal interest may contain unreliable information, the exception generally does not “apply to collateral assertions within declarations against penal interest.” (*People v. Campa* (1984) 36 Cal.3d 870, 882; *People v. Vasquez* (2012) 205 Cal.App.4th 609, 621 [“collateral statements are not against one’s penal interest, and therefore are not admissible”].) Only those portions of the declaration that are “specifically dis-serving” to the declarant’s penal interests are admissible under Evidence Code section

1230. (*People v. Leach* (1975) 15 Cal.3d 419, 441). Thus, the “fact that a person is making a broadly self-inculpatory confession does not make more credible the confession’s non-self-inculpatory parts.” (*People v. Vasquez, supra*, 205 Cal.App.4th at p. 621.)

Collateral statements “are not made trustworthy by proximity to incriminating statements.” (*People v. Duarte, supra*, 24 Cal.4th at p. 626.) To determine whether a statement is trustworthy, the court ““may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.”” (*Id.* at p. 614, citation omitted)

People v. Lawley (2002) 27 Cal.4th 102, 153-154, and *People v. Garcia* (2008) 168 Cal.App.4th 261, 289-290, held the portion of a confession identifying a confederate was not admissible as a statement against interest.

In *People v. Lawley, supra*, a statement by the actual killer that he was hired to kill the victim was properly admitted as a declaration against penal interest. (*People v. Lawley, supra*, 27 Cal.4th at p. 154.) However, the trial court properly excluded the killer’s statement that he had been hired by the Aryan Brotherhood, rather than the defendant, because that portion of the statement was not “specifically disserving” of the declarant’s interest. (*Ibid.*) The *Lawley* court found the portion of the declarant’s statement indicating the identity of the entity that paid for the murder did not make the declarant more culpable. (*Id.* at pp. 153-154.) In fact, the statement served to bolster the declarant’s reputation as a feared criminal. (*Id.* at p. 155.)

People v. Garcia, supra, a multi-defendant case, addressed the admissibility of a note written by the cellmate of one of the defendants in

that case, defendant Geraldo Ojito. (168 Cal.App.4th at pp. 289-290.) Ojito's cellmate was Miguel Thompson. The reviewing court rejected the argument that the note was admissible as a declaration against Thompson's penal interest because, while one statement in the note asserted that Thompson had written the note, another said he had done so as a favor to Ojito. (*People v. Garcia, supra*, 168 Cal.App.4th at pp. 286–290.) The statement indicating the note had been written as a favor to Ojito was not wholly inculpatory and therefore should not have been admitted: “Thompson's statement in [the note] that he wrote ‘that kite’ . . . is disserving to his interest, but the statements implying that Ojito authorized or participated in the writing of [the note] are not; they are disserving to *Ojito's* penal interest.” (*Id.* at pp. 289-290, italics in original.)

C. Although Brook's Statement That He Acquired Drugs for Sale Was Inculpatory, His Statement's Regarding Carey's Alleged Involvement and the Manner in Which Brooks Obtained the Drugs from Carey Were Neither Specifically Disserving Nor Otherwise Trustworthy

As detailed above, the prosecution's theory – that George Brooks told his sister, Kanisha Garner, that he robbed William Carey – was in conflict with the hearsay provided by Garner. Garner testified that Brooks “ended up having” drugs that he obtained from Carey. (7 RT 1489.) Specifically, according to Garner, Brooks told her that Carey had given him some drugs and he was supposed to pay Carey back after Brooks sold them. (7 RT 1489-1490, 1493.) During the transaction in which Brooks received the cocaine from Carey, there was a shooting and Brooks left with the drugs. (7 RT 1490-1491.) Garner was clear, however, that Brooks did not tell her he “snatch[ed]” the drugs to steal from Carey, but that Carey “gave it to him. He was supposed to reimburse him with the money for the drugs

after he sold them.” (7 RT 1493; see also 3 CT 582 [Garner previously testified that Carey offered to “give” Brooks drugs as a means to “earn money”].)

As such, there is simply no support for the prosecution’s argument that Brooks’s statement was a sufficiently reliable statement against interest on the basis that he admitted to robbing Carey, and could expect retaliation if word got out of this admission. (3 CT 585.) One might speculate, as the prosecution later did, that Brooks was lying to his sister about the details of how he acquired the cocaine to exculpate himself, and that he *did* in fact rob or steal from Carey. But it is impossible to support the admission of hearsay as “trustworthy” based on a theory that the hearsay statement itself was a lie intended to exculpate the declarant. (*People v. Vasquez, supra*, 205 Cal.App.4th at p. 627 [“indicia of reliability are lacking where the declarant makes an exculpatory statement”].)

That Brooks admitted to acquiring a significant quantity of cocaine for the purposes of sale was, to be sure, against his penal interest. But as the courts in *Lawley* and *Garcia* make clear, statements simply identifying confederates of a crime are not specifically dis-serving statements against interest. Thus, Brooks’s statements that he obtained the cocaine at issue from Carey, and statements about the circumstances under which he obtained the cocaine, were inadmissible collateral statements.

Nor do the specific circumstances surrounding Brooks’s statement to his sister meet the necessary requirements of reliability. (*People v. Frierson* (1991) 53 Cal.3d 730, 745 [“[t]he focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration”].) As noted above, the prosecutor himself argued that Garner’s version of what Brooks told her was false: that Carey was “robbed” by

Brooks. (3 CT 582-585 [motion]; (5 RT 1099-13 [opening argument]; 9 RT 1847-1848, 1850-1851 [closing argument].) Above and beyond the prosecution's own insistence that Brooks's story was a lie, there is every reason to doubt the veracity of Brooks statement with regard to the details of how, and from whom, he acquired the drugs.

According to the prosecution's gang expert, Brooks was not known as a leader within the Bounty Hunters gang. (8 RT 1767.) Carey, however, was known to be one of the lead narcotics distributors in all of Nickerson Gardens. (8 RT 1757.) He was close to the top level of leadership in the Bounty Hunters gang. (21 RT 4123 see also 6 RT 1254 [Hill's testimony that Carey was an "O.G." in the gang].) For Brooks to claim that he had obtained a few ounces of cocaine from a top level distributor in the projects – during a wild firefight, no less – is clearly suggestive of "an exercise designed to enhance [his] prestige." (*People v. Lawley, supra*, 27 Cal.4th at p. 155.) As this Court explained in *Lawley*, hearsay statements associating a lower level criminal actor with a more powerful set of criminal actors (in that case, the leaders of the Aryan Brotherhood gang), makes the statement less reliable, not more reliable. (*Ibid.*) At a minimum, for a criminal to associate himself with more powerful criminals does nothing to "create[] a risk of making [the declarant] an object of hatred, ridicule, or social disgrace in the relevant community." (*Ibid.*)

Because the statements regarding who Brooks obtained the drugs from and the circumstances under which he obtained them failed to qualify under Evidence Code section 1230, they should have been excluded.

D. The Admission of the Hearsay Statement Was Prejudicial

Erroneous admission of hearsay evidence under Evidence Code 1230 is state law error. (*People v. Duarte, supra*, 24 Cal.4th at pp. 618–619

[erroneous admission of hearsay evidence subject to harmless error review under reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].) Admission of unreliable evidence may also violate the due process clauses of the Fifth and Fourteenth Amendments (see *Michigan v. Bryant* (2011) 562 U.S. 344, 370, fn. 13), triggering analysis under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18.) Brooks's collateral hearsay statements to Garner were both hearsay and extremely unreliable. Moreover, they led to the introduction of a significant quantity of highly inflammatory and irrelevant gang evidence, which itself violates due process. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227-231 [introduction of largely irrelevant and highly prejudicial gang evidence violated due process].) Therefore, the improper admission of the hearsay violated appellant's right to a fair trial, a fair and reliable capital sentencing hearing, and denied him due process by making the penalty trial fundamentally unfair. (*See ibid.*; U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; *Michigan v. Bryant, supra*, 131 S.Ct. at p. 1162, fn. 13.) Assessed under either federal constitutional or state law prejudice standards, the error requires reversal.

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1. Absent the Garner Hearsay, There Is a Reasonable Probability That the Jury Would Not Have Accepted the Prosecutor's Weakly Supported Gang-retaliation Theory

The evidence regarding the alleged gang-retaliation motivation, upon which the gang enhancement was based, was extremely thin. As noted above, it was supported almost entirely through the hearsay statement of

Brooks, introduced through Garner. (7 RT 1489-1493 [Garner's testimony]; 9 RT 1847-1848, 1850-1852 [closing argument regarding motive for crime]; 9 RT 1863-1865 [prosecution argument regarding the gang enhancement allegations].) There were only a few remaining pieces of evidence of gang motivation, mostly trivial and all ambiguous.

In addition to Garner's statement, the prosecutor referenced the fact that appellant told Brooks soon before the killing that "Billy Pooh's looking for you." (9 RT 1845.) However, this statement did little if anything to support the prosecutor's gang-retaliation theory. The testimony about appellant's statement came from Derrick Dillard, who indicated that on the day of the killing appellant asked Brooks "where have you been?," and said that "Billy Pooh [was] looking for him," to which Brooks responded that he had "been at home. Let's go down here to Nobe's house." (5 RT 1107, 1140.) According to Dillard, nothing about this conversation suggested that it was hostile or tense. (5 RT 1139-1140.) That Brooks announced where he was staying to a friend of Carey – and even invited him over for a party – hardly suggested that there was bad blood between Brooks and Carey over an alleged drug theft.

The prosecutor also cited the fact that appellant told Carey about the killing a few hours after it occurred, which the prosecutor termed a "status report." (5 RT 1847, 1869-1870.) However, there was no evidence at all that the conversation between appellant and Carey revealed that Brooks had been killed at Carey's behest. The evidence concerning appellant's interaction with Brooks immediately after the killings came from co-defendant Harris's girlfriend, Angel Hill. Hill testified that appellant had invited Carey over to his (appellant's) girlfriend's house several hours after the crime and bragged and joked about the crime. (6 RT 1245, 1247-1248,

1252-1265; cf. 7 RT 1461 [testimony of appellant's girlfriend, Tiffany Hawes, who was also present, denying that appellant said anything about the crime at the time].)

Hill's testimony contained no statements from appellant or co-defendant Harris indicating that appellant had committed the crime on behalf of Carey or to benefit Carey or the Bounty Hunters gang. Hill's version of the conversation did not even suggest that Carey had been wronged in any manner by Brooks, a surprising omission if it were indeed a "status report" to the wronged gang leader.

Defense counsel specifically noted the weakness in the evidence regarding the involvement of Carey as the alleged motivation for the crime:

Now Billy Pooh is a shadow over this case. And he's a person that was introduced in this case by the prosecution as a motive witness. He's the mover and the shaker and the reason and everything.

But I ask you, what is the evidence we have regarding Billy Pooh?

We've got Kanisha Garner telling us that her brother told us – some hearsay – about what he had done with Billy Pooh, okay. We have some testimony from Dillard about Billy Pooh's name came up on that – that amiable encounter on the street. We have Angel Hill's self-serving lawyer negotiated statement to the police that Billy Pooh – that Donte was bragging to Billy Pooh reporting the incident. . . . That's basically it.

(9 RT 1924; see also 9 RT 1929 ["We have had all the Billy Pooh stuff, but there's not a lot of corroboration"]; 9 RT 1933 ["the whole Billy Pooh story . . . is a little bit vague as far as being corroborated by real facts"]; see also 9 RT 1935 [no proof beyond a reasonable doubt regarding Carey theory].)

Perhaps the most substantial motivation evidence the prosecutor cited were statements by appellant allegedly overheard by Dollie Sims. (9 RT 1868.) Sims testified that shortly before the shootings, appellant came to her home and told Harris that someone had been robbing the spots where he “hustled,” and he wanted to deal with the situation and wanted Harris to go with him. (7 RT 1420-1421.)

Preliminarily, Sims was not in the same room when this alleged conversation took place, but was attempting to eavesdrop from her bedroom. (7 RT 1419.) The individuals who were in the same room during the conversation – Shirley Richardson and Angel Hill – made no mention of appellant bringing up a robbery or anything similar. (See 6 RT 1359-1361 [Richardson testimony regarding conversation]; 6 RT 1230-1290 [Hill testimony].) And there was little indication that Richardson was covering up for anyone: she told police that both appellant and Harris were armed with weapons prior to their departure. (6 RT 1360-1361.)

Extrajudicial admissions such as that allegedly overheard by Sims are to be viewed with great caution. As this Court has recently emphasized (and as the jury was instructed under CALJIC No. 2.71):³³

This kind of testimony is considered dangerous, first, because it may be misapprehended by the person who hears it; secondly, it may not be well remembered; thirdly, it may not be correctly repeated. [Citation.] Even witnesses with the best intentions often cannot report the “exact language” used by a defendant, and therefore may convey, through errors and omissions, an inaccurate impression of a defendant’s statements. [Citation]. No other class of testimony affords

³³ The trial court gave the cautionary instruction on admissions contained in CALJIC No. 2.71 specifically to deal with statements allegedly overheard by Sims. (9 CT 2227; 9 RT 1831-1832.)

such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself. [Citation].

(*People v. Diaz* (2015) 60 Cal.4th 1176, 1185.)

Even assuming Sims’s “understanding” of what she overheard (7 RT 1420-1421) was accurate, nothing she recounted mentioned Carey, Brooks, or the Bounty Hunter gang at all. Instead, she simply indicated that appellant suspected that someone “ha[d] been robbing” a location where *appellant* (not Carey) had been “hustl[ing].” (*Ibid.*)

Absent the improper hearsay testimony provided by Garner (relating a story involving Carey that might have been interpreted as a robbery), the jury might not have credited Sims’s account at all. At best, the jury could have understood that appellant was having a personal dispute with Brooks, not necessarily involving the Bounty Hunter gang in any way.

Aside from the fact that Brooks, appellant, and co-defendant Harris were all allegedly Bounty Hunters, there was no other evidence, specific to appellant, of gang motivation in the killings.

2. The Gang Enhancements and Gang Evidence, Which Depended on the Improper Garner Hearsay, Had a Broad and Prejudicial Effect

By the prosecution’s own admission, the Garner hearsay was the very “foundation” of the gang retaliation theory. (3 CT 585.) Without that foundation, the theory itself would have collapsed. (See *People v. Louis* (1987) 42 Cal.3d 969, 995 [“There is no reason why we should treat this evidence as any less ‘crucial’ than the prosecutor – and so presumably the jury – treated it”].) Most immediately, therefore, the improper hearsay

prejudiced appellant with respect to the gang enhancement findings. (9 CT 2239-2242.) However, the prejudice was not limited to the enhancements.

One obvious effect of the gang enhancements was to put before the jury otherwise inadmissible gang membership and gang expert evidence which aided in solidifying the prosecution's case for first degree murder. This Court has long recognized the severe impact of gang evidence. Even where gang membership is relevant, trial courts must scrutinize its admission "because it may have a highly inflammatory impact on the jury." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) The impact of the Garner hearsay, the basis for the gang-related motivation for the killing in this case, was devastating.

Defense counsel's entire strategy was to concede second degree murder and dispute only premeditation and deliberation. (See 9 RT 1927-1928 [defense closing argument].) Essentially, the defense argument was that the shooting of Anderson was not planned – it happened "in the moment" (9 RT 1929) – and was an act which the forensic evidence strongly suggested was attributable to co-defendant Harris. (See 9 RT 1854 [prosecution concession that bullet recovered from Anderson's chest was eliminated as coming from weapon attributed to appellant]; 9 RT 1908 [defense argument that although there were two casings from Harris's gun found near Anderson's body, there were no casings from the weapon attributed to appellant in the living room where her body was found].) And the defense theory for the killing of Brooks was that – though clearly intentional – it was attributable to a "sudden rage." (9 RT 1929; see 9 CT 2232 [CALJIC No. 8.73 "you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation"].)

The hearsay derived gang-motivation testimony was unquestionably extremely harmful to this theory. By attributing the motivation for the killings to a gang-related dispute between Brooks and Carey that had occurred approximately a week or two prior to the killing (7 RT 1490-1491), the hearsay completely undermined the conclusion that the decision to target Brooks for a killing was in any way “sudden.”

Further, the prosecution’s gang expert testified that any gang member could “elevate his status” by shooting people (8 RT 1756), and that gang members commit crimes to create fear in the neighborhood as a means of witness intimidation. (8 RT 1762.) The expert further opined that a retaliatory murder due to a drug “rip-off” of a high ranking member would be committed for the benefit, in association with, and at the direction of the Bounty Hunter gang in order to keep the community in fear and enhance the killer’s reputation. (8 RT 1762-1764.) The hearsay thus allowed the prosecution to undermine any claim that Brooks’s killing had anything to do with “rage,” and to attribute it solely to a cold-blooded desire to intimidate others and elevate appellant’s status within the gang. (See 9 RT 1851 [prosecution argument that “these gang members when they commit their crimes are committing them not just to hurt other people, but to create fear, to enhance the reputation, so that word gets spread”].) The hearsay similarly undermined any claim that Anderson’s murder was an unexpected, unplanned act of co-defendant Harris. There is thus a “reasonable probability” that the error affected the jury’s guilt phase verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The improper hearsay (and the gang-retaliation motivation and gang expert testimony which depended on it) was certainly sufficient to prejudice the determination of penalty. (*People v. Brown* (1988) 46 Cal.3d 432, 447

[more stringent test for state law errors that impact penalty phase]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard of *Chapman*].) To begin with, the prosecutor specifically directed the penalty phase jury to focus upon the gang enhancements in its closing argument, explaining that “all [victims were] shot to benefit his gang. The verdicts have significance in this case.” (24 RT 4555.) And the prosecutor used appellant’s alleged gang membership and motivation again and again in his penalty phase closing argument. (See, e.g., 24 RT 4555, 4564, 4572, 4575-4576.)

Moreover, there were significant potential spill-over effects from the gang evidence. For instance, the guilt phase jury’s finding that appellant’s firearm killed Anderson (9 CT 2239), a fact for which there was no supporting forensic evidence (see 9 RT 1908), was likely strongly affected by gang motivation evidence. The penalty phase jury was instructed to treat the first jury’s findings regarding all enhancements as conclusive. (17 RT 3167; see also 24 RT 4554-4555 [prosecution penalty phase closing argument relying on enhancement findings to argue that appellant personally shot Anderson].) Given that Brooks was relatively less sympathetic than Anderson, and much of the penalty phase was devoted to the harm caused by the murder of Anderson, the fact that the penalty phase jury was forced to assume that appellant personally killed Anderson likely had enormous impact. (*People v. Garcia* (1984) 36 Cal.3d 539, 546, overruled on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 676 [“an accomplice is far less likely to receive the death penalty than the triggerman”].) The improper hearsay thus may have contributed to an

irrebuttable presumption that appellant personally killed Anderson for gang purposes, despite a lack of forensic support.

Regardless, the gang motivation alone almost certainly impacted the penalty determination. (*People v. Merriman* (2014) 60 Cal.4th 1, 104 [gang evidence “highly relevant” to penalty phase determination].) Evidence that appellant hoped to kill innocent people simply to enhance reputation and instill fear (24 RT 4555, 4564, 4572, 4575-4576), was central to the prosecution case for death. (See, e.g., *Young v. State* (1987) 103 Nev. 233, 237 [erroneously introduced hearsay gang evidence was “dubious” and “inflammatory” and warranted reduction in sentence].) And the gang enhancements, themselves prejudicial, were necessarily considered by the jury under Penal Code section 190.3, factor (a). (*People v. Montes* (2014) 58 Cal.4th 809, 892 [gang motivation of crime admissible under factor (a)].)

Appellant’s jury deliberated – after a prior hung jury – for over 20 hours over the course of four days and requested readback and reinstruction, all hallmarks of a close case. (9 CT 2283-2293, 2411-2412, 2415, 2419, 2427-2428, 2430, 2434-2436, 2473.) Given the powerful cascade of effects caused by the improper hearsay, the entire judgment must be reversed.

IV.

**BECAUSE THE GUILT AND PENALTY PHASE JURIES
IMPROPERLY CONSIDERED HIGHLY INFLAMMATORY
GANG ENHANCEMENTS FOR WHICH THERE WAS
INSUFFICIENT EVIDENTIARY SUPPORT, REVERSAL OF
APPELLANT’S CONVICTION AND SENTENCE IS
REQUIRED**

“[S]omething more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be

treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.” (*People v. Williams* (2008) 167 Cal.App.4th 983, 988 (*Williams*)).³⁴ No such showing was made in this case.

The prosecution’s own witness, gang detective Kenneth Schmidt, frankly conceded that there is “no structured hierarchy” within the alleged Bounty Hunters Blood gang. (8 RT 1750.) Instead, there are groups (cliques) of men, who describe themselves by neighborhood and who share nothing but a name. (8 RT 1750-1551, 1765.) According to Schmidt, the only relationship between the various groups “is that they are all Bounty Hunters. They all grow up together. . . It just could be at any point in time where they’re living at that point in time. They’ll say they’re [neighborhood areas such as] Ace Line or Five Line.” (8 RT 1751.) In keeping with a complete absence of actual association, Schmidt described the gang not as any form of association between members but merely as a geographic area: “Bounty Hunters as a whole is all within the area in and around Nickerson [Gardens].” (8 RT 1750.) And, in fact, Schmidt explained that different neighborhood cliques frequently are in conflict with one another. (8 RT 1751; see also 8 RT 1775.)

³⁴ This issue is currently before this Court in *People v. Prunty* (2013) 214 Cal.App.4th 1110, rev. granted June 26, 2013, S210234. The question presented in *Prunty* is whether “evidence of a collaborative or organizational nexus is required before multiple subsets of Norteños can be treated as a whole for the purpose of determining whether a group constitutes a criminal street gang within the meaning of Penal Code section 186.22, subdivision (f)?” (*People v. Prunty* (2013) 158 Cal.Rptr.3d 260.)

There was evidence that appellant associated himself with one of these neighborhood cliques, “Ace Line.” (8 RT 1749-1750, 1754.) However, no evidence about the “Ace Line” group was presented to support the finding that appellant committed a crime on behalf of a criminal street gang. In fact, no specific evidence about the Ace Line group was presented at all.

Instead, the prosecution attempted to prove that the Bounty Hunters as a whole was a criminal street gang by providing evidence of convictions of Ravon Baylor and Lamont Sanchez. These individuals, according to Schmidt, were members of the Bounty Hunters. (8 RT 1744-1746.) The Court instructed the jury that the crimes committed by Baylor and Sanchez had “nothing to do with Mr. McDaniel.” (8 RT 1746.) There was no evidence that Baylor or Sanchez associated themselves with the Ace Line Bounty Hunters, or indeed any evidence regarding which clique(s) they belonged to. There was no evidence that appellant had ever met, or was even aware of the existence of either Baylor or Sanchez, much less that he associated with them in any way. (Cf. Penal Code 186.22, subd. (f).)

In short, there was insufficient evidence of “collaborative activities or collective organizational structure . . . so that the various groups reasonably can be viewed as parts of the same overall organization.” (*People v. Williams, supra*, 167 Cal.App.4th 983, 988.) Accordingly, the four gang enhancements must be set aside.

The extensive gang evidence offered by the prosecution to prove the four gang enhancements was extraordinarily prejudicial to appellant’s case, thereby violating his rights under the state and federal Constitutions to a fair trial, due process and a fair and reliable capital sentencing hearing. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; see *People v.*

Albarran (2007) 149 Cal.App.4th 214, 222, 232 [the erroneous admission of largely irrelevant and highly prejudicial gang evidence through unsubstantiated gang enhancements violates due process].) Accordingly, appellant's convictions and death sentence must be reversed.

A. Relevant Facts

Virtually all of the information regarding the history, structure, and activities of the Bounty Hunters came from Detective Kenneth Schmidt of the Los Angeles Police Department. (8 RT 1740-1784.) Schmidt had worked for several years as a gang detective, working within the Nickerson Gardens projects and gathering information on individuals within the projects who identified as "Bounty Hunters Bloods." (8 RT 1741.)

Nickerson Gardens is the biggest housing development west of the Mississippi River. (8 RT 1764.) The development itself has approximately 1100 separate units. (8 RT 1764.) It is the size of a small or medium size town. (8 RT 1777.)

The "Bounty Hunters" moniker itself originated sometime in the late 1960s or early 1970s, deriving from a group who had previously called themselves the "Green Jackets." (8 RT 1766.) At the time of the instant crimes, there were approximately 550 to 600 people that had been "registered" by the Los Angeles Police Department as Bounty Hunters. (8 RT 1743.) Individuals who claim to be Bounty Hunters share common symbols and signs: hats with a letter 'B,' hand signs making a 'B,' and wearing the color red – symbols associated with being a "blood gang." (8 RT 1744.)

The territory of individuals claiming to be Bounty Hunters is not limited to the development proper. The "predominant" territory includes the areas both in and "around" Nickerson Gardens. (8 RT 1744.) The

“primary activity” of the Bounty Hunters as a whole involves narcotics, robberies, and shootings. (8 RT 1744.)

Not all members within the Bounty Hunters are “equally active or equally violent.” (8 RT 1782.) Each individual member decides how active that member wants to be within the group. (8 RT 1782.) The level of involvement is a “question of personal choice.” (8 RT 1782.) Members can move away and dissociate from the Bounty Hunters. (8 RT 1779-1780.) However, Schmidt was unaware of anyone still living in Nickerson Gardens who no longer claimed to be a Bounty Hunter. (8 RT 1768.)

There exists “no structured hierarchy [within the Bounty Hunters] other than O.G., old gangsters that have been around longer.” (8 RT 1750.) Instead, there are several different cliques inside of the Bounty Hunters. (8 RT 1750.) There are certain individuals with more money or dealing more narcotics that have a higher stature. (8 RT 1750-1751.) Drug sales occur “in different areas pretty much where people grow.” (8 RT 1750-1751.) Different cliques include “Bellhaven Bloods,” “Block Bloods,” “Ace Line,” “112th Street,” “Deuce Line,” “114th Street,” “115th Street,” “Four Line,” “Five Line,” “Shad Lot,” “Folsom Lot,” “Nelson Lot,” and “Hunter Lot.” (7 RT 1751.)

When asked “what relationship, if any, there is between the different cliques of Bounty Hunters” Schmidt replied as follows:

Other than they are all Bounty Hunters. They all grow up together. They live together. It just could be at anyone point in time where they’re living at that point in time, they’ll say they’re Ace Line or Five Line.

(8 RT 1751.)

When asked if all of the cliques got along, Schmidt responded “not at all.” (8 RT 1751.) He explained that different cliques frequently feuded

over areas for drug sales, robberies, and even over women. (8 RT 1751, 1775.) Schmidt provided no testimony that the various cliques worked together in any fashion. Instead, he affirmed that the warring cliques within the town-sized Nickerson Gardens are “Hatfields and McCoys.” (8 RT 1777.)

Schmidt had numerous contacts with appellant in Nickerson Gardens. (8 RT 1747.) Schmidt interpreted photographs of various tattoos on appellant’s body. (See generally, Peo. Exhs. 65-71.) For instance, the combination of the word “Nickerson” across appellant’s back and the letters ‘B’ and ‘H’ showed allegiance to the gang. (8 RT 1749.) Next to the ‘B,’ appellant also had the numbers ‘111,’ which stood for 111th Street, which was the region of “Ace Line” one of the cliques “inside Bounty Hunters itself.” (8 RT 1750.) There was a another tattoo with the letters ‘ALCK’ which stood for “Ace Line Crip Killer.” (8 RT 1753-1754.) Appellant had various other tattoos, which Schmidt associated with gangs: a nickname “Dee Dogg” with the letters ‘G’ crossed off because it was associated with a rival Crip gang (8 RT 1752-1753), and two tattoos for deceased friends reading “BIP” (Blood in Peace) and “BHIP” (Bounty Hunter in Peace). (8 RT 1754-1755.) According to Schmidt, appellant was not always associated with the Bounty Hunters. (8 RT 1781.)

Schmidt was familiar with William Carey, who was also “in the Bounty Hunters,” and was one of the major narcotics distributors in Nickerson Gardens. (8 RT 1756-1757.) Schmidt had seen appellant and Carey together on several occasions. (8 RT 1758.) There was no evidence regarding the clique(s) with which Carey associated.

Schmidt testified that appellant’s co-defendant, Kai Harris, victim George Brooks, Derrick Dillard, and Prentice Mills were all members of the

Bounty Hunters. (8 RT 1759.) However, Schmidt provided no information regarding the clique(s) with which any of these men associated, or that any of the men had any criminal association with each other.³⁵

Schmidt also provided information about his experience with Bounty Hunter gang members generally. Gang members could elevate their status by doing robberies, shootings, or moving narcotics which would elevate their reputation as “strong.” (8 RT 1756.) Given a hypothetical assuming facts mirroring the prosecution theory of the case, Schmidt testified that the shootings in this case would have been committed for the benefit, in association, and at the direction of the Bounty Hunter gang. (8 RT 1763-1764.) This opinion was based on the idea that it would enhance appellant’s reputation and create fear in the neighborhood, which would in turn deter anyone from “crossing” appellant and would prevent witnesses from coming forward. (8 RT 1763-1764.)

B. Applicable Law

Section 186.21 sets forth the policy underlying the Street Terrorism Enforcement and Prevention (STEP) Act. The intent of the Legislature in enacting the STEP Act was “to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and *upon the organized nature of street gangs*, which together, are the chief source of terror created by street gangs.” (Pen. Code, § 186.21, italics added.) The

³⁵ When asked whether there was any association between Brooks and Carey, Schmidt said that the “only” known association was the “word on the street” that Brooks had robbed Carey of a large quantity of drugs. (8 RT 1759.) The trial court on its own motion admonished: “We can’t go into that. That’s hearsay and too specific.” (*Ibid.*)

foundational requirement of “organization” is embodied in Penal Code section 186.22, subdivision (f), which defines a “criminal street gang” as:

[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity

(Pen. Code, § 186.22, subd. (f).)

When it passed the STEP Act in 1988, the Legislature was “fully cognizant” that to penalize someone based upon their membership in a criminal organization that person must entertain “‘guilty knowledge and intent’ of the organization’s criminal purposes.” (*People v. Castenada* (2000) 23 Cal.4th 743, 749, citation omitted.). Thus, the STEP Act generally requires “proof that the defendant knows of and intends to further [the criminal street gang’s] illegal aims.” (*Ibid*; accord, *People v. Mesa* (2012) 54 Cal.4th 191, 196.)

It is against this backdrop that the court in *Williams* held that, “before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang” there must be “collaborative activities or collective organizational structure [] inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.” (*Williams, supra*, 167 Cal.App.4th at p. 988.)

At issue in *Williams* was a larger umbrella group, the “Peckerwoods gang,” and a subset known as the “Small Town Peckerwoods.” The defendant conceded he was a member of the Small Town Peckerwoods. At

trial, the gang expert opined the Small Town Peckerwoods was a subset of the larger Peckerwoods gang. (*Williams, supra*, 167 Cal.App.4th at pp. 987-988.) The expert testified that the Small Town Peckerwoods and the Peckerwoods shared the same ideology. Both believed in white pride or white supremacist ideology. (*Id.* at p. 988.) Both groups responded to “shot-callers” who received orders from a higher authority in prison. (*Ibid.*) The defendant had a “Peckerwood” tattoo. (*Ibid.*) His former co-defendant identified himself to law enforcement as a “Peckerwood,” and had a poem entitled “Peckerwood Soldiers” about Peckerwoods in prison. (*Ibid.*) The gang expert also testified that Peckerwoods were not typically organized like other criminal street gangs: they had no constitution and have a looser organization with a less well-defined rank structure. Peckerwood groups got together more for bragging than for strategizing, and one group of Peckerwoods would not necessarily know what another group was doing. (*Ibid.*)

The *Williams* court found the above information insufficient to attribute the larger gang’s activities to the smaller subset for purposes of satisfying section 186.22, subdivision (f). (*Williams, supra*, 167 Cal.App.4th at p. 988.) As noted above, the court held that “something more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang.” (*Ibid.*) Instead, “some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.” (*Ibid.*)

Relying upon the logic of *Williams*, a similar decision (construing virtually identical language)³⁶ was made in the Virginia case of *Taybron v. Commonwealth* (2011) 57 Va.App. 470, 703 S.E.2d 270 (*Taybron*).

In *Taybron*, the defendant was allegedly an active member of a local gang called the 36th Street Bang Squad and was charged with a count of active gang participation. (*Taybron, supra*, 703 S.E.2d at p. 272.) The prosecution asserted that the 36th Street Bang Squad was part of a national gang, the Bloods. (*Ibid.*) Instead of providing evidence of the criminality of the 36th Street Bang Squad to prove it was a criminal street gang, the prosecution offered into evidence plea agreements from two local gang members unrelated to the defendant: Arenzo King and Jumar Turner. (*Ibid.*) The prosecution expert claimed these two were either “members[] or affiliat[es]’ of ‘the Bloods criminal street gang,’” (*ibid.*), or alternatively, that they belonged to a “homegrown set[] that rep[s] Blood” but that was a “different set” than the defendant. (*Id.* at p. 273).

The *Taybron* court contrasted the facts of another case, *Phillips v. Commonwealth* (2010) 56 Va.App. 526, 694 S.E.2d 805, which dealt with a

³⁶ The Virginia law defines a “criminal street gang” as follows: [A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, at least one of which is an act of violence, provided such acts were not part of a common act or transaction.

(Va. Code Ann. § 18.2-46.2.)

group called the Bounty Hunter Bloods and another group called the Nine Tek Gangsters which both claimed the “Cradock area of Portsmouth.” (*Taybron, supra*, 703 S.E.2d at pp. 274-275.) The *Taybron* court noted that in *Phillips*, there was evidence that both groups “had a separate hierarchy of gang officers” and that both sets “responded to orders from higher ranking members of either set.” (*Taybron, supra*, 703 S.E.2d at p. 275.) The *Taybron* court noted that, in contrast to *Phillips*, the expert in the defendant’s case had testified that there was not a ““whole lot of organization with our Bloods gangs,”” and that ““they tend to beef amongst each other . . . so you’ll have Bloods fighting with Bloods.”” (*Ibid.*)

The *Taybron* court ultimately ruled the predicate convictions of local gang members Turner and King were insufficient to establish that the 36th Street Bang Squad was a criminal street gang. Turner and Kings’s convictions showed that these men were “members of one or two homegrown local gangs, and they were merely loosely affiliated with the national Bloods gang through their respective homegrown local gang or gangs.” (*Taybron, supra*, 703 S.E.2d at p. 276.) Similarly, the court found that the defendant “was a member of his homegrown local gang, the 36th Street Bang Squad, of which neither King nor Turner was a member,” and the defendant “was merely loosely affiliated with the national Bloods gang through that homegrown local gang.” (*Ibid.*) The evidence thus failed to establish that King or Turner were members of the same local or national “ongoing organization, association, or group” as the defendant. (*Ibid.*)

Both *Williams* and *Taybron* are consistent with the understanding of “criminal street gangs” embodied in the language of section 186.22, subdivision (f) and the STEP Act generally. The statute itself provides strong indication that “criminal street gangs” are not meant to refer to large

umbrella organizations. In the findings written into the statute itself, the Legislature expressed its understanding that there were “nearly 600 *criminal street gangs* operating in California.” (Pen. Code, § 186.21.) These numbers were based on statements from one of the bill’s lead sponsors, the Los Angeles District Attorney. (Assem. Com. on Pub. Safety, Reply Mem., Assem. Bill No. 2013 (1987–1988 Reg. Sess.) June 8, 1987, p. 4 [“There are presently 597 street gangs in California”].) According to the sponsors there were approximately 500 gangs in Los Angeles alone. (See Assem. Com. on Pub. Safety, Mem., Assem. Bill No. 2013 (1987–1988 Reg. Sess.), June 8, 1987, p. 4 [“In the Los Angeles area, law enforcement officials believe that there are between forty and 50,000 members in about 500 gangs”].) It would be impossible for the Legislature to find so many “criminal street gangs” if statewide groups, such as “Bloods” “Crips” “Nortenos” or “Sureños,”– or even large umbrella subsets of these organizations such as Bounty Hunter Bloods – were counted as a single “criminal street gang.”

Indeed, soon after the passage of the STEP Act, the lead sponsor itself, the Los Angeles District Attorney’s Office, issued a report anticipating the logic in *Williams* in describing the organization of gangs:

Gang Organization:

Analogies of street gangs to subterranean armies, organized crime, or paramilitary groups are profoundly misleading. An apparently imposing group like the Crips is a loose association of some 200 gangs, many of which are at war with one another, and none of whom recognizes or exerts any kind of central authority.

Individual gangs are equally marginal in their organization. Most are loosely knit coalitions of *small, autonomous cliques*. Apart from a general commitment to

their ‘hood and the gang lifestyle, the only unifying force is combat with outsiders. Gang leadership is decentralized, non-hierarchical, even situational – more a function of individual prowess and reputation than of any collective decision. To the extent that leaders can be identified, they resemble other gang members.

...

Gangs are loosely organized into small age/friendship cohorts or cliques. . . . A clique reaches its peak in terms of *organized gang activities* at 15-18, when its exploits provide a model for the generation coming up. After 18, cliques begin to dissolve as the members marry, get jobs, or go prison. A clique is designated by a specific name, which is appended to the barrio name. Reference to a specific gang usually includes all active cliques.

Cliques vary in size . . . There are social occasions when some or all of a gang’s cliques come together – picnics, weddings, funerals, parties, sporting events, etc. But even on such occasions the clique remains the basic unit.

(Los Angeles District Attorney Ira Reiner, (1992) *Gangs, Crime and Violence in Los Angeles*, Executive Summary, pp. xvi-xvii (“Gangs, Crime and Violence in Los Angeles”).)

In short, cases like *Williams* and *Taybron* recognize the same basic realities of gang organization and structure observed by the sponsors of the Step Act itself: many Los Angeles “gangs” have little or no organization or structure and to the extent that “organized gang activities” occur, it is at the level of the clique. (*Gangs, Crime and Violence in Los Angeles* at pp. xvi-xvii at p. xvii; see also *id.* at p. xx [gang homicides and other confrontations “typically involve small sets of gang members acting more or less on their own – not large groups representing an entire gang”]; see also *ibid.* [“the crimes themselves are not committed on behalf of a gang, nor are the proceeds shared. Individuals who commit crimes do so for their own

reasons and by their own rules”].) In fact, the Los Angeles District Attorney noted that a significant percentage of “gangs” are not criminal street gangs at all. (See *id.* at p. xxii [noting research that “28% of gangs are involved in few delinquent activities and little drug use other than alcohol and marijuana use. They also have low involvement in drug sales, mostly to finance their own use. These gangs are not unlike many adolescent social groups”].)

C. There Was No Showing of an Associational Nexus Between the Ace Line Bounty Hunters and the Bounty Hunters Gang

Here, as in *Williams* and *Taybron*, there was no connection made between the umbrella “Bounty Hunters” gang, and the neighborhood subset associated with appellant: the Ace Line Bounty Hunters. To the contrary, the evidence was that there was “no structured hierarchy” within the alleged Bounty Hunters Blood gang. (8 RT 1750; accord, *Williams, supra*, 167 Cal.App.4th at p. 988 [local gang did not have a constitution, had a less well-defined rank structure, and one group did not know what another group was doing]; *Taybron, supra*, 703 S.E.2d at p. 275 [there was “not . . . a whole lot of organization with our [local] Blood gangs”]; *Gangs, Crime and Violence in Los Angeles, supra*, at p. xvi [both “Crips” and subset groups “equally marginal in their organization”].)

Instead, the prosecution’s own gang expert, Detective Schmidt, explained that there were many different cliques organized solely by neighborhood where the men lived. (8 RT 1750-1551; *Gangs, Crime and Violence in Los Angeles, supra*, at p. xvii [“A clique is designated by a specific name, which is appended to the barrio name”].) Various cliques of Bounty Hunters Bloods occupy a tremendously large area: the

“predominant” area of the Bounty Hunters was the town-sized Nickerson Gardens and the area “around” it. (8 RT 1744, 1777; see also National Gang Intelligence Center, *National Gang Threat Assessment*, p. 25 (2009) available at <www.fbi.gov/stats-services/publications/national-gang-threat-assessment-2009-pdf> (as of July 30, 2015) [“national-level Bloods gangs include [the] Bounty Hunter Bloods”].) Schmidt provided a list, by no indication exhaustive, that included at least 13 different cliques just within Nickerson Gardens proper. (7 RT 1751.) And, counting only those gang members registered in law enforcement databases, the group had at least 550 to 600 different members. (8 RT 1743.)

Despite the large geographical and numerical figures defining the “gang,” this case provided even less evidence than in *Williams* regarding a connection between the umbrella “Bounty Hunters” and the subset “Ace Line Bounty Hunters” because the prosecution presented *no* evidence regarding the functioning of the Ace Line clique with respect to the “Bounty Hunters” as a whole. There was no evidence regarding the Ace Line clique whatsoever, except that it occupied a neighborhood in Nickerson Gardens. In fact, there was no evidence that the Ace Line clique even had three or more members. (Cf. § 186.22, subd. (f) [criminal street gang must be group of three or more persons].)

This absence of proof regarding the Ace Line clique was critical because to the extent that the prosecution provided any evidence regarding the functioning of the different subsets with each other, it was that they were *adverse*. The different cliques were “Hatfields and McCoys” who constantly feuded over both illegal activity (drugs and robberies) and basic human relationships (women). (8 RT 1751, 1775, 1777 see *Taybron, supra*, 703 S.E.2d at p. 275 [local Bloods groups fought with one another].) To

define multiple, warring cliques as a single “criminal street gang” sweeps for too broadly given the underlying purposes of the STEP Act enhancements:

The enhancements recognize the fact that crimes committed by gangs are a greater threat to society than they would be otherwise due to the *organized and collegial nature of street gangs*.

(Assem. Com. on Pub. Safety, Reply Mem., Assem. Bill No. 2013 (1987–1988 Reg. Sess.) June 8, 1987, p. 4, italics added.)

Here, the evidence regarding the subsets was that they were neither “organized” with each other – i.e., they lacked a unifying hierarchy (8 RT 1750) – nor “collegial.” (8 RT 1751, 1775, 1777.) A useful contrast discussed in *Williams* is the decision *In re Jose P.* (2003) 106 Cal.App.4th 458. As discussed in *Williams*, the expert in *In re Jose P.* “testified that the Norteño street gang was an ongoing organization having around 600 members or associates in Salinas; that there were separate cliques or factions within the larger Norteño gang; that the two gangs at issue in the case were such subgroups; that the two subgroups were loyal to one another and to the larger Norteño gang; and that all Norteño gangs followed the same bylaws as the Norteño prison gangs.” (*Williams, supra*, 167 Cal.App.4th at pp. 987-988.)

Here, the vital evidence present in *In re Jose P.* was entirely lacking: there was no evidence that the subgroups at issue were loyal to one another, or to the larger Bounty Hunter gang, and there was no evidence that any of the cliques followed any set bylaws or other form of hierarchical or associational structure set by any larger organization.

Also undercutting the existence of one unified “criminal street gang,” the prosecution evidence showed that not all Bounty Hunters

necessarily engaged in violent or even criminal behavior: different members within the Bounty Hunters were not all “equally active or equally violent.” (8 RT 1782.) According to Schmidt, each individual member, as a matter of “personal choice,” decided how active to be within the group. (8 RT 1782.) Even with the varying levels of involvement among different members, Schmidt was unaware of a *single* individual in his years of experience who remained in Nickerson Gardens and who had left the label “Bounty Hunter” behind. (8 RT 1768.)

Thus, even if one neighborhood area’s delinquent young men aged into peaceable old timers who committed *no* crimes, the prosecution theory of a “Bounty Hunters” gang affiliation would leave even these geriatric, law-abiding members of a neighborhood clique as part of a criminal street gang simply because of a name. Those identifying as a clique of Bounty Hunters (for instance, by a indelible tattoo) would continue to be considered criminal street gang members under section 186.22, subdivision (f), based on the conduct of individuals from other neighborhoods whom they may have never met and may have never known existed. (Cf. *Taybron, supra*, 703 S.E.2d at p. 272 [“taken to the extreme, [this theory] would permit [a defendant] to be convicted if the [prosecution] proved a [Bounty Hunter] Bloods member in [Virginia] had been convicted of an offense falling within [California’s] statute”].)

This is not to downplay the seriousness of the offenses for which appellant was convicted. However, there was an insurmountable failure of necessary proof that appellant was a member of a particular criminal street gang. Because the prosecution offered insufficient proof that the Ace Line clique was a criminal street gang under section 186.22, subdivision (f),

there was insufficient proof that the instant crimes were committed at the direction of, in association with, or for the benefit of a criminal street gang.

D. Reversal Is Required

The failure to provide adequate proof that appellant was a member of a criminal street gang necessarily invalidates the four gang enhancements. (*Williams, supra*, 167 Cal.App.4th at p. 989 [reversing active participation count and special circumstance finding based on insufficiency of evidence].) However, that does not end the prejudice inquiry. The gang enhancements in this case were used, in part, as a vehicle to introduce otherwise irrelevant and highly prejudicial gang testimony to solidify the prosecution’s first degree murder theory and to support its case for death. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [“In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal”], italics in original.) Where there is insufficient evidence to support gang enhancements, introduction of a significant quantity of largely irrelevant and highly prejudicial gang evidence through those enhancements violates due process. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 222, 232 (*Albarran*).)

In *Albarran*, the defendant was convicted of attempted murder, shooting at an inhabited dwelling and attempted kidnapping for carjacking. (*Albarran, supra*, 149 Cal.App.4th at p. 217.) At trial, defendant presented an alibi defense. (*Id.* at p. 222.) After the jury found the gang enhancements true, the trial court granted a motion for new trial as to the gang enhancements, finding insufficient evidence to support the true findings. (*Id.* at p. 217.) The defendant thereafter filed a motion for a new trial on the substantive charges, arguing he had been prejudiced by the

admission of the gang evidence. (*Ibid.*) The court denied the motion, noting that the gang evidence was relevant to the issues of the defendant's motive and intent in committing the underlying crimes. (*Ibid.*)

On appeal, the reviewing court reversed the judgment and remanded the matter for a new trial on the substantive offenses. (*Albarran, supra*, 149 Cal.App.4th at p. 217.) Preliminarily, the court agreed with the trial court's finding that the prosecution had failed to present sufficient evidence that the crimes were gang motivated. (*Id.* at p. 227.) But the court went further, holding that the insufficiency of the evidence supporting the enhancements warranted reversal on the *substantive* offenses as well. (*Id.* at pp. 228-231.) Reversal on the substantive offenses was necessary because of "the highly inflammatory nature of the gang evidence presented," which consisted of "a panoply of incriminating gang evidence" which, though potentially relevant to the gang allegations "had no bearing on the underlying [non-gang] charges." (*Id.* at pp. 217, 227; see also *People v. Williams* (2009) 170 Cal.App.4th 587, 612 ["In *Albarran*, the court held that gang evidence was only marginally relevant but was highly prejudicial"].)

In this case, as in *Albarran*, the gang enhancements opened the floodgates to the admission of a vast amount of gang evidence regarding the Bounty Hunter Bloods. The admission of this irrelevant and highly inflammatory evidence violated appellant's right to a fair trial, a fair and reliable capital sentencing hearing, and denied him due process by making the penalty trial fundamentally unfair. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; *Albarran, supra*, 149 Cal.App.4th at pp. 229-230.)

Perhaps the most strikingly prejudicial and irrelevant gang evidence presented below was Schmidt's testimony that appellant was part of a gang

whose “primary activities” included “a lot of crimes involving shootings and murder.” (8 RT 1744.) It is hard to conceive of a more devastating rebuttal to the defense that the killings of Brooks and Anderson were not premeditated (9 RT 1927-1928) than that appellant had knowingly joined a criminal enterprise which not only engaged in murder, but included murder as a *primary activity*.

The prosecution took full advantage of this guilt-by-association in choosing the two predicate acts: a conviction of murder and attempted murder for Ravon Baylor and a conviction for murder and attempted murder for Lamont Sanchez. (8 RT 1744-1747; Peo. Exhs. 62-63.) Yet there was no evidence whatsoever that appellant’s Ace Line group had any connection with either Baylor or Sanchez; that appellant was personally acquainted with either Baylor or Sanchez, or that he was aware that they had committed these crimes; or that members of the Ace Line crew with which appellant was associated had been convicted of *any* crimes, much less murder or attempted murder. Certainly, there was no evidence that a “primary activity” of the Ace Line clique was murdering people. (8 RT 1744.) Yet the prosecution repeatedly used the gang evidence in closing argument to prove that the murders must have been part of gang retaliation because of the nature of the Bounty Hunter organization. (See, e.g., 9 RT 1850 [“Payback. . . That’s just a fact of life among the Bounty Hunters.”], 1851 [“gang members” must punish misconduct of fellow gang members].)

Similarly prejudicial, the prosecution’s gang expert testified that a Bounty Hunter Bloods gang member could “elevate his status” by shooting people (8 RT 1756), and that members committed crimes to hurt people, create fear in the neighborhood, and as a means of witness intimidation (8 RT 1762). The gang expert further opined that a retaliatory murder due to a

drug “rip-off” of a high ranking member would be committed for the benefit, in association with, and at the direction of the Bounty Hunter gang in order to keep the community in fear and enhance the killer’s reputation. (8 RT 1762-1764.) This evidence was relied upon heavily in the prosecutor’s guilt phase closing argument. (9 RT 1851, 1863-1864.) Yet none of the expert testimony was tied in any way to appellant’s clique, the Ace Line clique.

In Argument IV, *ante*, appellant has described in detail why the gang-retaliation theory and gang evidence was prejudicial with respect to the guilt and penalty determinations. The error with respect to the gang enhancements was prejudicial in much the same way. The gang evidence allowed the prosecution to undermine appellant’s claim that Brooks’s killing was the result of unpremeditated rage. (9 RT 1929; see also 9 CT 2232 [jury instructed with CALJIC No. 8.73].) Instead, the prosecution was able to attribute the killing solely to a desire to intimidate others and elevate appellant’s status within the gang. The gang expert’s testimony similarly undermined any claim that Anderson’s murder was an unexpected, unplanned act of co-defendant Harris. (9 RT 1929 [defense argument].)

Gang evidence is often “catastrophically prejudicial.” (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 76.) Detective Schmidt’s testimony that appellant was a member of a murderous criminal street gang created “a near certainty that the jury viewed appellant as more likely to have committed the violent offenses charged against him because of his membership in the [] gang.” (*People v. Cardenas* (1982) 31 Cal.3d 897, 906 [reversing in part due to introduction of gang membership].) There is thus a “reasonable probability” that the error affected the jury’s guilt phase verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Necessarily, the state cannot prove

beyond a reasonable doubt that the gang evidence did not contribute to the verdict. (*People v. Albarran*,, *supra*, 149 Cal.App.4th at p. 229 [applying *Chapman v. California* (1967) 386 U.S. 18, 24, and reversing due to the introduction of largely irrelevant gang evidence].)

The prejudice at penalty is even more clear. Obviously, the invalid enhancements themselves would weigh against appellant, since they were circumstances of the crime under section 190.3, factor (a). (17 RT 3167 [penalty phase jury instructed to treat the guilt phase jury’s findings regarding all enhancements as conclusive].) In fact, the prosecutor specifically directed the penalty phase jury to the gang enhancements in closing argument, explaining that “all [victims were] shot to benefit his gang. The *verdicts have significance in this case.*” (24 RT 4555, italics added.) And the prosecutor used appellant’s alleged gang membership and motivation again and again in his penalty phase closing argument. (See, e.g., 24 RT 4555, 4564, 4572, 4575-4576.)

In addition, the guilt phase jury’s finding that appellant had personally used a firearm in the killing of Anderson (9 CT 2239), a fact for which there was no supporting forensic evidence, was likely strongly affected by the gang motivation evidence. Given that Brooks was relatively less sympathetic than Anderson, and much of the penalty phase was devoted to the harm caused by the murder of Anderson, the fact that the penalty phase jury was forced to assume that appellant personally killed Anderson likely had enormous impact on its choice of penalty. (*People v. Garcia* (1984) 36 Cal.3d 539, 546, overruled on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 676) [“an accomplice is far less likely to receive the death penlty than the triggerman”]; see also 24 RT 4555 [prosecution

penalty argument relying on weapons enhancements to argue that appellant was actual shooter of Anderson].)

At the penalty retrial following a prior hung jury, appellant's jury deliberated for over 20 hours over the course of four days and requested readback and reinstruction, all hallmarks of a close case. (9 CT 2283-2293, 2411-2412, 2415, 2419, 2427-2428, 2430, 2434-2436, 2473.) Given the closeness of the case, appellant can easily satisfy the harmless error standard for penalty phase error. (*People v. Brown* (1988) 46 Cal.3d 432, 447 [more stringent test for state law errors that impact penalty phase]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard of *Chapman*].)

For each of the reasons set forth above, reversal of the entire judgment is required.

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V.

THIS COURT SHOULD INDEPENDENTLY REVIEW THE REPORTER'S TRANSCRIPTS OF THE IN CAMERA PROCEEDINGS AND THE UNDERLYING DOCUMENTS REVIEWED DURING THE PROCEEDINGS TO DETERMINE WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S PITCHESS MOTION

A criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant upon a showing of good cause. (Evid. Code, § 1043, subd. (b); see also *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)³⁷ Good cause exists when the defendant shows both “‘materiality’ to the subject matter of the pending litigation and a ‘reasonable belief’ that the agency has the type of information sought.” (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) A showing of good cause is measured by “relatively relaxed standards” that serve to “insure the production” for trial court review of “all potentially relevant documents.” (*Ibid*). “This court has held that the good cause requirement embodies a ‘relatively low threshold’ for discovery” (*People v. Samuels* (2005) 36 Cal.4th. 96, 109), under which a defendant need demonstrate only “a logical link between the defense proposed and the pending charge” and describe with some specificity “how the discovery being sought would support such a defense or how it would impeach the officer’s version of events.” (*Warrick v. Superior Court* (2005) 35 Cal.4th

³⁷ In *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, this Court held that a criminal defendant has a limited right to discovery of peace officer personnel records in order to ensure “a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.” (*Id.* at p. 535.)

1011, 1021.) If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. (*Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679.) Subject to certain statutory exceptions and limitations (see Evid. Code, § 1045, subs. (b), (e)), “the trial court should then disclose to the defendant ‘such information [that] is relevant to the subject matter involved in the litigation.’” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226, quoting Evid. Code, § 1045, subd. (a); see also *Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1019.) The disclosed information from the confidential records should be “relevant to the subject matter involved in the pending litigation” (Evid. Code, § 1045, subd. (a)), provided that the information does not concern peace officer conduct occurring more than five years earlier, the conclusions of an officer investigating a citizen complaint about a peace officer, or facts that are so remote as to make disclosure of little or no practical benefit (Evid. Code, § 1045, subd. (b)).

Appellant sought discovery of any records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations as to the following law enforcement officers: Los Angeles County Sheriff Deputies Boling, Esquivel, Jimenez and Orosco, and Los Angeles County Police Officers J. Arenas, C. Bodell, C. Bourbois, Chavez, Coughlin, Craig, Davila, Moreno, J. Moya, B. Perez, Rogers, Sanchez, E.

Shear, R. Smith, Eric Sorenson, and M. Turner.³⁸ (Supplemental IV CT 17-110; 111-122; 2CT 417-435 [confidential].)

The trial court held a number of in camera hearings, from which appellant was excluded. (3 RT 355-364 [sealed], 374-381 [sealed]; 4 RT 799-837; 10 RT 2010-6 through 2010-12 [sealed].) The trial court denied appellant's discovery requests as to all of the Los Angeles County police officers and as to Sheriff's Deputies Boling and Orosco, but granted it as to Sheriff's Deputies Esquivel and Jimenez. (3 RT 365-366, 382-383; 10 RT 2011.) Neither the transcripts of the various in camera hearings nor the personnel files reviewed by the trial court have been provided to appellant on appeal. As such, appellant is not in a position to challenge the propriety of the trial court's denial of his discovery requests.

In order to ensure that appellant's due process rights were not violated by the trial court's rulings below, appellant requests that this Court independently review the transcripts of the in camera hearings and the documents reviewed by the trial court to determine whether the trial court erred. Such a procedure has been followed on numerous occasions in similar situations. (See, e.g., *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874, ["in order to protect petitioner's right to appellate review, '[t]he trial court can and should exercise its inherent power to order that the proceedings be recorded and transcribed and that the transcript be sealed"]; *People v. Woolman* (1974) 40 Cal.App.3d 652, 654, ["we have

³⁸ In light of appellant's motion for any records of complaints as to , Los Angeles County Police Officers Moya and Smith, the prosecutor said that an in camera review of both Moya's and Smith's personnel file was not needed because he was withdrawing the incidents involving those two officers. (3 RT 414-415.)

examined the file tendered to the trial court at the in camera hearing”]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1077 [“In connection with the appeal this court has reviewed a transcript of that in camera hearing”]; *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1488-1489 [“Defendant asks this court to independently review the transcript of the in camera hearing to determine whether the trial court erred”].)

Pursuant to the above authorities, and to ensure that appellant’s state and federal constitutional rights were not violated, appellant requests that this Court review the in camera hearing transcripts and the documents considered by the trial court.

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VI.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT ONE OF THE VICTIMS HAD BEEN STRICKEN BY CANCER AND ALLOWING THE PROSECUTOR TO ARGUE THAT THIS TERRIBLE PLIGHT, WHOLLY UNRELATED TO VICTIM IMPACT EVIDENCE, SHOULD SUPPORT A DEATH SENTENCE FOR APPELLANT

A. Introduction

Cancer is a scourge and a tragedy that strikes the lives of millions of Americans, seemingly at random. Quite naturally, both those who have been stricken by the illness and those with the good fortune to avoid it feel tremendous sympathy towards cancer survivors. Here – over defense objection – the prosecution cynically sought to exploit this normal emotional response to secure a death sentence by adducing evidence that one of the murder victims, Annette Anderson, had been diagnosed, repeatedly, with cancer. Although undeniably tragic, Anderson’s bouts of cancer and difficult treatment had nothing whatsoever to do with whether appellant should receive a life or death sentence. Because the prosecutor repeatedly utilized Anderson’s cancer in its argument for death, the resulting sentence was infected by irrelevant and prejudicial aggravation. The erroneous admission of this evidence coupled with the prosecutor’s penalty phase jury argument denied appellant his right to a fair penalty trial and a reliable determination of penalty under both the state and federal Constitutions. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15 & 17). As such, appellant’s death sentence must be reversed.

B. Relevant Facts

On December 8, 2012, the trial court held an Evidence Code section 402 hearing regarding several pieces of evidence the defense wished to

exclude from the prosecutor's penalty phase presentation. Appellant specifically urged the exclusion of photographs and testimony indicating that Anderson – many years before her death – had been diagnosed with cancer and had undergone chemotherapy. (19 RT 3486.) As discussed below, Anderson had various recurrences of this cancer, including just prior to her death.

The evidence was first introduced in the first penalty trial, which provided the context for the subsequent Evidence Code section 402 hearing. The evidence at the first penalty trial came from Anderson's only daughter, Neisha Sanford. Sanford had testified that one of the photos of her mother, whose date she could not recall, was taken "around the time when [her mother] was dealing with cancer." (11 RT 2345-2346.) The cancer was possibly ovarian and was in the uterine/abdominal area. (11 RT 2346.) Anderson was receiving treatment, "on and off" including chemotherapy, which led her to decide to cut off her hair. (11 RT 2346.)

Sanford indicated that her mother "probably" had problems with addiction, which she surmised could have resulted from her bouts with cancer, but "if she did" she "never did [drugs] around us or anything." (11 RT 2353-2354.) Later, Sanford again identified photos, in which her mother had little hair, from the period when she was undergoing chemotherapy. (11 RT 2354.) Sanford also related that in the days leading up to the killing, her mother's cancer had gotten worse and she had wanted to try to spend more time with her grandchildren. (11 RT 2357.)

At the December 8, 2008, hearing, the prosecutor argued that the cancer evidence (which he described as "victim impact evidence") was admissible under Penal Code section 190.3, factor (a) ("factor (a)"), because a defendant "takes the victim as she is." (19 RT 3486-3487.) He

also argued that the fact that Anderson was battling illness (which the prosecutor stated was terminal), meant that she was a particularly vulnerable victim. (19 RT 3486.) He further argued that her life was all the more valuable because she had limited time left. (19 RT 3487.) Finally, the prosecutor argued that Anderson's cancer was admissible to explain that she had turned to drugs because of her sickness. (19 RT 3488.)

The defense objected that there was no evidence that Anderson discussed with her daughter why, or even if, she was using drugs. (19 RT 3489.) Further, defense counsel indicated that the fact that Anderson at some point underwent chemotherapy "has nothing to do with effects caused by" the murder and so it did nothing to "illuminat[e] [the impact] to the family." (19 RT 3492.)

The prosecution countered that failure to admit evidence regarding Anderson's cancer and "vulnerable state . . . at the time she was killed" would deprive factor (a) of all meaning. (19 RT 3492; see also 19 RT 3494.)

The trial court ultimately responded:

What you are saying, judge, this morning, I want to get into the cancer. One of the reasons I want to get into the cancer, because particularly now we're going to have some evidence of drug usage. That then of course goes back to the defense argument, that they want me to revisit the issue of whether there was drugs in the system at the time. I mean, all of these things kind of tie together. ¶ One approach to take, is throw up my hands and let it all come in and let the jury there sort it out, which will probably be the safest way from an appellate review standpoint. ¶ I think that is what I am going to do.

But because I am allowing the cancer, I am going to allow the evidence from the coroner about the fact that there

were drugs in the system and then we'll just let the jury sort it all out.

(19 RT 3494-3495.)

The prosecutor responded "that's fine." (19 RT 3495.)

At the penalty retrial, Sanford subsequently testified that her mother was diagnosed with cancer in approximately 1989 and from that time forward was "back and forth"; she received various treatments, including chemotherapy, which caused her at one point to cut off her hair. (21 RT 4094-4095.)

Sanford testified that the return of cancer after periods of remission "affected [her mother] a lot, being sick from the medication, the chemotherapy. She drank, you know. She had on and off ongoing problem with drugs and stuff. Yeah. She dealt with it pretty rough." (21 RT 4095.) Sanford attributed these problems to "some of the difficulties of being ill and what was going on in her life." (21 RT 4095.) When her mother had a recurrence of cancer prior to her death, she wanted to spend more time with her grandchildren. (21 RT 4099-4100.)

As discussed in more detail below, the prosecution returned again and again during its closing argument to Anderson's cancer, in ways irrelevant to or unsupported by the alleged victim impact evidence. (See 24 RT 4523, 4562, 4594, 4596, 4598.)

C. Applicable Law

"[F]or the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have . . . at the sentencing phase evidence of the specific harm caused by the defendant." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) This harm, so-called "victim impact evidence," allows prosecutors to introduce two types of evidence: "evidence

that gives the jury ‘a quick glimpse of the life’ which a defendant ‘chose to extinguish’ [citation], and evidence that ‘demonstrate[s] the loss to the victim’s family and to society which has resulted from the defendant’s homicide.’” (*People v. Kelly* (2007) 42 Cal.4th 763, 802-803.)

There are, however, obvious limitations to such evidence. “[I]rrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role or invites an irrational, purely subjective response should be curtailed.” (*People v. Edwards* (1991) 54 Cal.3d 787, 836.) This case involves the first limitation, for which the California rule is quite simple. Although this Court reviews admission of victim impact evidence for abuse of discretion (*People v. Trinh* (2014) 59 Cal.4th 216, 245), a trial court “lacks discretion to admit irrelevant evidence” (*People v. Cowan* (2010) 50 Cal.4th 401, 482). Thus, victim impact evidence “offered in aggravation must be excluded if not relevant.” (*People v. Kelly, supra*, 42 Cal.4th at p. 798.)

That Anderson had been diagnosed with cancer in 1989, had years prior to the murder undergone difficult chemotherapy treatment, and had been diagnosed with a recurrence of cancer at an unidentified point prior to her death, are all heartwrenching details about her difficult life. However, they are not relevant to whether appellant should or should not receive a death sentence.

The prosecutor’s cynical attempt to tug the heartstrings of the jury in this fashion was clearly error. The trial court should not have sanctioned this misconduct by “throw[ing] [its] hands up in the air” out of a misguided urge to proceed along the “safest way from an appellate review standpoint.” (19 RT 3494-3495.)

D. Because Anderson’s Cancer Had No Relevance to the Penalty Phase Proceeding, it Should Have Been Excluded

The prosecutor provided various justifications for his desire to admit evidence of Anderson’s cancer. None, however, provides a relevant basis for its admission.

1. The Prosecutor’s Appeal to Cancer as Supporting Victim Vulnerability Was a Red Herring

Victim vulnerability, to the extent it demonstrates that the victim was particularly helpless to the defendant’s attack, has been held to be an aggravating circumstance of the offense under section 190.3, factor (a). (*People v. Clair* (1992) 2 Cal.4th 629, 672 [victim’s cerebral palsey admissible where it helped demonstrate that defendant could have “mounted and executed his fatal attack without significant resistance”]; *People v. Carrera* (1989) 49 Cal.3d 291, 337 [evidence about victim’s poor eyesight, lack of weapon, and peaceable nature admissible to show “double murder was executed in all likelihood without any resistance”].) However, nothing in either the first or second penalty phase even suggested that Anderson was made more vulnerable by her sickness. To be sure, there was ample evidence in the record that she was taken by surprise and was unarmed. But none of these vulnerabilities related in any way to her cancer. Although the prosecutor clearly intended to (19 RT 3486, 3492, 3494) and did (24 RT 4562), argue that Anderson was more vulnerable as a result of her cancer, he adduced no evidence that she suffered from any symptom of weakness or any other form of vulnerability from her illness. Indeed, the prosecutor did not introduce a single symptom of any kind that Anderson was experiencing at the time of her death. Thus, any attempt to argue that

Anderson's diagnosis made her more vulnerable is without any evidentiary support in the record.

2. Anderson's Cancer Was Not Relevant to Explain Her Drug Use and the Trial Court's Ruling Merely Emboldened the Prosecutor's Improper Argument That Appellant Intended to "Dirty Up" the Victims

As noted above, the trial court admitted references to Anderson's cancer on the basis that it would help explain why she had been using drugs on the night of her murder, a fact which the court had initially excluded in the form of a positive drug toxicology report. During a prior penalty phase in limine hearing, the defense had sought to admit the toxicology report, which revealed the presence of drugs in Anderson. (See 18 RT 3444-3459.)

At that prior hearing, the defense conceded that the fact that Anderson was a drug user did not mitigate the crime, but argued that the fact that she was having "a drug party inside the house" and that people were "going over there . . . for a drug party" was a mitigating circumstance of the offense. (18 RT 3446.) In particular, this was because "[t]he whole case revolves around the motive, revolves around the drugs. We have had witnesses testify that Brooks had a quantity of drugs that he ripped off, that he was living at Anderson's house. All of this – the drugs in [Anderson's] system merely corroborates [*sic*] those facts." (18 RT 3449.) In other words, because the entire "backdrop" of the case was Brooks allegedly "ripping off Billy Pooh and that was the motive for this incident," the defense – unsuccessfully – argued that these circumstances of the offense mitigated the severity of the crime. (18 RT 3457-3458; see *People v. Harris* (2005) 37 Cal.4th 310, 373-374 (dis. opn. of Kennard, J.) [that victim's fiancée "was a drug dealer who kept drugs and drug money at their apartment, and that [victim] was aware of and acquiesced in this drug

dealing and, by reasonable inference, benefitted financially from it” should have been admissible as circumstance of the offense and to rebut victim impact evidence].)

The prosecution repeatedly claimed during this hearing that the defense merely intended to “dirty[] up” the victim to make the crime “seem . . . less serious.” (18 RT 3447, 3449, 3450.) The trial court initially agreed (18 RT 3452 [“there is a sense that you are trying to dirty up the victim”]) and ultimately held there was “no relevance” in the fact that either victim had been using drugs at the time of their death. (18 RT 3456.)

Under current law, the trial court’s initial ruling was correct: the fact that Anderson was using drugs, and even that she took in as a boarder a violent drug dealer and allowed her home to be used to hold a drug party was not relevant. (See *People v. Loker* (2008) 44 Cal.4th 691, 734 [toxicology report indicating that murder victims had high levels of methamphetamine in their systems inadmissible at penalty]; *People v. Harris, supra*, 37 Cal.4th at p. 354 [that the robbery and murder might have been connected to the fact that the victim was associated with a drug dealer, who earlier that evening participated in a large-scale drug deal “bore no relevance to the assessment of the severity of the crime.”].) Thus, the trial court’s decision to reverse course and admit evidence of one irrelevant fact, the victim’s cancer, to rebut evidence of another irrelevant fact, the victim’s drug use, only compounded the problem.

Most obviously, two wrongs do not make a right. But worse still, by admitting the toxicology report which it had previously found irrelevant, the trial court invited the prosecutor’s later argument denigrating the defense for introducing irrelevant evidence – i.e., that the defense was simply trying to “dirty” up the victims:

How much dirtying up of the victims did we see in this case? . . . I mean, it was subtle, but then it was also clear. The victims were using drugs when they were killed. I am sure someone on the defense team is going to explain to all of us why the use of drugs has anything to do with this case.

It is not the cause of death. It's not the reason why Donte shot Annette Anderson in the eye. ¶ What does it have to do with it? ¶ Well, the defense might say, okay, it's the circumstance of the crime. ¶ Really? ¶ Is that what we're saying? Because let's be upfront about that. ¶ Are we saying that someone who uses a drug, who has drugs in their system, that their life has less value than somebody else's; that we, that the jury should treat this crime as less serious because the victim has drugs in their system when they're at home, unarmed, not bothering anybody? Someone can come in and shoot them all in the face and that makes the crime less serious because they have drugs in their system? Is that what we are saying? Is that equal justice. Is that fair?

The defense is hoping that you are going to see the victims in this case as subhuman.

(24 RT 4589-4590; see also 24 RT 4591 [“Don't allow them to dirty up the victim in this man's defense”]; (cf. *People v. Cook* (2006) 39 Cal.4th 566, 613 [“a prosecutor commits misconduct by impugning the integrity of defense counsel”].)

Of course, the relevance of the victims' drug use had nothing to do with the argument that they deserved to be killed because they were using drugs. (See 24 RT 4658-4659 [defense counsel's statement that “nobody is saying that . . . [Anderson] deserved to be killed because she was using drugs or any of that kind of stuff”].) As defense counsel argued, Anderson's (and Brooks's) drug use merely showed the circumstances of the offense, i.e., that “everyone in that house was using drugs.” (18 RT 4658 [defense argument as to why toxicology evidence was admitted].)

At most, the drug evidence showed that Anderson, by taking in a violent drug dealer as a boarder, and allowing him (and other gang members), to have a drug party within her home placed herself and everyone else present at risk. (*People v. Bryant* (2014) 60 Cal.4th 335, 431 [“There is no doubt that drug dealing and violence commonly go hand in hand”]; see also *People v. Harris, supra*, 37 Cal.4th at pp. 373-374 (dis. opn. of Kennard, J.) [that victim knowingly roomed with drug-dealing fiancée, and presumably benefitted financially, should have been admissible circumstance of the offense].) But nothing about Anderson’s cancer was, or even could be, argued to rebut these circumstances. The risks of inviting a violent gang member/drug dealer and other drug abusers into one’s home for a drug party exists regardless of whether the motivation for the party is traceable to the stress of an illness or is the unadorned desire to consume drugs.

The *only* purpose of admitting evidence of Anderson’s cancer – as rebuttal – would be to address the “dirtying up the victim” argument that the defense had expressly disclaimed, and which California law does not even permit. (*People v. Loker, supra*, 44 Cal.4th at p. 736 [defense has no “right to present evidence that the victims had been using drugs when they were murdered” simply to ““make[] the victim of a crime look bad.’ [Citation].”].)

Thus, by admitting evidence of Anderson’s cancer as rebuttal, the trial court essentially invited the prosecutor to attack the defense on irrelevant grounds. At a very minimum, allowing the cancer evidence as rebuttal to an irrelevant and nonexistent line of defense argument is not a proper basis for the introduction of evidence in the first instance.

3. The Prosecutor’s Argument That Anderson’s Life Was More “Precious” Because of Her Illness Did Not Render the Evidence Proper Victim Impact

The prosecution also argued that Anderson’s cancer was admissible because if a murder victim “knows that they have precious limited days left with their life” the crime is particularly “egregious and [that is] something the jury is permitted to consider.” (19 RT 3487.) This argument, while underscoring the prejudice of admitting the evidence, does not make Anderson’s cancer more relevant.

Victim impact evidence allows the prosecution to put on evidence demonstrating “the specific harm caused by the defendant, including the impact on the family of the victim.” (*People v. Edwards, supra*, 54 Cal.3d at p. 835.) In the present case, the harm caused by appellant was neither increased nor decreased by the fact that Anderson had previously been diagnosed, or had a recurrence of, cancer. Indeed, the Supreme Court in *Payne* prohibited “‘comparative judgments’ . . . between different victims.” (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 482.) Thus, that one victim had suffered through an illness and another did not does not render either’s life more “precious” and a death sentence for their murderer more appropriate. (See *People v. Tully* (2012) 54 Cal.4th 952, 1036-1037 [trial court “appropriately ruled on [] objections” including “sustain[ing] an objection to a question by the prosecutor about how [surviving victim’s] mother’s earlier cancer diagnosis had ‘[brought] home her mortality to you.’”].) Ultimately, sad stories about a victim’s life that are too “collateral and inflammatory” do not qualify as proper victim impact. (See *Floyd v. State* (2002) 118 Nev. 156, 175, abrogated on other grounds by *Grey v. State* (2008) 124 Nev. 110 (2008) [kidnapping of victim’s family and sexual

assault of victim's sister, events which were wholly unrelated to capital crime, was improper victim impact[.]) This is such a case.

This Court has repeatedly stated that the federal Constitution bars victim impact evidence only if it is "so unduly prejudicial" as to render the trial "fundamentally unfair." (See, e.g., *People v. Bramit* (2009) 46 Cal.4th 1221.) However, this high bar is for *relevant* victim impact evidence (see *Payne v. Tennessee, supra*, 501 U.S. 808, 836 (conc. opn. of Scalia J.); see also *id.* at 831 (conc. opn. of O'Connor, J.) [discussing "unduly inflammatory" evidence]), not for irrelevant aggravating evidence. (See *People v. Abel* (2012) 53 Cal.4th 891, 939 [discussing admission of irrelevant victim impact].) Because Anderson's cancer was ultimately irrelevant to the case, it should have been excluded.

E. Reversal Is Required

Due process and the Eighth Amendment prohibit death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586 [death sentence which was based, at least in part, on felony conviction that was later vacated violated Eighth Amendment]; see also *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 [when an "improper element" has been "add[ed] to the aggravation scale in the weighing process," and results in the jurors hearing and considering facts or evidence it could not otherwise have heard or considered, the ensuing death judgment violates due process].)

The erroneous admission of the evidence of Anderson's cancer thus violated appellant's right to a fair and reliable capital sentencing hearing, and denied him due process by making the penalty trial fundamentally

unfair. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; *Payne v. Tennessee*, *supra*, 501 U.S. 808, 827.)

1. Standard of Review

The violations of appellant’s federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant’s rights under state law require reversal if there is any reasonable possibility that they affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448; *People v. Abel*, *supra*, 53 Cal.4th at p. 939 [analyzing admission of irrelevant victim impact evidence under *Brown* standard]; accord, *People v. Brady* (2010) 50 Cal.4th 547, 578.) As recognized by this Court, the *Chapman* and *Brown* standards for harmless error are essentially one and the same. (See, e.g., *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard of *Chapman*].)

Appellant is thus entitled to penalty relief if the record establishes that there was a reasonable possibility that his jury would have returned a different penalty verdict absent the erroneous admission of the evidence of Anderson’s cancer.

2. There Exists a Reasonable Possibility That the Admission of Evidence of the Victim’s Cancer Affected the Outcome of the Trial

“In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. [Citation].” (*People v. Von Villas* (1992) 11 Cal. App. 4th 175, 249.) That the erroneous admission of the victim-impact

evidence in this case was not harmless is demonstrated convincingly by the fact that the case for death was a close one. The jury deliberated – after a prior hung jury – for over 20 hours over the course of four days and requested readback and reinstruction, all hallmarks of a close case. (9 CT 2283-2293, 2411-2412, 2415, 2419, 2427-2428, 2430, 2434-2436, 2473.)

Moreover, it is clear that the prosecutor thought that admission of the cancer evidence was important to his ability to achieve a death sentence. Not only did the prosecutor fight to admit the evidence itself, he was willing to make sacrifices to do so: explicitly accepting the trial court’s proposal to admit the evidence of Anderson’s cancer only in conjunction with the positive drug toxicology reports that the prosecution had previously and successfully excluded. (19 RT 3495; *People v. Louis* (1987) 42 Cal.3d 969, 995 [“There is no reason why we should treat this evidence as any less ‘crucial’ than the prosecutor – and so presumably the jury – treated it”].)

Moreover, the prosecutor referred to Anderson’s cancer on no less than five separate occasions during closing argument. (24 RT 4523, 4562, 4594, 4596, 4598; *People v. Diaz* (2014) 227 Cal.App.4th 362, 384 [finding prejudice where the prosecutor referred to the improper evidence “*five* times during closing argument”], italics in original.)

The prosecutor heightened the prejudice of the cancer evidence by emphasizing it in ways irrelevant to the jury’s decision. Most generally, he used the cancer evidence in an attempt to evoke sympathy for Anderson, who was suffering through a harrowing tragedy at the time of her murder. (24 RT 4523.) Although it is clearly heartrending that the victim had suffered through many years of illness and believed she would soon die, it is not something that weighs in aggravation against appellant.

As explained above, the prosecutor argued to the jury – without record support – that the crime was more heinous because Anderson’s cancer made her more vulnerable. (24 RT 4523, 4562.) He used the evidence to compare the appellant to the terrible illness. (24 RT 4523; *People v. Yeoman* (2003) 31 Cal.4th 93, 149 [“we do not condone the use of opprobrious terms in argument”].) Over defense objection, the prosecutor even invited the jury to speculate about the joys the victim would have experienced had she not been killed and somehow recovered from her fatal illness. (24 RT 4596; cf. 19 RT 3486 [prosecutor’s statement that Anderson’s cancer was terminal]; 21 RT 4099-4100 [daughter’s testimony that, after the recurrence, her mother believed that cancer “would be her death”].)

Particularly under the stringent standard for errors affecting the penalty phase, it is unquestionable that admission of the evidence relating to Anderson’s cancer was prejudicial and reversal of the death judgment is required.

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VIII.

THE TRIAL COURT ERRED IN REJECTING APPELLANT’S REQUEST FOR A LINGERING DOUBT INSTRUCTION AT THE PENALTY RETRIAL, AND BY INSTRUCTING THE JURORS THAT THEY HAD TO ACCEPT THE GUILT AND OTHER FINDINGS MADE BY THE PRIOR JURY AND THAT APPELLANT WAS THE ACTUAL SHOOTER OF VICTIM ANNETTE ANDERSON

Despite repeated requests, appellant was denied any instruction informing the second penalty phase jury that it could consider lingering doubt. Critically, the trial court not only denied the instruction, it actively undermined appellant’s ability to argue lingering doubt at the penalty retrial by giving misleading jury instructions and by making other rulings before, during, and after closing argument. This was error warranting reversal of appellant’s death sentence.

California case law governing the concept of lingering or residual doubt at a penalty retrial is seemingly inconsistent. On the one hand, this Court has held that evidence of residual doubt suggesting that the defendant was not the shooter of a victim is “relevant and admissible at his penalty retrial as a ‘matter relevant to . . . mitigation, and sentence,’ such as ‘the nature and circumstances of the present offense’ under section 190.3.” (*People v. Gay* (2008) 42 Cal.4th 1195, 1217 [reversing sentence for failure to admit evidence that defendant was not the shooter].) This is true even if the prior jury’s specific guilt phase findings indicated that the defendant was the shooter. (See *id.* at p. 1218.)

On the other hand, this Court has steadfastly maintained that a defendant has no absolute right to a lingering doubt instruction, even upon request. (See, e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1260

[whether a lingering doubt instruction should be given is generally “entrusted to the trial court’s discretion”].)

Appellant submits that the unique rules for lingering doubt (i.e., evidence on the topic allowed but specific instruction to give effect to lingering doubt evidence not required) prevents the jury from having “a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision.” (*Penry v. Johnson* (2001) 532 U.S. 782, 797.) At a minimum, it creates a significant risk that the mitigating circumstance of lingering doubt will be ignored or improperly considered by the jury in violation of state law and the federal and state Constitutions. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; Pen. Code, § 190.3.)

Indeed, this Court has itself noted that there exists an inherent tension “between the legislatively stated preference not to retry the question of guilt at the second penalty phase trial (§ 190.4, subd. (b)) and the defendant’s right to ensure that the jury consider evidence that might raise a doubt, albeit amorphous or slight, that his role was less heinous than the prior jury’s findings established. [Citation].” (*People v. Gonzales* (2011) 52 Cal.4th 254, 325 (*Gonzales*)). Thus, although this Court has “frequently and consistently” rejected claims that the trial court is always “required to instruct on lingering doubt” (*ibid.*), it has “found it unnecessary to resolve whether this tension could ever require a lingering doubt instruction.” (*Id.* at pp. 325-326.)

Appellant invites this Court to reconsider the confusing and contradictory rules governing the presentation and consideration of evidence regarding lingering doubt.

At a minimum, this case requires the Court to resolve the question left open in *Gonzales*: whether a lingering doubt instruction may be required under certain circumstances. When, as here, both the trial court and the prosecution cast doubt on the ability of the jury to consider evidence of lingering doubt as to the prior jury’s findings, a specific instruction is required. (See *People v. Johnson, supra*, 3 Cal.4th at p. 1261 (conc. opn. of Mosk, J.) [“The court is obligated to give an express instruction on [lingering doubt] when there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard”].)³⁹

A. The Facts

1. Forensic Evidence Supporting Lingering Doubt

The jury at the guilt phase found that appellant was the shooter of all four victims and had committed the murders and attempted murders for the benefit of, in association with, or at the direction of a criminal street gang. (9 CT 2239-2242.)

As he had at the guilt phase, defense counsel elicited forensic and crime scene testimony at the penalty retrial undermining the prosecution theory that appellant had fired one of the two shots that had killed victim Anderson. For instance, defense counsel elicited from the prosecution criminalist Annie Ouzounian that the two shell casings found in the living room near the back door of the apartment (where according to the

³⁹ Although not cited on this precise point, Justice Mosk’s concurring opinion in *Johnson* regarding the law of lingering doubt has been subsequently cited repeatedly with approval by this Court. (See, e.g., *People v. Gay, supra*, 42 Cal.4th at p. 1220; *People v. Berryman* (1993) 6 Cal.4th 1048, 1104.)

prosecution Anderson had been shot), belonged to the .357 Desert Eagle attributed to co-defendant Harris. (19 RT 3716-3717; Def. Exhs. H, K, T, V, W.) In addition, prosecution criminalist Rafael Garcia testified that casings eject to the right of the pistol and that there is a reasonable expectation that the casings would be found in the same vicinity where they were fired. (20 RT 3893-3894.) In other words, the physical evidence was consistent with the theory that the .357 attributed to Harris was fired twice in the living room, where the back door of the apartment was located. (20 RT 3894.)

Furthermore, the bullet retrieved from Anderson's chest was excluded as coming from the 9 millimeter weapon attributed to appellant and was consistent with the .357 attributed to Harris. (20 RT 3896-3897.) Finally, there was no conclusive evidence that any of the bullet fragments retrieved from Anderson were related to the 9 millimeter. (20 RT 3897.) And in fact, analysis of the bullets recovered from the four victims did not establish that any of them came from the 9 millimeter, though analysis did show that some were consistent with the .357. (20 RT 3897-3898.)

2. Procedural History Relating to Lingered Doubt Instruction

During voir dire, the second penalty phase jury was instructed that appellant had been convicted of the first degree murder of Annette Anderson and George Brooks; that he was found to have personally discharged a firearm in the commission of these offenses; and that he was found to have committed the crimes in association with, and to benefit a criminal street gang. (17 RT 3166-3167.) The second penalty phase jury was further instructed that it "*must accept* the findings of the defendant's

guilt and the other findings made by a prior jury.” (17 RT 3167, italics added.)

Prior to the penalty phase closing arguments, defense counsel requested the following instruction on lingering doubt: “You may, however, consider any lingering doubt you may have about the evidence in deciding penalty.” (24 RT 4514-4515.) The trial court ruled that “I am not going to give a lingering doubt instruction since this is a retrial of the penalty phase. I don’t want the jury speculating about the crime.” (24 RT 4515.) Defense counsel objected to refusal to give a lingering doubt instruction based upon the due process and equal protection clauses of the Fourteenth Amendment and the Eighth Amendment. (24 RT 4515.)

On the day after closing argument but prior to instruction, appellant filed two, slightly different, proposed jury instructions relating to lingering doubt. (9 CT 2406-2407; 25 RT 4672.) The first instruction read: “You may consider any lingering doubt that you have concerning the circumstances of the offense in deciding whether or not to render the death penalty.” (9 CT 2407.) The second read: “You may consider any lingering doubt that you have concerning the guilt of the defendant in deciding whether or not to render the death penalty.” (9 CT 2407.)

The trial court again rejected appellant’s request to have the jury instructed on lingering doubt, stating “the problems I have with that is, that this jury did not hear the evidence in the guilt phase and I think it would be inappropriate.” (25 RT 4677.) The court concluded that “I am not to give a lingering doubt instruction in this penalty phase.” (25 RT 4677.)

Prior to the close of evidence, the parties stipulated that Kai Harris was convicted of the murder of Annette Anderson and George Brooks, and the attempted murder of Debra Johnson and Janice Williams; and that he

was convicted of personally using a .357 magnum Desert Eagle in the commission of these offenses. (24 RT 4519.)

Based on this stipulation, and based on the findings of the prior jury in appellant's case, the prosecutor argued in closing that appellant had personally shot Annette Anderson. (24 RT 4553.) The prosecutor explained its theory of the case as follows:

How do we know this, based upon some of the other evidence. ¶ The .357 Magnum, the gun used by Kai Harris based upon the stipulation you heard this morning, that shot was fired through her [Anderson's] chest. And it was determined that that was one of the causes of death, a fatal wound. That was the shot that left the strike mark under her body, which means what? She was on her back already. ¶ So who put her on her back? ¶ She only had one other fatal wound. . . And that was to the eye. ¶ So if Kai Harris personally used a firearm that caused the death shot through the chest, and McDaniel personally fired the shot that caused the death, based upon the verdicts well, we know –

[Defense counsel]: Objection

[The Prosecutor]: – that that is his shot.

The Court: Overruled.

[The Prosecutor]: That left gunpowder burns on her eyeball.

(24 RT 4553-4554.)

Soon thereafter, the prosecutor returned to his argument based on the prior jury's findings:

The verdicts have significance in this case, ladies and gentleman. ¶ McDaniel, by the verdicts, is the actual shooter of each victim.

[Defense counsel]: Objection

[The Prosecutor]: Personally and intentionally –

The Court: Overruled.

[The Prosecutor]: – discharged his firearm causing great bodily injury or death to each one. He’s the actual shooter. ¶ Kai Harris, you heard the stipulation.

[Defense Counsel]: Would object to that legal conclusion as improper.

The Court: There were two shooters, ladies and gentleman.

[The Prosecutor]: If I was talking about – if I can be allowed to continue without constant interruption.

[Defense Counsel]: I would object to counsel to continue to misstating [*sic*] the law to this jury. Due Process. Equal Protection, 8th Amendment.

The Court: I don’t think the prosecutor was misstating the law. I want to make very clear, ladies and gentleman, there were two shooters, as you well know.

[The Prosecutor]: Right. As I was describing, based upon the stipulation of *what you heard and what you have been instructed, McDaniel shot all four people in that apartment.*

[Defense Counsel]: Objection.

[The Prosecutor]: Kai Harris shot the two that died. There is a stipulation that defense just read to you this morning that Kai Harris used his .357 to personally

(24 RT 4553-4557, italics added)

After further defense objections, the court reminded the penalty jury of prior jury’s findings and instructed them as follows:

[T]he finding of personal discharge of a firearm which intentionally inflicted great bodily injury on the victims was also found to be true. But there were, of course, two shooters in the apartment, as you well know.

(24 RT 4558.)

Based upon the renewed instruction, the prosecutor reiterated his conclusions as to the meaning of the prior findings:

And to follow-up on what the judge just said and again to reiterate to you, there were two shooters, both of them shot the people who died. McDaniel shot everybody. The other did not. That's the distinction.

(24 RT 4558.)

In defense counsel's closing argument, he repeatedly focused on the lack of evidence to support the prior jury's finding that appellant had shot Anderson. He highlighted that the bullet found in Anderson's chest was consistent with the .357 attributed to Kai Harris and that the casings found in the living room area and the front door where Anderson and Johnson were shot were .357 casings. (24 RT 4605-4606.) Defense counsel explained that, although he was not contesting the ultimate finding of guilt, he was contesting "the portrayal, the manipulation, as it is, of the facts that are being used to make it seem like the mayhem was Donte McDaniel." (24 RT 4606-4607; see also 24 RT 4612-4613 [discussing weakness in identification evidence and the placement of the .357 casings near the front door where Anderson was shot]; 24 RT 4615 [bullet fragments retrieved from Anderson's body were consistent with Harris's .357 pistol and excluded as coming from 9mm gun attributed to McDaniel].). In short, the defense highlighted that there was some doubt to the prosecution theory that "McDaniel is the heavy. Donte did everything." (24 RT 4615.)

In its final instructions to the jury, the trial court reiterated that the prior guilt phase jury had found that appellant's firearm "proximately caused" the death and great bodily injury to all victims and that the penalty phase jury "must accept" these findings. (25 RT 4680-4681.)

B. Applicable Law

At a capital penalty trial, "lingering doubts about a defendant's guilt constitute a proper factor in mitigation of the penalty." (*People v. McCurdy*

(2014) 59 Cal.4th 1063, 1110.) However, this Court has held that “[a]lthough it is proper for the jury to consider lingering doubt, there is no requirement, under federal or state law, that the jury specifically be instructed that it may do so, even if such an instruction is requested by the defendant.” (*People v. Jackson* (2014) 58 Cal.4th 724, 769.)

In *People v. Cox* (1991) 53 Cal.3d 618 (*Cox*), the Court noted that a trial court “may be required to give a properly formulated lingering doubt instruction when warranted by the evidence.” (*Id.* at p. 678, fn. 20.) However, this Court “ha[s] since held, . . . that such an instruction is generally unnecessary where, as here, the court instructs in the standard terms of section 190.3, factors (a) and (k).” (*People v. Ward* (2005) 36 Cal.4th 186, 220; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1273 [distinguishing *Cox* where “defendant provides no explanation why the factor (k)-derived instruction that *was* given to the jury failed to convey the notion of residual doubt in his case”], italics in original.)

The reasoning of these decisions is that an instruction is not required “because the ‘[i]nstructions to consider the circumstances of the crime (§ 190.3, factor (a)) and any other circumstance extenuating the gravity of the crime (*id.*, factor (k)), together with defense argument highlighting the question of lingering or residual doubt, suffice to properly put the question before the penalty jury.’ [Citation].” (*People v. Jackson, supra*, 58 Cal.4th at p. 770; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 513 [*Cox* “dictum” inapplicable where “the standard instructions on capital sentencing factors, together with counsel’s closing argument, are sufficient to convey the lingering doubt concept to the jury”].)

As noted above, this Court has “found it unnecessary to resolve” whether individual circumstances could ever require a lingering doubt

instruction. (*People v. Gonzales, supra*, 52 Cal.4th 254, 325-326.) In his concurrence in *People v. Johnson, supra*, 3 Cal.4th 1183, however, Justice Mosk articulated the circumstances under which a lingering doubt instruction must be given:

Under certain circumstances, . . . the trial court is required to expressly instruct on “lingering doubt.” As shown, the California death penalty law allows capital jurors, in determining penalty, to entertain, and act on, such doubt. The court is obligated to give an express instruction on the matter *when there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard.* A reasonable likelihood of this sort would compel a finding of error.

(*People v. Johnson, supra*, 3 Cal.4th at p. 1261 (conc. opn. of Mosk, J.), italics added.)

C. Argument

1. This Court Should Reconsider its Conclusion That a Lingering Doubt Instruction Is Not Required

Under California law dating back to the 1960s, lingering or residual doubt has been deemed a relevant mitigating circumstance for a capital jury’s consideration at the penalty phase in deciding between life or death. (See *People v. Gay, supra*, 42 Cal.4th at p. 1221; *People v. Terry* (1964) 61 Cal.2d 137, 146.) In many cases, trial courts forthrightly have informed the jurors about their power to rely on, and return a sentence less than death based on lingering doubt. (See, e.g., *People v. Lucas* (2014) 60 Cal.4th 153, 315 [trial court delivered a lingering doubt instruction to jury]; accord, *People v. Jones* (2013) 57 Cal.4th 899, 979; *People v. Valdez* (2012) 55 Cal.4th 82, 173; *People v. Souza* (2012) 54 Cal.4th 90, 132; *People v.*

Hamilton (2009) 45 Cal.4th 863, 948; *People v. Gay, supra*, 42 Cal.4th 1195, 1225; *People v. Harrison* (2005) 35 Cal.4th 208, 255; *People v. Valdez* (2004) 32 Cal.4th 73, 129; *People v. Snow* (2003) 30 Cal.4th 43, 125; *People v. Maury* (2003) 30 Cal.4th 342, 436; *People v. Arias* (1996) 13 Cal.4th 92, 182-183; *People v. Morris* (1991) 53 Cal.3d 152, 218-219; *People v. Kaurish* (1990) 52 Cal.3d 648, 705–706, [approving lingering doubt instruction that said that such doubt “may” be considered].)

Arbitrarily, in other cases, such as the present one, the trial court has not provided similar guidance to the jury. (See, e.g., *People v. Edwards* (2013) 57 Cal.4th 658, 765, and cases cited therein; *People v. Ward* (2005) 36 Cal.4th 186, 219.) This violates both state law and the federal and state Constitutions.

The trial court had a statutory duty to provide correct statements of law to appellant’s jury upon request. Under section 1093, subdivision (f), the judge “shall” charge the jury “on any points of law pertinent to the issues, if requested by either party[.]” (*Ibid.*; see also § 1127 [court must give requested instructions it “thinks correct and pertinent”].) The statutory command is mandatory and unmistakably clear. This Court recognized as much in *People v. Cox, supra*, 53 Cal.3d 618.

In *Cox*, the Court determined that its earlier decision in *People v. Terry, supra*, 61 Cal.2d 137, authorizing a capital defendant to present evidence and/or argument relating to innocence or residual doubts about guilt, could not have addressed the trial court’s duty to instruct on that concept because under the law at the time, “the jury received virtually no instruction at the penalty phase.” (*People v. Cox, supra*, 53 Cal.3d at p. 678.) The Court rejected Cox’s argument that the trial court should have delivered his requested lingering doubt instruction, finding the instruction

was improperly framed. The Court, however, in reliance on sections 1093 and 1127, opined that a trial court might “be required to give a properly formulated lingering doubt instruction when warranted by the evidence.” (*Id.* at p. 678, fn. 20.) Although the Court subsequently retreated from this earlier observation as “dictum” (see, e.g., *People v. Hartsch*, *supra*, 49 Cal.4th at pp. 512-513), it has never suggested that the language of the statute was not mandatory, or that the statute imposed no duty to instruct a jury fully on the relevant law in a particular case.

The question, therefore, is whether other instructions, specifically CALJIC No. 8.85, factors (a) or (k), unambiguously conveyed and defined the concept of lingering doubt under the facts of appellant’s case so that the jurors were fully instructed in the applicable law. To be sure, the Court previously has determined in other cases that a jury might find room for consideration of lingering doubt in one or both of those CALJIC No. 8.85 factors. (See, e.g., *People v. Thomas* (2012) 53 Cal.4th 771, 826-827 (and cases cited therein) [confirming that factors (a) and (k) adequately cover the concept of lingering doubt]; *People v. Hamilton* (2009) 45 Cal.4th 863, 912 [finding that factor (a) includes residual doubt evidence]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272-1272 [reaffirming that the factor (k) instruction is sufficient “to encompass the notion of residual doubt”].) However, the plain language of the instructions suggest otherwise, and, therefore, appellant respectfully requests that this rationale be re-examined and discarded.

The instructions in the present case offered no definition of lingering or residual doubt, a key mitigating concept in the present case. The instructions were neither conflicting nor ambiguous on this point. There simply was no instruction directing the jury to consider that mitigating

factor. The instructions given on the aggravating and mitigating factors, CALJIC No. 8.85, also were deficient on whether residual doubt, however defined or perceived by the jury, was a mitigating factor. In *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174, a plurality of the United States Supreme Court observed that lingering doubt was neither a “circumstance of the offense” nor related to “any aspect” of a capital defendant’s “character” or “record.” In *People v. Cox, supra*, 53 Cal.3d at p. 676, this Court agreed. Indeed, the trial court in this case stated its belief that, because this was a retrial, it did not want the penalty phase jury “speculating about the crime.” (24 RT 4515.)

If the high court, this Court, and the trial court found that lingering doubt did not fit neatly into the sentencing factors, and consideration of it would amount to undesirable “speculation,” there is no reason to believe that appellant’s jury reached a contrary conclusion and expanded the instructions on its own to incorporate that principle.

This Court’s other rationale for declining to require a residual doubt instruction on request – that it is not required by the federal Constitution – also should be re-examined and discarded. The Court has noted that, in *Franklin*, the high court determined there was no federal constitutional right to a residual doubt instruction and has ruled that the same result obtains under state law. (*People v. Rogers* (2013) 57 Cal.4th 296, 348; *People v. Cox, supra*, 53 Cal.3d at pp. 676-677.) In *Franklin*, which notably did not deal with a penalty phase retrial, and again in *Oregon v. Guzek* (2006) 546 U.S. 517, the United States Supreme Court declined to resolve whether the Eighth Amendment affords capital defendants the right to seek a sentence less than death on the basis of lingering or residual doubt. (*Id.* at p. 525.) In contrast, in California, as a matter of substantive capital jurisprudence

since *Terry* was decided in 1964, “a capital jury may consider residual doubts about a defendant’s guilt.” (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1272.) Consequently, the question of whether an instruction is required is not appropriately answered logically or legally by reference to *Franklin*. Rather under state law, the question is whether the court fulfilled its duty to deliver an appropriate instruction on a clearly applicable legal principle. (Cf. *People v. Gurule* (2002) 28 Cal.4th 557, 659 [a trial court may refuse a proffered instruction only if it is an incorrect statement of law, is argumentative, or is duplicative, or might confuse the jury].)

In appellant’s view, this Court no longer should leave to chance the possibility that jurors will divine on their own that remaining doubts about their belief in a capital defendant’s guilt may be considered in the penalty calculus. Nor should this Court allow some capital defendants to receive clear instructions on the range of mitigation in their case, while others are deprived of this benefit. Such capriciousness is inconsistent with the heightened reliability required in determining the appropriate sentence in capital cases. (*In re Sakarias* (2005) 35 Cal.4th 140, 160; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This fundamental principle supports a forthright explanation to the jurors, rather than playing hide-the-ball, with respect to their sentencing discretion. And plainly, as discussed below, this Court should not affirm the death verdict in appellant’s case where the prosecutor and trial court obfuscated what the law permitted and where the trial court itself believed that lingering doubt had no role in the penalty phase because “since this is a penalty retrial” consideration of lingering doubts would amount to “speculation.” (24 RT 4515.)

Although this Court has ignored the statutory requirement on legally accurate instructions in the context of lingering doubt (see, e.g., *People v. Hartsch, supra*, 49 Cal.4th at p. 513), it has done nothing to explain away the language of sections 1093 and 1127 and has incorrectly interpreted United States Supreme Court precedent as having already decided the issue. It should therefore reconsider its holding allowing trial courts to randomly provide or deny instruction on lingering doubt.

2. Even If a Lingering Doubt Instruction Is Not Required in Every Case, it Should Be Mandatory When There Is a Reasonable Likelihood That in the Absence of Such an Instruction, the Jury Will Ignore Evidence of Lingering Doubt

Almost 23 years ago, Justice Mosk provided guidance regarding when, if ever, a lingering doubt instruction should be required:

The court is obligated to give an express instruction on [lingering doubt] when there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard.

(*People v. Johnson, supra*, 3 Cal.4th at p. 1261 (conc. opn. of Mosk, J.)

Although this Court has repeatedly looked to Justice Mosk’s explication of the law of lingering doubt in the Johnson concurrence for guidance (*People v. Berryman, supra*, 6 Cal.4th at p. 1104; *People v. Gay, supra*, 42 Cal.4th at p. 1220; *In re Avena* (1996) 12 Cal.4th 694, 767), this Court has yet to adopt, or even address, the test set forth in that opinion. Appellant urges this Court to do so.

It is one thing to say, as this Court has done repeatedly, that the existing instructions and defense counsel’s argument are sufficient “to encompass the notion of residual doubt.” (See, e.g., *People v. Musselwhite, supra*, 17 Cal.4th at pp. 1272.) It is quite another to say that the standard

instructions are sufficient in every case, regardless of whether the prosecution and trial court actively undermine the jury's ability to consider lingering doubt.

Several events in this case required a lingering doubt instruction. First, and most obviously, appellant requested one. (9 CT 2407 [two proposed lingering doubt instructions]; 24 RT 4514-4515; 25 RT 4677.) Second, appellant made the request for good reason: the jury which heard the evidence at the guilt phase and rendered the verdict of guilty was not the same jury which considered the question of penalty. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1219 [explaining that allowing evidence of lingering doubt is most important in a penalty retrial where the "second jury necessarily will deliberate in some ignorance of the total issue"].)

Third, appellant's requested instruction on lingering doubt at the penalty retrial was denied for the illogical reason that "since this is a penalty retrial" the trial court "d[id]n't want the jury speculating about the crime" (24 RT 4514-4515), and as "this jury did not hear the evidence in the guilt phase," instructing them on lingering doubt "would be inappropriate." (25 RT 4677.) By denying a lingering doubt instruction for precisely the reason such an instruction is most needed (see *People v. Gay*, *supra*, 42 Cal.4th at p. 1219), the trial court here at the very least abused its discretion. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1260 [provision of a lingering doubt instruction constitutes an exercise of the trial court's discretion]; *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773 ["Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation]"].) However, even if the failure to instruct under

these circumstances did not contravene this Court's decisional law, the trial court and the prosecution compounded the problem.

A fourth factor was the trial court's repeated instruction to the jury that they "must accept" the findings of the prior jury that appellant had personally killed Annette Anderson. (17 RT 3167, 25 RT 4681.) This unadorned language left no room for consideration of residual doubt. (Cf. *People v. Streeter, supra*, 54 Cal.4th 205, 265 [jury instructed "[y]ou must accept the previous jury's verdicts *as having been proved beyond a reasonable doubt*"], italics added; *People v. Banks* (2014) 59 Cal.4th 1113, 1195 [the court "instructed the jury that 'the defendant's guilt as to the [crimes of which defendant was convicted], special allegations, and special circumstances is conclusively presumed to have been shown *beyond a reasonable doubt*'"], italics added].)

In fact, one of the problems found in *Gay* was that the error in excluding evidence on lingering doubt "was compounded by the trial court's instruction to the jury, following opening statement, that defendant's responsibility for the shooting *had been conclusively proven.*" (*People v. Gay, supra*, 42 Cal.4th at p. 1224, italics added.) This is precisely the problem created by the trial court's instruction in appellant's case that the jury "must accept" the prior jury's findings.

Fifth, the prosecutor's argument that appellant had personally killed Anderson relied heavily on an appeal to the findings of the prior jury. (24 RT 4553-4559) Indeed, the prosecutor spent far more time arguing about the conclusive meaning of the prior finding that appellant killed Anderson than he did on the evidence that supported that finding. For instance, the prosecutor argued that "[t]he verdicts have significance in this case, ladies and gentleman. McDaniel, by the verdicts, is the actual shooter of each

victim.” (24 RT 4555; see also 24 RT 4554 [“based upon the verdicts well, we know” that appellant was the shooter].) Although it was certainly true that the prior verdicts found appellant to be the shooter of Anderson, this form of argument was problematic given that the trial court had instructed the jury to give those findings conclusive effect. (17 RT 3167, 25 RT 4681 [jurors instructed that they “must accept” the prior jury’s verdicts and findings].)

The prosecutor exacerbated this problem by declaring that the court’s instructions themselves negated all doubts regarding whether appellant shot Anderson: “based upon the stipulation of what you heard and what you have been instructed, McDaniel shot all four people in that apartment.” (24 RT 4556; *People v. Gay, supra*, 42 Cal.4th at p. 1225 [noting that the prosecutor “even quoted from” the judge’s instruction negating lingering doubt in his closing argument].)

This Court has indicated that prosecution argument that lingering doubt should not be considered is error. (*People v. Arias* (1996) 13 Cal.4th 92, 183 [agreeing “in principle” that prosecution cannot attack the instruction on lingering doubt, when given, but finding that prosecutor did not do so]; see also *id.* at p. 195 (conc. opn. of Mosk, J.) [finding prosecutorial misconduct, but finding error harmless].) Here, by urging the jury to ignore any doubts by focusing on the conclusive effect of the prior findings, the prosecutor committed similar misconduct. But the prosecutor was aided in his efforts to undercut lingering doubt by the trial court. (Cf. *People v. Lloyd* (2015) 236 Cal.App.4th 49, 63 [when prosecution improperly described the reasonable doubt burden, “the court’s action in overruling the defendant’s objection aggravated the situation”].)

Sixth, and perhaps most significantly, was the context in which the jury heard the prosecution's argument, the trial court's instructions, and the trial court's rulings on the defense objections to the prosecution's penalty phase closing argument. Combined, these factors almost certainly caused appellant's jury to disregard any consideration of lingering doubt as to the prior jury's findings.

When defense counsel repeatedly attempted to object to the prosecutor's appeal to the prior jury's findings (24 RT 4554-4556), the trial court again and again overruled the defense counsel's objections. For instance, when the prosecutor first argued that "we know" defendant must be the actual shooter "based upon the verdicts," defendant objected and was overruled. (24 RT 4554.) Similarly, when the prosecution continued that "McDaniel, by the verdicts, is the actual shooter of each victim," the trial court again overruled defense counsel's objection, and continued by commenting that it did not think the prosecution was misstating the law. (24 RT 4555-4556.)

The prosecutor took full advantage of the trial court's rulings: improperly reinforcing his argument by noting that based upon "*what you have been instructed*, McDaniel shot all four people" and then reminding the jury that "the verdicts are important." (24 RT 4556-4557, italics added.) In responding to another objection, the judge then actually took the time to reinstruct the jury – midargument – as to the prior jury's finding that appellant was the shooter of Anderson. (24 RT 4557 [reminding the jury that the enhancement indicating that defendant killed Anderson was "found to be true"].)

As it stood, the jury was already instructed before and after the argument that it "must accept" the prior jury's findings that appellant

personally killed Anderson. Given the context during argument – the ruling on the defense objections, the prosecutorial argument based on those rulings, and the trial court reinstruction during closing argument – it is extraordinarily unlikely that a jury would have understood that it could still give effect to lingering doubts as to whether appellant personally killed Anderson. In short, there is every reason to believe that the jury “labor[ed] under a misconception” regarding their ability to consider lingering doubt. (*People v. Johnson, supra*, 3 Cal.4th at p. 1261 (conc. opn. of Mosk, J.) Left without an instruction that the jury could take lingering doubt into consideration, appellant’s counsel’s lingering doubt arguments were merely hollow words without an instructional vehicle to give them meaning. (*Penry v. Johnson, supra*, 532 U.S. at p. 797 [jury must have vehicle for defense mitigation].) Failing to instruct on lingering doubt under these circumstances was error.

D. The Failure to Provide a Lingering Doubt Instruction Was Prejudicial

As an initial matter, appellant addresses this Court’s repeated holdings that the failure to provide a lingering doubt instruction does not implicate federal law. (See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 84.) Although federal law may not mandate that a defendant has the right to present some forms of residual doubt evidence,⁴⁰ once a state *chooses* to provide a defendant this right, it must allow that right to be exercised in a manner that comports with the federal Constitution. (See *Douglas v.*

⁴⁰ As noted above, the high court has not “resolve[d] whether such a right exists” (*Oregon v. Guzek, supra*, 546 U.S. at p. 525), and has addressed only the “narrow” question of whether there was a right to present “*new* evidence that shows [the defendant] was not present at the scene of the crime.” (*Id.* at p. 523, italics in original.)

California (1963) 372 U.S. 353 [no requirement for appeal, but counsel must be provided if the state allows for appeal]; *Ohio Adult Parole Authority v. Woodard* (1998) 523 U.S. 272, 289 (conc. opn. of O’Connor, J.) [no right to clemency, but some due process protections apply if state chooses to provide clemency proceedings]; *Castaneda v. Partida* (1977) 430 U.S. 482, 509 [no right for state court defendants to demand grand jury, but “if a State chooses to proceed by grand jury it must proceed within the constraints imposed by the Equal Protection Clause of the Fourteenth Amendment”]; *Evitts v. Lucey* (1985) 469 U.S. 387, 401 [“when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause”]; see also *People v. Wolfe* (2003) 114 Cal.App.4th 177, 187 [no federal right to juror unanimity, but “once state law has conferred a right to jury unanimity, the federal Constitution demands that each juror be convinced beyond a reasonable doubt”].)

To the extent that California provides defendants the right to present mitigating evidence of lingering doubt (*People v. McCurdy, supra*, 59 Cal.4th at p. 1110), it must also provide the jury a “vehicle” for giving effect to such evidence. (*Penry v. Johnson, supra*, 532 U.S. at p. 797.) Neither due process, equal protection, the Eighth Amendment, nor their state counterparts permit a state to grant defendants the right to present evidence and then to arbitrarily block consideration of that same evidence. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17; Pen. Code, § 190.3; cf. also *Tyson v. Trigg* (7th Cir. 1995) 50 F.3d 436, 448 [the right to present a defense “would be empty if it did not entail the

further right to an instruction that allowed the jury to consider the defense”]; *U.S. v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 [“[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury’s mind, will entitle the defendant to a judgment of acquittal”].)

Regardless, state law error at penalty and federal constitutional error are considered under equivalent prejudice standards. (*People v. Brown* (1988) 46 Cal.3d 432, 447 [more stringent test for state law errors that impact penalty phase]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard of *Chapman*].)

This Court has recognized the strongly prejudicial effects of foreclosing consideration of lingering doubt. To begin with, it has noted that “residual doubt is perhaps the most effective strategy to employ at sentencing.” (*People v. Gay, supra*, 42 Cal.4th at p. 1227 [citations omitted]; accord, *People v. Banks, supra*, 59 Cal.4th at p. 1196.) Nor is this principle simply abstract: the record indicates that, according to the prosecution’s own interviews of the jurors in co-defendant Kai Harris’s penalty trial, lingering doubt “was in fact a very weighty consideration of theirs.” (2 RT 165.)

Here, the evidence that appellant had initiated the bloodshed by shooting Anderson was particularly weak. As highlighted in defense counsel’s argument, one bullet retrieved from Anderson was associated with Harris’s weapon and the casings found in the living room where Anderson had been shot were from Harris’s .357 caliber pistol. (24 RT 4605-4607, 4612-4613, 4615; see *People v. Gay, supra*, 42 Cal.4th at p.

1226 [relying on the “absence of physical evidence linking defendant to the shooting”].) That appellant may not himself have killed Anderson was important for two reasons.

First, Anderson was by far the more sympathetic of the two decedents. Much of the penalty phase and the prosecution’s argument was devoted to the harm caused by the murder of Anderson. The fact that the penalty phase jury was essentially told to disregard any lingering doubts regarding whether appellant himself killed Anderson would therefore have had enormous impact. (*People v. Garcia* (1984) 36 Cal.3d 539, 546, overruled on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 676 [“an accomplice is far less likely to receive the death penalty than the triggerman”].)

Second, whether the jury believed that appellant initiated the shootings by killing Anderson was also critical in assessing the seriousness of his crimes. The dark apartment was filled with multiple gang members and at least one with a reputation for shooting people. (5 RT 1767.) Assuming, as the physical evidence suggested, that co-defendant Kai Harris alone shot Anderson would have drastically changed the narrative.

It may be that once Harris decided to shoot Anderson, the situation immediately escalated and appellant chose thereafter to shoot first and ask questions later. Lingering doubts about whether appellant shot Anderson might have therefore suggested that he shot the remaining surviving victims not out of a desire to execute everyone in the apartment, but out of a desire to ensure that he himself was not killed. To be sure, this would not excuse his mission to retaliate against Brooks in the first place, but such a version of events would be a far cry from the heinousness of the prosecution theory:

that appellant hoped to execute three unarmed women simply to elevate his status in a gang and instill fear in the neighborhood.

Unfortunately, the jury was directed to ignore any doubts it may have had about the evidence that appellant killed Anderson. Instead, it was forced to accept as conclusive the prosecution's narrative, an error directly attributable to the failure to instruct the jury on lingering doubt.

Accordingly, for each of the reasons set forth herein, appellant's death sentence must be reversed.

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IX.

PENAL CODE SECTION 1042 AND ARTICLE I, SECTION 16 OF THE STATE CONSTITUTION REQUIRE THAT A SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

A. Introduction

Penal Code section 1042, first enacted in 1872,⁴¹ dictates that: “Issues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state.” This foundational provision of the Penal Code – and the jury trial right it incorporates – have not been fully addressed by this Court in decades of litigation regarding whether the basic requirements of a jury trial (particularly unanimity and proof beyond a reasonable doubt) apply to the aggravating factors and the verdict at the penalty phase of a capital trial.

Much ink has been spilled over the question of whether aggravating factors in our capital scheme increase the permissible punishment, triggering Sixth Amendment protections under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. Although appellant disagrees, this Court has firmly concluded that the Sixth Amendment guarantees articulated in *Apprendi* do not apply at the penalty phase of a capital trial. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Ochoa* (2001) 26 Cal.4th 398, 454.)

Analysis under Penal Code section 1042 and the state jury trial right which it incorporates, however, is distinct. (See *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1077 [nothing suggests that the drafters of the state

⁴¹ When first enacted, Penal Code section 1042 read, “Issues of fact must be tried by a jury.” (Former section 1042, enacted by Stats. 1872.)

Constitution even “had the Sixth Amendment in mind” when incorporating the jury right into the state Constitution[.]) The question is not whether the range of punishment is increased as dictated by *Apprendi*, but whether an “issue of fact” is “tried.” (Pen. Code, § 1042.) If it is, these facts must be tried in the accordance with the protections of our state Constitution (*ibid.*), which include the right of unanimity and proof beyond a reasonable doubt (hereafter “jury trial right” or “jury trial protections”) (see Note, *Jury Unanimity in California: Should It Stay or Should It Go?* (1996) 29 Loyola L.A. L.Rev. 1319, 1333 [The “unanimity requirement has been a necessary component of California jury trials since California’s passage into statehood in 1850”]; *People v. Kelly* (1928) 203 Cal. 128, 133 [“It is well settled that the right of a trial by jury, guaranteed by the state Constitution (article 1, § 7), is the right as it existed at common law”];⁴² *People v. Tyler* (1869) 36 Cal. 522, 529 [common law gives defendant “the benefit of any reasonable doubt arising on the evidence”]).

The protections of Penal Code section 1042 and the state Constitution therefore do not operate in the same manner (or apply to the same scope) as those of the Sixth Amendment. This, of course, is only the beginning of the inquiry regarding what is dictated by the requirement that an “issue of fact” must be tried in accordance with the California constitutional jury right.

Whatever can be said of the outermost reaches of the definition of “issue of fact,” applying Penal Code section 1042 to its very core – topics that the Legislature has traditionally chosen to designate as questions of fact

⁴² Former article I, section 7, and current article I, section 16, are one and the same. (*People v. Guzman* (1988) 45 Cal.3d 915, 935, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

to be resolved by a jury in accordance with the jury right – does nothing to limit legislative prerogative. If the Legislature has always designated capital penalty issues as “issues of fact” to be tried (absent a waiver) to a jury, applying section 1042 straightforwardly dictates that the guarantees of the state Constitution’s inviolate jury trial right obtain.

Appellant is well aware of the long line of cases denying the rights to unanimity and proof beyond a reasonable doubt to various components of a capital trial. However, traced to their origins, these holdings derive not from any considered analysis of California statutes or the California Constitution, but from this Court’s uncritical acceptance of litigation positions *taken by capital defendants* hoping to mount facial attacks to the California death penalty.

These decisions ignore the unambiguous holding of this Court, unquestioned by the Legislature for nearly a century, that the jury trial right applies to the penalty determinations in a capital case. (*People v. Hall* (1926) 199 Cal. 451, 456 [under the state Constitution, penalty decision “must be the result of the unanimous agreement of the jurors”] (hereafter *Hall*)).) There is no basis in logic or history to apply simply the unanimity requirement or the beyond a reasonable doubt requirement – but not both – to the penalty determination or factually disputed aggravating factors. Piecemeal application of these bedrock jury requirements runs contrary to the expressed intent of the drafters of the California Constitution’s jury trial provision.

Because this Court has failed to account for the provisions of Penal Code section 1042 (and the state jury right which it incorporates) in denying capital defendants critical protections during the sentencing phase, it should reconsider its prior decisions denying a requirement of unanimity and proof

beyond a reasonable doubt with respect to “issues of fact” such as the existence of factually contested aggravating factors and the ultimate penalty decision.

B. The State Constitution and Penal Code Section 1042 Require That Issues of Fact must Be Tried by a Jury and Accorded the Protections of Unanimity and Proof Beyond a Reasonable Doubt

When the Penal Code was first adopted in 1872, section 1042 required that “[i]ssues of fact must be tried by jury.” (Former section 1042 enacted by Stats. 1872, ch. 350, § 2 p. 481.)⁴³ After the amendment of the jury trial provision (formerly article 1, section 7 of the California Constitution) to provide for jury trial waivers in felony cases, section 1042 was amended to read: “Issues of fact shall be tried in the manner provided” by the constitutional jury trial right. (Former section 1042, enacted by Stats. 1939, ch. 109, § 1, p. 1225.)⁴⁴ In other words, Penal Code section 1042 has long been understood as requiring protections synonymous with the protections provided under California Constitution, article I, section 16. Because section 1042 now explicitly incorporates the jury trial provision of the California Constitution, it is important to understand what is encompassed by the protections of the inviolate right to a jury.

⁴³ This language was nearly identical to language from the earlier Criminal Practice Act of 1850, which stated that “Issues of fact must be tried by a jury of the county in which the indictment was found, unless the action be removed by order of the Court into some other county.” (Criminal Practice Act, § 337, Stats. 1850, ch. 119, § 337, p. 299.)

⁴⁴ In 2002, there was a “nonsubstantive” change to Penal Code section 1042 to refer to the changed location of the jury trial right within the California Constitution. (See Stats. 2002, ch. 787, § 20.)

1. The Jury Right Enshrined in Article I, Section 16 Is Broader than the Corresponding Federal Right and in Criminal Trials Encompasses Resolution of “Issues of Fact” by a Unanimous Jury Beyond a Reasonable Doubt

The California Constitution dictates that the rights which it protects “are not dependent on those guaranteed by the United States Constitution.” (Cal. Const., art. I, § 24.)

[I]t is well established that the California Constitution ‘is, and always has been, a document of independent force’ [citation], and that the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution. [Citation.] California cases long have recognized the independence of the California Constitution [citation], and article I, section 24, of the California Constitution expressly confirms that the rights ‘guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.’ Past cases make clear that even when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts’ interpretation of the corresponding provision contained in the federal Constitution. [Citations.]

(*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 330.)

In particular, the state constitutional right to a jury (Cal. Const. art. I, § 16) furnishes broader protection than the counterpart federal right. (See, e.g., *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1241 [“There is a fundamental difference between the reach of the federal and state constitutional guaranties of the right to a jury trial”].) Not only is the text of the Sixth Amendment and article I, section 16 completely different, nothing suggests that the drafters of the state Constitution even “had the Sixth

Amendment in mind” when originally incorporating the jury trial right into the state Constitution. (*Price v. Superior Court, supra*, 25 Cal.4th at p. 1077.) Courts at the time of provision’s adoption “looked to Blackstone, not the Sixth Amendment, for a description of the common law right incorporated into the jury trial provision of the 1879 Constitution.” (*Ibid.*)

According to well-established common law rules, “[t]he determination of a question of fact by means of a jury, and public and oral procedure, was common to all the courts of law. [Citation] “. . . each form of action was started by a different writ and had its own peculiarities, but there was one characteristic possessed by nearly all of them, *the submission of issues of fact to a jury.*”” (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296, italics added.) Thus, Blackstone defined a trial “to be the examination of the matters of fact in issue.” (*Carpenter v. Winn* (1911) 221 U.S. 533, 538 [citing 3 Blackstone’s Commentaries 350].)

According to the very earliest California cases defining the state jury right, it applied to those criminal cases “in which an issue of fact is joined.” (*Koppikus v. State Capitol Com'rs* (1860) 16 Cal. 248, 253; see also *In re Javier A.* (1984) 159 Cal.App.3d 913, 930, fn. 9 [*Koppikus* was “[a]mong the earlier Supreme Court cases dealing with various facets of the [state] jury trial guarantee”].)

And the framers of the California Constitution certainly believed that the fundamental guarantees of the jury right should apply to capital punishment. (1 Debates and Proceedings, Cal. Const. Convention (1880) p. 297 (statement of Mr. Barry) [in discussing proposal limiting unanimity to felonies, “I believe in throwing all the safeguards [of the jury trial right] that can be thrown around cases involving life and liberty . . .”].)

As understood at common law, an “issue of fact” in a criminal case “arises from an allegation of ultimate fact made by one of the parties which is denied by the other.” (*People v. Pantages* (1931) 212 Cal. 237, 267; see also 4 Blackstone’s Commentaries 333 [“when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact”].) Thus, both as a matter of common law and as expressly defined by statute, an issue of fact arises upon a plea of not guilty. (Pen. Code, § 1041.) The “constitutional [jury right] guarantee has to do with the *trial of issues that are made by the pleadings* and if the pleadings are such that no issue is to be tried, as in the case of a plea of guilty, then the guarantee has no application, for there are no issues and there can be no trial.” (*Dale v. City Court of City of Merced* (1951) 105 Cal.App.2d 602, 607, italics added; see also *In re Javier A.*, *supra*, 159 Cal.App.3d at p. 930, fn. 9 [earliest California cases guaranteed jury trial to “issue of fact [] made by the pleadings”].)

Since the earliest days of the state, the right to a jury in a criminal case included the protection of requiring proof beyond a reasonable doubt on issues of fact. As stated by the early case of *People v. Tyler*, *supra*, 36 Cal. 522, once a defendant has raised an “issue” by a plea of not guilty “the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence.” (*Id.* at p. 529; see also *Apodaca v. Oregon* (1972) 406 U.S. 404, 411 & fn.6 (plur. opn.) [American courts began applying reasonable doubt standard “in its modern form” around the mid-19th century].)

Moreover, although the Sixth Amendment provides no unanimity protection in state criminal trials (*Apodaca v. Oregon*, *supra*, 406 U.S. at p.

406 (plur. opn.), the California Constitution does guaranty such unanimity. (*People v. Collins* (1976) 17 Cal.3d 687, 693.) The debates by the drafters of the jury trial right made unassailably clear that the protections of a unanimous jury were considered fundamental safeguards in any criminal trial. (*See Mitchell v. Superior Court, supra*, 49 Cal.3d at p. 1243 [proposals to limit the protections of a unanimous jury in misdemeanor trials were “strongly denounced”].)

2. Determination of the Penalty Verdict Is an Issue of Fact Protected under Penal Code Section 1042 and Article I, Section 16

Given that the California Constitution itself adopted the common law requirements, it is unsurprising that Penal Code section 1042 would likewise dictate the same basic precept, namely, that “issues of fact” be found by a jury in accordance with basic jury protections. (§ 1042.) Of course, that issues of fact in normal criminal cases would be tried by a jury does not end the inquiry. The true question is whether “issues of fact” under the statute and implicit in the state Constitution include determinations of the existence of aggravating factors and the ultimate determination of penalty at the penalty phase of a capital.

As a starting point, this Court has strongly emphasized that the state constitutional right of trial by jury “is not to be narrowly construed.” (*People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d at pp. 299-300.) In keeping with that precept, “[i]t is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions.” (*Id.* at p.

300.) Thus, although post-*Furman*⁴⁵ jury sentencing procedures in capital cases did not exist at the time of the adoption of the state Constitution in 1850, this does not mean that “issues of fact” do not include those determinations made by modern capital juries. (See *People v. Oppenheimer* (1974) 42 Cal.App.3d Supp. 4, 8 [“The fact the statute in question was enacted after the adoption of the Constitution in 1850 makes no difference” as long as the action is of the “same class” as that protected at common law].)

The history of the death penalty in California suggests that the penalty phase verdict was itself considered an issue of fact. For instance, when in 1957 the capital scheme was first amended to expressly include consideration of aggravation and mitigation, the Legislature directly specified “[t]he determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying *the issue of fact* on the evidence presented.” (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509, italics added.)⁴⁶

Nor was the legislative determination that the penalty verdict was an “issue of fact” an anomaly limited to the 1957 statute. Even under the prior statute dating back to the era of the drafting of the 1878 Constitution,⁴⁷ this

⁴⁵ *Furman v. Georgia* (1972) 408 U.S. 238.

⁴⁶ Although the 1957 statute provided for the possibility of a bench trial on guilt, the jury was still designated as the “trier of fact” at penalty unless a jury was expressly waived. (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509.) This presents additional evidence that the Legislature understood and wished defendants to have the constitutional right to a jury for the penalty determination.

⁴⁷ See Former section 190, as amended by Amends. to the Codes,
(continued...)

Court held that both the jury trial right and Penal Code section 1042 “give to a defendant charged with murder the right, . . . *to have the jury determine not only the question of his guilt . . . but also, if the offense be murder of the first degree, the penalty to be imposed.*” (*People v. Williams* (1948) 32 Cal.2d 78, 102, italics added; see also *People v. Perry* (1925) 195 Cal. 623, 639 [“It is the *jury’s right and duty* to consider and weigh all the facts and circumstances attending the commission of the offense, and . . . determine whether or not . . . life imprisonment should be imposed rather than the infliction of the death penalty”], italics added.) In short, the California jury right under article I, section 16 has long applied to jury sentencing in capital cases.

Although there is no federal right to a jury determination of a capital sentence (see *Spaziano v. Florida* (1984) 468 U.S. 447, 459), the drafters of the 1978 death penalty statute also seem to have anticipated that defendants would have a right to a jury: absent waiver, a jury is the default trier of fact. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1026; see also Cal. Const. art. I, § 16 [providing for bench trials if there is a waiver].) The 1978 statute continued an unbroken chain of death penalty statutes which placed before juries the question of determining the facts that lead to a death sentence. (See Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances* (1990) 30 Santa Clara L. Rev. 333, 337 [discussing various death penalty schemes in California].)⁴⁸ The

⁴⁷(...continued)
1873-1874, ch. 508, § 1, p. 457.

⁴⁸ Under the earlier death penalty schemes a defendant could plead guilty – waiving jury determination of any issue of fact (see § 1041) – and
(continued...)

fact that the Legislature has always chosen to make discretionary capital sentencing a jury question is strong evidence that the jury right protections should apply. (See *Andres v. United States* (1948) 333 U.S. 740, 748 [federal unanimity right “extends to all issues – character or degree of the crime, guilt *and punishment – which are left to the jury*”], italics added; *People v. Green* (1956) 47 Cal.2d 209, 220 [extensively citing reasoning of *Andres* with approval under state law].) Thus, although the penalty determination relates to punishment and not guilt, there is little historical indication that the penalty decision did not depend on the resolution of “issues of fact” by a jury.

In keeping with the premise that the penalty determination was an “issue of fact” protected by the traditional jury trial guarantees, the courts of California have long required that the penalty verdict in a capital case “must be the result of the unanimous agreement of the jurors.” (*Hall, supra*, 199 Cal. at p. 456; see also *People v. Green, supra*, 47 Cal.2d at p. 224 [“There is nothing in the statute which authorizes holding that the jurors are not required to agree *unanimously on the penalty* just as they must agree unanimously on the questions of guilt and class and degree of offense”], italics added.)

In *Hall*, although the jury unanimously convicted the defendant of first degree murder, the jury was unable to render a unanimous finding as to punishment and the judge then sentenced the defendant to death. (*Hall, supra*, 199 Cal. at p. 453.) The *Hall* court was clear that a death sentence absent an unanimous penalty finding by a jury violated the California

⁴⁸(...continued)
have a judge decide the sentence (see, e.g., Former section 190, as amended by Amends. to the Codes, 1873-1874, p. 457).

Constitution's jury right. (*Id.* at p. 459 [death sentence issued by non-unanimous jury was “in effect the denial of a trial by jury,” and “however degraded and hardened a criminal the evidence may disclose an accused to be, he is entitled under the Constitution to trial by jury”].) The ruling in *Hall* – unquestioned by any court or legislative capital scheme for nearly a century – creates a gaping hole in the logic that sustains this Court's rejection of jury trial protections to capital defendants. If these safeguards have no application to penalty phase trials, it would be strange indeed that early cases required juror unanimity as to the sentencing decision.

Similarly, some early cases also reasoned that the reasonable doubt protection applied to the jury's determination of penalty. For instance, in *People v. Cancino* (1937) 10 Cal.2d 223, although finding no error, the Court approved the instruction to jurors “that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser.” (*Id.* at p. 230 [“This rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment”]; see also *People v. Sampsell* (1950) 34 Cal.2d 757, 760 [jury given the instruction approved in *Cancino*].) Similarly, in the earlier case of *People v. Perry, supra*, 195 Cal. 623, the Court explained that the instruction, ““If the jury should be in doubt as to the proper penalty to inflict the jury should resolve that doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life,”” accurately described the jury's “duty” to determine penalty such that the jury was under “no misapprehension” based on other challenged instructions. (*Id.* at p. 640.)

This is not to say that decisions from this Court were always consistent on the application of the reasonable doubt burden to penalty

determinations. (See *People v. Purvis* (1961) 56 Cal.2d 93, 95, overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631 [rejecting claimed error that instructions should require jury’s penalty determination to only consider facts proven beyond a reasonable doubt and that reasonable doubt burden should apply to choice of penalty].) But cases such as *Purvis* – which deny any reasonable doubt burden as to the verdict or the aggravating evidence – set up an irreconcilable conflict that persists to this day: if unanimity is constitutionally required (see *Hall, supra*, 199 Cal. at p. 456), how can the reasonable doubt burden somehow not apply?

Such a position is manifestly contradicted by the intent of the drafters of article I, section 16, who expressed a belief that the unanimity requirement and the beyond a reasonable doubt burden were inextricably intertwined. (See 3 Debates and Proceedings, Cal. Const. Convention, *supra*, p. 1175 (statement of Mr. Reddy) [proposal to limit unanimity requirement to felony cases would upset the “fundamental principle of criminal jurisprudence” that defendants are “entitled to the benefit of all reasonable doubts” and would therefore require not only change in juror unanimity but also a change to a “preponderance of the evidence” standard]; see also *Hibdon v. United States* (6th Cir. 1953) 204 F.2d 834, 838 [“The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof”]; *U.S. v. Correa-Ventura* (5th Cir. 1993) 6 F.3d 1070, 1076) [discussing common law origins of unanimity and beyond a reasonable doubt requirements and concluding that “[t]he unanimity rule is a corollary to the reasonable-doubt standard” and is “employed to give substance to the reasonable-doubt standard”].)

Because the historical evidence strongly supports the conclusion that the determination of penalty is an “issue of fact” under Penal Code section

1042 and the jury trial right, this Court should reconsider its prior decisions denying the jury trial protections guaranteed by these provisions.

3. Determination of the Existence of Factually Disputed Aggravating Factors Are Also Issues of Fact under Penal Code Section 1042 and Article I, Section 16, Thereby Requiring Proof Beyond a Reasonable Doubt and Jury Unanimity

By directing that “issues of fact” be tried by a jury in accordance with article I, section 16, Penal Code section 1042 “established rules which permit the jury to derive the truth from conflicting testimony.” (*People v. Gay* (1940) 37 Cal.App.2d 246, 247.) Although this Court has long maintained that certain components of a penalty trial are “inherently moral and normative, not factual” in nature, (see, e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 779), this does not limit the application of the jury trial right to those issues which are purely “issues of fact.”

Although not every component of California’s capital sentencing scheme requires juries to “derive the truth from conflicting testimony” (*People v. Gay, supra*, 37 Cal.App.2d at p. 247), the application of aggravating factors to a capital defendant often involves the classic exercise of the jury’s fact-finding power. Indeed, the penalty phase determinations are explicitly and repeatedly designated to the “trier of fact.” (Pen. Code, § 190.3; see Black’s Law Dictionary (10th ed. 2014) [defining “fact-finder” as “[o]ne or more persons who hear testimony and review evidence to rule on a *factual issue*”]; see also *id.* [defining “issue of fact” as “[a] point supported by one party’s evidence and controverted by another’s”].)

Uncontroversially, this Court has directly held that under section 190.3, factor (b), “the question whether the acts occurred” is a “factual matter for the jury.” (*People v. Nakahara* (2003) 30 Cal.4th 705, 720; cf.

People v. Loker (2008) 44 Cal.4th 691, 745 [“characterization of other crimes as involving express or implied use of force or violence, or the threat thereof, is a legal question properly decided by the court”].) Similarly, at least when identity is in dispute, factor (c) also involves questions of fact that must be resolved by juries beyond a reasonable doubt. (See *People v. Williams* (2010) 49 Cal.4th 405, 459.) More broadly, this Court has acknowledged that:

[D]espite the “normative” nature of the penalty decision itself, a substantial part of the mitigating evidence typically adduced by the defendant at the penalty phase concerns such *factual matters* as the nature of his character and background, the extent of his rehabilitation or remorse, or the existence of any mental defect or disease. Similarly, a significant portion of the prosecutor’s aggravating evidence involves the defendant’s prior offenses. Thus, whether aggravating or mitigating, the penalty phase evidence may *raise disputed factual issues*

(*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236, italics added.) In short, the holdings of this Court, and the statute itself, indicate that the determination of which aggravating factors apply, are “factual issues” (*ibid.*) to be made by the “trier of fact” (§ 190.3). And these factual issues must be “made by the pleadings.” (*In re Javier A., supra*, 159 Cal.App.3d at p. 930, fn. 9 [earliest California cases guaranteed jury trial to “issue of fact [] made by the pleadings”]; see § 190.3 [requiring that prosecution provide to defense notice of aggravating evidence it will attempt to prove].) They are therefore protected by the jury trial right of our state Constitution. (Cal. Const. art. I, section 16; Pen. Code, § 1042.)

C. The Reasoning Provided in this Court’s Prior Decisions Rejecting Application of the Jury Trial Rights Warrants Reconsideration

This Court has not hesitated to overrule past decisions when they depended on “uncritical” analysis of key relevant topics that underpinned the prior decisions. (See, e.g., *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 528 [overruling *People v. Elliot* (1960) 54 Cal.2d 498 based on “uncritical” analysis of the term “jurisdiction” as it applied to flawed preliminary hearings].) This reflects the policy that “[a]lthough the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction.” (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504, internal citations omitted.) This Court’s holdings regarding the absence of unanimity and beyond reasonable doubt requirements in the penalty phase originate in part from historical accident rather than careful reasoning, and therefore should be reconsidered.

1. This Court’s View That There Is No Requirement of Unanimity or Findings Beyond a Reasonable Doubt Stems Not from Reasoned Analysis but from Uncritical Acceptance of Legal Positions Taken by Defendants Attacking California’s Death Penalty

a. This Court Has Held That the Jury Trial Protections Could Be Imputed into the 1977 Statute

In the first decision interpreting the 1977 death penalty statute, *People v. Frierson* (1979) 25 Cal.3d 142 (*Frierson*), the defendant mounted a facial attack on the California death penalty scheme based on the absence of adequate constitutional safeguards. The defendant assumed that California law did not require the trier of fact to find “beyond a reasonable doubt the existence of aggravating circumstances which outweigh the

mitigating circumstances,” and claimed this deficiency in the statute violated the state and federal Constitutions. (*Id.* at p. 180 (plur. opn. of Richardson, J.)) The plurality, in rejecting the facial challenge, concluded that the 1977 statute was “not constitutionally vulnerable because of its failure to provide a different method of proving or weighing the relevant statutory considerations specified therein.” (*Ibid.*) However, it did so without any analysis of the correctness of the defendant’s assumption that the California scheme did not require proof beyond a reasonable doubt as to the ultimate sentencing determination, or indeed any state-law analysis with respect to burden of proof or unanimity whatsoever.

In his concurrence (which provided the necessary majority for the plurality), Justice Mosk, joined by Justice Newman, more accurately noted that the statute did not require the “sentencing authority to expressly find that at least one of the statutory aggravating factors is proved beyond a reasonable doubt, as in Georgia.” (*Frierson, supra*, 25 Cal.3d at p. 192 (conc. opn. of Mosk, J.)) He separately noted that “numerous [] questions were left unanswered by *Gregg [v. Georgia]* (1976) 428 U.S. 153]” including (1) whether “the jury [must] unanimously agree on which aggravating factors are established by the evidence”; (2) whether they must make these “find[ings] beyond a reasonable doubt”; and (3) whether before imposing a sentence of death, the jury must “unanimously agree that the aggravating factors outweigh the mitigating factors” and “[m]ust that finding also be beyond a reasonable doubt[.]” (*Frierson, supra*, 25 Cal.3d at p. 193 & fn. 8 (conc. opn. of Mosk, J.))

Given that the judgment was reversed on other grounds, Justice Mosk noted that it would be “prudent to refrain from unnecessary advisory opinions on what are the precise constitutional requirements of *Furman* and

Gregg et al. and whether the 1977 death penalty legislation in California complies with those requirements.” (*Frierson, supra*, 25 Cal.3d at p. 194.) However, he did find that the 1977 statute was not facially unconstitutional under *federal* law and therefore allowed retrial of the defendant. (*Id.* at p. 196.)

Soon thereafter, in *People v. Jackson* (1980) 28 Cal.3d 264, the plurality again rejected various facial constitutional attacks to the 1977 death penalty statute. (*Id.* at pp. 315-317 (plur. opn. of Richardson, J.)) The plurality noted that “[m]ost of the arguments advanced by defendant were discussed at considerable length in *People v. Frierson, supra*, 25 Cal.3d 142, 172-188, 191-195, and we do not repeat them here.” (*Id.* at p. 315.) Although addressing the challenge on a lack of written findings, it did not separately address facial attacks based on the alleged lack of unanimity and beyond reasonable doubt requirements other than to conclude that the lack of “adequate safeguards” was addressed in *Frierson*. (*Id.* at p. 316.)

The dissenters complained that, among various procedural deficiencies in the 1977 statute, there was no express requirement that “the sentencing authority [] find that at least one of the statutory aggravating factors is proved beyond a reasonable doubt” or any express “requirement that the jury be unanimous in finding the statutory aggravating factor or factors upon which it bases its decision on penalty.” (*People v. Jackson, supra*, 28 Cal.3d at p. 337 (dis. opn. of Mosk, J.); see also *id.* at pp. 357, 363 (dis. opn. of Bird, C.J.) [complaining that the statute did not explicitly provide for written findings indicating unanimity as to aggravating factors or provide evidence that jury reached determinations on aggravating factors beyond a reasonable doubt].)

In a brief concurrence, Justice Newman (whose vote was necessary for the affirmance) wrote to explain why he did not “subscribe fully to any colleague’s views.” (See *People v. Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.) In particular, Justice Newman expressed concern that legislative drafters could not anticipate every single procedural issue applicable to complex death penalty procedures. (*Ibid.*) He explained that the concerns voiced by the dissenters were therefore insufficient to facially invalidate the statute because:

California courts . . . are not timid in reading into legislation various procedural and other rules deemed constitutionally required that the draftsmen may have overlooked or rejected. That is demonstrably true as to countless requirements on matters *such as unanimous verdict, proof beyond a reasonable doubt and jury or judge findings.*

(*Id.* at p. 319 (conc. opn. of Newman, J.).

In sum, the 1977 law was first affirmed as constitutional only with respect to federal requirements in *Frierson*. (See *Frierson*, *supra*, 25 Cal.3d 142 at p. 196 (conc. opn. of Mosk, J.). In *Jackson*, it was upheld against facial attack with the *specific caveat* that beyond a reasonable doubt and unanimity requirements could be read into the existing statute. (*People v. Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.); see also *id.* at p. 338 (dis. opn. of Bird, C.J.) [“Justice Newman explicitly claims it would be proper for this court to read into the death penalty statute all present and future constitutional requirements omitted by the Legislature”].) However, because defendants repeatedly took the position that the procedural safeguards were absent in order to mount facial attacks to the death penalty statutes – rather than asserting that the protection should be read into the statute – defense assertions in *Frierson* and *Jackson* were

uncritically repeated by later Courts. This superficial analysis ultimately read out fundamental jury requirements firmly entrenched in the California Constitution and mandated by Penal Code section 1042.

b. The Holdings under the 1977 Statute Were Applied to the 1978 Briggs Initiative

The first time the unanimity issue was directly addressed under the 1978 death penalty statute was in *People v. Easley* (1982) 187 Cal.Rptr. 745 a decision with no force or effect as it was later reheard due to inadequate briefing. (*People v. Easley* (1982) 33 Cal.3d 65; *People v. Easley* (1983) 34 Cal.3d 858, 863.)⁴⁹ Subsequently, in *People v. Rodriguez* (1986) 42 Cal.3d 730, the Court upheld, in a four to three decision, the 1978 initiative against facial attacks, explaining with relatively brief analysis that “[m]ost of these challenges were rejected as to the 1977 law.” (*Id.* at p. 777 [citing the plurality opinions in *People v. Jackson, supra*, 28 Cal.3d 264, 315-317 and *People v. Frierson, supra*, 25 Cal.3d at pp. 176-184.]) Similar to *Frierson*, the Court accepted without analysis the defendant’s contentions that the 1978 death penalty statute did not require “jury unanimity on the dispositive aggravating factors, [or] a finding that aggravating factors outweigh mitigating beyond a reasonable doubt” or “a finding beyond a reasonable doubt that death is the appropriate penalty.” (*Id.* at p. 777.) These

⁴⁹ The analysis in the vacated *Easley* opinion was extremely cursory. Rejecting the claimed error in failing to instruct on unanimity with regard to aggravating factors, the Court stated that “we find no authority for the proposition that a more specific instruction [on unanimity] must be given sua sponte” and separately noted that the “defendant cites no cases or statutory provisions which suggest that the penalty phase jurors are forbidden to consider evidence of the defendant’s prior crimes unless they unanimously find the defendant guilty of those crimes.” (*People v. Easley, supra*, 33 Cal.3d 65; 187 Cal.Rptr. 745 at p. 760.)

contentions – assumed correct – did not render the California death penalty facially unconstitutional. (*Id.* at 777-779.)

The *Rodriguez* opinion contained no specific state-law analysis as to the correctness of the defendant’s assumption, only a conclusion that “the 1978 statute is similar in all relevant respects” to the 1977 law. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 778; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1285-1286 [rejecting similar facial attacks].) Critically, it cited for its authority on these matters the Court’s earlier decision in *Jackson*, which, as noted above, provided that reasonable doubt burdens and unanimity requirements could be read into the statute. (*People v. Jackson, supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.) see also *id.* at p. 338 (dis. opn. of Bird, C.J.).)

**c. Uncritical Application of Prior Cases
Resulted in the Jury Right Protections Being
Read out of the 1978 Statute**

While this Court’s initial cases uncritically accepted defendants’ tacit acceptance there was no unanimity or beyond a reasonable doubt requirement under state law, later cases affirmatively held that to be true. However, the decisions in those cases often provided no citation for the principles articulated or simply cited *People v. Rodriguez, supra*, 42 Cal.3d 730 or other cases. (See, e.g., *People v. Gates* (1987) 43 Cal.3d 1168, 1201 [no requirement that weighing decision be found beyond a reasonable doubt]; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774 [no unanimity required for aggravating evidence under section 190.3, factor (b), despite reasonable doubt burden applying]; *People v. Miranda* (1987) 44 Cal.3d 57, 99, 107 [no unanimity required for factor (b) or beyond reasonable doubt requirement as to ultimate penalty determination]; *People v. Jennings*

(1988) 46 Cal.3d 963, 988 [accord]; *People v. Williams* (1988) 44 Cal.3d 883, 960 [approving instruction that the prosecution has “no burden of proof” under the 1978 statute with respect to the penalty phase determination].)

None of these cases cited or mentioned article I, section 16 specifically. However, their holdings have been repeated countless times, including in cases with some reference to the state Constitution. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1102 [noting that previous decisions rejecting unanimity requirement spoke “impliedly and generally of U.S. Const. and Cal. Const.”]; *People v. Duff* (2014) 58 Cal.4th 527, 569 [nothing in the “state or federal Constitutions” requires a jury to “unanimously agree on any particular aggravating circumstances, [] find true beyond a reasonable doubt any particular aggravating circumstances, or [] find that aggravating factors outweigh mitigating factors beyond a reasonable doubt”].)

2. This Court’s Reasoning for Rejecting the Application of Unanimity and Beyond Reasonable Doubt Burdens to Factually Disputed Aggravating Evidence and the Ultimate Penalty Determination Is Flawed

To appellant’s knowledge, there have been no capital decisions by this Court directly addressing the application of article I, section 16 and/or Penal Code section 1042 to the unanimity and beyond a reasonable doubt requirements to factually disputed aggravating evidence or the ultimate penalty determination. And this Court has so far failed to acknowledge the principle announced in Justice Newman’s concurrence in *People v. Jackson, supra*, 28 Cal.3d 264, suggesting that these jury trial rights could be read into the statute to comport with constitutional requirements. (See

id. at p. 318 (conc. opn. of Newman, J.)) However, this Court has spoken numerous times on the topic in rejecting similar challenges under other state and federal constitutional amendments, particularly the analogous right to a jury under the Sixth Amendment. This Court has provided several basic principles, none of which soundly defeat application of the California constitutional jury right.

a. Attaching the Label ‘Normative’ Does Not Render Issues of Fact Any less Issues of Fact

One often-repeated principle is that determinations made at the penalty phase “do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment [citations] that is outside the scope of *Apprendi* [*v. New Jersey, supra*, 530 U.S. 466] and its progeny. [Citation.]” (*People v. Duff, supra*, 58 Cal.4th at p. 569.) As noted above, even when the penalty phase determination under the late 19th century scheme was *entirely* discretionary and did not require subsidiary determinations of factually disputed culpable acts, this Court stated that the penalty determination was an issue of fact which implicated Penal Code section 1042 and the state Constitution. (*People v. Williams, supra*, 32 Cal.2d at p. 102.) And this Court has also recognized that “despite the ‘normative’ nature of the penalty decision itself,” the penalty phase decision ultimately rests on numerous “disputed factual issues . . .” (*People v. Superior Court (Mitchell), supra*, 5 Cal.4th at p. 1236 .)

Perhaps most importantly, that a proceeding determines “normative” instead of “factual” issues is simply a label attached to the process by which the jury uses to come to a conclusion. Any number of issues a jury decides (for instance, various degrees of culpability in mental states) could be labeled as “normative.” But the Court cannot evade the California

Constitution simply by ascribing the label “normative” to a question traditionally reserved to the jury. This would directly contradict the expressed intent of the drafters of the jury right. (See 1 Debates and Proceedings, Cal. Const. Convention, *supra*, p. 302 (statement of Mr. Barbour) [warning that labels assigned to statutes may be easily changed].)

The question whether the jury right is triggered is therefore not a question of malleable labels such as “normative,” but “a purely historical question, a fact which is to be ascertained like any other social, political or legal fact.’ [Citations.]” (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1010.) Since the very dawn of non-mandatory capital sentencing in California, the questions answered regarding penalty have been questions of fact reserved in the first instance to the jury. (*In re Anderson* (1968) 69 Cal.2d 613, 621 [discussing how under the amendments of 1873–1874,⁵⁰ Penal Code section 190 “*vest[ed] in the trier of fact* discretion to fix the penalty at death or life imprisonment”], italics added.) Although subsequent amendments added subsidiary determinations labeled “aggravation” to the “issues of fact” tried (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509), this does not change the outcome of whether the jury right and burden of proof protections apply.

The question is simply whether the proceeding is “of the same class” of action which would have called for a jury trial at common law. (*People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d at p. 300.) If it was, “the

⁵⁰ At the time of the 1873 amendments, the *only* trier of fact available was a jury. It was not even possible for a judge to try a case, as bench trials in felony cases were not permitted until afterward. (See *People v. Smith* (1933) 218 Cal. 484, 488 [discussing 1928 amendment to constitutional jury right to permit waiver of jury].)

right is carried over to the new statute.” (*People v. Anderson* (1987) 191 Cal.App.3d 207, 219.) Under every capital scheme ever adopted in California, juries have made the factual determinations that condemn defendants to death. There can be no question that the current scheme is of the “same class” as prior schemes to which the jury right attached. (*Hall, supra*, 199 Cal. at p. 459.) Therefore, the “normative” label does not defeat application of the jury trial right.

b. This Court’s Claim That Application of the Reasonable Doubt Standard at Penalty Is Impossible Because the Questions at Issue Are “Not Susceptible to a Burden-of-Proof Quantification” Is Premised on a Fundamental Misunderstanding of Reasonable Doubt

Along with the claim that the penalty phase issues are “normative,” this Court has frequently rejected application of the reasonable doubt standard to the ultimate penalty phase determination and certain aggravating facts because they are “not susceptible to a burden-of-proof quantification.” (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) This justification rests on a misunderstanding of the concept of reasonable doubt.

As eloquently explained by the Supreme Court of Connecticut in applying a reasonable doubt burden to the outcome of weighing of aggravating and mitigating evidence:

We disagree with the dissent . . . suggesting that, because the jury’s determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent’s contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. . . . the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty

of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238 fn. 37; see also *U.S. v. Correa-Ventura*, *supra*, 6 F.3d at p. 1076-1077 [both unanimity and reasonable doubt were "conceived as a means of guaranteeing that each of the jurors 'reach [] a subjective state of certitude' with respect to a criminal defendant's culpability. [Citation]."])

Connecticut is not alone in applying the reasonable doubt standard to the weighing of aggravating and mitigating factors and/or the proof of aggravating evidence. Many states, even in the absence of explicit textual requirements, have read the reasonable doubt burden into their death penalty schemes. (See, e.g., *People v. Tenneson* (Colo. 1990) 788 P.2d 786, 795, citations omitted ["qualitatively unique and irretrievably final nature of the death penalty make it unthinkable for jurors to impose the death penalty when they harbor a reasonable doubt as to its justness"]; *State v. Biegenwald* (1987) 106 N.J. 13, 62 ["If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt"]; *State v. Wood* (Utah 1982) 648 P.2d 71, 81, 83 [to impose the death penalty "notwithstanding serious doubt as to its

appropriateness” would create unacceptable risk of arbitrariness and disproportionality]; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888 disapproved on other grounds by *State v. Reeves* (1990) 453 N.W.2d 359 [reading reasonable doubt burden into silent statute].)

And many states explicitly require that either the ultimate determination or the aggravating circumstances themselves be proven beyond a reasonable doubt.⁵¹ This Court’s *ipse dixit* that the penalty phase is “not susceptible” to reasonable doubt burdens (*People v. McKinzie*, *supra*, 54 Cal.4th at p. 1366), flies in the face of these out-of-state cases and statutes explicitly requiring it.

c. This Court’s Rule That There Is No Requirement of Unanimity for “Foundational Facts” Is Inconsistent with the Rule That Juries must Be Unanimous as to Discrete Criminal Acts

One of this Court’s earliest decisions directly rejecting the question of unanimity with respect to criminal acts which are disputed at the penalty phase was *People v. Miranda*, *supra*, 44 Cal.3d 57, where the court held that “unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special

⁵¹ See, e.g., Ark.Code Ann. § 5–4–603 [aggravating circumstance must be found unanimously and beyond a reasonable doubt and must outweigh mitigating circumstances beyond a reasonable doubt]; Former N.J. Stat. Ann. § 2C:11–3(c)(3) (2006) [aggravating circumstance must be found beyond a reasonable doubt]; N.Y.Crim. Proc. Law § 400.27(3) & (11)(a) [jury must find aggravating factors unanimously and beyond a reasonable doubt, and must find aggravators outweigh mitigation beyond a reasonable doubt]; Ohio Rev.Code Ann. § 2929.03(D)(1) [beyond reasonable doubt burden applies to weighing of aggravating and mitigating factors]; Tenn.Code Ann. § 39–13–204(g)(1) (A) & (B) [aggravating circumstances and weighing must be beyond a reasonable doubt].

finding. A defendant is, of course, entitled to a unanimous jury verdict in the final determination as to penalty.” (*Id.* at p. 99.) As to the idea that multiple “foundational” crimes do not implicate unanimity, this is simply incorrect.

“[T]he jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, citing Cal. Const., art. I, § 16.) This is precisely what analysis of aggravating factor (b) and factor (c) of Penal Code section 190.3 require: jury determination of multiple “discrete crimes.” (Cf. *People v. Russo*, *supra*, 25 Cal.4th at pp. 1134-1135. [overt acts in furtherance of a conspiracy are not discrete crimes].)

This is not to say that the requirement of unanimity and reasonable doubt extend to the “minute details of how a single, agreed-upon act was committed.” (*People v. Mickle* (1991) 54 Cal.3d 140, 178.) Clearly, they do not. (*Ibid.*)⁵² But the constitutional guarantee encompasses “the trial of issues that are made by the pleadings.” (*Dale v. City Court of City of Merced*, *supra*, 105 Cal.App.2d at p. 607; *Koppikus v. State Capitol Com’rs*, *supra*, 16 Cal. at p. 254 [“It is a right . . . which can only be claimed in . . . criminal actions, where an issue of fact is made by the pleadings”].) To the extent that the aggravating factors and the punishment

⁵² Thus, the concern voiced in *People v. Ghent* (1987) 43 Cal.3d 739 that jurors would become mired in “lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them” is largely inapt. (*Id.* at pp. 773-774.)

of death are required to be raised in pleadings (see § 190.3 [notice of aggravating evidence required]; *Lankford v. Idaho* (1991) 500 U.S. 110, 127 [notice of capital punishment required]), they are therefore issues of fact which require unanimous determination beyond a reasonable doubt.

D. Failure to Instruct That the Ultimate Penalty Determination must Be Made Beyond a Reasonable Doubt and That Section 190.3, Factor (B) must Be Found Unanimously and Beyond a Reasonable Doubt Requires Reversal

California courts have long held that violation of the state constitutional right to unanimity is a structural error under the state Constitution. (*People v. Hall, supra*, 199 Cal. at p. 456; *People v. Traugott* (2010) 184 Cal.App.4th 492, 505 [11-person verdict is structural error].) Failure to give a reasonable doubt instruction when required only under state law is analyzed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Aranda* (2012) 55 Cal.4th 342, 354.) However, at the penalty phase, state law errors and federal harmless error standards are equivalent. (*People v. Brown* (1988) 46 Cal.3d 432, 447 [more stringent test for state law errors that impact penalty phase]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard of *Chapman*].) Under any standard, failure to instruct on the beyond a reasonable doubt requirement as to the ultimate penalty determination and failure to instruct as to unanimity with regard to the aggravating evidence requires reversal.

As to the aggravating evidence, there were numerous disputed “issues of fact” which would have been greatly impacted by a unanimity instruction. For instance, with regard to the killing of Akkelli Holley, the

prosecution's sole witness denied witnessing the murder. (19 RT 3726.) She also testified that around the time Holley was shot and on the day he was shot she was using a number of drugs on a daily basis, including PCP, cocaine, marijuana, alcohol, and methamphetamine. (20 RT 3865.) She specifically said that these drugs would cause her to hallucinate and make her see things that were not there. (20 RT 3864-3865.) Although she was later impeached by a prior statement to police identifying appellant as the shooter (21 RT 3983, 4019, 4021-4022), a single juror could certainly have found her to be an incredible witness upon which to base a beyond a reasonable doubt finding that appellant had killed Holley. The disputed allegation that appellant assassinated an unarmed paraplegic man unquestionably prejudiced appellant.

Similarly, a single witness, Jeanette Geter, testified that she was an eyewitness to appellant shooting Ronnie Chapman. (19 RT 3646-3648.) At one point in her testimony, however, she indicated that the person she saw shooting could have been appellant or his brother. (19 RT 3655-3656.) According to the officer who took Geter's statement, the two brothers looked "a lot alike," and he had heard them referred to as twins. (20 RT 3809.) The forensic evidence recovered from the crime scene (a single casing) also contradicted Geter's report that six shots were fired. (20 RT 3809.) Again, a unanimity instruction could have impacted whether the jury did or did not rely on this prejudicial incident of violence.

With regard to another of the incidents in aggravation, the alleged possession of a shank in the county jail, the evidence of appellant's possession was contested and the evidence was hardly overwhelming. The shanks were concealed from plain view, hidden in mattresses. (21 RT 3948-3949) Two shanks were found in another inmate's (inmate Pittman)

mattress and Pittman was lying on appellant's mattress, where another shank was found. (21 RT 3949 -3951, 3964-3965.) Perhaps more importantly, the prison guard who testified did not know how long appellant had been assigned to the cell, and acknowledged inmates were being shuttled in and out of that transitional cell all of the time. (21 RT 3968.) In other words, it is entirely possible that all three shanks belonged to Pittman or even a previous occupant of the cell.

Another incident in aggravation was the alleged assault of police officer Gerardo Davilla. (See 20 RT 3902-3908.) However, an eyewitness to the altercation, Joshua Smith, testified to facts suggesting that the alleged assault was actually an unwarranted act of police brutality. (See 22 RT 2244-2252.)

In short, there were numerous "issues of fact" that were hotly contested and for which the evidence was relatively weak. Yet the jury was expressly instructed that they did not all need to agree that appellant committed the acts in question. (9 CT 2455 [CALJIC No. 8.87 "It is not necessary for all jurors to agree regarding any uncharged criminal act"].) Perhaps most tellingly, the jury asked repeated questions regarding the definition of "uncharged criminal act," as used in CALJIC No. 8.87 (See 9 CT 2419 [jury note requesting definition of "uncharged criminal act" as used in CALJIC No. 8.87]; 9 CT 2430 [second request for definition of "uncharged criminal act"].) These repeated questions lead to an inference that there was not necessarily unanimity regarding the application of this aggravating circumstance. Even if a rule of automatic reversal did not apply, appellant unquestionably suffered prejudice.

The prejudice was equally clear with respect to the failure to require a beyond a reasonable doubt instruction as to the ultimate penalty

determination. Appellant's jury deliberated – after a prior hung jury – for over 20 hours over the course of four days and requested readback and reinstruction, all hallmarks of a close case. (9 CT 2283-2293, 2411-2412, 2415, 2419, 2427-2428, 2430, 2434-2436, 2473; see *ante*, Argument II, pp. 111-112.) The error in failing to instruct on the beyond a reasonable doubt burden therefore cannot be said to be harmless.

Accordingly, appellant's sentence of death must be reversed.

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X.

CALIFORNIA’S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT’S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

Many features of California’s capital sentencing scheme violate the United States Constitution. However, this Court has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be “routine” challenges to California’s punishment scheme would be deemed “fairly presented” for purposes of federal review “even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision.” (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court’s directive in *Schmeck*, appellant briefly presents the following challenges to California’s sentencing scheme in order to urge reconsideration of these claims and to preserve them for federal review. Should the Court decide to reconsider any of these claims, appellant requests leave to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few murder cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.)) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of

murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California’s capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 listed 22 special circumstances which in total made 33 factually distinct murders eligible for the death penalty.

Given this large number of special circumstances, California’s statutory scheme failed to identify the few cases in which the death penalty might have been appropriate, and instead made almost everyone convicted of first degree murder eligible for the death penalty. This Court has routinely rejected these challenges to the statute’s lack of meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme because they are so over-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Penal Code Section 190.3(a) Violated Appellant’s Constitutional Rights

Section 190.3, factor (a), directed appellant’s jurors to consider in aggravation the “circumstances of the crime.” (See 9 CT 2447; 25 RT 4693-4694 [CALJIC No. 8.85].) In capital cases throughout California, prosecutors have urged juries to weigh in aggravation almost every conceivable circumstance of a crime, even those that, from case to case, are starkly opposite. In addition, prosecutors use factor (a) to embrace the entire spectrum of factual circumstances inevitably present in any homicide; facts such as the age of the victim, the age of the defendant, the method of

killing, the alleged motive for the killing, the location of the killing, and the impact of the crime on the victim's surviving relatives.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 [“circumstances of crime” not required to have spatial or temporal connection to crime].) As a result, the concept of “aggravating factor” has been applied in such a random and arbitrary manner that almost every feature of every murder can be and has been characterized by prosecutors as “aggravating.” As such, California’s capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jurors to assess death upon no basis other than that the particular set of circumstances surrounding the murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware this Court has repeatedly rejected the claim that permitting the jurors to consider the “circumstances of the crime” within the meaning of section 190.3, factor (a), results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

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C. California’s Death Penalty Statute and the CALJIC Instructions Given in this Case Failed to Set Forth the Appropriate Burden of Proof and the Requirement of Unanimity

1. Appellant’s Death Sentence Is Unconstitutional Because it Was Not Premised on Findings Made Beyond a Reasonable Doubt

This Court has not required that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86 and 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not “susceptible to a burden-of-proof quantification”].) The jurors were not told they had to find beyond a reasonable doubt either the existence of any aggravating circumstances or that the aggravating circumstances outweighed the mitigating circumstances, before determining whether or not to impose a death sentence. (See 9 CT 2449; 25 RT 4720-4722 [CALJIC No. 8.88].)⁵³

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 281, now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to the jurors and proved beyond a reasonable

⁵³ Appellant has separately challenged the lack of unanimity and reasonable doubt requirements accorded to various components of the penalty phase under the California Constitution. (See *ante*, Argument IX, pp. 196-227.) As discussed below, appellant raises similar challenges under the federal Constitution.

doubt. In order to impose the death penalty in this case, appellant's jurors had to first make several factual findings: (1) that aggravating circumstances were present; (2) that the aggravating circumstances outweighed the mitigating circumstances; and (3) that the aggravating circumstances were so substantial as to make death an appropriate punishment. (See 9 CT 2447, 2449; 25 RT 4693-4694, 4720-4722 [CALJIC Nos. 8.85, 8.88].) Because these additional findings were required before the jurors could impose the death sentence, *Apprendi*, *Blakely*, *Ring*, and *Cunningham* require that each of these facts be found, by the jury, to have been established beyond a reasonable doubt. The court failed to so instruct the jurors in this case and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 819-821). The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also contends due process and the prohibition against cruel and unusual punishment mandate that the jurors in a capital case be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires the jurors be instructed that to return a death sentence they must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. (*People v. Blair, supra*, 36 Cal.4th at p. 753.) Appellant requests the Court reconsider this holding.

2. Some Burden of Proof Should Have Been Required, or the Jurors Should Have Been Instructed That There Was No Burden of Proof

Evidence Code section 520, which provides that the prosecution always bears the burden of proof in a criminal case, creates a legitimate expectation as to the way a criminal prosecution will be decided under state law, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jurors should have been instructed, but were not, that the state had the burden of persuasion regarding the existence of any and all circumstances in aggravation, the determination whether aggravating circumstances outweighed mitigating circumstances, and the appropriateness of the death

penalty, and that it was presumed life without parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given in this case (9 CT 2447, 2449; 25 RT 4693-4694, 4720-4722; see also 24 RT 4654 [comment by the trial court that only the “uncharged criminal acts [] have to be proven beyond a reasonable doubt”), fail to provide the jurors with the guidance legally necessary for the imposition of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal constitution and therefore urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant’s Death Verdict Was Not Premised on Unanimous Jury Findings Regarding Aggravating Circumstances

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jurors, ever found a single set of aggravating circumstances that rendered death the appropriate penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court “has held that unanimity with respect to aggravating circumstances is not required by statute or as a constitutional procedural safeguard.” (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant submits that *Prieto* was incorrectly decided and that application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. “Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury’s ultimate decision will reflect the conscience of the community.” (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J).)

The failure to require appellant’s jurors to unanimously find any and all aggravating circumstances were established also violated the equal protection clause of the Fourteenth Amendment. In California, when a criminal defendant has been charged with certain special allegations that may increase the severity of his sentence, the jurors must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Because capital defendants are entitled to more rigorous

protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than to a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have “a substantial impact on the jury’s determination whether the defendant should live or die” (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), by its inequity violates the equal protection clause of the Fourteenth Amendment and by its irrationality violates both the Fourteenth Amendment due process clause and Eighth Amendment cruel and unusual punishment clause, as well as the Sixth Amendment’s guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

D. California’s Death Penalty Statute and the CALJIC Instructions Given in this Case on Mitigating and Aggravating Circumstances Violated Appellant’s Constitutional Rights

1. The Instructions Given Failed to Inform the Jurors That the Central Sentencing Determination Is Whether Death Is the Appropriate Penalty

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 did not make this clear to jurors; rather it instructs them they can return a death verdict if the

aggravating evidence “warrants” death rather than life without parole. (9 CT 2449; 25 RT 4722.) These determinations are not the same.

To satisfy the Eighth Amendment “requirement of individualized sentencing in capital cases” (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be “warranted” when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions here violated the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this challenge to CALJIC No. 8.88. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

2. The Use of Adjectives in the List of Potential Mitigating Circumstances Is Impermissibly Restrictive

The inclusion in the list of potential mitigating circumstances of such adjectives as “extreme” and “substantial” (see CALJIC No. 8.85; § 190.3, subd. (g); 9 CT 2447) impeded the jurors’ consideration of mitigation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

3. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question whether to impose the death penalty upon appellant hinged on whether the jurors were “persuaded that the aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole.” (See 9 CT 2449; 25 RT 4720-4722 [CALJIC No. 8.88].) The phrase “so substantial” is an impermissibly broad phrase that does not channel or limit the sentencer’s discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violated the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant requests this Court reconsider that opinion.

4. The Jurors Should Not Have Been Instructed on Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant’s case because no evidence was presented to support them – specifically, factor (d) (“Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance”), (e) (“Whether or not the victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act”), factor (f) (“Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct”), factor (h) (“Whether or not at

the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication”), factor (g) (“Whether or not the defendant acted under extreme duress or under the substantial domination of another person”), and factor (j) (“Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor”). (9 CT 2447-2448; 25 RT 4694-4696.) The trial court failed to omit those factors from the jury instructions (*ibid.*), likely confusing the jurors and preventing them from making a reliable determination of the appropriate penalty, in violation of defendant’s constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

5. The Jurors Should Have Been Instructed That Statutory Mitigating Circumstances Were Relevant Solely as Potential Mitigation

In accordance with customary state court practice, nothing in the instructions given in appellant’s case advised the jurors which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jurors’ appraisal of the evidence. This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigating circumstances. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant’s

jurors were not instructed that a “not” answer as to any of these “whether or not” sentencing factors did not establish an aggravating circumstance. Consequently, the jurors were free to aggravate appellant’s sentence based on non-existent or irrational aggravating circumstances, precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as potential mitigation.

6. The Instructions Given Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without Possibility of Parole

Section 190.3 directs the jury in a capital case to impose a sentence of life imprisonment without possibility of parole if the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant’s circumstances that is required by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Here, the trial court gave CALJIC No. 8.88, which did not address this proposition, but only informed the jurors of the circumstances that permitted the rendering of a death verdict. (9 CT 2449; 25 RT 4720-4722.) Because it fails to conform to the mandate of section 190.3, the instruction violated appellant’s right to due process of law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

This Court has held that because CALJIC No. 8.88 tells the jurors that death can be imposed only if they find aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People*

v. Duncan (1991) 53 Cal.3d 955, 978.) Appellant submits this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be appropriate, but failing to explain when a life without possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Given Erroneously Precluded The Jurors from Considering Sympathy for Appellant’s Family and Limited Their Consideration of the Impact His Execution Would Have on Them

The jurors in this case were instructed, pursuant to CALJIC No. 8.85, factor (k), that they could not consider sympathy for appellant’s family as a factor in mitigation and should disregard evidence of the impact of appellant’s execution on his family unless it “illuminate[d] some positive quality of the defendant’s background or character.” (9 CT 2448; 25 RT 4696.) Appellant’s repeated requests that the jury be instructed to consider sympathy for his family as mitigating evidence were denied. (17 RT 3152; 24 RT 4515.) The prosecutor reminded jurors in voir dire and again during closing argument that they could not consider sympathy for appellant’s family. (18 RT 3394-95; 24 RT 4585.) The trial court also reminded the jurors during voir dire – and later during family member testimony at trial –

that they could not consider sympathy for appellant's family or the impact of the execution except to the extent that the effect of his sentence on his family members "illuminated a positive quality" of his background. (18 RT 3423; 23 RT 4344-4345.)

The prohibition against the jurors' consideration of sympathy for appellant's family and the limitation on its consideration of the impact appellant's execution would have on them deprived appellant of his Eighth and Fourteenth Amendment right to have the jurors consider "as a mitigating factor, any aspect of a defendant's character or record *and any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, italics added; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-114.) A defendant need not demonstrate a nexus between the mitigating circumstances and the crime. (*Tennard v. Dretke* (2004) 542 U.S. 274, 289; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) The threshold of relevance for admitting mitigation is low. (*Tennard v. Dretke*, *supra*, 542 U. S. at p. 285.) Thus, a state cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." (*Ibid.*, quoting *McKoy v. North Carolina*, *supra*, 494 U.S. at p. 441; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1287.) Under this standard, appellant's jurors should not have been precluded from considering sympathy for his family or have been limited in their consideration of the impact of his execution.

Considerations of fairness and parity, under the due process clause, further support a capital defendant's entitlement to have the jurors consider sympathy for his family and the impact of his execution on them. In *Payne v. Tennessee* (1991) 501 U.S. 808, in which the Supreme Court held that

testimony as to the impact of a murder on the victim's family was relevant and admissible in aggravation, the underlying premise of the majority opinion is that capital sentencing requires an even balance between evidence available to the defendant and evidence available to the state. (*Id.* at pp. 820-826.) In his concurring opinion, Justice Scalia explicitly noted that because the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Id.* at p. 833.) Parity means that if the state may introduce victim impact and sympathy evidence, the defendant should not be precluded from introducing comparable evidence.

The instruction given in appellant's case prohibiting the consideration of sympathy for his family and limiting the consideration of execution impact evidence is also inconsistent with Penal Code section 190.3, which provides in pertinent part that: "In the proceedings on the question of penalty, evidence may be presented by both the people *and the defendant* as to *any* matter relevant to aggravation, mitigation *and sentence*," (Pen. Code, § 190.3, italics added.) The impact of the defendant's execution on his family, as such, is relevant to the "sentence." Because CALJIC No. 8.85 fails to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

Appellant recognizes that this Court has upheld the giving of the instruction he challenges here (*People v. Bemore* (2000) 22 Cal.4th 809, 855-856; *People v. Ochoa* (1999) 19 Cal.4th 353, 454-456), but urges the Court to reconsider its analysis. For one thing, while the Supreme Court's decision in *Payne* predated this Court's decisions in *Bemore* and *Ochoa*, the

trials in those two cases occurred before *Payne* was decided; thus the juries in those cases were not permitted to consider *either* sympathy for the victim’s family, *or* sympathy for the family of the defendant. (*People v. Bemore, supra*, 22 Cal.4th at p. 856, fn. 21; *People v. Ochoa, supra*, 19 Cal.4th at pp. 454-455, fn. 9.) Thus, the parity concerns addressed in *Payne* were not implicated. In any event, appellant maintains that *Bemore* and *Ochoa* were wrongly decided as a matter of federal constitutional law and urges their reconsideration. (See *Cullen v. Pinholster* (2011) ___ U.S. ___ [131 S.Ct. 1388, 1407] [“[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant’s family is a better idea because the defendant himself is simply unsympathetic.”]; *DeBruce v. Commissioner, Alabama Dept. of Corrections* (11th Cir. 2014) 758 F.3d 1263, 1301 [defense “could appeal to the jury's sympathy for DeBruce’s family, suggesting that as parents they should spare this ‘kid’ who had done something ‘stupid,’ . . . or they could try to manufacture sympathy for DeBruce himself”]; *Morgan v. Branker* (W.D.N.C., July 17, 2012, 1:09-CV-416) 2012 WL 2917841, at *6 [“defense counsel, . . . hammered home the family sympathy theme”].)

8. The Jurors Should Have Been Instructed on the Presumption That Life Without Possibility of Parole Was the Appropriate Sentence

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) At the penalty phase of a capital case, the presumption that life without possibility of parole is the appropriate penalty is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty

phase, there is no statutory requirement that the jury be instructed as to the presumption that life without possibility of parole is the appropriate sentence. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jurors that the law favors life and presumes the sentence of life imprisonment without possibility of parole to be the appropriate sentence violated appellant's Eighth Amendment right to be free from cruel and unusual punishment and to have his sentence determined in a reliable and non-arbitrary manner, and his Fourteenth Amendment right to due process and the equal protection of the laws.

In *People v. Arias, supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is fundamentally deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

E. Failing to Require the Jurors to Make Written Findings Violated Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), the jurors in this case were not required to make any written findings at the penalty phase of the trial. The failure to require written or other

specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments, as well as his right to meaningful appellate review to ensure the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook, supra*, 39 Cal.4th at p. 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

California's capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between appellant's and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (*People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or in violation of the defendant's right to equal protection or to due process. For this reason, appellant urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. California's Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the equal protection clause. To the extent there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating circumstances must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) At the penalty phase of a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider them.

H. California's Imposition of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

XI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming, arguendo, that none of the errors asserted in Arguments II-IX taken separately require reversal, the effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the trial and the reliability of the resulting death verdict. (See *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect “the trial with unfairness as to make the resulting conviction a denial of due process”]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) [“prejudice may result from the cumulative impact of multiple deficiencies”].)⁵⁴ Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v.*

⁵⁴ Indeed, where there are a number of errors at trial, “a balkanized, issue-by-issue harmless error review” is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace, supra*, 848 F.2d at p. 1476.)

California (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The guilt phase errors in this case include the erroneous denial of appellant's motion to suppress the firearm and ammunition found in his possession (Argument II) and the errors relating to the gang enhancements (Arguments III and IV). The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., Amend. 14th; Cal. Const., art. I, § 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction must therefore be reversed.

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that error in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible

evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a “reasonable probability” that a different result would have been reached in absence of error.

(*People v. Hamilton* (1968) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The errors committed at the penalty phase of appellant’s trial include the erroneous denial of appellant’s requested lingering doubt instruction (Argument VIII), the erroneous admission of the improper victim impact evidence relating to victim Annette Anderson’s cancer (Argument VII), the failure to require unanimity as to aggravating factors and a beyond reasonable doubt determination as to penalty (Argument IX) and the numerous instructional errors which, as set forth in Argument X, increased the risk that the jury’s death verdict was imposed in an arbitrary and unreliable manner. Reversal of the death judgment is mandated here because it cannot be shown that these errors, either individually or collectively in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

As held by this Court in *People v. Hamilton* (1963) 60 Cal.2d 105, a case cited by the *Brown* court (*People v. Brown, supra*, 46 Cal.3d at p. 447):

If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that

evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial.

(People v. Hamilton, supra, 60 Cal.2d at p. 137.)

Accordingly, the cumulative effect of the errors in this case requires reversal of the judgment of conviction and the sentence of death.

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CONCLUSION

For the reasons set forth above, the entire judgment must be reversed.

DATED: August 6, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender

ELIAS BATCHELDER
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Peter Silten, am the attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 71,857 words in length.

DATED: August 6, 2015

PETER SILTEN

DECLARATION OF SERVICE BY MAIL

People v. Donte Lamont McDaniel

Supreme Court No. S171393
Superior Court No. TA074274

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

APPELLANT’S OPENING BRIEF

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Kathy Pomerantz, Deputy Attorney
General
Office of the Attorney General
300 S. Spring St., Ste. 1702
Los Angeles, CA 90013

Donte McDaniel #G-53365
CSP-SQ
4-EB-41
San Quentin, CA 94974

LeQuincy Stuart
Clerk of the Court—Appeals Division
Los Angeles County Superior Court
210 W. Temple St.
Los Angeles, CA 90012

James Brewer, Esq.
333 Washington Blvd. #449
Marina Del Rey, CA 90292

John Daley, Esq.
7119 West Sunset Blvd. #1033
Los Angeles, CA 90046

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on August 6, 2015, at Oakland, California.

TAMARA REUS